

**204-07-BZY**

APPLICANT – Sheldon Lobel, P.C., for Washington-Hall Holdings, LLC, owner.

SUBJECT – Application August 17, 2007 – Proposed extension of time (§11-332) to complete construction of a minor development of a 15 story mixed use building under the prior R6/C1-3 Zoning District.

PREMISES AFFECTED – 163-167 Washington Avenue, approximately 80’ from the northeast corner of Myrtle Avenue and Washington Avenue, Block 1890, Lots 1, 4, 82, Borough of Brooklyn.

**COMMUNITY BOARD #2BK**

APPEARANCES –

For Applicant: Jordan Most.

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

**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 application under ZR § 11-331, to renew a building permit and extend the time for the completion of the foundation of a 16-story mixed-use residential/community facility building; and

WHEREAS, this application was accompanied by a companion application under BSA Cal. No. 270-07-A, filed at a later date, but decided the date hereof, which is a request for a finding that the owner of the premises has obtained a vested right to continue construction under the common law; and

WHEREAS, the Board notes that while separate applications were filed according to Board procedure, in the interest of convenience, the second case was heard with the first as of January 15, 2008, and the record is the same for both; and

WHEREAS, a public hearing was held on this application on October 30, 2007 after due notice by publication in *The City Record*, with continued hearings on December 11, 2007 and January 15, 2008, and then to decision on March 4, 2008; and

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

WHEREAS, Community Board 2, Brooklyn, recommends disapproval of this application; and

WHEREAS, City Council Member Letitia James provided testimony in opposition to this application citing concerns that the threshold for substantial completion of foundations had not been met, that work continued at the site after the permitted hours of operation, and that the proposed building is not compatible with the neighborhood character; and

WHEREAS, additionally, Building Too Tall, represented by counsel, opposed this application; this group of neighbors was represented by the same counsel in BSA Cal. 270-07-A; and

WHEREAS, collectively, the parties who provided testimony in opposition to the proposal are the “Opposition”; and

WHEREAS, specifically, the Opposition raised the following concerns: (1) excavation was not complete, (2) substantial progress on the foundation was not complete, (3) some construction took place after hours, (4) the applicant is not credible, and (5) the construction at the site was dangerous and damaged nearby properties; and

WHEREAS, the site is a through lot, with 100 feet of frontage on the east side of Washington Avenue and 104 feet of frontage on the west side of Hall Street, 80 feet from the intersection with Myrtle Avenue; and

WHEREAS, the site comprises three lots – Lots 1, 4, and 82 – which are to be merged into a single lot, Lot 4, with a total of 18,422 sq. ft. of lot area; and

WHEREAS, the owner of the site seeks to construct a new 16-story mixed-use building with community facility use on the first floor and residential use in the remainder of the building (the “Building”); and

WHEREAS, the design of the Building includes a second-floor terrace which does not have significant load-bearing needs and requires 15 footings that are separate from the foundation for the building; and

WHEREAS, the terrace contributes to the open space required at the site and, without it, the Building could not achieve the proposed amount of floor area; and

WHEREAS, on May 2, 2007, DOB issued New Building Permit No. 302249715-01-NB (the “Permit”); and

WHEREAS, at the time the Permit was issued, the site was located partially within an R6 zoning district and partially within a C1-3 (R6) zoning district; and

WHEREAS, however, on July 25, 2007, (the “Enactment Date”), the City Council voted to adopt the Fort Greene-Clinton Hill Rezoning, which rezoned the site to C2-4 (R7A), R5B, and R6B; and

WHEREAS, the applicant represents that the Building complies with the former R6 and C1-3 (R6) zoning district parameters; specifically, the proposed 2.43 FAR and height of 16 stories, were permitted; and

WHEREAS, because the site is now partially within a C2-4 (R7A) zoning district, partially within an R5B zoning district, and partially within an R6B zoning district, the Building would not comply with the maximum FAR of 1.93 or maximum height of six stories; and

WHEREAS, because the Building violated these provisions of the C2-4 (R7A), R5B, and R6B zoning districts and work on the foundation was not completed as of the Enactment Date, the Permit lapsed by operation of law; and

WHEREAS, additionally, the Department of

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Buildings issued a stop work order on July 25, 2007 for the Permit; and

WHEREAS, the applicant now applies to the Board to reinstate the Permit pursuant to ZR § 11-331; and

