240-07-A
APPLICANT – Sheldon Lobel, P.C., for 1270 Bay Ridge Parkway Development, LLC, owner.
SUBJECT – Application October 24, 2007 – Appeal seeking a determination that the owner has acquired a common law vested right to continue development commenced under the prior R4/C1-2 zoning district. R4-1 zoning district.
PREMISES AFFECTED – 1270 Bay Ridge Parkway, 12th Avenue and 13th Avenue, Block 6221, Lot 34, Borough of Brooklyn.
COMMUNITY BOARD #10BK
APPEARANCES –
For Applicant: Sheldon Lobel.
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 appeal requesting a Board determination that the owner of the premises has obtained the right to complete a proposed mixed-use building under the common law doctrine of vested rights; and

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

WHEREAS, the site was inspected by Chair Srinivasan, Vice Chair Collins and Commissioner Hinkson; and

WHEREAS, Council Member Gentile provided a letter in support of the proposal; and

WHEREAS, certain neighbors also submitted letters in support of the proposal; and

WHEREAS, the applicant states that the subject site consists of a 6,000 sq. ft. lot fronting on the south side of Bay Ridge Parkway between 12th Avenue and 13th Avenue in the Dyker Heights neighborhood of Brooklyn; and

WHEREAS, the applicant proposes to develop the site with a three-story mixed-use building with six dwelling units and a total floor area of 13,477 sq. ft. containing 3,050 sq. ft of commercial floor area, 590 sq. ft. of community facility floor area and 6,617 sq. ft. of residential floor area; and

WHEREAS, the subject site was formerly located within an R4 zoning district with a C1-2 overlay on a portion of the site; and

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

WHEREAS, however, on July 25, 2007 (hereinafter, the "Rezoning Date"), the City Council voted to adopt the Dyker Heights Rezoning, which rezoned the site to R4-1; and

WHEREAS, the building does not comply with the R4-1 district parameters as to residential density, permitted uses, and front and side yards; 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, DOB has confirmed that New Building Permit No. 302298500 (hereinafter, the "New Building Permit") was lawfully issued to the owner by DOB on July 12, 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, the applicant cites to Putnam Armonk, Inc. v. Town of Southeast, 52 A.D.2d 10, 15, 382 N.Y.S.2d 538, 541 (2d Dept. 1976) 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 preparation, shoring of adjacent properties and nearly all the excavation; and

WHEREAS, in support of this assertion, the applicant submitted the following evidence: photographs of the site; affidavits of the architect and general contractor; an invoice from the general contractor stating the amount of work completed; cancelled checks; and accounting summaries; and

WHEREAS, the architect and general contractor both state that 90 percent of the excavation and all site clearance and shoring activities were completed by the Rezoning Date; and

WHEREAS, the Board concludes that given the size of the site, and 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 and excavation at the site indisputably occurred prior to the Rezoning Date; and

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WHEREAS, the Board has reviewed the representations as to the amount and type of work 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 $1,670,093, including hard and soft costs and irrevocable commitments, out of $3,291,463 budgeted for the entire project; and

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

WHEREAS, the Board notes that the budgeted expenditures included site purchase costs which, for the purposes of its analysis here, the Board has excluded; and

WHEREAS, thus, based upon the applicant's representation as to the total project cost and these particular site purchase costs, the Board concludes that the actual construction costs for the proposed construction, both soft and hard, approximate $2 million; and

WHEREAS, in relation to actual construction costs and related soft costs, the applicant specifically notes that the owner had paid $102,761 for demolition, disposal of excavated fill, shoring materials, manufacture of structural steel, construction waste containers, architectural and engineering fees; and

WHEREAS, the applicant further states that the owner also irrevocably owed an additional $1.8 million in connection with the proposed construction, because it had executed binding contracts for work and materials, including $284,500 in outstanding fees to the construction manager; and

WHEREAS, the Board considers the amount of expenditures significant, both in and of itself for a project of this size, and when compared against the total development costs; 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 if the development proceeded under the new zoning; and

WHEREAS, the applicant contends that the loss of the $387,261 associated with pre-Rezoning Date project costs that would result if this appeal was denied is significant; and

WHEREAS, additionally, the applicant explained the diminution in income that would occur if the residential density limits, front and side yard requirements, and restrictions on commercial use of the new zoning were imposed; and

WHEREAS, specifically, the inability to develop the proposed building would require the owner to re-design the development; and

WHEREAS, the applicant represents that a complying development would have a maximum of four dwelling units in two buildings with a total floor area of 4,200 sq. ft., due to the R4-1 zoning district's required front and side yard and density and use restrictions; and

WHEREAS, additionally, as noted by the applicant, soil excavated along the western lot line would have to be backfilled for such a complying building, further compounding the economic harm to the owner; and

WHEREAS, the Board agrees that the need to redesign, the limitations of any complying development, and the $387,020 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, in sum, the Board has reviewed the representations as to the work performed, the expenditures made, and 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 had accrued to the owner of the premises as of the Rezoning Date.

Therefore it is Resolved that this appeal made pursuant to the common law of vested rights requesting a reinstatement of DOB Permit No. 302298500, 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, January 15, 2008.

A true copy of resolution adopted by the Board of Standards and Appeals, January 15, 2008.
Printed in Bulletin No. 3, Vol. 93.

Copies Sent
To Applicant
Fire Com'r.
Borough Com'r.