

202-08-BZY

APPLICANT – Greenberg Traurig by Deirdre Carson, for Oliver Development, LLC, owner.

SUBJECT – Application August 1, 2008 – Extension of time (§11-331) to complete construction of a minor development commenced prior to a text amendment on July 23, 2008. R6 Zoning district.

PREMISES AFFECTED – 131 Second Place, northwest corner of Second Place and Smith Street, Block 459, Lot 24, Borough of Brooklyn.

COMMUNITY BOARD #6BK

APPEARANCES –

For Applicant: Deirdre Carson.

ACTION OF THE BOARD – Appeals granted.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice-Chair Collins, Commissioner Ottley-Brown and Commissioner Hinkson.....4

Negative:.....0

Absent: Commissioner Montanez.....1

THE RESOLUTION –

WHEREAS, this is an application under ZR §11-331 to renew a building permit and extend the time for the completion of the foundation of a seven-story residential building; and

WHEREAS, this application was heard concurrently with a companion application under BSA Cal. No. 212-08-A, decided the date hereof, which is a request for a finding that the owner of the site has obtained a vested right to continue construction under the common law; and

WHEREAS, the Board notes that while separate applications were filed according to Board procedure, in the interest of convenience, the cases were heard together and the record is the same for both; and

WHEREAS, a public hearing was held on this application on September 24, 2008, after due notice by publication in *The City Record*, with a continued hearing on October 28, 2008, and then to decision on November 25, 2008; and

WHEREAS, the premises and surrounding area had site and neighborhood examinations by Chair Srinivasan, Vice-Chair Collins, Commissioner Hinkson, Commissioner Montanez and Commissioner Ottley-Brown; and

WHEREAS, Community Board 6, Brooklyn recommends disapproval of this application; and

WHEREAS, a representative of Assemblywoman Joan L. Millman testified in opposition to this application; and

WHEREAS, several community residents testified in favor of this application; and

WHEREAS, certain community residents also opposed this application, including members of the Carroll Gardens Neighborhood Association, Inc., and the Carroll Gardens Coalition for Respectful Development, (collectively, the “Opposition”); and

WHEREAS, specifically, the Opposition raised the following concerns: (1) the permit is invalid; (2) the excavation was not complete; and (3) substantial progress on the foundation was not complete; and

WHEREAS, the subject site is located at the northwest corner of Second Place and Smith Street in the Carroll Gardens neighborhood of Brooklyn; and

WHEREAS, the site has a frontage of approximately 82.5 feet on Smith Street and 115 feet on Second Place; the Zoning Lot has a total lot area of 23,023 sq. ft.; and

WHEREAS, the site shares the Zoning Lot with a two-story school/day care facility located at 342 Smith Street; the subject site occupies approximately 9,400 sq. ft. of the Zoning Lot area; and

WHEREAS, the site is proposed to be developed with a seven-story 48-unit residential building (the “Building”), with a total floor area of 61,031 sq. ft. (2.7 FAR); and

WHEREAS, the subject site is located on a “Place Street” which is the subject of a recently adopted zoning text amendment, described below, within an R6 zoning district; and

WHEREAS, the subject site is subject to an easement in favor of the Transit Authority for a subway entrance, and contains subway structures at or near grade and a subway line below grade; and

WHEREAS, on February 22, 2008, New Building Permit No. 302290777-01-NB (the “Permit”) was issued by the Department of Buildings (“DOB”) permitting construction of the Building; and

WHEREAS, revised structural plans were approved on April 15, 2008 and revised architectural plans were approved on May 5, 2008; the Owner commenced construction of the foundation on April 15, 2008; and

WHEREAS, when the Permit was issued, Second Place was a “wide street” under the Zoning Resolution because it is flanked by 30-foot deep gardens on land claimed to be City-owned, which are mapped as part of the City street on the official City Map and which must be maintained as courtyards pursuant to a 19th century statute; and

WHEREAS, on July 23, 2008 (hereinafter, the “Enactment Date”), the City Council voted to adopt the Carroll Gardens Narrow Street/Wide Street Zoning Text Amendment, which redefined Second Place as a “narrow street;” and

WHEREAS, the applicant represents that the Building complies with the Quality Housing Program requirements applying to a wide street in an R6 zoning district; specifically, a proposed FAR of 2.7 (a maximum FAR of 3.0 is permitted), a floor area of 61,031 sq. ft., a street wall height of 66 feet, and a total building height of 70 feet; and

