

**125-11-A**

APPLICANT – Law Offices of Marvin B. Mitzner for 514-516 E. 6th Street, LLC, owner.

SUBJECT – Application August 25, 2011 – Appeal challenging the Department of Buildings’ determination to deny the reinstatement of permits that allowed an enlargement to an existing residential building. R7B zoning district.

PREMISES AFFECTED – 514-516 East 6<sup>th</sup> Street, south side of East 6th Street, between Avenue A and Avenue B, Block 401, Lot 17, 18, Borough of Manhattan.

**COMMUNITY BOARD #3M**

**APPEARANCES –**

For Applicant: Marvin B. Mitzner.

**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 construction of a six-story mixed-use commercial/residential building under the common law doctrine of vested rights; and

WHEREAS, a public hearing was held on this application on December 6, 2011, after due notice by publication in *The City Record*, with continued hearings on January 24, 2012, February 28, 2012 and March 27, 2012, and then to decision on September 25, 2012; and

WHEREAS, the applicant filed a variance application, under BSA Cal. No. 96-11-BZ, seeking zoning waivers, which address the non-compliance with the current zoning; the Board agreed to adjourn the hearings on the variance application pending the outcome of the subject vested rights application; and

WHEREAS, the site is the subject of two prior Board decisions: (1) by decision dated November 25, 2008, under BSA Cal. No. 81-08-A (the “MDL Appeal”), the Board determined that DOB had erroneously approved waivers to the Multiple Dwelling Law (“MDL”) and (2) by decision dated August 3, 2010, under BSA Cal. No. 217-09-A (the “MDL Variance”), the Board approved a conditional grant to vary certain sections of the MDL to allow for the legalization of the enlargement of the building, subject to conditions to be reviewed by the Department of Buildings (“DOB”), as set forth in the Board’s decision; and

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

WHEREAS, Community Board 3, Manhattan, recommends disapproval of this application, citing the concern that the permits should not be reinstated to allow construction that does not comply with the current zoning;

and

WHEREAS, State Assembly Speaker Sheldon Silver, State Senator Thomas Duane, and State Senator Daniel Squadron submitted written testimony in opposition to the application because the enlargement of the building does not comply with the MDL, the owner has not yet installed fire safety measures or eliminated the seventh floor construction, and on the basis that the Board’s earlier determination that the permit be revoked should not be reversed; and

WHEREAS, City Council Member Rosie Mendez submitted oral and written testimony in opposition to the application, citing concerns about the validity of the permit and that the building has not been modified in conformance with the Board’s prior decision and removed the seventh floor by February 3, 2011; and that the permit was properly revoked in November 2008 and the sixth and seventh floors violate MDL provisions; and

WHEREAS, the Greenwich Village Society for Historic Preservation submitted oral and written testimony in opposition to the application citing concerns that the construction violates the MDL and the current zoning and that the enlargement of the building is out of character with the neighborhood and that the permits should not be retroactively corrected; and

WHEREAS, certain community members raised concerns about approving a building that does not comply with current zoning and the issuance of the permit, and failure to complete work within the timeframe set forth in the MDL Variance decision; and

WHEREAS, the subject site is located on the south side of East 6<sup>th</sup> Street between Avenue A and Avenue B, within an R7B zoning district; and

WHEREAS, the site comprises two adjacent lots each occupied by a six-story attached building (together, the “Buildings”) with a total floor area pre-enlargement of 13,500 sq. ft. and a total lot area of 4,850 sq. ft.; and

WHEREAS, the applicant proposes to complete construction of an enlargement to the Buildings to result in a total floor area of 16,200 sq. ft. (3.34 FAR); and

WHEREAS, the subject site is currently located within an R7B zoning district, but was formerly located within an R7-2 zoning district; and

WHEREAS, the applicant represents that the Buildings comply with the former R7-2 zoning district parameters, specifically with respect to FAR; and

WHEREAS, however, on November 19, 2008 (the “Rezoning Date”), the City Council voted to adopt the East Village/Lower East Side Rezoning, which rezoned the site to R7B; and

WHEREAS, the Buildings do not comply with the R7B zoning district parameters as to FAR; and

WHEREAS, the Board notes that, under the subject calendar number, the applicant initially sought to appeal DOB’s determination not to reinstate its permits along with asserting that it had met the vesting criteria; through

