

**92-14-A**

APPLICANT – Greenberg Traurig, LLP, for MTS Propco. LPC/Rockpoint Group, LLC, owner.

SUBJECT – Application May 2, 2014 – Variance pursuant to Multiple Dwelling Law Section 310(2)(c) to waive court requirements and legally required windows under MDL Sections 26 and 30 for the construction of a residential addition to an existing hotel . C6-7/C6-6(MID) zoning district.

PREMISES AFFECTED – 790 7th Avenue, West 51st Street, Broadway, West 52nd Street and 7th Avenue, Block 1023, Lot 29, Borough of Manhattan.

**COMMUNITY BOARD #10M**

**ACTION OF THE BOARD** – Application granted on condition.

**THE VOTE TO GRANT –**

Affirmative: Commissioner Hinkson, Commissioner Ottley-Brown and Commissioner Montanez .....3

Negative:.....0

**THE RESOLUTION –**

WHEREAS, the decision of the Department of Buildings Application (“DOB”), dated April 10, 2014, acting on DOB Application No. 121184547 reads, in pertinent part:

The court for the existing transient hotel that is formed by the proposed new building on the same lot is less than the area required; contrary MDL 26;

Legally required windows for the existing transient hotel do not open onto a lawful yard, court, or space above a setback; contrary to MDL 30; and

WHEREAS, this is an application pursuant to Multiple Dwelling Law (“MDL”) § 310(2)(c), to permit, on a site located partially within a C6-7 zoning district and partially within a C6-6 zoning district, within the Theater Subdistrict of the Special Midtown District, a variance of the court requirements in order to allow the enlargement of the existing building used primarily as a transient hotel, to permit construction of a residential addition, contrary to MDL §§ 26 and 30; and

WHEREAS, a public hearing was held on this application on July 15, 2014, after due notice by publication in *The City Record*, and then to decision on August 19, 2014; and

WHEREAS, the site and surrounding area had site and neighborhood examinations by Commissioner Hinkson and Commissioner Ottley-Brown; and

WHEREAS, the subject site is the city block bounded by Broadway, West 52nd Street, Seventh Avenue, and West 51st Street; it is located partially within a C6-6 zoning district and partially within a C6-7 zoning district, within the Theater Subdistrict of the Special Midtown District; and

WHEREAS, the site has 201.04 feet of frontage along Broadway, 170.92 feet of frontage along West 52nd Street, 200.83 feet of frontage along Seventh

Avenue, 161.72 feet of frontage along West 51st Street, and 33,410 sq. ft. of lot area; and

WHEREAS, the site is occupied by a four-story base building (the “Podium”), which covers the entire site and contains retail uses (Use Group 6), a parking garage (Use Group 8), and the lobby of the hotel (Use Group 5), which for a portion of the site rises 22 stories; the existing floor area of the site is approximately 358,681 sq. ft. (10.7 FAR); the building was constructed prior to December 15, 1961; and

WHEREAS, the applicant proposes to modify the existing building to enhance the hotel and retail space, and to construct a 49-story residential tower with a building height of approximately 601 feet, 109 dwelling units, and a total residential floor area of 165,533 sq. ft.; and

WHEREAS, the applicant states that the construction of the residential tower will form an L-shaped open area between the tower and the hotel portion of the building; the open area is comprised of two overlapping, rectangular inner courts (as that term is defined in MDL § 4(32)): the court to the west of the hotel will have an area of 2,207 sq. ft. and the court to the south of the hotel will have an area of 2,078 sq. ft.; the combined, overlapping courts (the “Inner Court”) have a total area of approximately 3,832 sq. ft.; and

WHEREAS, the applicant notes that per MDL § 26(7), the maximum required area for an inner court is 1,200 sq. ft.; and

WHEREAS, the applicant states that 230 legally required hotel windows will face the Inner Court, and 169 of the 230 windows will be separated from the residential tower by distance of 20 horizontal feet; and

