

**166-12-A & 107-13-A**

APPLICANT – (Cal. No. 166-12-A) – NYC Department of Buildings.

OWNER – Sky East LLC c/o Magnum Real Estate Group, owner.

APPLICANT – (Cal. No. 107-13-A) – Law Office of Marvin B. Mitzner LLC, for Sky East LLC, owner.

SUBJECT – Application June 4, 2012, April 18, 2013 – Application to of two appeals before the Board: (1) an application filed by the First Deputy Commissioner of the New York City Department of Buildings (“DOB”), dated June 4, 2012, pursuant to New York City Charter §§ 645(b)(3)(e) and 666(6)(a) to revoke Certificate of Occupancy No. 103703226F issued for the site (the “CO Revocation Appeal”) and (2) an application seeking a determination that the owner of the premises (the “Appellant”) obtained the right to complete construction of the one-story plus mezzanine building present at the site under the common law doctrine of vested rights (the “Vested Right Application,” collectively, the “Appeals”).  
PREMISES AFFECTED – 638 East 11<sup>th</sup> Street, south side of East 11th Street, between Avenue B and Avenue C, Block 393, Lot 25, 26 & 27, Borough of Manhattan.

**COMMUNITY BOARD #3M**

**ACTION OF THE BOARD** – Application for Common Law Vested Right Denied (BSA Cal. No. 107-13-A) and Application for Revocation of Certificate of Occupancy Granted in Part (BSA Cal. No. 166-12-A).

THE VOTE –

Affirmative: Chair Perlmutter, Vice-Chair Chanda and Commissioner Ottley-Brown.....3

Negative: .....0

Abstain: Commissioner Sheta.....1

THE RESOLUTION –

WHEREAS, this site is the subject of two appeals before the Board: (1) an application filed by the First Deputy Commissioner of the New York City Department of Buildings (“DOB”), dated June 4, 2012, pursuant to New York City Charter §§ 645(b)(3)(e) and 666(6)(a) to revoke Certificate of Occupancy No. 103703226F issued for the site (the “CO Revocation Appeal”) and (2) an application seeking a determination that the owner of the premises (the “Appellant”) obtained the right to complete construction of the one-story plus mezzanine building present at the site under the common law doctrine of vested rights (the “Vested Right Application,” collectively, the “Appeals”); and

WHEREAS, a public hearing was first held on the Appeals on November 26, 2013, after due notice by publication in *The City Record*, with continued hearings on January 28, 2014, March 31, 2015, November 15, 2016, January 31, 2017, and June 20, 2017, and then to decision on October 17, 2017; and

WHEREAS, Chair Perlmutter, Vice-Chair Chanda, Commissioner Ottley-Brown, former Vice-Chair Hinkson and former Commissioner Montanez performed inspections of the site and the surrounding neighborhood; and

WHEREAS, the subject site is located on the south side of East 11th Street, between Avenue B and Avenue C, in an R8B zoning district, in Manhattan; and

WHEREAS, the site has approximately 75 feet of frontage along East 11th Street, a depth of 95 feet and 7,109 square feet of lot area; and

WHEREAS, Certificate of Occupancy No. 103703226F and associated DOB-approved plans represent that the site is occupied by a seven-story mixed-use community facility and residential building (the “Front Building”) and a one-story community facility building located in the Front Building’s required rear yard (the “Rear Building,” together, the “Development”); and

WHEREAS, the Appellant submits that the site was previously comprised of tax lots 25, 26 and 27 (“Former Tax Lot 25”, “Former Tax Lot 26” and “Former Tax Lot 27”) located at 636, 638 and 640 East 11th Street, respectively; and

WHEREAS, Former Tax Lot 25 was previously occupied by a one-story residential building in the rear yard; Former Lot 26 was previously occupied by a five-story residential building and a three-story residential building in the rear yard; and Former Tax Lot 27 was previously occupied by a five-story residential building; and

**FACTS**

WHEREAS, on March 23, 2004, DOB issued an Alteration Type 2 (“Alt 2”) permit (the “Demolition Alt 2 Permit”) for work at the site described as follows:

