270-07-A
APPLICANT – Sheldon Lobel, P.C., for Washington Hall Holdings, LLC, owner.
SUBJECT – Application November 27, 2007 – seeking a determination that the owner has acquired a common law vested right to continue development under the prior R6 zoning.
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 appeal requesting a Board determination that the owner of the premises has obtained a vested right under the common law to complete a proposed development at the referenced premises; and

WHEREAS, this application was filed subsequent to the filing of a companion application brought under BSA Cal. No. 204-07-BZY (the "BZY Application"), decided the date hereof, which is a request to the Board for a finding that the owner of the premises has obtained a right to continue construction pursuant to ZR § 11-331; and

WHEREAS, the Board notes that while separate applications were filed according to Board procedure, in the interest of convenience, after the filing of the subject application, it heard the cases together and the record is the same for both; and

WHEREAS, a public hearing was held on this application on January 15, 2008 after due notice by publication in *The City Record*, 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. 204-07-BZY; 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 about the common law vested rights application: (1) the subject common law vested rights application is not timely and (2) the applicant has failed to establish serious economic hardship if the vested rights application is denied; 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, (hereinafter, 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 Buildings issued a stop work order on July 25, 2007 for the Permit; and

WHEREAS, first, the Opposition claims that the application for the subject common law vested rights case was untimely because it was not filed within 30 days of a final determination from DOB; and

WHEREAS, the Opposition contends that a stop work order issued on July 25, 2007, is the pertinent DOB final determination which should be appealed; and

WHEREAS, the Board notes that the applicant filed the companion statutory vested rights case under BSA Cal. No. 204-07-BZY within 30 days of the Enactment Date as required by ZR § 11-331; and

WHEREAS, the relevant time period for the filing of the subject application was within 30 days of the November 11, 2007 DOB final determination associated with this case; and

WHEREAS, the Board notes that the applicant filed the subject application within the specified timeframe, cited in BSA Rules of Practice and Procedure § 1-07; and

WHEREAS, the court in Kadin v. Bennett, 163 A.D.2d 308 (2d Dept. 1990) deals specifically with ZR § 11-30 et seq., and explicitly held that a common law remedy exists separate and apart from the statute; and

WHEREAS, the court stated: "New York City Zoning Resolution § 11-331 does not codify or abolish the common-law doctrine of vested rights. The common-law doctrine is a broader consideration than that posited in that section of the resolution, which confines itself to whether or not certain physical stages of construction relating to excavation and the foundation have been completed. While the general standard in determining vested rights is substantial construction and substantial expenditure made prior to the effective date of the zoning amendment . . . unlike New York City Zoning Resolution § 11-331, '[t]here is no fixed formula which measures the content of all the circumstances whereby a party is said to possess 'a vested right'"; and

WHEREAS, in sum, the Board rejects the Opposition's arguments as to the timeliness argument; and

WHEREAS, the applicant states that construction proceeded as follows: (1) excavation commenced on May 7, 2007, (2) excavation was completed July 10, 2007, (3) footing installation commenced on July 11, 2007, and (4) 547 cubic yards of concrete were poured from July 19, 2007 to July 25, 2007; and

WHEREAS, the Board notes that the applicant has agreed to deduct 24 cubic yards of concrete, which were poured after hours, from the total so that the amount of concrete the Board has accepted is 523 cubic yards; and

WHEREAS, the applicant requests that the Board find that based upon the amount of work performed, and the amount of financial expenditures, including irrevocable commitments, as well as the serious economic loss the owner would face if compelled to comply with the new zoning, the owner has a vested right to continue construction of the Building; and

WHEREAS, the Board notes that established precedent exists for the proposition that seeking relief pursuant to ZR § 11-30 et seq. does not prevent a property owner from also seeking relief under the common law; and

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

WHEREAS, the Board notes that the validity of the Permit has not been questioned; and

WHEREAS, when a valid permit has been issued and work has proceeded under it, the Board notes that 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 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, as discussed by the court in Kadin "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 represents that after the issuance of the Permit on May 2, 2007, the following work was completed: (1) installation of 100 percent of the required stone below the footings, (2) installation of 100 percent of the sheeting work, (3) installation of 100 percent of the required underground plumbing, (4) pouring of 100 percent of the concrete for the footings, excluding those required for the second floor terrace, and (5) installation of 67 percent of the rebar; and

