

165-09-A

APPLICANT – Law Office of Howard Goldman, for 13 Hendricks LLC, owner.

SUBJECT – Application April 30, 2009 – Appeal seeking a determination that the owner has acquired common law vested rights for a development commenced under the prior R4 district regulations. R3 Zoning district.

PREMISES AFFECTED – 150 Hendricks Avenue, between Jersey Street and Bismark Avenue, Block 44, Lot 15, Borough of Staten Island.

COMMUNITY BOARD #1SI

APPEARANCES –

For Applicant: Chris Wright.

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Otley-Brown, Commissioner Hinkson and Commissioner Montanez5

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 three-story residential building under the common law doctrine of vested rights; and

WHEREAS, a public hearing was held on this application on July 14, 2009 after due notice by publication in *The City Record*, and then to decision on July 28, 2009; and

WHEREAS, the site was inspected by Commissioner Montanez; and

WHEREAS, Community Board 1, Staten Island, recommends approval of this application; and

WHEREAS, the applicant proposes to develop the subject site with a three-story, 11-unit residential building; and

WHEREAS, the subject premises was formerly located partially within an R4 zoning district and partially within an R5 zoning district, within the Special Hillside Preservation District; and

WHEREAS, however, on October 25, 2006 (hereinafter, the “Rezoning Date”), the City Council voted to adopt the Stapleton Rezoning, which rezoned the R4 portion of the site to R3A; and

WHEREAS, the applicant represents that the building complies with the former R4 and R5 district parameters, specifically the floor area of approximately 6,575 sq. ft., and the use as an 11-unit multiple dwelling was permitted; and

WHEREAS, because the site is now partially within an R3A district, the proposed building does not comply with the maximum permitted floor area of approximately 5,175 sq. ft. or the restriction to use as a one- or two-family detached home; 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, New Building Permit No. 500483256 was issued by DOB on July 21, 2003 (the “Permit”),

permitting the construction of the subject building, prior to the Rezoning Date; and

WHEREAS, a DOB submission further states that the Permit was lawfully issued; and

WHEREAS, the Board notes that as of the Rezoning Date the owner had obtained a permit for the development and had completed 100 percent of its foundation, such that the right to continue construction was vested pursuant to ZR § 11-331, which allows the Department of Buildings (“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 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 of the proposed building was completed, but 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 NB Permit pursuant to ZR § 11-332 before the deadline of November 26, 2008 and is therefore requesting additional time to complete construction under the common law and obtain a certificate of occupancy; and

WHEREAS, 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, Putnam Armonk, Inc. v. Town of Southeast, 52 A.D.2d 10, 15, 382 N.Y.S.2d 538, 541 (2d Dept. 1976) stands 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 Board notes that DOB determined that the applicant had completed 100 percent of its foundation prior to the

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Rezoning Date, such that the right to continue construction had vested pursuant to ZR § 11-331; and

WHEREAS, the applicant states that aside from completing the foundation, as of the Rezoning Date all work on the proposed building was complete except for interior finishes; and

WHEREAS, the applicant states that since DOB vested the Permit under ZR § 11-331, the owner has completed all of the interior finishes for the proposed building and applied for a certificate of occupancy in July 2008; and

WHEREAS, on July 10, 2008, DOB issued a Certificate of Occupancy Inspection Work Order Form ("CO Inspection Order") listing all remaining objections to be addressed prior to the issuance of a certificate of occupancy; however, the two year time frame to obtain a certificate of occupancy expired on October 26, 2008, before the issues were addressed; and

WHEREAS, in support of the assertion that the owner has undertaken substantial construction, the applicant submitted the following evidence: photographs of the site prior to the lapse of the Permit; a construction timeline, an affidavit of the project manager; invoices; and check details; and

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 has been made, 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 the owner has expended \$1,302,904, including hard and soft costs and irrevocable commitments, out of \$1,326,904 budgeted for the entire project, and that the remaining costs for the project are soft costs associated with obtaining the certificate of occupancy; and

WHEREAS, as proof of the expenditures, the applicant has submitted invoices, check details, and an affidavit from the project 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

A true copy of resolution adopted by the Board of Standards and Appeals, July 28, 2009.

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To Applicant

Fire Com'r.

Borough Com'r.

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 states that the floor area that would result if vesting is not permitted would be reduced from 6,560 sq. ft. to 5,160 sq. ft.; and

WHEREAS, the applicant states that this would lead to serious loss because, in order to comply with the rezoning, at a minimum the owner would have to eliminate the entire third floor of the completed three story building; and

WHEREAS, the applicant further states that the subject building is an 11-unit multiple dwelling and that the R3A zoning district restricts use of the building to a one- or two-family detached home; and

WHEREAS, the applicant contends that in order to comply with this restriction, the entire building would have to be demolished, resulting in a complete loss of all project costs to date, or \$1,302,904; and

WHEREAS, the applicant further contends that the inability to develop the proposed building would require the owner to re-design the development and incur significant costs associated with constructing a complying building; and

WHEREAS, the Board agrees that the need to redesign, the expense of demolition and reconstruction, and the \$1,302,904 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.

Therefore it is Resolved that this appeal made pursuant to the common law of vested rights requesting a reinstatement of DOB Permit No. 500483256, 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, July 28, 2009.