DEMOLISH EXISTING FLOOR SLABS,  
PARTITIONS CEILING AND DOORS  
REMOVE

EXISTING STAIRS REMOVE REAR  
PORTION OF BUILDING. INSTALL NEW  
OPENING IN PANTRY WALL. REMOVE  
EXTERIOR SIDE WALL TO THE 2ND  
FLOOR

existing party walls as shown on drawings filed  
herewith. No change in use o [sic]

occupancy. Egress filed under Alt I #; and

WHEREAS, on March 30, 2004, an Alt 2 permit was issued for “Removal of building structures in [the] rear yard” of the site and additionally noted, “Main buildings to remain” (the “Rear Yard Alt 2 Permit”); and

WHEREAS, on April 21, 2004, an Alt 2 permit was issued to permit the installation of new foundations and footings for a new enlargement at the site (the “Foundation Permit”) and on May 21, 2004, DOB issued an Alteration Type I permit for a use identified as “J-2 Residential Apartment House” with a Schedule A indicating Use Group (“UG”) 4 “medical offices” (Permit No. 103703226, the “Alt 1 Permit”); and

WHEREAS, at the time that the Alt 1 Permit was issued, ZR § 24-33(b) permitted a building or portion of a building used for community facility<sup>1</sup> use at the subject site to be located within a required rear yard, provided that its height did not exceed one story or, in any event, 23 feet above curb level; and

<sup>1</sup> Per ZR § 12-10, a “community facility” use is any use listed in Use Group 3 or 4. As further described in ZR § 22-14 (Use Group 4), Use Group 4 includes ambulatory diagnostic or treatment health care facilities, common referred to as “medical offices.”

**166-12-A & 107-13-A**

WHEREAS, on May 27, 2004, a zoning lot description describing the metes and bounds of the subject zoning lot (consisting of Former Tax Lot 25, Former Tax Lot 26 and Former Tax Lot 27) was recorded with the Office of the City Register; and

WHEREAS, on June 21, 2004, DOB issued a stop work order (ECB Violation No. 34440904N) for work contrary to approved plans filed under the Rear Yard Alt 2 Permit (the "Stop Work Order"); and

WHEREAS, on the same date, DOB issued a violation citing a failure to maintain an exterior building wall (ECB Violation No. 34440903L, the "Hazardous Conditions Violation") and a preemptory vacate order for 640 East 11th Street, which stated:

Due to construction operations, the party wall foundation is cracked and separating from rear exterior wall. Rear masonry wall is bulging, cracked, and defective from the second story to roof. West exterior wall of adjacent property (638 East 11th Street) is bulging at the 5th story to roof which is creating a hazardous condition; and

WHEREAS, by letter dated July 20, 2004, DOB partially lifted the Stop Work Order to allow work to resume in accordance with the approved plans at 636 and 638 East 11th Street, but continued to prohibit any demolition, alteration or renovation at 640 East 11th Street; and

WHEREAS, on August 16, 2004, two violations were issued for an alleged failure to comply with the Stop Work Order and for work contrary to the plans filed under the Rear Yard Alt 2 Permit (ECB Violation No. 34451354L and ECB Violation No. 34451352H); and

WHEREAS, on September 1, 2004, DOB lifted the Stop Work Order as to 640 East 11th Street, allowing work to proceed as recommended in a letter from the structural engineer of record for the subject site, dated August 26, 2004, which included, among the list of items proposed to cure hazardous site conditions, work pursuant to the Foundation Permit, specifically, the pouring of "foundation walls on the east side of 636 vacant lot according to plan" and the completion of "foundation work in 638 and 640 according to approved plan, and continue foundation on 636 lot" (the "2004 Structural Engineer Letter"); and

WHEREAS, on September 9, 2004 (the "Effective Date"), an amendment to the Zoning Resolution was adopted that, among other things, modified the definition of permitted obstructions under ZR § 24-33 (the "ZR Amendment"), in relevant part, as follows:

- (b) In any rear yard or rear yard equivalent:  
[...]