WHEREAS, the applicant notes that, per MDL § 26(7), within an inner court, a minimum horizontal distance of 30 feet is required between a legally required window and any wall opposite such window; in addition, per MDL § 30(2), every living room in a multiple dwelling<sup>1</sup> shall have at least one window directly opening onto a street or upon a lawful yard, court, or space above setback located on the same lot as that occupied by the multiple dwelling; as such, with respect to 169 windows, the Inner Court will not be a lawful court, contrary to MDL § 30(2); and

WHEREAS, accordingly, the applicant seeks a variance to provide a horizontal distance of 20 feet instead of 30 feet, as required by MDL §§ 26(7) and 30; and

WHEREAS, pursuant to MDL § 310(2)(c), the Board has the authority to vary or modify certain provisions of the MDL for multiple dwellings erected or to be erected or altered pursuant to plans filed on or after

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1 Pursuant to MDL § 4(9), transient hotels are considered “class B” multiple dwellings; therefore the proposed hotel use must comply with the relevant provisions of the MDL.

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December 15, 1961, provided that the Board determines that strict compliance with such provisions would cause practical difficulties or unnecessary hardships, and that the spirit and intent of the MDL are maintained, public health, safety and welfare are preserved, and substantial justice is done; and

WHEREAS, as noted above, the existing building at the site was constructed prior to 1961; however, MDL § 310(2)(c) is applicable to the proposal, because it results in a newly-created non-compliance with respect to MDL §§ 26(7) and 30; and

WHEREAS, pursuant to MDL § 310(2)(c) the Board may vary or modify provisions or requirements related to: (1) height and bulk; (2) required open spaces; and (3) minimum dimensions of yards or courts; and

WHEREAS, in varying or modifying the MDL pursuant to MDL § 310(2)(c), the Board must also find that: (i) the open areas for light and ventilation are “at least equivalent in area to those required” under the MDL; (ii) there are unique physical or topographical features, peculiar to and inherent in the particular premises, including irregularity, narrowness or shallowness of the lot size or shape; and (iii) such variance would be permitted under the Zoning Resolution; and

WHEREAS, the Board notes that MDL § 26(7) specifically relates to the minimum dimensions of courts; therefore the Board has the power to vary or modify the subject provision pursuant to MDL § 310(2)(c)(3); and

WHEREAS, the applicant represents that an unnecessary hardship would result from strict compliance with the MDL; and

WHEREAS, to demonstrate that strict compliance with the requirements of MDL §§ 26(7) and 30 would cause unnecessary hardships, the applicant examined the following development scenarios: (1) the construction of a residential tower that provides the required 30-foot distance for all hotel windows (the “As-of-Right Tower”); and (2) the construction of a residential tower that provides the required 30-foot distance between the hotel windows and the eastern façade of the tower (80 rooms) and a 20-foot distance between the hotel windows and the northern façade of the tower (the “Alternative Tower”); and

WHEREAS, the applicant represents that the As-of-Right Tower would have a building height of approximately 769 feet (168 feet taller than the proposal) and contain 63 stories and 121 dwelling units; and

WHEREAS, the applicants notes that despite the As-of-Right Tower’s significant increase in height over the proposed tower, it would not utilize 15,015 sq. ft. of available floor area; further, the increased height would require thicker shear walls and additional elevator stops and mechanical systems, at significant cost; and

WHEREAS, the applicant represents that the As-of-Right Tower yields 32,939 fewer sq. ft. of marketable

space than the proposal, resulting in a loss of \$96,476,026; accordingly, the applicant concludes that there is a practical difficulty in constructing the As-of-Right Tower; and

WHEREAS, the applicant represents that the Alternative Tower would have a building height of approximately 685 feet (84 feet taller than the proposal) and contain 56 stories and 116 dwelling units; as with the As-of-Right Tower, the Alternative Tower’s increased height would require thicker shear walls and additional elevator stops and mechanical systems, at significant cost; and

WHEREAS, the applicant represents that the Alternative Tower yields 9,903 fewer sq. ft. of marketable space than the proposal, resulting in a loss of \$51,351,966; accordingly, the applicant concludes that there is a practical difficulty in constructing the Alternative Tower as well; and

