

194-07-A

APPLICANT – Rothkrug Rothkrug & Spector, for Elite III Contractor’s Inc., owner.

SUBJECT – Application August 8, 2007 – Appeal seeking a determination that the owner of the premises has acquired a common law vested right to continue development commenced under the prior R6 Zoning District. R5 Zoning District.

PREMISES AFFECTED – 1447 Rosedale Avenue, Cross Bronx Expressway Service Road N and Rosedale Avenue, Block 3895, Lot 77, Borough of Bronx.

COMMUNITY BOARD #9BX

APPEARANCES –

For Applicant: Harold Weinberg.

ACTION OF THE BOARD – Appeal granted.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice-Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.....5

Negative:.....0

THE RESOLUTION:

WHEREAS, this is an appeal requesting a Board determination that the owner of the premises has obtained the right to complete the enlargement of a single-family dwelling under the common law doctrine of vested rights; and

WHEREAS, a public hearing was held on this appeal on May 13, 2008, after due notice by publication in *The City Record*, with a continued hearing on June 17, 2008, and then to decision on July 15, 2008; and

WHEREAS, the site was inspected by Chair Srinivasan, Commissioner Hinkson and Commissioner Ottley-Brown; and

WHEREAS, Community Board 9, Bronx, recommends disapproval of the appeal; and

WHEREAS, certain neighbors testified in opposition to the appeal (“the Opposition”); and

WHEREAS, the applicant states that the subject site consists of an approximately 667 sq. ft. lot at the intersection of the Cross Bronx Expressway Service Road North and Rosedale Avenue; and

WHEREAS, the applicant proposes to develop the site with a three-story two-family home with 1,470 sq. ft. of residential floor area; and

WHEREAS, the subject site was formerly located within an R6 zoning district; and

WHEREAS, the proposed home complies with the former zoning district parameters; and

WHEREAS, however, on May 9, 2007 (hereinafter, the “Rezoning Date”), the City Council voted to adopt the “Park Stratton Rezoning,” which rezoned the site to R5; and

WHEREAS, the home does not comply with the R5 district parameters as to the maximum permitted floor area, parking, lot coverage, residential density and front yard; and

WHEREAS, as a threshold matter in determining this appeal, the Board must find that the construction was conducted pursuant to a valid permit; and

WHEREAS, Section 645 (b) (1) of the Charter vests the Commissioner of Buildings with "exclusive

power . . . to examine and approve or disapprove plans for the construction or alteration of any building or structure . . .”, and

WHEREAS, DOB has confirmed that New Building Permit No. 201109549 (hereinafter, the “Construction Permit”) was lawfully issued to the owner by DOB on April 25, 2007, prior to the Rezoning Date; and

WHEREAS, thus, the Board finds that the permits were validly issued by DOB to the owner of the subject premises and were in effect until the Rezoning Date; and

WHEREAS, assuming that valid permits had been issued and that work proceeded under them, the Board notes that a common law vested right to continue construction generally exists where: (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, Putnam Armonk, Inc. v. Town of Southeast, 52 A.D.2d 10, 15 (2d Dept. 1976) stands for the proposition that 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, the court in Kadin v. Bennett, 163 A.D.2d 308 (2d Dept. 1990) found that “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 to substantial construction, the applicant states that before the Rezoning Date, the owner had completed site excavation, footings and foundations and backfilled the site; and

WHEREAS, in support of this assertion, the applicant submitted the following evidence: photographs of the site, an affidavit from the general contractor, concrete pour tickets, and accounting summaries; and

WHEREAS, the general contractor states that the excavation, fill removal, foundations and backfilling of the site were completed on May 9, 2007; and

WHEREAS, the Board concludes that, based upon a comparison of the type and amount of work completed in the instant case with the type and amount of work found by New York State courts to support a positive vesting determination, a significant amount of work was performed at the site prior to the rezoning; and