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the hearing process, the applicant modified its application to focus on the common law vesting criteria and did not pursue the appeal against DOB; and

WHEREAS, accordingly, the Board's analysis addresses the common law vesting criteria and it does not take a position on DOB's determination not to reinstate the permits; and

### Procedural History

WHEREAS, on January 31, 2007, DOB issued an Alteration Type 2 ("Alt 2") building permits (Job Nos. 104668646 and 104668655) for the renovation of the existing Buildings; the work performed under those permits included upgrading existing apartments, modernizing kitchens and bathrooms, and excavating the cellar for the installation of new steel columns to support the enlargement; the applicant also made MDL-related improvements including increasing the fire rating of common areas, improving the fire safety of stairways, installing fire-rated self-closing doors, and smoke detectors; and

WHEREAS, on May 21, 2007, DOB issued Alt 2 permit (Job No. 104694476) for the installation of sprinklers and on May 25, 2007, DOB issued an Alt 2 permit (Job No. 104762507) for the installation of new boilers, storage tanks, gas meters, and gas piping; and

WHEREAS, on June 28, 2007, DOB issued an Alt 1 permit (Job No. 104816353) for the vertical enlargement of the Buildings; work on the enlargement commenced immediately including waterproofing, masonry, and roofing; and

WHEREAS, on July 24, 2007, DOB revoked the Alt 1, by which time the superstructure and walls were complete; and

WHEREAS, on October 4, 2007, DOB issued another Alt 1 (Job No. 104744877) based on an Alt 1 application filed on May 2, 2007, and work on the enlargement commenced, including plumbing, electrical, flooring, installation of fixtures, appliances, and tile and exterior work; and

WHEREAS, in early December 2007, at which time, per the applicant, work on the enlargement was 97 percent complete, DOB conducted a special audit and temporarily stopped work; and

WHEREAS, the applicant represents that as of December 14, 2007, the last time construction was in progress, the project was approximately 97 percent finished; and

WHEREAS, on July 28, 2008, DOB granted a partial lift of the Stop Work Order so that the roof of the enlargement could be completed and the construction protected from the elements; and

WHEREAS, on November 19, 2008, the East Village/Lower East Side Rezoning took effect and the permit lapsed by operation of law; and

WHEREAS, in the MDL Appeal decision, dated November 25, 2008, the Board granted the appellant's request that the permit be revoked; and

WHEREAS, in the MDL Variance decision, dated August 3, 2010, the Board granted a conditional approval to vary certain conditions of the MDL; and

### The Validity of the Permit

WHEREAS, a threshold matter for the vested rights analysis is that a permit be issued lawfully prior to the Rezoning Date and that the work was performed pursuant to such permit; and

WHEREAS, in this case, there is no dispute that permits were issued and work was performed pursuant to those permits well in advance of the Rezoning Date; and

WHEREAS, however, a question raised by the Opposition is whether that permit can be deemed to have been lawful, in light of the fact that it was associated with DOB's erroneous approval of MDL variances (the subject of the MDL Appeal) and was ultimately revoked through its MDL Appeal decision; and

WHEREAS, subsequent to the Board's decision in the MDL Variance case, the applicant sought permits from DOB to complete the work authorized by the MDL Variance and reflected on the associated plans; and

WHEREAS, at that time, DOB took the position that it did not have the authority to reissue the permit under the R7-2 zoning in effect at the time of the permit's first issuance, and that, absent vesting, could only reissue the permit pursuant to R7B zoning; DOB determined that it could not reinstate the permits that the Board had directed to be revoked, through its resolution; and

WHEREAS, accordingly, because DOB will not reinstate the permit that the Board directed to be revoked in the MDL context, the Board considers whether its revocation determination has any effect on the permit in the vesting context; and

WHEREAS, the Board must consider the status of the permit which relied on DOB's erroneous approval and which it directed to be revoked, six days after the permit had already lapsed by operation of law; and

WHEREAS, the Board notes that in granting the MDL Appeal brought on behalf of a tenant of the Buildings, it agreed with the tenant that DOB erroneously modified the MDL in its approval of the building plans as it did not have authority to do so; in its resolution, the Board granted the appellant's request to (1) reverse DOB's final determination and (2) revoke the permit.