WHEREAS, based on the above, the Board agrees that the applicant has established a sufficient level of unnecessary hardship in complying with the requirements of MDL §§ 26(7) and 30; and

WHEREAS, the applicant states that the requested variance of MDL §§ 26(7) and 30 is consistent with the spirit and intent of the MDL, and will preserve public health, safety and welfare, and substantial justice; and

WHEREAS, the applicant contends that the primary intent of the court regulations of the MDL is ensure that adequate light and ventilation is provided to rooms in which people spend a substantial amount of time, such as sleeping rooms, living rooms within Class A permanent residential apartments or certain Class B residences, such as dormitories; and

WHEREAS, the applicant asserts that this intent is not substantially furthered by a strict application of the 30-horizontal distance requirement to the subject site; specifically, the applicant states that visitors to the subject hotel—which is in the heart of Times Square—are unlikely to spend a significant amount of time during daylight hours in their hotel rooms; accordingly, it is immaterial to such guests whether light is provided from a space with a distance of 30 feet or 20 feet; further, because the area of the Inner Court is more than twice the maximum required area for a court that complies with the MDL, guests at the subject hotel may receive even more light than guests staying rooms with windows facing minimally compliant courts; and

WHEREAS, the applicant also notes that the 20-foot horizontal distance provided by the Inner Court is equivalent to the minimum rear yard depth that would be required for a Use Group 5 hotel under the Zoning Resolution; thus, where a transient hotel relies on a yard rather than court for required light and ventilation, such yard is typically no more than 20 feet from the adjoining rear lot line; and

WHEREAS, based on the above, the Board finds that the proposed variance to MDL §§ 26(7) and 30 will

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maintain the spirit and intent of the MDL, preserve public health, safety and welfare, and ensure that substantial justice is done; and

WHEREAS, the applicant states that the open areas for light and ventilation are “at least equivalent in area to those required” under the MDL; and

WHEREAS, as noted above, the applicant asserts that although the minimum distance of the proposed open area is less than required by the MDL, the size of the open area is well in excess of the maximum required area for a court; and

WHEREAS, the Board finds that the proposal provides an equivalent open area for light and ventilation; and

WHEREAS, as to whether there are unique physical or topographical features, peculiar to and inherent in the particular premises, including irregularity, narrowness or shallowness of the lot size or shape, the applicant contends the existing pre-1961 hotel building at the site constitutes a unique physical condition, as that term has been interpreted by the Board; and

WHEREAS, the Board agrees that the existing building at the site constitutes a unique physical condition at the site; and

WHEREAS, finally, the applicant represents and the Board accepts that the proposed MDL variance results in a building that is permitted under the applicable provisions of the Zoning Resolution; and

WHEREAS, accordingly, the Board finds that the Appellant has submitted adequate evidence in support of the findings required to be made under MDL § 310(2)(c) and that the requested variance of MDL §§ 26(7) and 30 is appropriate, with certain conditions set forth below.

*Therefore it is Resolved*, that the decision of the DOB, dated April 10, 2014, is modified and that this appeal is granted, limited to the decision noted above, on condition that construction will substantially conform to the plans filed with the application marked, "Received May 2, 2014" ten (10) sheets; and on further condition:

THAT this approval is limited to the relief granted by the Board in response to specifically cited and filed DOB objections related to the MDL;

THAT the approved plans will be considered approved only for the portions related to the specific relief granted; and

THAT DOB must ensure compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code and any other relevant laws under

its jurisdiction irrespective of plan(s) and/or configuration(s) not related to the relief granted.

Adopted by the Board of Standards and Appeals, August 19, 2014.

**A true copy of resolution adopted by the Board of Standards and Appeals, August 19, 2014.**

**Printed in Bulletin Nos. 32-34, Vol. 99.**

**Copies Sent**

**To Applicant**

**Fire Com'r.**

**Borough Com'r.**