Any building or portion of a building used for community facility uses, provided that the height of such building shall not exceed one story, nor in any event 23 feet above curb level. However, the following shall not be permitted obstructions:

- (1) in all residence districts, any portion of a building containing rooms used

for living or sleeping purposes, other than a room in a hospital used for the care or treatment of patients;

- (2) in R1, R2, R3A, R3X, R3-1, R4A, R4B or R4-1 Districts, any portion of a building used for any community facility use;
- (3) in all residence districts not listed in paragraph (b)(2) of this Section, beyond one hundred feet of a wide street, any portion of a building used for a community facility use other than a school, house of worship, college or university, or hospital and related facilities;  
[...]; and

WHEREAS, the subject site is located beyond one hundred feet of a "wide street," which, per ZR § 12-10, "is any street 75 feet or more in width"; and

WHEREAS, Appellant did not file an application with the Board, within 30 days of the Effective Date, seeking recognition of a statutory right, pursuant to ZR § 11-331 to complete construction under the Alt 1 permit; and

WHEREAS, a Certificate of Correction, dated December 7, 2004, reporting the completion of all work to cure the Hazardous Conditions Violation was submitted to DOB and approved on December 15, 2004; and

WHEREAS, on July 26, 2005, the Alt 1 Permit was signed off and Final Certificate of Occupancy No. 103703226F was issued for the subject premises under the Alt 1 Permit on July 15, 2008, indicating a total of 36 dwelling units in a seven-story building and UG 4 medical offices in the cellar, mezzanine and first floor levels (the "CO"); and

WHEREAS, on December 31, 2008, DOB issued violations to the premises for (1) occupancy contrary to that allowed by the CO, specifically citing the conversion of 26 medical offices at the first floor and cellar levels into Class A apartments (ECB Violation No. 34758244R); (2) illegal use in a residential district, noting that, at the first floor and cellar levels, the residential floor area and lot coverage of the Development exceeded the maximum allowable in the zoning district and ordering the discontinuance of the illegal use (ECB Violation No. 34758243P); (3) the conversion of 14 medical offices at the first floor and 12 medical offices at the cellar level to Class A apartments (ECB Violation No. 34758241L); and (4) work without a permit, specifically the installation of showers in the medical offices located on the first floor and cellar levels (ECB Violation No. 34758242N); and

WHEREAS, on August 26, 2010, DOB again issued violations for (1) occupancy contrary to the CO, indicating that, based on the affidavit of New York City Councilwoman Rosie Mendez, medical offices at the first floor and cellar levels had been converted into Class A apartments (ECB Violation No. 34808444Y) and (2) illegal conversion of the first floor and cellar levels and illegal use in a residential district (ECB Violation No. 34808445X); and

WHEREAS, on June 4, 2012, DOB filed the CO

**166-12-A & 107-13-A**

Revocation Appeal, BSA Cal. No. 166-12-A, alleging that the CO should not have been issued because the Alt 1 Permit, to which the CO is related, lapsed as a matter of law when foundations at the site were not completed by September 9, 2004, and the permit was not thereafter renewed by the Board pursuant to ZR § 11-331; and

WHEREAS, the Vested Right Application was filed on April 18, 2013; and

WHEREAS, the Appeals were first heard, in tandem, on November 26, 2013, and a continued hearing was scheduled by the Board for January 28, 2014; and

WHEREAS, in response to testimony given at the hearing held on November 26, 2013, that illegal conditions cited in the 2008 and 2010 ECB violations issued to the property remained outstanding, DOB conducted inspections of the premises on December 2, 5 and 9, 2013, and issued additional violations; and

WHEREAS, on December 2, 2013, DOB issued violations to the premises for (1) failure to comply with an order to correct conditions pursuant to a previous violation relating to the installation of showers in medical offices at the site (ECB Violation No. 35032322R, relating back to ECB Violation No. 34758242N); (2) occupancy contrary to that allowed by the CO and DOB records, specifically, a temporary certificate of occupancy indicated medical offices at the cellar, first and second floors<sup>2</sup> of the Rear Building, but the inspector observed exclusively residential occupancy with 14 Class A apartments, four of which had mezzanines (ECB Violation No. 35033408M); (3) failure to provide an unobstructed exit passageway, specifically, a second means of egress from the Rear Building, which, the inspector observed, is a three-level building with residential occupancy (ECB Violation No. 35033409Y); and (4) work without permits, indicating that 100 percent of the work had been completed, but noting approximately 14 residential, Class A apartments, four with mezzanines, in three-level Rear Building and that respondent has history of non-compliance (ECB Violation No. 35032321P); and