WHEREAS, the Board notes that the MDL Appeal resolution addressed the authority to modify MDL regulations and did not address zoning compliance or the fact that on November 19, 2008, six days prior to its decision on the appeal, the East Village/Lower East Side Rezoning took effect, at which time the permit lapsed by operation of law; and

WHEREAS, subsequently, the Board granted the property owner's request to modify the MDL provisions that formed the basis for the MDL Appeal through the MDL Variance; and

WHEREAS, the Board also notes that New York

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state courts have recognized the permit validity question as one subject to the expertise of and have deferred to the buildings departments' and zoning boards' determinations about the validity of a permit; and

WHEREAS, the Board notes that it defers to DOB, as the permit issuing body, on the question of permit validity and that by its January 10, 2012 submission it states that the reinstatement of the Permit "would not present a correctable error issue" as long as the Board granted the vested rights application and its pending audit review concluded favorably for the applicant; and

WHEREAS, in support of its conclusion that the permit was validly issued prior to the Rezoning Date, the Board notes that (1) the MDL non-compliance had been resolved at DOB to a great extent prior to the rezoning in 2008, but the applicant had to re-apply to the Board, the appropriate authority, for additional modifications, which were not resolved until after the rezoning; (2) the flaws in the original permits relate to the erroneous assumption of jurisdiction of the permit-issuing entity first and secondarily to the substance of the non-compliance; (3) the Board's revocation was only intended to prevent the application from moving forward until the MDL issues were resolved and did not relate to zoning; (4) the MDL has not changed during the relevant time periods and the requirements were the same under the prior and current zoning regulations; and (5) the revocation was by the Board in the context of an interpretive appeal, rather than by DOB; and

WHEREAS, the Board states that the intent of its 2008 revocation was for the permit to be revoked to the extent of the MDL non-compliance and not to take any position on the remainder of the building subject to zoning and other regulations; and

WHEREAS, the Board recognizes that it directed the revocation of the permit and that it is within DOB's and the Board's authority to determine that the corrected permit is valid; and

WHEREAS, thus, because DOB's audit concludes to DOB's satisfaction that the plans comply with R7-2 zoning regulations, it is appropriate for the Board to accept the permit as valid while considering the vesting criteria; and

WHEREAS, by letter dated September 24, 2012, DOB states that all zoning objections have been resolved; and

WHEREAS, the applicant cites to GRA V, LLC v. Srinivasan, 12 N.Y.3d 863 (2009), for the proposition that minor plan errors may be corrected in the vested rights context in accordance with the prior zoning; and

WHEREAS, the applicant states that DOB's erroneous issuance of the initial permit, which included waiver of MDL non-compliance, was authorized by the highest levels of DOB and the MDL non-compliance has already been corrected and resolved by the Board's MDL Variance; and

WHEREAS, the Board has reviewed the record and

agrees that the Permit was lawfully issued to the owner of the subject premises prior to the Rezoning Date and based on the fact that it directed the Permit to be revoked solely due to MDL non-compliance, it makes the determination that the Permit (with its zoning objections resolved) was valid; and

WHEREAS, however, pursuant to ZR § 11-332, for other construction, the applicant must apply to renew the lapsed permit within 30 days of the Rezoning Date; and

WHEREAS, the Board notes that the applicant failed to file an application to renew the Permit pursuant to ZR § 11-332 within 30 days of their lapse on November 19, 2008, and is therefore requesting additional time to complete construction and obtain a certificate of occupancy under the common law; and

WHEREAS, the Board notes that when work proceeds under a valid 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 The Vesting Analysis

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, 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 owner has completed the following: approximately 97 percent of the enlargement, as described above, nearly a year before the Rezoning Date; and

WHEREAS, in support of this assertion, the applicant submitted the following evidence: photographs of the site, an engineer's statement, and communication with DOB; and

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

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substantial work was performed prior to the Rezoning Date; and

WHEREAS, the Board concludes that based upon a comparison of the type and amount of work completed in this case with the type and amount of work discussed by New York State courts, a significant amount of work was performed at the site during the relevant period; 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 states that prior to the Rezoning Date (and prior to the December 14, 2007 Stop Work Order), the owner expended \$1,517,062, including hard and soft costs and irrevocable commitments, out of \$1,557,062 budgeted for the Enlargement; the applicant separated out the additional costs associated with the entire project including work in the existing Buildings not affected by the rezoning; and