WHEREAS, ZR § 11-331 reads: "If, before the effective date of an applicable amendment of this Resolution, a building permit has been lawfully issued . . . to a person with a possessory interest in a zoning lot, authorizing a minor development or a major development, such construction, if lawful in other respects, may be continued provided that: (a) in the case of a minor development, all work on foundations had been completed prior to such effective date; or (b) in the case of a major development, the foundations for at least one building of the development had been completed prior to such effective date. In the event that such required foundations have been commenced but not completed before such effective date, the building permit shall automatically lapse on the effective date and the right to continue construction shall terminate. An application to renew the building permit may be made to the Board of Standards and Appeals not more than 30 days after the lapse of such building permit. The Board may renew the building permit and authorize an extension of time limited to one term of not more than six months to permit the completion of the required foundations, provided that the Board finds that, on the date the building permit lapsed, excavation had been completed and substantial progress made on foundations."; and

WHEREAS, a threshold requirement in this application is that the Permit is valid; and

WHEREAS, the validity of the Permit has not been challenged; and

WHEREAS, because the proposed development contemplates construction of one building, it meets the definition of minor development; and

WHEREAS, since the proposed development is a minor development, the Board must find that excavation was completed and substantial progress was made as to the required foundation; and

WHEREAS, the applicant asserts that excavation was completed and that substantial progress was made on the foundation as of the Enactment Date; and

WHEREAS, as to excavation, the Opposition asserts that it was not complete since the holes for the 15 footings for the second floor terrace had not been cleared; and

WHEREAS, in response, the applicant stated that its construction plan reflects that the holes for the terrace footings would be excavated much later in the process because if the earth had been removed, then the bars and footings would have had to have been assembled and poured in order to keep the holes open and they would have stuck out above grade; and

WHEREAS, accordingly, the footings would inhibit circulation on the site for vehicles, workers, and staging

areas during the construction process; and

WHEREAS, the applicant notes that the terrace footings require a total of 13 cubic yards of concrete out of a total amount of approximately 763 cubic yards for the entire foundation; and

WHEREAS, at hearing, the Board asked the applicant to describe the requirements for the construction site and to provide evidence to support the assertion that the excavation for the terrace footings was not practical given the balance of the work to be performed at the site; and

WHEREAS, in response, the applicant provided testimony from the construction manager and plans of the construction site which reflect that this area was required for efficient operations of the construction site; and

WHEREAS, the Opposition states that because the terrace provides required open space for the Building and without it the Building would not comply with the prior zoning, it is an integral part of the foundation, which cannot be viewed separately; and

WHEREAS, the Board recognizes that the terrace is required in order for the Building to comply with the prior zoning, but it notes that it is a common practice to backfill portions of sites which have been excavated in order to accommodate maneuvering construction vehicles and/or to provide staging areas as construction continues on the remainder of the site; and

WHEREAS, accordingly, the Board has determined that the footing holes, if excavated, would essentially have to be backfilled to accommodate a staging area, similar to that described for other sites, and the excavation would not serve any purpose as it would need to be re-done after the area was no longer needed for staging; and

WHEREAS, notwithstanding the Opposition's assertion that there were other possible ways of designing the construction site, which might have permitted the applicant to excavate and cover the footings for the terrace, the Board finds that the applicant's decision to reserve that work for a later point in the construction process was reasonable so that the footings would not have to potentially be re-poured if damaged and to provide efficient and safe working condition at the site; and

WHEREAS, accordingly, the Board finds that the absence of excavated footings for the terrace, which is not part of the larger foundation, does not preclude a determination that excavation was complete; and

WHEREAS, the Board finds that the excavation performed at the site for the foundation for the 16-story building is in the spirit of the ZR's requirement that excavation be complete for vesting purposes under ZR § 11-331; and

WHEREAS, the Board notes that the Opposition

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does not contend that the remainder of the excavation for the 16-story building, excluding the second floor terrace, was not finished; and

WHEREAS, as to substantial progress on the foundation, the applicant represents that the foundation is approximately 74 percent complete; and

WHEREAS, specifically, the applicant represents that (1) 558 tons of crushed stone have been installed under the footings, (2) 100 linear feet of sheeting have been installed, (3) 44.5 tons of rebar have been installed, and (4) 547 cubic yards of concrete have been poured; and

WHEREAS, the applicant has carved out 24 cubic yards of concrete, which were poured after hours, so that the total amount of concrete that the Board has considered is 523 cubic yards, rather than the 547 cubic yards actually poured; and

WHEREAS, at hearing, the Board asked the applicant to provide detailed information about the concrete pours including the time of dispatch from the concrete plant and the time of the pour; and

WHEREAS, in response, the applicant provided records reflecting truck numbers, dispatch time, and pour time, along with the pour tickets reflecting how much concrete had been poured; and

