

140-14-A

APPLICANT – Eric Palatnik, P.C., for 1016 East 13th Realty, LLC, owner.

SUBJECT – Application June 16, 2014 – Appeal seeking a determination that the owner has acquires a common law vested rights to complete construction under the prior C4-3A/R6 zoning district. R5 zoning district.

PREMISES AFFECTED – 1016 East 16th 13th Street, Block 6714, Lot 11, Borough of Brooklyn.

COMMUNITY BOARD #14BK

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Perlmutter; Vice-Chair Hinkson, Commissioner Ottley-Brown and Commissioner Montanez.....4
Negative:.....0

THE RESOLUTION –

WHEREAS, this application seeks a determination from the Board that the owner of the subject site has obtained the right to complete construction of a five-story, mixed residential and community facility building under the common law doctrine of vested rights; and

WHEREAS, a public hearing was held on this application on February 10, 2015, after due notice by publication in *The City Record*, with a continued hearing March 10, 2015, and then to decision on March 31, 2015; and

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

WHEREAS, Community Board 14, Brooklyn, recommends disapproval of this application; and

WHEREAS, the subject site is located on the west side of East 13th Street, between Avenue J and Avenue K, within an R5 zoning district; and

WHEREAS, the site has 40 feet of frontage along East 13th Street, and 4,000 sq. ft. of lot area; and

WHEREAS, under construction at the site is a five-story, mixed residential and commercial building with 10,778 sq. ft. of floor area (2.69 FAR) (8,600 sq. ft. of residential floor area (2.15 FAR) and 2,178 sq. ft. of community facility floor area (0.54 FAR)), eight dwelling units, and no accessory parking spaces (the “Building”); and

WHEREAS, the applicant represents that the Building complies with the parameters of the former C4-3 zoning district, which is an R6 equivalent, per ZR § 35-23(a); and

WHEREAS, on December 29, 2005, the Department of Buildings (“DOB”) issued New Building Permit No. 302056343-01-NB (hereinafter, the “New Building Permit”) authorizing construction of the Building; and

WHEREAS, on April 5, 2006, (hereinafter, the

“Enactment Date”), the City Council voted to adopt the Midwood Rezoning, which rezoned the site from C4-3 to R5; and

WHEREAS, as a result of the Midwood Rezoning, the Building no longer complies with following zoning regulations: (1) total FAR (a maximum total FAR of 2.0 is permitted, 2.69 FAR is proposed); (2) residential FAR (a maximum residential FAR of 1.25 is permitted, 2.15 FAR is proposed); (3) maximum street wall height (a maximum street wall height of 30’-0” is permitted, a street wall height of 45’-0” is proposed); (4) maximum building height (a maximum building height of 40’-0” is permitted, a building height of 55’-0” is proposed); (5) lot coverage (a maximum lot coverage of 92 percent is permitted, 100 percent lot coverage is proposed); and (6) side yards (two side yards with minimum widths of 8’-0” are required, no side yards are proposed); and

WHEREAS, the applicant represents that, as of the Enactment Date, the applicant had obtained permits and completed, among other things, 100 percent of the foundations; as such, pursuant to ZR § 11-331, the owner had two years—until April 5, 2008—in which to complete construction pursuant to the New Building Permit and obtain a certificate of occupancy; and

WHEREAS, the applicant notes that subsequent to the Enactment Date, the owner encountered significant financial difficulties; work on the Building ceased and the site was backfilled to grade to preserve public safety and to prevent degradation of the foundation; and

WHEREAS, the applicant states that as of April 5, 2008, construction had not been completed and a certificate of occupancy had not been obtained; accordingly, on May 8, 2008, the owner filed an application under BSA Cal. No. 140-08-BZ and pursuant to ZR § 11-332, seeking reinstatement of the New Building Permit and a two-year extension of time to complete construction; and

WHEREAS, the applicant represents that BSA Cal. No. 140-08-BZ was not prosecuted and the application was withdrawn; and

WHEREAS, accordingly, the applicant now seeks recognition of its vested right to complete construction pursuant to the common law doctrine of vested rights; and

WHEREAS, as set forth below, to establish the owner’s entitlement to a vested right, the applicant relies on the work performed and the expenditures made prior to the Enactment Date, as well as the serious loss that would result from having to comply with the R5 regulations; and

WHEREAS, a threshold matter for the vested rights analysis is that a permit be issued lawfully prior to the Enactment Date and that the work was performed pursuant to such lawful permit; and

WHEREAS, by letter dated November 8, 2014, DOB confirmed that the New Building Permit was lawfully issued, authorizing construction of the Building

140-14-A

prior to the Enactment Date; and

WHEREAS, the Board notes that when work proceeds under a lawfully-issued permit, a common law vested right to continue construction after a change in zoning generally exists if: (1) the owner has undertaken substantial construction; (2) the owner has made substantial expenditures; and (3) serious loss will result if the owner is denied the right to proceed under the prior zoning; and