WHEREAS, because the site now fronts a narrow street within an R6 zoning district, the Building would not comply with the requirements providing for a maximum FAR of 2.2, a maximum residential floor area of 43,631 (because of envelope restrictions), a streetwall height of 45 feet, and a maximum building height of 55

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feet; and

WHEREAS, because the Building violates these limitations on development fronting on a narrow street and work on the foundation was not completed as of the Enactment Date, the Permit lapsed by operation of law; and

WHEREAS, additionally, DOB issued a Stop Work Order on July 24, 2008 for the Permit; and

WHEREAS, the applicant now applies to the Board to reinstate the Permit pursuant to ZR § 11-331, so that the proposed development may be fully constructed under the prior R6 zoning as applied to a wide street; and

WHEREAS, ZR § 11-331 reads: "If, before the effective date of an applicable amendment of this Resolution, a building permit has been lawfully issued . . . to a person with a possessory interest in a zoning lot, authorizing a minor development or a major development, such construction, if lawful in other respects, may be continued provided that: (a) in the case of a minor development, all work on foundations had been completed prior to such effective date; or (b) in the case of a major development, the foundations for at least one building of the development had been completed prior to such effective date. In the event that such required foundations have been commenced but not completed before such effective date, the building permit shall automatically lapse on the effective date and the right to continue construction shall terminate. An application to renew the building permit may be made to the Board of Standards and Appeals not more than 30 days after the lapse of such building permit. The Board may renew the building permit and authorize an extension of time limited to one term of not more than six months to permit the completion of the required foundations, provided that the Board finds that, on the date the building permit lapsed, excavation had been completed and substantial progress made on foundations"; and

WHEREAS, a threshold requirement in this application is that the Permit is valid; and

WHEREAS, ZR § 11-31(a) provides that "[a] lawfully issued building permit shall be a building permit which is based on an approved application showing complete plans and specifications, authorizes the entire construction and not merely a part thereof, and is issued prior to any applicable amendment to this Resolution;" and

WHEREAS, the record indicates that the Permit was issued to the owner by DOB on February 22, 2008 authorizing construction of the proposed Building; and

WHEREAS, at hearing, the Opposition contested the validity of the Permit based on two issues: (i) the alleged non-compliance of the outer court; and (ii) an alleged discrepancy in the zoning lot description; and

WHEREAS, the Opposition contends that the proportions of the outer court of a one-story permitted obstruction in the rear yard of the building do not comply with ZR § 23-841; therefore, that the permit is invalid; and

WHEREAS, further, the Opposition contends that there is a discrepancy between the Zoning Lot Description approved by DOB for the Permit application which was recorded with the Office of the City Register on April 11, 2007 and the Zoning Lot description submitted to the Board by the applicant; and

WHEREAS, at hearing, in response to the Opposition's concerns, the Board requested DOB to respond to both issues; and

WHEREAS, in response, the Department of Buildings issued an objection to the applicant on October 20, 2008 based on the potential non-compliance of the Building plans with the outer court requirements of ZR § 23-841; and

WHEREAS, a subsequent submission by DOB states that amended plans that addressed the objection concerning ZR § 23-841 were approved on October 24, 2008; therefore the Permit was lawfully issued on February 22, 2008; and

WHEREAS, ZR § 11-31(b) provides that building permits issued before the effective date of amendment may be modified after the effective date of the zoning amendment so long as the modifications to such plans do not create a new non-compliance or non-conformity or increase the degree of non-compliance or non-conformity; and

WHEREAS, a further submission by DOB stated that the respective Zoning Lot Descriptions recorded at the City Register and submitted to the Board were essentially identical except for the different format of the lot diagrams; and

WHEREAS, ZR § 11-31(a) provides that the Commissioner of DOB shall determine whether a building permit authorizes the proposed construction; and

WHEREAS, DOB has provided a submission confirming the validity of the permit; and

WHEREAS, based on the determination by DOB, the Board accepts the validity of the Permit on the referenced date of issuance, which is prior to the Enactment Date; and

WHEREAS, accordingly, the Board finds that the record contains sufficient evidence to satisfy the findings set forth ZR § 11-31(a) and a decision may be rendered provided the other findings are met; and