WHEREAS, on December 5, 2013, DOB issued a violation to premises for failure to maintain the Development, noting non-compliances with regards to fire safety (ECB Violation No. 35033407K) and on December 9, 2013, four violations were issued for additional non-compliances of the Development with the New York City Fire Code (ECB Violation Nos. 35008848L, 35008849N, 35008847J and 35008925X); and

WHEREAS, the hearing scheduled for January 28, 2014, as well as the next seven hearings, were adjourned at the Appellant's and/or DOB's request in order to permit the parties to resolve outstanding DOB objections relating to the premises and conclude the Appeals; and

WHEREAS, at the hearing held on March 31, 2015,

---

<sup>2</sup> DOB avers that, pursuant to ZR § 12-10, which defines a "story" as "that part of a building between the surface of a floor (whether or not counted for purposes of computing floor area ratio) and the ceiling immediately above," the mezzanine in the Rear Building constitutes a second "story."

DOB stated that the Appellant had made progress in addressing the outstanding objections, specifically, the Appellant had submitted revised plans for the Development showing the removal of the mezzanine from the Rear Building as well as two means of egress, two issues DOB considered to be major objections; and

WHEREAS, on March 31, 2015, the Board removed the Appeals from the Board's hearing calendar to allow the Appellant to resolve all outstanding issues with DOB such that DOB would withdraw the CO Revocation Appeal; and

WHEREAS, by letter dated May 4, 2016, DOB requested that the CO Revocation Appeal be returned to the Board's calendar because of the Appellant's seven-month delay in providing revised plans to address the final remaining DOB objection; DOB averred that to date, it had been unable to determine that the Alt 1 Permit had been validly issued; and

WHEREAS, by letter dated June 30, 2016, in response to DOB's request to return the CO Revocation Appeal to the Board's calendar, Appellant stated that the objection remained outstanding because of a missing planning sheet, which the Appellant provided on May 9, 2016, and the DOB plan examiner subsequently removed this final objection; accordingly, the Appellant requested that the Appeals remain off-calendar; and

WHEREAS, by letter dated July 12, 2016, DOB reported that an audit of the plans filed in connection with the Development prior to September 9, 2004, (the "2012 Audit") had been completed, advised the Board that the Alt 1 Permit was, indeed, validly issued and requested that the Vested Right Application alone be returned to the Board's calendar to determine if Appellant had obtained a vested right under the common law; DOB maintained its position, however, that the foundation was not complete prior to September 9, 2004, and requested that if the Appellant failed to further pursue the Vested Right Application, or if the Board denied it, the CO Revocation Appeal be returned to the Board's hearing calendar; and

WHEREAS, the Appeals were re-calendared for a continued hearing on September 20, 2016, but that hearing date was adjourned at the Appellant's request due to a scheduling conflict; continued hearings were subsequently held on November 15, 2016, January 31, 2017, June 20, 2017, and October 17, 2017, and both cases were then decided on that same date; and

WHEREAS, at the November 15 hearing, DOB stated that plans presented by the Appellant curing DOB's objections had been approved, enabling the 2012 Audit to be closed, but acknowledged that permits could not be issued and the construction to cure undertaken unless and until the Board recognized that the Appellant had acquired a common law vested right to complete the Rear Building in the first instance; and

WHEREAS, at that hearing, the Board requested that the Appellant correct those violations that did not require DOB permits, namely, remove the residential uses from the areas of the Development indicated as medical office on the CO; and

WHEREAS, at the January 31 hearing, the Appellant informed the Board that four non-conforming

**166-12-A & 107-13-A**

residential occupancies remained in the Rear Building, that ownership was engaged with discussions with those tenants to work out relocation, but that such relocation may take a number of months; and

WHEREAS, on April 20, 2017, Board Commissioners and staff visited the site with DOB and the Appellant's representatives to inspect the premises; and

WHEREAS, a hearing scheduled for May 2, 2017, was adjourned at the Appellant's request to allow time to comply with requests made by the Board in prior hearings, but at the May 1 Executive Session, the Chair stated that, at the April site inspection, the Board observed that two of the units in the Rear Building remained occupied by residential tenants; that it was clear from observing window treatments and domestic furnishings that the first floor at the rear of the Front Building had been occupied by residential tenants contrary to DOB-approved plans; that areas in the Front Building indicated on plans as an accessory lounge, fitness room and medical office were each occupied by residential tenants; and that kitchens and bathrooms had been constructed in the Rear Building contrary to DOB-approved plans; and