WHEREAS, in support of this statement, the applicant has submitted photographs, invoices for labor and material, work logs, concrete pour tickets, and

affidavits from construction personnel; and

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

WHEREAS, the Board's conclusion is based upon a comparison of the type and amount of work completed in the instant case with the type and amount of work discussed by New York State courts; and

WHEREAS, specifically, the Board has reviewed cases of which it is aware through its review of numerous vested rights applications, and agrees that the degree of work completed by the owner in the instant case is comparable to, or in excess of, the degree of work cited by the courts in favor of a positive vesting determination; and

WHEREAS, the Board notes that the appropriate comparison is between the amount of construction work here and that cited by other courts; and

WHEREAS, in light of such comparison, the Board can only conclude that the noted work is substantial; 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 the owner is obligated by contract to pay for work at the site in the amount of $5.8 million; and

WHEREAS, further, the applicant represents that $564,214 in hard costs and $588,000 in soft costs have been expended; and

WHEREAS, the applicant projects that the total hard costs required for the completion of the Building are $11.7 million and the total soft costs are $3.3 million; and

WHEREAS, the Board considers the noted expenditure substantial in and of itself, and when compared to the total development costs; and

WHEREAS, the Board's consideration is again guided by cases considering how much expenditure is needed to vest rights under the prior zoning, as well as the expenditure percentages; and

WHEREAS, as to the serious loss that the owner would incur if required to construct the building under the current zoning, the applicant states that the floor area that would result if vesting was not permitted would be reduced from 49,568 sq. ft. to 39,336 sq. ft. (from an FAR of 2.43 to 1.93); and

WHEREAS, further, the applicant would be required to eliminate floors seven through 16; and

WHEREAS, the applicant states that this would lead to financial loss because: (1) further architectural and engineering costs would be required to reconfigure and redesign the building to account for this loss; and (2) approximately 21 percent of floor area, including the most valuable floor area on the upper floors, would be lost; and

WHEREAS, the Opposition raised concerns about the applicant's assertions of proposed economic loss; and

WHEREAS, specifically, the Opposition contends that there were errors and contradictions in the data submitted by the applicant; the areas of concern include: (1) floor area dimensions, (2) calculations of sellable floor area, (3) inflated sales prices, and (4) inaccurate reflection of hard and soft costs; and

WHEREAS, the Opposition asserts that if the Building and calculations were modified, the applicant would still be able to achieve a reasonable rate of return on the development; and

WHEREAS, the Board notes that a reasonable rate of return is not the standard for a vested rights claim, but rather, the applicant must show that there would be a significant loss associated with modifying the Building to comply with the new zoning; and

WHEREAS, in response to the Opposition, the applicant states that (1) building floor area was calculated on a gross square footage basis for the complying and non-complying scenarios, as is standard practice; (2) the community facility space is not valueless and should be included in sellable floor area since it is valuable space; (3) the sales figures are based on projections from brokers who have relied on a series of comparable; and (4) the soft and hard costs are accurate as documented; and

WHEREAS, the Board agrees with the applicant and finds that the applicant has provided thorough documentation and reasonable explanations of how it calculated its floor area and prices; and

WHEREAS, the Board notes that a serious loss 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, here, the Board agrees that the building would have to be redesigned at significant cost, and that the prior architectural and engineering costs related to the plans accepted by DOB could not be recouped; and

WHEREAS, additionally, serious loss can be substantiated by a determination that there would be diminution in income if the FAR requirement of the new zoning were imposed; and

WHEREAS, here, the Board agrees that a significant reduction in floor area will result in a serious loss; and

WHEREAS, the Board notes that its conclusion that serious loss would occur includes consideration of the costs related to the need to revise the plans and redo

some of the construction work; 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 Enactment Date; and

WHEREAS, while the Board was not swayed by any 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 the common law and is entitled to the requested reinstatement of the Permit, and all other related permits necessary to complete construction.

Therefore it is Resolved that this appeal made pursuant to the common law of vested rights requesting a reinstatement of DOB Permit No. 302249715-01-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 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.