WHEREAS, as proof of the expenditures, the applicant has submitted copies of cancelled checks and accounting tables; and

WHEREAS, thus, the expenditures up to the December 14, 2007 Stop Work Order represent approximately 97 percent of the projected total cost; 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, the Board notes that it did not consider or credit the work or costs associated with the seventh-floor portion of the enlargement as it is to be removed pursuant to the Board's approval in the MDL Variance; 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 considers 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 states that if vesting were not permitted, the site's floor area would have to be reduced from the proposed 16,200 sq. ft. (3.34 FAR) to a maximum of 14,550 sq. ft. (3.0 FAR); and

WHEREAS, the applicant represents that if vesting were not permitted, it would have to remove nearly the entire sixth floor enlargement (the application does not seek to vest the seventh-floor enlargement and has not considered it in its loss analysis); and

WHEREAS, the applicant represents that compliance with the R7B zoning district parameters would result in a reduction of the annual rental income of approximately \$165,500; and

WHEREAS, additionally, the applicant states that the deconstruction of the enlargement would require the fifth floor to be vacated for the six months of reconstruction, resulting in additional lost rental income of \$90,000; and

WHEREAS, the applicant states that it would lose the entire \$1,517,062 cost of the enlargement and the \$320,000 cost to remove the enlargement and reconstruct the roof; and

WHEREAS, the applicant states that the floor area that would be lost represents 20 percent of the floor area of the pre-existing Buildings and that since the units in the enlargement are new and on the highest floor, they have a disproportionately higher value compared to the other units; and

WHEREAS, the Board agrees that the need to redesign, the limitations of any complying construction, and the loss 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 Buildings had accrued to the owner of the premises at the Rezoning Date; and

WHEREAS, as to the Opposition's concerns that the Buildings do not comply with MDL requirements, the Board notes that it has thoroughly reviewed and approved the MDL-related provisions as reflected in the resolution and on the plans associated with the MDL Variance and that none of the requirements set forth in that decision or the associated plans have been disturbed or will be altered without the Board's review and approval; further, the Board notes that the Appellate Division has upheld its decision in the MDL Variance case See Chin v. Board of Standards and Appeals, 97 A.D.3d 485 (1<sup>st</sup> Dept. 2012); and

WHEREAS, as to the Opposition's concerns that the applicant has not yet instituted the changes associated with the MDL Variance, including the installation of fire safety measures and the removal of the partial seventh floor, the Board accepts the applicant's assertion that those changes would be affected by the determination in the subject vested rights application and, thus it sought a determination on vesting prior to commencing the work; and

WHEREAS, as to the Opposition's assertion that the Board's determination in the MDL Appeal case that

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the permit be revoked not be reversed, as discussed above, the revocation of the permit was associated with MDL non-compliance and was not a reflection of the Board's position on the validity of the permit; and

WHEREAS, as to the Opposition's argument that the proposed Buildings are out of context with the surrounding neighborhood, the applicant states, and the Board agrees, that findings related to neighborhood character are not part of the vested rights analysis; and

WHEREAS, the Board notes that findings related to the financial feasibility of the project are also not part of the vested rights analysis; and

WHEREAS, while the Board is not persuaded by any of the Opposition's arguments, it nevertheless understands that the community and the elected officials worked diligently on the East Village/Lower East Side Rezoning and that the Building does not comply with the new zoning parameters; and

WHEREAS, however, the Board finds that the applicant has met the test for a common law vested rights determination, and therefore has the right to continue construction on the site pursuant to the zoning regulations in place prior to the Rezoning Date.

*Therefore it is Resolved* that this appeal made pursuant to the common law of vested rights requesting a reinstatement of Permit No. 104744877, as well as all related permits for various work types, either already issued or necessary to complete construction as approved by DOB and in compliance with the MDL Variance and obtain a certificate of occupancy, is granted for two years from the date of this grant.

Adopted by the Board of Standards and Appeals, September 25, 2012.

**A true copy of resolution adopted by the Board of Standards and Appeals, September 25, 2012.  
Printed in Bulletin Nos. 39-40, Vol. 97.**

**Copies Sent**

**To Applicant**

**Fire Com'r.**

**Borough Com'r.**