WHEREAS, specifically, as held in *Putnam Armonk, Inc. v. Town of Southeast*, 52 AD 2d 10 (2d Dept 1976), where a restrictive amendment to a zoning ordinance is enacted, the owner's rights under the prior ordinance are deemed vested "and will not be disturbed where enforcement [of new zoning requirements] would cause 'serious loss' to the owner," and "where substantial construction had been undertaken and substantial expenditures made prior to the effective date of the ordinance"; and

WHEREAS, however, notwithstanding this general framework, as discussed by the court in *Kadin v. Bennett*, 163 AD 2d 308 (2d Dept 1990) "there is no fixed formula which measures the content of all the circumstances whereby a party is said to possess 'a vested right'. Rather, it is a term which sums up a determination that the facts of the case render it inequitable that the State impede the individual from taking certain action"; and

WHEREAS, as noted above, the applicant obtained a permit to construct the Building and performed certain work prior to the Enactment Date; and

WHEREAS, specifically, the applicant states that the work it performed constitutes substantial construction, in that, prior to the Enactment Date, it constructed 100 percent of the foundation, completed all footings and foundation walls, and constructed the elevator pit in the proposed cellar; and

WHEREAS, in support of this statement, the applicant has submitted the following: a breakdown of the construction costs by line item; copies of cancelled checks; construction permits; and photographs of the site; and

WHEREAS, the Board has reviewed the representations as to the amount and type of work completed before and after the Enactment Date and the documentation submitted in support of these representations, and agrees that it establishes that substantial work was performed; and

WHEREAS, as to expenditure, the Board notes that unlike an application for relief under ZR § 11-30 *et seq.*, soft costs and irrevocable financial commitments can be considered in an application under the common law and accordingly, these costs are appropriately included in the applicant's analysis; and

WHEREAS, the applicant represents that the total expenditure paid toward the construction of the

Building prior to the Enactment Date is \$296,408 (\$236,612 in hard costs and \$59,796 in soft costs), or approximately 15 percent, out of the \$1,920,000 cost to complete; and

WHEREAS, the applicant also notes that subsequent to the Enactment Date, an additional \$51,356 has been expended, including \$49,131 in soft costs; and

WHEREAS, the Board considers the amount of expenditures significant, both for a project of this size, and when compared with the development costs; and

WHEREAS, the Board's consideration is guided by the percentages of expenditure cited by New York courts considering how much expenditure is needed to vest rights under a prior zoning regime; and

WHEREAS, as to serious loss, the Board examines not only whether certain improvements and expenditures could not be recouped under the new zoning, but also considerations such as the diminution in income that would occur if the new zoning were imposed and the reduction in value between the proposed building and the building permitted under the new zoning; and

WHEREAS, the applicant states that the R5 floor area and yard regulations are significantly more restrictive than the C4-3 regulations; to demonstrate the serious loss inherent in complying with the current zoning regulations, the applicant explored the feasibility of the following four complying developments: (1) a community facility building with 8,000 sq. ft. of floor area (2.0 FAR) and two side yards with widths of 8'-0"; (2) a mixed residential and community facility building 8,000 sq. ft. of floor area (2.0 FAR) and side yards with widths of 8'-0"; (3) a detached single-family home with 5,000 sq. ft. of floor area (1.25 FAR) and side yards with widths of 5'-0" and 8'-0"; and (4) a semi-detached multiple dwelling with 5,000 sq. ft. of floor area (1.25 FAR), seven dwelling units, and one side yard with a width of 8'-0"; and

WHEREAS, the applicant states that scenarios (1), (2), and (3) would require removal of 100 percent of the foundation and that scenario (4) would require removal of 85 percent of the foundation; the cost of removing the entire foundation would be \$65,000 and the cost of removing 85 percent of the foundation would be \$55,250; and

WHEREAS, in addition to the costs of removing work already performed, the applicant states that the value of each of the complying buildings would be significantly less (at least \$2,500,000 less) than the value of the Building authorized; and

WHEREAS, thus, the applicant states that it would suffer a serious loss if the site was required to comply with the R5 district regulations; and

WHEREAS, the Board agrees that complying with the R5 district regulations would result in a serious economic loss for the applicant; and

140-14-A

WHEREAS, in sum, the Board has reviewed the representations as to the work performed and the expenditures made both before and after the Enactment Date, the representations regarding serious loss, and the supporting documentation for such representations, and agrees that the applicant has satisfactorily established that a vested right to complete construction of the Building has accrued to the owner of the premises.

Therefore it is Resolved, that this application made pursuant to the common law doctrine of vested rights requesting a reinstatement of Permit No. 302056343-01-NB, as well as all related permits for various work types, either already issued or necessary to complete construction and obtain a certificate of occupancy, is granted for four years from the date of this grant.

Adopted by the Board of Standards and Appeals, March 31, 2015.

A true copy of resolution adopted by the Board of Standards and Appeals, March 31, 2015.

Printed in Bulletin No. 15, Vol. 100.

Copies Sent

To Applicant

Fire Com'r.

Borough Com'r.

