155-11-A
APPLICANT – Sheldon Lobel, P.C., for 10 Stratford Associates, owners.
SUBJECT – Application October 3, 2011 – Appeal seeking a common law vested right to continue construction commenced under the prior R6 zoning district regulations. R3X zoning district.
PREMISES AFFECTED – 480 Stratford Road, west side of Stratford Road, through to Coney Island Avenue between Dorchester and Ditmas Avenue, Block 5174, Lot 16, Borough of Brooklyn.
COMMUNITY BOARD #14BK
APPEARANCES – None.
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 seven-story mixed-use community facility/residential building under the common law doctrine of vested rights; and

WHEREAS, a public hearing was held on this application on March 6, 2012, after due notice by publication in *The City Record*, with a continued hearing on April 3, 2012, and then to decision on August 21, 2012; and

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

WHEREAS, Community Board 14, Queens, recommends disapproval of this application, citing the following primary concerns: (1) the Department of Buildings ("DOB") has not established that the permit is valid as the proposed plans do not comply with the prior zoning district parameters; (2) the applicant is a contract vendee and not the owner of the property and therefore lacks standing; (3) the proposed parking plan is not financially feasible; and (4) the proposed building is out of character with the surrounding neighborhood; and

WHEREAS, New York State Assembly Member James F. Brennan submitted written testimony requesting that DOB review the project to determine whether the plans comply with the prior zoning district regulations prior to any approval by the Board; and

WHEREAS, representatives of Ditmas Park West (the "Opposition") provided oral and written testimony in opposition to this application, reiterating the concerns raised by the Community Board and raising the additional concern that the owner acted in bad faith by failing to provide a security fence while construction was stalled on the site; and

WHEREAS, the subject site is located on a through lot bounded by Stratford Road to the east and Coney Island Avenue to the west, between Dorchester Road and Ditmas Avenue, within an R3X zoning district; and

WHEREAS, the site has approximately 40 feet of frontage on Stratford Road and Coney Island Avenue, a depth ranging from 106 feet to 109 feet, and a total lot area of 4,302 sq. ft.; and

WHEREAS, the applicant proposes to develop the site with a seven-story mixed-use community facility/residential building with a floor area of 16,193 sq. ft. (3.76 FAR) (the "Building"); and

WHEREAS, the subject site is currently located within an R3X zoning district, but was formerly located within an R6 zoning district; and

WHEREAS, the Building complies with the former R6 zoning district parameters, specifically with respect to floor area ratio ("FAR") and density; and

WHEREAS, however, on July 29, 2009 (the "Rezoning Date"), the City Council voted to adopt the Flatbush Rezoning, which rezoned the site to R3X, as noted above; and

WHEREAS, the Building does not comply with the R3X zoning district parameters as to FAR and density; and

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

WHEREAS, the Board notes that New Building Permit No. 302228346-01-NB was issued on May 3, 2007 (the "New Building Permit"), authorizing the development of the proposed seven-story mixed-use community facility/residential building pursuant to R6 zoning district regulations; and

WHEREAS, the Board notes that, as of the Rezoning Date, the applicant had obtained permits for the development and had completed 100 percent of their 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 permitted for the completion of construction and to obtain a certificate of occupancy; and

WHEREAS, in the event that construction permitted by ZR § 11-331 has not been completed and a certificate of occupancy has not been issued within two years of a Rezoning, ZR § 11-332 allows an application to be made to the Board not more than 30 days after its lapse to renew such permit; and

WHEREAS, the applicant states that construction was not completed and a certificate of occupancy was not obtained within two years of the Rezoning Date; and

WHEREAS, accordingly, the applicant is seeking an extension of time to complete construction and obtain a certificate of occupancy; and

WHEREAS, the Board notes that the applicant failed to file an application to renew the New Building Permit pursuant to ZR § 11-332 within 30 days of their

lapse on July 29, 2011, and is therefore requesting additional time to complete construction and obtain a certificate of occupancy under the common law; and