WHEREAS, the Chair requested that all of the spaces illegally occupied by residential tenants at the site be vacant by the next hearing and for the submission of an affidavit from the architect indicated on the title block of drawings approved by DOB attesting to whether they were hired to and indeed did conduct field observations of the site during the period of construction of the Development and whether the architect inspected the site prior to sign off and observed that the Development—particularly the areas on the cellar and first floor levels indicated as medical office—had been constructed pursuant to plans approved by DOB; and

WHEREAS, the architect instead provided a letter without a professional seal stating that the architect "recalled" that the Development was built according to DOB approved plans; and

WHEREAS, New York City Council Member Rosie Mendez submitted a letter and testified at hearings held on November 15, January 31, and June 20 in opposition to the Vested Right Application, stating that spaces indicated as UG 4 medical office on the CO at the site had been illegally occupied by residential tenants since at least January 2006 and that the premises never displayed signage indicating the presence of medical offices; and

WHEREAS, additionally, the Greenwich Village Society for Historic Preservation submitted letters and oral testimony in opposition to the Vested Right Appeal, stating that the Development has never been occupied fully in conformance with the CO; and

WHEREAS, DOB inspected the premises on June 15, 2017, and observed that all units in the Rear Building and one duplex unit in the Front Building were unoccupied, but that two duplex units in the Front Building remained occupied; and

WHEREAS, on an October 12, 2017, inspection, DOB observed that all six units in the cellar and all six units on the first floor of the Rear Building, were

unoccupied, as were the three duplex units in the Front Building; and

WHEREAS, by letter dated October 13, 2017, the Appellant reported to the Board that the appliances and fixtures had been removed from all of the units inspected by DOB on October 12; and

COMMON LAW VESTED RIGHTS DOCTRINE

WHEREAS, when a restrictive amendment to the Zoning Resolution is enacted, a vested right can be acquired when, pursuant to a lawfully-issued permit, a property owner demonstrates a commitment to the purpose for which the permit was granted; and

WHEREAS, pursuant to ZR § 11-331, a property owner may continue construction subsequent to an applicable zoning change pursuant to a lawfully-issued building permit if, in the case of a "minor development," all work on foundations had been completed prior to such effective date or, in the case of a "major development," the foundations for at least one building has been completed prior to such effective date; and

WHEREAS, if the required foundation work has been commenced, but not completed, prior to the effective date of the amendment to the Zoning Resolution that rendered the project non-conforming or non-complying, the building permit will automatically lapse on the effective date and the right to continue construction will terminate; and

WHEREAS, however, the building permit may be renewed if an application is made to the Board to recognize the statutory right to continue construction pursuant to ZR § 11-331 within 30 days of the automatic lapse of the permit and the Board may grant such application upon finding that, at the date the building permit lapsed, excavation at the site had been completed and substantial progress on foundations had been made; and

WHEREAS, more than 30 days after the automatic lapse of a building permit due to an applicable zoning change, a property owner may apply to the Board seeking the recognition of a common law vested right to continue construction pursuant to a permit lawfully-issued prior to that applicable zoning change, and the Board may grant such application, 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, notwithstanding this general framework, as discussed by the court in Kadin v. Bennett, 163 A.D.2d 308, 309 (2d Dept. 1990),

[T]here is no fixed formula which measures the

**166-12-A & 107-13-A**

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, however, even if the Board recognizes a common law vested right, there may be instances in which circumstances may have changed such that the City’s interest in present zoning outweighs the property owner’s vested right; and

WHEREAS, Putnam holds that the following factors are relevant in determining whether a common law vested right has lapsed: (1) abandonment, including the intent to abandon and an overt act, or some failure to act, implying that the owner neither claims nor retains any interest in the subject matter of the abandonment; (2) recoupment by the owner of all or part of his financial expenditures on the property without completing construction; or (3) the extent to which considerations of public safety, health and welfare indicate that enforcement of present zoning regulations would provide an overriding benefit to the public; and

APPELLANT’S POSITION

WHEREAS, the Appellant acknowledges that the ZR Amendment prohibited the community facility use in the Rear Building, but that neither the owner of the premises nor DOB noticed this change and that it was not until receipt of a letter from DOB, dated February 3, 2012—alleging that the Alt 1 Permit lapsed by operation of law on September 9, 2004—that Appellant was on notice that the Rear Building was contrary to applicable zoning regulations; and

