

**247-13-A**

APPLICANT – Sheldon Lobel, P.C., for Castle Hill Equities, LLC, owners.

SUBJECT – Application August 22, 2013 – Common Law Vested Right to continue development of proposed six-story residential building under prior R6 zoning district. R5A zoning district.

PREMISES AFFECTED – 123 Beach 93rd Street, western side of Beach 93rd Street with frontage on Shore Front Parkway and Cross Bay Parkway, Block 16139, Lot 11, Borough of Queens.

**COMMUNITY BOARD #14Q**

**ACTION OF THE BOARD** – Application 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 application requesting a Board determination that the owner of the premises has obtained the right to complete construction of a six-story residential building under the common law doctrine of vested rights; and

WHEREAS, a public hearing was held on this application on October 8, 2013, after due notice by publication in *The City Record*, and then to decision on October 29, 2013; and

WHEREAS, the subject site is located on the west side of Beach 93rd Street, approximately 211 feet south of Holland Avenue in Rockaway Beach, in an R5A zoning district; and

WHEREAS, the site has 175 feet of frontage along Beach 93rd Street, 157.13 feet of frontage along Beach 94th Street, 107.01 feet of frontage along Shore Front Boulevard, and a total lot area of 18,488 sq. ft.; and

WHEREAS, the site is proposed to be developed with a six-story residential building with 57 dwelling units and 36 accessory parking spaces (the “Building”); and

WHEREAS, the applicant represents that the Building complies with the parameters of the former R6 zoning district; and

WHEREAS, on January 8, 2007, New Building Permit No. 402483013-01-NB (hereinafter, the “New Building Permit”) was issued by the Department of Buildings (“DOB”) permitting construction of the Building; and

WHEREAS, however, on August 14, 2008 (hereinafter, the “Enactment Date”), the City Council voted to adopt the Rockaway Neighborhoods Rezoning, which rezoned the site from R6 to R5A; and

WHEREAS, the Building, which is a multiple dwelling with a floor area ratio in excess of 1.10 and a height in excess of 35 feet, does not comply with the current zoning; and

WHEREAS, as of the Enactment Date, the applicant had obtained permits for the development and had completed 100 percent of its foundations, such that the right to continue construction was vested pursuant to ZR § 11-331, which allows DOB to determine that

construction may continue under such circumstances; and

WHEREAS, however, only two years are allowed for completion of construction and to obtain a certificate of occupancy; and

WHEREAS, in the two years subsequent to the Enactment Date, construction was not completed and a certificate of occupancy was not issued; and

WHEREAS, accordingly, an application was filed with the Board for an extension of time to complete construction and obtain a certificate of occupancy; and

WHEREAS, on October 19, 2010, pursuant to ZR § 11-30 *et seq.*, the Board granted, under BSA Cal. No. 110-10-BZY, a two-year extension of time to complete construction and obtain a certificate of occupancy under the subject calendar number; and

WHEREAS, accordingly, the applicant had until October 19, 2012 to complete construction and obtain a certificate of occupancy; and

WHEREAS, as of October 19, 2012, construction had not been completed; and

WHEREAS, accordingly, on March 19, 2013, pursuant to ZR § 11-30 *et seq.*, the Board granted, under BSA Cal. No. 110-10-BZY, an additional two-year extension to complete construction and obtain a certificate of occupancy under the subject calendar number; and

WHEREAS, pursuant to the Board’s March 19, 2013 grant, the New Building Permit does not lapse until March 19, 2015; and

WHEREAS, nevertheless, the applicant now seeks a four-year extension to complete construction pursuant to the common law doctrine of vested rights; and

WHEREAS, the applicant states that it seeks a four-year extension because construction will be delayed as a result of the applicant’s seeking public financing for the Building from the New York City Housing Development Corporation (“HDC”) and the New York City Department of Housing Preservation and Development (“HPD”), which may dictate a change in the number of dwelling units proposed under the New Building Permit; and

WHEREAS, the Board notes that changes to the New Building Permit are subject to DOB approval; 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 August 17, 2010, DOB stated that the New Building Permit was lawfully issued, authorizing construction of the proposed Building 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

**247-13-A**

Armonk, Inc. v. Town of Southeast, 52 A.D.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 A.D.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 to substantial construction, the applicant states that the work on the Building subsequent to the issuance of the permits includes: 100 percent of the excavation; 100 percent of the foundation (including the installation of over 300 driven piles); and the installation of a complex drainage system; and

WHEREAS, in support of this statement, the applicant has submitted the following: a breakdown of the construction costs by line item; a foundation survey; copies of cancelled checks; invoices; 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 for the development is \$3,011,614 (including \$1,474,974 in hard costs), or 17 percent, out of the \$17,610,614 cost to complete; and

WHEREAS, as noted, the applicant has submitted invoices and copies of cancelled checks; 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, 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, the Board

**A true copy of resolution adopted by the Board of Standards and Appeals, October 29, 2013.**

**Printed in Bulletin No. 44, Vol. 98.**

**Copies Sent  
To Applicant  
Fire Com’r.  
Borough Com’r.**

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 notes that the R5A use regulations are significantly more restrictive than the R6 regulations; specifically, whereas any type of residence is permitted within an R6 district, however, an R5A district is limited to one- and two-family detached residences; and

WHEREAS, the applicant states that if the owner is not permitted to vest the Building under the former R6 district regulations, more than half of the floor area (34,696 sq. ft.) of the Building would be lost, the height of the building would have to be reduced from 65 feet to 35 feet, twice as many accessory parking spaces would be required, and a front yard with a minimum depth of ten feet will be required (no front yard is required in an R6 district), all of which will reduce the livable space within the Building; and

WHEREAS, the applicant also notes that its foundation—which is 100 percent complete—would be useless for any complying and conforming development because it was designed and built for a six-story multiple dwelling; and

WHEREAS, the applicant represents that individually and collectively, the changes to the Building required under the R5A district regulations would significantly decrease the market value of the Building, causing a serious economic loss to the applicant; and

WHEREAS, the Board agrees that complying with the R5A district regulations would result in a substantial reduction of the market value of the site and cause the applicant a serious economic loss; and

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. 402483013-01-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, October 29, 2013.