WHEREAS, the Opposition reviewed the applicant's submissions and found inconsistencies within the submissions as to the truck numbers and cylinder tests that do not match; and

WHEREAS, in response, the applicant stated that there may have been some oversight in the record-keeping of the pours, but that all core tests were performed as per the standards of the Building Code and the total amount of concrete poured is accurate; and

WHEREAS, the Opposition asserts that the discrepancies in the concrete pour records call the applicant's credibility into question; and

WHEREAS, the Board notes that the applicant modified the information related to the concrete pours throughout the hearing process as it compiled its records; and

WHEREAS, when the Board inquired into the reason for these changes, the applicant stated that, during the hearing process, as the concrete pours were analyzed, it located more records to help substantiate the assertions about the amount of work completed; and

WHEREAS, ultimately, the applicant submitted a survey of the site performed on July 30, 2007, affidavits from the site's construction managers, and comprehensive records of the concrete pours, which support its assertions; and

WHEREAS, the Board directed the applicant to subtract any concrete that was poured after hours and to subtract any work which might have been performed while a stop work order was in effect; and

WHEREAS, as to the Opposition's assertion that the applicant's representations about the amount of concrete

poured lack credibility, the Board notes that the records submitted in support of the concrete pours are like those which have been accepted in other vested rights cases; and

WHEREAS, additionally, the Board notes, that based on a physical inspection of the site, substantial work, comparable to the amount performed in other vested rights cases, has been performed; and

WHEREAS, accordingly, the Board finds the combination of the physical work completed and the concrete pour records is compelling evidence that substantial work was completed on the foundation; and

WHEREAS, the Board understands that the concrete pour records may have initially caused some confusion, but that, in the absence of evidence that the amount of concrete purported to have been poured was not poured, the Board accepts the applicant's evidence, both physical and documentation, as proof that substantial work was completed; and

WHEREAS, the Board has only considered work completed as of the Enactment Date and excluded all work performed after hours; and

WHEREAS, the Opposition also cites to DOB's assessment that only 40 percent of the foundation had been completed by the Enactment Date as evidence that substantial work had not been completed; and

WHEREAS, the Board notes that DOB's assessment was based on visual observation and did not consider the amount of concrete documented as poured; and

WHEREAS, the applicant's records reflect that 523 cubic yards (after subtracting the 24 cubic yards poured after hours) out of a total of 763 cubic yards required for the site (69 percent) of the concrete had been poured, in addition to the other foundation construction noted above; and

WHEREAS, finally, the Opposition contends that construction at the site resulted in hazardous site conditions and damage to adjacent properties; and

WHEREAS, the Board defers to DOB to ensure that construction is performed pursuant to the Permit and pursuant to all relevant Building Code requirements; and

WHEREAS, in the absence of additional stop work orders from DOB, the Board accepts that applicant's representations that construction was performed legally; and

WHEREAS, the applicant has also submitted financial documents, including cancelled checks, invoices, and accounting tables, which reflect significant expenditure associated with the excavation and foundation work incurred as of the Enactment Date; and

WHEREAS, the Board finds all of the above-mentioned submitted evidence sufficient and credible;

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and

WHEREAS, while the Board was not swayed by many of the Opposition's arguments, it nevertheless understands that the community and the elected officials worked diligently on the Fort Greene-Clinton Hill Rezoning and that the Building does not comply with the new zoning parameters; and

WHEREAS, however, the owner has met the test for a common law vested rights determination, and the owner's property rights may not be negated merely because of general community opposition; and

WHEREAS, accordingly, based upon its consideration of the arguments made by the applicant and the Opposition, as outlined above, as well as its consideration of the entire record, the Board finds that the owner has met the standard for vested rights under and is entitled to the requested reinstatement of the Permit, and all other related permits necessary to complete construction.

WHEREAS, because the Board finds that excavation was complete and that substantial progress had been made on the foundation, it concludes that the applicant has adequately satisfied all the requirements of ZR § 11-331.

*Therefore it is Resolved* that this application to renew New Building Permit No. 302249715-01-NB pursuant to ZR § 11-331 is granted, and the Board hereby extends the time to complete the required foundations for one term of six months from the date of this resolution, to expire on September 4, 2008.

Adopted by the Board of Standards and Appeals, March 4, 2008.

**A true copy of resolution adopted by the Board of Standards and Appeals, March 4, 2008.  
Printed in Bulletin No. 10, Vol. 93.**

**Copies Sent**

**To Applicant**

**Fire Com'r.**

**Borough Com'r.**