WHEREAS, the Appellant states that the foundation of the Rear Building was 100 percent complete by the Effective Date and, in support of this contention, submitted into the record a survey said to depict the extent of the work completed at the premises as of September 9, 2004 (the “Survey”); and

WHEREAS, accordingly, the Appellant submits that their right to complete construction at the site pursuant to the Alt 1 Permit vested by operation of law, specifically ZR § 11-331(b), which states that, in the case of a major development, a statutory right to complete construction vests if the foundations for at least one building has been completed prior to the effective date of the applicable amendment; and

WHEREAS, the Appellant states that the development of the subject site is considered a “major development”<sup>3</sup> for purposes of ZR § 11-331(b) because it includes two or more “buildings,” as that term was defined by the Zoning Resolution at the time of the Alt 1 Permit; therefore, because the foundations for the Rear Building

---

<sup>3</sup> Zoning Resolution Section 11-31(c)(2) includes, among the definition of “major development” for purposes of statutory vesting, “construction of two or more *buildings* on a single *zoning lot* which will be *non-complying* under the provisions of any applicable amendment to this Resolution.”

were complete as of the Effective Date, the Appellant’s right to complete all construction on the site under the Alt 1 Permit vested pursuant to statute; and

WHEREAS, in the alternative, if the Board does not agree that the work under the Alt 1 Permit constitutes a “major development,” the Appellant suggests that the facts nevertheless support a finding that the Appellant instead acquired a vested right to complete construction under the common law; and

WHEREAS, with regards to substantial construction, the Appellant directs the Board’s attention to the permits issued for the site between March 24 and April 21, 2004, as well as the Survey; re-alleges that the foundations of the Rear Building were 100 percent complete by September 9, 2004, and additionally submits into the record (1) an Affidavit from a concrete contractor, contracted to remove old foundations at the site and install rebar and concrete for the new foundation, stating that the foundation for the Rear Building was completed “by the end of June 2004” and that all foundation work at the property, that is, including that for the Front Building, was completed “[b]y September 2004”; (2) a letter from Metropolis Group stating that the foundation work at the premises “was completed well before September 2004 since the project was in superstructure in September 2004 and could not have been in that phase of construction unless the foundations were complete” and that not obtaining sign-offs on the foundation work until after the Effective Date has no bearing on when the foundation work was actually completed by the Effective Date; (3) a letter, dated February 23, 2012, from a surveyor stating that when they visited the site on August 3, 2004, to mark out a proposed elevator shaft, their crew installed a mark “on the newly installed foundation of the building at the rear of the property” and, thus, the Rear Building was “installed and completed as of August 4, 2004”; (4) photos from the site taken May 6, May 21, June 2 and June 15, 2004, showing the progress of the Rear Building foundation; (6) a letter, dated January 11, 2017, from the structural engineer of record for the Development stating that, based on the Surveyor Letter and the structural engineer’s own observation “that the foundations existed on or before August 26, 2004,” the foundations for the Rear Building were completed prior to the Effective Date; and (7) a letter, dated September 25, 2017, from the architect of the site from 2003 to 2005 interpreting the 2004 Structural Engineer Letter’s observation that “there presently are timber braces from the first floor rear wall to the new foundation of the rear addition” to indicate that the new foundation of the Rear Building was already built as of August 24, 2004, two days before the 2004 Structural Engineer’s Letter, and stating that the recommendations made in the 2004 Structural Engineer’s Letter regarding completion of foundations related to the Front Building only; and

WHEREAS, with regards to substantial expenditures, the Appellant avers that approximately \$1.25 million was spent on demolition, construction and restoration of the Front Building and Rear Building prior to September 9, 2004, including approximately \$691,000 spent on the Rear Building alone, out of a total estimated

**166-12-A & 107-13-A**

cost of \$6.7 million (19 percent); and

WHEREAS, the Appellant submits that substantial loss would result if no common law vested right was recognized by the Board because such a determination would require not only the complete demolition of the Rear Building, but the “perpetual annual loss of income from the 12 medical offices of lost space estimated at \$296,808 for the first year”; and

