173-11-A
APPLICANT – Rothkrug Rothkrug & Spector, LLP, for Southside Manhattan View LLC, owner.
SUBJECT – Application November 7, 2011 – Appeal seeking a determination that the owner of the premises has acquired a common law vested right to complete construction under the prior R4 zoning. R4-1 Zoning district.
PREMISES AFFECTED – 68-10 58th Avenue, south side of 58th Avenue, 80' east of intersection of 58th Avenue and Brown Place, Block 2777, Lot 11, Borough of Queens.
COMMUNITY BOARD #5Q
APPEARANCES –
For Applicant: Todd Dale.
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 the enlargement of a mixed-use residential/commercial building under the common law doctrine of vested rights; and

WHEREAS, a public hearing was held on this appeal on April 3, 2012, after due notice by publication in *The City Record*, with a continued hearing on May 1, 2012, and then to decision on June 5, 2012; and

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

WHEREAS, Community Board 5, Queens, recommended disapproval of the original iteration of this application, because it did not provide off-street parking for the eight apartment units; and

WHEREAS, the site is located on the south side of 58th Avenue between Brown Place and 69th Street, within an R4-1 zoning district; and

WHEREAS, the site has 80 feet of frontage on 58th Avenue, a depth of 100 feet, and a total lot area of 8,000 sq. ft.; and

WHEREAS, the applicant proposes to construct a three-story (including basement) horizontal enlargement consisting of six apartment units to the existing 4,722 sq. ft. two-story mixed-use residential/commercial building, and to convert the second floor of the existing building into two apartment units, resulting in a total of eight apartment units and a total floor area of 10,782 sq. ft. (1.35 FAR); and

WHEREAS, the subject site was formerly located within an R4 zoning district; and

WHEREAS, the proposed mixed-use building complies with the former R4 zoning district parameters; and

WHEREAS, however, on July 29, 2009 (hereinafter, the "Rezoning Date"), the City Council voted to adopt the Middle Village, Glendale and Maspeth Rezoning, which rezoned the site to R4-1; and

WHEREAS, the proposed building does not comply with the R4-1 district parameters as to floor area and density; 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, the Board notes that Alteration Permit No. 401996337-01-AL (the "Permit"), which authorized the proposed enlargement of the building and conversion of the second floor of the existing building pursuant to R4 zoning district regulations was issued on August 8, 2005; 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 Permit pursuant to ZR § 11-332 within 30 days of its 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 letter dated February 29, 2012, the Department of Buildings ("DOB") states that the Permit was lawfully issued, authorizing construction of the proposed Building prior to the Rezoning Date; and

WHEREAS, the Permit lapsed by operation of law on the Rezoning Date because the plans did not comply with the new R4-1 zoning district regulations and DOB determined that the required work had not been completed; and

WHEREAS, thus, the Board finds that the Permit was validly issued by DOB to the owner of the subject premises and was in effect until its lapse by operation of law on the Rezoning Date; and

WHEREAS, in response to the Community Board's concerns regarding the lack of parking, the applicant states that the approved plans failed to indicate parking spaces that would be required pursuant to ZR § 25-23 under the R4 zoning; and

WHEREAS, the applicant submitted a reconsideration request from DOB reflecting that DOB approved the applicant's proposal to amend the plans to provide four accessory off-street parking spaces at the site, in compliance with ZR § 25-23; and

WHEREAS, assuming that valid permits had been issued and that work proceeded under them, 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, the applicant cites to Putnam Armonk, Inc. v. Town of Southeast, 52 A.D.2d 10, 15 (2d Dept. 1976) 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 applicant states that as of the two year anniversary of the Rezoning Date, the owner had completed approximately 90 percent of all work on the site, including: 100 percent of excavation, backfill, drywell installation, footing, waterproofing, structural frame installation, interior demolition, exterior walls, insulation, water and sewer mains, and windows; and

WHEREAS, the applicant states that the only remaining work on the site consists of interior finishing work, installation of roofs and gutters, and exterior landscaping and parking areas; and

WHEREAS, the applicant submitted the following evidence to support its assertions regarding completed work: affidavits from the architect and project manager; construction schedules; and photographs of the site; and

WHEREAS, the Board concludes that, based upon a comparison of the type and amount of work completed in the instant case with the type and amount of work found by New York State courts to support a positive vesting determination, a significant amount of work was performed at the site prior to the rezoning, 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 prior to the two year anniversary of the Rezoning Date, the owner expended $1,056,260, including hard and soft costs and irrevocable commitments, or 86 percent out of approximately $1,227,800 budgeted for the entire enlargement; and

WHEREAS, as proof of the expenditures, the applicant has submitted expense charts and affidavits from the architect; and

WHEREAS, at hearing, the Board questioned the basis for the cost estimates in the expense charts; and

WHEREAS, in response, the applicant submitted a letter from the architect stating that the cost estimates in the expense chart are based on industry standards used when filing the proposed work with DOB based on figures on the 2010 National Construction Estimator by Craftsman Book Company, as well as over 30 years of professional experience in the field of architecture and construction; 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 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 contends that the loss of the $101,049 associated with pre-Rezoning Date project costs that would result if this appeal were denied is significant; and

WHEREAS, the applicant states that if required to build in accordance with the new zoning, the owner would be limited to a maximum of 0.75 FAR (0.90 with attic bonus) and a maximum density of a one- or two-family semi-detached home; and

WHEREAS, the applicant states that complying with the R4-1 district regulations would therefore require the demolition of the completed enlargement

and the reconstruction of a two-family home on that portion of the site (in conjunction with the existing two-story mixed-use building) to reduce the occupancy from eight dwelling units to three dwelling units, and from an FAR of 1.35 to 0.75; and

WHEREAS, the applicant submitted a letter from a demolition company stating that the estimated cost for the demolition work that would be required for the site to comply with R4-1 zoning, would be approximately $298,000; and

WHEREAS, the applicant submitted a letter from a real estate broker stating that the estimated rental income for the entire site under R4-1 district regulations would be $6,800 per month ($4,200 for two three bedroom dwelling units, $1,400 for a first floor commercial space, and $1,200 for the second floor apartment); and

WHEREAS, the letter from the real estate broker estimated that the monthly rental income for the proposed building would be $14,450; therefore, compliance with the R4-1 district regulations would result in a loss of $7,650 in monthly rental income; and

WHEREAS, the Board agrees that the need to demolish portions of the existing building, 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, the serious loss projected, and the supporting documentation for such representations, and agrees that the applicant has satisfactorily established that a vested right to complete construction had accrued to the owner of the premises as of the two year anniversary of the Rezoning Date.

Therefore it is Resolved that this appeal made pursuant to the common law doctrine of vested rights requesting a reinstatement of DOB Permit No. 401996337-01-AL, 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, June 5, 2012.

A true copy of resolution adopted by the Board of Standards and Appeals, June 5, 2012.
Printed in Bulletin Nos. 22-24, Vol. 97.

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