WHEREAS, the Board also notes that the site preparation, excavation and foundation work at the site indisputably occurred prior to the Rezoning Date; and

WHEREAS, the Board has reviewed the representations as to the amount and type of work

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completed and the supporting documentation and agrees that it establishes that significant progress was made prior to the Rezoning Date, and that said work was substantial enough to meet the guideposts established by case law; 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; accordingly, these costs are appropriately included in the applicant's analysis; and

WHEREAS, the applicant states that prior to the Rezoning Date, the owner expended \$47,940; and

WHEREAS, as proof of the expenditures, the applicant has submitted invoices and accounting reports; and

WHEREAS, the Board considers the amount of expenditures significant, both in and of itself and for a project of this size; and

WHEREAS, again, 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, such a determination may be based in part upon a showing that certain of the expenditures could not be recouped under the new zoning; and

WHEREAS, the applicant contends that the loss of the \$47,940 associated with pre-Rezoning Date project costs that would result if this appeal were denied is significant; and

WHEREAS, the inability to construct the proposed building would mean that no portion of these expenditure could be recouped; and

WHEREAS, the applicant represents that a complying home would be uninhabitable due to the narrow lot width, which would result in a maximum building width of less than 4'-0" after providing the required 10'-0" front yard and 5'-0" side yard along the northerly lot line; and

WHEREAS, the Board agrees that the limitations of any complying construction, and the \$47, 940 of actual expenditures and outstanding fees that could not be recouped constitute, in the aggregate, a serious economic loss, and that the supporting data submitted by the applicant supports this conclusion; and

WHEREAS, at hearing, the Opposition argued that the subject application should be denied because work was performed by the owner in violation of an outstanding Stop Work Order issued May 2, 2007 by the Department of Buildings; and

WHEREAS, the Board observes that it can only consider representations of work performed and expenditures made pursuant to a valid permit in a

determination as to whether the owner has a common law vested right to complete construction under the Prior Zoning; and

WHEREAS, the applicant represents that with respect to the validity of the permit and the work completed thereunder, none of the violations giving rise to the stop work order affected the validity of the permits or approval of the work completed at the site; and

WHEREAS, the record indicates a Notice of Violation was issued by DOB related to a failure by the owner to provide for the protection of employees on the site and for failing to safeguard the abutting sidewalk; and

WHEREAS, a submission by DOB states that an inspection performed on May 2, 2007 found an unshored excavation and an incomplete foundation with concrete footings in place and that concrete was poured to correct an unsafe condition, and was not contrary to the Stop Work Order; and

WHEREAS, the applicant represents that the pouring of concrete on May 2, 2007 had the effect of curing the violations; and

WHEREAS, furthermore, the applicant has submitted documentation indicating that the required shoring was scheduled to be delivered and installed at the site on May 2, 2007, and represents that the scheduled installation would have led to the lifting of the Stop Work Order and the completion of the foundations by the Rezoning Date; and

WHEREAS, the applicant further represents that backfilling work was also performed prior to the Rezoning Date under authority of a DOB inspector on May 3, 2007; and

WHEREAS, in sum, the Board has reviewed the representations as to the work performed, the expenditures made, the serious loss projected, and the supporting documentation for such representations, and agrees that the applicant has satisfactorily established that a vested right to complete construction had accrued to the owner of the premises as of the Rezoning Date; and

Therefore it is Resolved that this appeal made pursuant to the common law of vested rights requesting a reinstatement of DOB Permit No. 201109549, as well as all related permits for various work types, either already issued or necessary to complete construction and obtain a certificate of occupancy in conformance with DOB Permit No. 201109549, is granted for four years from the date of this grant.

Adopted by the Board of Standards and Appeals, July 15, 2008.

A true copy of resolution adopted by the Board of Standards and Appeals, July 15, 2008.

Printed in Bulletin No. 29, Vol. 93.

Copies Sent

To Applicant

Fire Com'r.

Borough Com'r.