WHEREAS, with regards to allegations that the Rear Building was occupied contrary to the CO with residential tenants, the Appellant, by submission dated June 7, 2017, reported that residential tenants had been completely vacated from the Rear Building and the rear units of the Front Building and reiterated that they believed that they had previously submitted evidence sufficient to support their argument that the foundation of the Rear Building had been completed by September 9, 2004; and

WHEREAS, finally, Appellant requested that the CO Revocation Appeal be dismissed because DOB had not yet met their burden and proven that the Alt 1 Permit did not vest; a request to revoke the CO based on objections from an audit performed nine years after the issuance of the Alt 1 Permit and five years after the issuance of the CO was not properly before the Board because, *inter alia*, DOB failed to allow Appellant the opportunity to address and cure objections prior to the filing of the appeal; DOB’s argument that certain objections were curable and others were not was arbitrary and such objections were issued in error; and DOB’s issuance of the CO was further proof that construction vested under the Alt 1 Permit; and

DOB’S POSITION

WHEREAS, DOB initially asserted that the Alt 1 Permit “was not validly issued,” and, therefore, the Appellant could not have attained a vested right to complete construction after September 9, 2004 (See Vil. Of Asharokan v. Pitassy, 119 A.D.2d 404, 417 (N.Y. App. Div. 2nd Dep’t 1986; see also Jayne Estates, Inc. v. Raynor, 22 N.Y.2d 417, 422 (1968)); and

WHEREAS, DOB additionally submitted that the 2012 Audit revealed substantial and incurable errors—including violations of the Zoning Resolution and the Building Code—affecting life and safety that would require a substantial redesign of the Development for compliance; in particular, DOB identified the elevated exterior walkways on the Rear Building as contrary to ZR §§ 23-44 and 24-33, the second story of the Rear Building as an obstruction contrary to ZR § 24-33 and the absence of a second means of egress from both the Front Building and the Rear Building as contrary to Sections 27-362 and 27-366 of the 1968 Building Code; and

WHEREAS, DOB additionally identified other objections discovered in the course of the 2012 Audit as potentially curable, but alleged that when all of the objections are considered in their totality, the objections render the Alt 1 Permit invalid; and

WHEREAS, therefore, DOB considered the question of whether foundations were complete prior to September 9, 2004, as irrelevant because a vested right

cannot accrue where the construction upon which such right relies was completed pursuant to invalid permits; and

WHEREAS, upon completion of the 2012 Audit, DOB concluded that the Alt 1 Permit was, in fact, validly issued, but contested that foundations at the site had not been completed and, thus, the Alt 1 Permit lapsed by operation of law on the Effective Date, citing, among other things, the facts that (1) the Stop Work Order issued for the site was not lifted in its entirety until September 1, 2004, eight days before the Effective Date; (2) the Alt 1 Permit was not signed off until July 26, 2005; (3) a Post-Approval Amendment for the Demolition Alt 2 Permit was not filed until on or about October 5, 2004; and (4) the Foundation Permit was renewed on March 10, 2005; and

WHEREAS, in support of their contention that the foundation was not complete by September 9, 2004, DOB identifies the following pieces of evidence: (1) the 2004 Structural Engineer Letter advising the owner that, among other things, foundation work at 638 and 640 East 11th Street be completed and foundation work at 636 East 11th Street should be continued; (2) the renewal of the Foundation Permit on March 10, 2005, six months after the Effective Date, and its ultimate signoff on July 26, 2005, ten months after the Effective Date; (3) the filing of a Post Approval Amendment to the Demolition Alt 2 Permit on October 5, 2004, with notations that had not previously appeared on drawings previously submitted with the Demolition Alt 2 Permit approved prior to the Effective Date stating “Existing foundation wall to be removed and replaced with new structural concrete wall...”, “Underpin existing walls as req’d...”, and “New struct. Walls as req’d...”, suggesting that a month after the Effective Date, foundation walls still needed to be removed and new concrete walls constructed in their place; and (4) the Survey submitted by the Appellant reflecting conditions at the site on April 25, 2005, outlining the buildings under construction and a proposed elevator shaft, suggesting that the foundations of the Front Building at 638 and 640 East 11th Street may have been complete, but providing no evidence of the rear foundation walls for any portion of the site; and

