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BOARD OF STANDARDS AND APPEALS

MEETING OF: September 14, 2020
CALENDAR NO.: 2018-190-A
PREMISES: 32-18 Union Street, Queens
Block 4954, Lot 35

ACTION OF BOARD — Application granted.

THE VOTE —

**Affirmative: Chair Perlmutter, Vice-Chair Chanda,
Commissioner Ottley-Brown, Commissioner Sheta, and
Commissioner Scibetta.....5**
Negative:.....0

THE RESOLUTION —

This is an application, based on the common-law doctrine of vested rights, to establish the right to continue construction and to renew building permits lawfully issued by the Department of Buildings (“DOB”), acting on New Building Application No. 402141516 (the “New Building Application”), before the effective date of an amendment to the Zoning Resolution, which have lapsed as a result of such amendment.

A public hearing was held on this application on May 18, 2020, after due notice by publication in *The City Record*, with a continued hearing on July 27, 2020, and then to decision on September 14, 2020. Vice-Chair Chanda, Commissioner Ottley-Brown, and Commissioner Scibetta performed an inspection of the site and surrounding neighborhood. Community Board 7, Queens, recommends approval of this application.

The Premises are located on the west side of Union Street, between 32nd Avenue and 33rd Avenue, in an R5D zoning district, in Queens. With approximately 25 feet of frontage along Union Street, 83 feet of depth, and 2,075 square feet of lot area, the Premises are occupied by a four-story building (the “Building”).

On June 22, 2005, DOB determined that the Building would comply with all applicable zoning regulations and issued a New Building permit authorizing work associated with the application to construct a four-story residential building on July 20, 2005.

Effective April 22, 2009 (the “Effective Date”), the City amended the Zoning Resolution, changing the zoning district from an R6 zoning district to an R5D zoning district, such that the Building does not comply with bulk regulations pertaining to building height, front yards, side yards, parking, and maximum number of dwelling units.

Because not “all work on” the Building’s “foundations had been completed prior to” the Effective Date, the building permits

authorizing work associated with the New Building Application “automatically lapse[d]” on the Effective Date and “the right to continue construction . . . terminate[d]” under ZR § 11-331. Accordingly, the applicant seeks to establish the right to continue construction of the Building, based on the common-law doctrine of vested rights, and to renew building permits authorizing work associated with the New Building Application.

“Under New York law, a property owner has no right to an existing land-use benefit unless that right has ‘vested.’ In New York, a vested right can be acquired when, pursuant to a legally issued permit, the landowner demonstrates a commitment to the purpose for which the permit was granted by effecting substantial changes and incurring substantial expenses to further the development. *Town of Orangetown v. Magee*, 88 N.Y.2d 41, 47, 643 N.Y.S.2d 21, 665 N.E.2d 1061 (1996). In order to gain the vested right, the landowner’s actions relying on a valid permit must be so substantial that the municipal action results in serious loss rendering the improvements essentially valueless,” *Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 784 (2d Cir. 2007) (internal quotation marks omitted); *see also Zahra v. Town of Southold*, 48 F.3d 674, 681 (2d Cir. 1995) (recognizing a “protectible ‘property interest’ in a benefit that affects land use—i.e. a building permit, certificate of occupancy, zoning variance, excavation permit or business license”). Notwithstanding this general framework, “there is no fixed formula which measures the content of all the circumstances whereby a party is said to possess a vested right,” *Estate of Kadin v. Bennett*, 163 A.D.2d 308, 309 (N.Y. App. Div. 1990) (internal quotation marks omitted).

As noted above, the record shows that the owner of the Premises obtained lawfully issued permits to construct the Building in accordance with the New Building Application before the Effective Date.

The applicant submitted evidence that, before the Effective Date and in accordance with the building permits authorizing work associated with the New Building Application, the owner had effected substantial construction to further development of the Building. In particular, the applicant submits that the entire foundation and superstructure of the Building were completed prior to the Rezoning; DOB records of professionally certified plumbing inspections show that gas, sanitary, and storm piping were substantially completed prior to the Rezoning; and, furthermore, publicly available satellite and street-view images of the Premises and surrounding area show that the superstructure was erected in its current form as recently as 2007 prior to the Rezoning. The applicant submits that the construction completion is substantial and amounts to approximately 70 percent of the required work prior to the Effective Date.

The applicant submitted evidence that, before the Effective Date, substantial expenses had been incurred. Due to foreclosure on the prior owner of property, the applicant could not provide specific expenditure information, but, based on completion of the foundation, superstructure, and completed interior work, estimates that approximately \$961,884 (67 percent) of the total development cost of

\$1,428,262 has been expended. Accordingly, the record reflects that, before the Effective Date, the owner had incurred substantial expenses to further development of the Building.

The applicant submitted evidence that, if the right to continue construction of the Building were denied, the owner would suffer serious loss—that is, substantial economic harm. In particular, the applicant submits that the Building’s height, front yards, side yards, FAR, parking, and interior layout were built pursuant to the R6 and do not comply with existing underlying R5D zoning regulations. Specifically, to comply with applicable yard regulations, demolition of the superstructure would be necessary. Because of the substantial nature of the losses pertaining to total demolition and reconstruction of the fully constructed Building to comply with yard requirements, it is unnecessary for the Board to determine the full extent of the economic harm that would be inflicted were common-law vested rights denied herein. Accordingly, the record reflects that, if the right to continue construction of the Building were denied, the owner would suffer serious loss in the form of substantial economic harm.

Accordingly, the Board finds that the evidence in the record supports the establishment of a right to continue construction of the Building, based on the common-law doctrine of vested rights, and that the applicant has substantiated a basis to warrant renewal of building permits authorizing work associated with the New Building Application.

Therefore, it is Resolved, that the Board of Standards and Appeals does hereby *grant* this application, based on the common-law doctrine of vested rights, to establish the right to continue construction and to renew building permits lawfully issued by the Department of Buildings (“DOB”), acting on New Building Application No. 402141516 (the “New Building Application”), before the effective date of an amendment to the Zoning Resolution, which have lapsed as a result of such amendment on April 22, 2009, as well as all related permits for various work types, either already issued or necessary to complete construction and obtain a certificate of occupancy, for four years and six months, expiring March 14, 2025, in light of the current state of emergency declared to exist within the City of New York resulting from an outbreak of novel coronavirus disease.

Adopted by the Board of Standards and Appeals, September 14, 2020.

CERTIFICATION

***This copy of the Resolution
dated September 14, 2020
is hereby filed by
the Board of Standards and Appeals
dated November 4, 2020***



***Carlo Costanza
Executive Director***