WHEREAS, because the proposed development contemplates construction of one building, it meets the definition of minor development; and

WHEREAS, since the proposed development is a minor development, the Board must find that excavation was completed and substantial progress was made as to the required foundation; and

WHEREAS, the applicant states that excavation began on April 21, 2008 and was completed July 22, 2008, and that substantial progress was made on the foundation as of the Enactment Date; and

WHEREAS, the applicant further states that the excavation was completed in stages, as follows: (1) the entire foundation area was excavated to a level two feet

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above the final sub-grade level to provide a necessary platform for the drilling rig; and (2) the remaining soil was removed as the piles were installed, with the south end of the site excavated immediately prior to completion; and

WHEREAS, the Opposition asserts that the excavation of the site was not complete since photographs of the site indicated that a mound of earth measuring approximately 1,400 sq. ft. remained on the Enactment Date that was to have been cleared for the foundation; and

WHEREAS, the Opposition further states that no excavation had occurred in an area at the former subway plaza, despite plans depicting that area as a site for a mat foundation; and

WHEREAS, at hearing the Building engineer explained that all excavation for the foundation was complete and that the soil remaining was meant to protect the subway during the construction; and

WHEREAS, the Board finds that the excavation performed at the site for the foundation of the Building is complete for vesting purposes under ZR § 11-331; and

WHEREAS, as to substantial progress on the foundation, the applicant represents that the foundation was approximately 86 percent complete as of the Enactment Date; and

WHEREAS, the applicant states that, as a result of the location of the subject site over a subway station and the MTA right of way, the Building's foundation is unusual and consists of two components; and

WHEREAS, applicant states that one component of the foundation consists of 91 70-foot long drilled friction piles and a 505 cubic yard reaction mass; and

WHEREAS, the applicant further states that the piles do not reach bedrock and are constructed in parts by drilling a hollow steel pipe containing rebar to the full pile depth, filling the pipe with concrete grout, and adding and filling additional pipes on top of each other; many of the piles are drilled at a 24 degree angle; and

WHEREAS, after the piles are completed, the reaction mass is poured around their tops to serve as a large, single pile cap and as a slab to bear the vertical and lateral loads of the portion of the Building located above the reaction mass as well as lateral loads from the remainder of the Building; and

WHEREAS, the applicant represents that the other component of the foundation consists of the existing subway foundation and structure which covers the majority of the site and was engineered to support a six-story manufacturing building at loads heavier than that of the Building; and

WHEREAS, the applicant states that the subway structure will support the Building's loads in the following manner: existing subway columns support the subway roof, constructed of steel and concrete, which is currently covered with mastic and a layer of fire brick and a thin layer of fill; and

WHEREAS, additional fill and the concrete slab will be placed on the existing fill layer and then neoprene

vibration isolators will be placed on the concrete mat to support the Building's columns; and

WHEREAS, the applicant represents that the Building's loads will be transferred through the neoprene pads, through the concrete mat, fill, fire brick, and mastic, to the subway roof and its columns and ultimately to the soil below; and

WHEREAS, the applicant further represents that the creation of a foundation to support a building above was contemplated by the MTA in its design for the station, as evidenced by the MTA's original drawing which states that "columns may be placed within the easement area to support structure above the upper plane of easement, provided loads to be supported on subway roof shall not exceed twenty seven hundred (2,700) pounds per square foot" and

WHEREAS, the applicant represents that the use of the existing subway structure to support the Building is consistent with the Building Code definition of a "foundation" as "a construction that transfers building loads to the supporting soil" (see Building Code of the City of New York, Title 27, Subchapter 2); and

WHEREAS, the applicant asserts that because the only construction on the Property that will transfer the Building's loads to the soil will be the reaction mass and the piles -- and the remainder of the Building's loads will be transferred to the existing subway structure (or, in the case of lateral loads, to the reaction mass), which, in turn, will transfer those loads to the soil -- the only components of the Building project that may properly be considered "new foundation" are the reaction mass and the piles, as the existing subway structure forms part of the foundation; and

WHEREAS, the applicant represents that the foundation was approximately 86 percent complete as of the Enactment Date; and

WHEREAS, as noted above, because all 91 required piles had been installed the applicant represents that it has met the threshold necessary to establish substantial progress within the meaning of the statute; and