WHEREAS, DOB notes that the Stop Work Order was active at the premises at the time of the 2004 Structural Engineer’s Letter, was lifted at 636 and 638 East 11th Street on the same day, but was not lifted at 640 East 11th Street until September 1, 2004, eight days before the Effective Date, leaving the Appellant with insufficient time to complete foundations at the site by that time; and

THE BOARD’S FINDINGS

WHEREAS, the Board accepts DOB’s conclusion that the Alt 1 Permit was validly issued; and

WHEREAS, the Board finds that foundation work for the Development had been commenced prior to the Effective Date, but that the question of whether the Development is a “major development” or a “minor development” is not properly before this Board and, in any event, neither the Rear Building foundation nor all work on foundations were completed at the site prior to the Effective Date and thus, the Alt 1 Permit lapsed pursuant to ZR § 11-331; and

**166-12-A & 107-13-A**

WHEREAS, because the Appellant did not file an application to the Board within 30 days of the Effective Date to recognize a statutory right to continue construction at the site subsequent to the Effective Date, the Appellant did not obtain a statutory vested right to complete the construction of the Development; and

WHEREAS, however, the Board finds that the Appellant had undertaken substantial construction, made substantial expenditures in connection with the Alt 1 Permit and that serious loss would have resulted if the owner had been denied the right to proceed under the prior zoning; and

WHEREAS, thus, the Board recognizes that the Appellant had, indeed, acquired a common law vested right to complete the construction of the Development subsequent to the Effective Date; and

WHEREAS, the 2004 amendment to ZR § 24-33 exempted from the definition of "permitted obstruction," "any portion of a building" located in a residence district other than R1, R2, R3A, R3X, R3-1, R4A, R4B or R4-1, beyond 100 feet of a wide street "used for community facility use other than a school, house of worship, college or university, or hospital and related facilities;" and

WHEREAS, therefore, as of the Effective Date, the Rear Building was rendered non-complying because its bulk was not permitted in the rear yard of a residential building as a permitted obstruction; and

WHEREAS, the Board finds, based on the substantial evidence in the record, that neither the Rear Building nor the first floor and cellar of the Front Building have been occupied by UG 4 medical offices since on or around December 31, 2008, the date of the first violations issued to the premises by DOB for occupancy contrary to the CO; and

WHEREAS, even assuming that the Appellant was not on notice that residential occupancy of the Rear Building and the first and cellar floor levels of the Front Building were contrary to both the CO and the Zoning Resolution until a February 2012 letter from DOB, residential occupancy of these areas of the Development continued until mid-2017, another five years; and

WHEREAS, viewed in the most generous light and supposing that the medical office areas of the Development were, in fact, occupied by medical offices at some time prior to 2012, pursuant to ZR § 52-61, if a non-conforming use is considered abandoned once it is discontinued in a building for a continuous period of two years, that building must thereafter be used only for conforming use; and

WHEREAS, the Board finds that ten years have lapsed since the time of the construction of the Development and circumstances have changed such that the City's interest in present zoning, to wit, legal occupancy of the premises, outweighs the property

**A true copy of resolution adopted by the Board of Standards and Appeals, October 17, 2017.**

**Printed in Bulletin Nos. 42-43, Vol. 102.**

**Copies Sent**

**To Applicant**

**Fire Com'r.**

**Borough Com'r.**

owner's vested right; and

WHEREAS, the Board finds that the failure to occupy the UG 4 medical office space in the Rear Building with UG 4 medical office in the face of multiple years of attempted enforcement by DOB, both in the issuing of violations and the filing and prosecution of the CO Revocation Appeal to be an overt act sufficient to constitute abandonment as contemplated in Putnam; and

WHEREAS, the Board notes that the Zoning Amendment specifically rendered UG 4 medical office use in the Rear Building non-complying; and

WHEREAS, accordingly, the Board finds that the Appellant abandoned its right to occupy the Rear Building with UG 4 medical offices; and

*Therefore it is Resolved*, that the application to revoke Certificate of Occupancy No. 103703226F, filed under BSA Cal. No. 166-12-A, is *granted in part* with regards to the UG 4 medical office occupancies indicated on the cellar, first floor and mezzanine levels of the Rear Building and the application to recognize a common law vested right to complete construction under Permit No. 103703226, filed under BSA Cal. No. 107-13-A, is *denied*.

Adopted by the Board of Standards and Appeals, October 17, 2017.