WHEREAS, by letters dated March 6, 2012 and July 10, 2012, DOB stated that it issued a letter of intent to revoke the permit after an audit revealed that the application documents propose an amount of floor area that exceeds the maximum FAR allowed in the district, but that it was a minor and curable error in a lawfully issued permit; and

WHEREAS, at the direction of the Board, and in response to concerns raised by the Community Board, State Assembly Member, and the Opposition, the applicant met with DOB to review the plans for compliance with the R6 district regulations; and

WHEREAS, by letter dated August 6, 2012, DOB stated that the floor area objection has 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 Board has reviewed the record and agrees that the New Building Permit was lawfully issued to the owner of the subject premises prior to the Rezoning Date; 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

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: 100 percent of site preparation work; 100 percent of excavation; and 100 percent of the foundation; and

WHEREAS, in support of this assertion, the applicant submitted the following evidence: a construction schedule, a foundation plan; and photographs of the site; 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 substantial work was performed prior to the two year anniversary of 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 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 two year anniversary of the Rezoning Date, the owner expended $212,315.16, including hard and soft costs and irrevocable commitments, out of $2,149,917.29 budgeted for the entire project; and

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

WHEREAS, in relation to actual construction costs, the applicant specifically notes that the owner had paid or contractually incurred $162,390.16 for the work performed at the site as of the two year anniversary of the Rezoning Date; and

WHEREAS, the applicant further states that the owner paid an additional $49,925 in soft costs related to the work performed at the site; and

WHEREAS, thus, the expenditures up to the two year anniversary of the Rezoning Date represent approximately ten 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, 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 16,193 sq. ft. (3.76 FAR) to a maximum of 2,151 sq. ft. (0.50 FAR), and the density would have to be reduced from the proposed mixed-use building with 18 units to a single- or two-family home; and

WHEREAS, the applicant represents that compliance with the R3X zoning district parameters would result in a reduction of the annual rental income for the site from approximately $405,900 for the proposed building to approximately $42,000 for the complying building, resulting in an annual loss of rental income of approximately $363,900; and

WHEREAS, the applicant states that the side yard foundation walls, the interior parking ramp, and the cellar foundations constructed for the proposed R6 building would all be completely unusable for an R3X compliant building; as a result, none of the foundation costs expended would be recoverable for an R3X compliant building; 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 Building had accrued to the owner of the premises as of the two year anniversary of the Rezoning Date.

WHEREAS, as to the Opposition's concerns regarding the applicant's lack of standing as a contract vendee, the applicant states that standing is appropriate for contract vendees, that the Board has granted many applications on behalf of contract vendees (citing BSA Cal. Nos. 124-05-BZ, 342-03-BZ and 402-01-BZ), and that the economic injury at issue in a vested rights case is one sustained by the property as a result of the zoning change; and

WHEREAS, the Board notes that its Rules of Practice and Procedure specifically authorize contract vendees to bring applications before the Board; and

WHEREAS, the Board further notes that a site's ownership is not a relevant element in the vested rights analysis, as a property owner succeeds to all the right, title and interest in the property held by its predecessor-in-interest and transferred to it (see Caponi v. Walsh, 228 A.D. 86 (2d Dep't 1930); see also Elsinore Prop. Owners Ass'n v. Morwand Homes; 52 A.D. 1105 (2d Dep't 1955)); and

WHEREAS, as to the Opposition's argument that the proposed building is 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, as to the Opposition's claim that the proposed parking plan is not financially feasible, the applicant states that the parking plan has been reviewed and approved by DOB; 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, in response to the Opposition's concerns that the applicant acted in bad faith by not providing a security fence while construction was stalled on the site, the applicant states that construction stalled on the site due to extenuating financial circumstances, and not bad faith on the part of the applicant, and that the actions taken by the Department of Housing Preservation and Development of backfilling the site to prevent injury and the pooling of water was common for many incomplete buildings throughout the surrounding area; 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 Flatbush 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 New Building Permit No. 302228346-01-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 two years from the date of this grant.

Adopted by the Board of Standards and Appeals, August 21, 2012.

A true copy of resolution adopted by the Board of Standards and Appeals, August 21, 2012.
Printed in Bulletin No. 35, Vol. 97.

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