WHEREAS, the Opposition contends that approximately only 20 percent of the foundation is complete, based on a statement in the July 24, 2008 Stop Work Order issued subsequent to the Enactment Date; and

WHEREAS, the Board notes that the conclusions of the inspector in the Stop Work Order are recorded for the purposes of a finding that the Permit for the property has or has not vested under ZR § 11-331(a), requiring completion of the foundations, and was not meant to be dispositive of the amount of work performed or remaining; and

WHEREAS, the Opposition further contends that the proposed concrete slab serves as the structural system that disperses vertical point loads to the subsurface materials and because it and the proposed five-foot thick pile caps have not yet been installed, that the foundation

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has not been substantially completed to permit the project to be vested under ZR § 11-331; and

WHEREAS, the Board notes that the standard for vesting set forth in ZR § 11-331 is “substantial progress” on the foundation, rather than “substantial completion,” as propounded by the Opponents; and

WHEREAS, the Opposition further contends that the subway structure cannot serve as the foundation for the Building because the Building and its columns are not supported directly by it; and

WHEREAS, a submission by the Building’s structural engineer states that the slab above the subway roof is not a concrete mat slab, but is a two-way structural slab which was requested by the New York City Transit Authority to protect the tunnel roof during construction from falling objects and debris; and

WHEREAS, in his submission, the engineer further states that the slab is not designed to transfer building loads to the subway structure; and

WHEREAS, a submission by a consulting structural engineer, based on a review of the structural drawings prepared by the Building’s structural engineers concluded that the Building’s column loads are distributed through a layer of soil to the rooftop of the substructure where the loads are then directed the substructure’s columns and then by extension to the spread footings; and

WHEREAS, the Board finds that the submissions clearly demonstrate that the Building is indeed supported by the existing subway structure and foundation; and

WHEREAS, the Opponents also argue that the precedent created by use of the subway foundation would allow any structure built over a subway to be vested ab initio conferring a windfall for a property owner; and

WHEREAS, a submission by the applicant points out that this outcome is highly unlikely as the requirements for such construction by the MTA are exceedingly onerous and led to extensive delays in the project design and permit approval process for the Building, as well as imposing significant limitations on the location of a newly-developed building; and

WHEREAS, at hearing, the Board asked the applicant to provide a breakdown of the amount of concrete required to complete the foundation; and

WHEREAS, in order to complete the foundation, the applicant states that the owner must pour 502 cubic yards of concrete forming the reaction mass; and

WHEREAS, the applicant states that the work remaining on the foundation would take six weeks to complete, including two weeks necessary to mobilize the crew; and

WHEREAS, the applicant represents that even if the reaction mass were deemed foundation, the total cost of

the work required for that portion of the project is estimated at \$650,000, substantially less than the \$1,670,000 expense of the 91 completed friction piles; and

WHEREAS, the applicant has also submitted financial documents, including cancelled checks, invoices, and accounting tables, which reflect significant expenditure associated with the excavation and foundation work incurred as of the Enactment Date; and

WHEREAS, the Board finds all of the above-mentioned submitted evidence sufficient and credible; and

WHEREAS, the Board has reviewed all of the applicant’s representations and the submitted evidence and agrees that it establishes that substantial progress was made on the required foundation as of the Enactment Date; and

WHEREAS, while the Board is not swayed by any of the Opposition’s arguments, it nevertheless understands that the community residents and elected officials worked diligently on the Carroll Gardens Narrow Street/ Wide Street Rezoning and that the Building does not comply with the new zoning parameters; and

WHEREAS, however, if the owner has met the test for a vested rights determination pursuant to ZR § 11-331, the owner’s property rights may not be negated merely because of general community opposition; and

WHEREAS, accordingly, based upon its consideration of the arguments made by the applicant and the Opposition, as outlined above, as well as its consideration of the entire record, the Board finds that the owner has met the standard for vested rights under ZR § 11-331 and is entitled to the requested reinstatement of the Permit, and all other related permits necessary to complete construction.

WHEREAS, because the Board finds that excavation was complete and that substantial progress had been made on the foundation, it concludes that the applicant has adequately satisfied all the requirements of ZR § 11-331.

Therefore it is Resolved that this application to renew New Building Permit No. 302290777-01-NB pursuant to ZR § 11-331 is granted, and the Board hereby extends the time to complete the required foundations for one term of six months from the date of this resolution, to expire on May 25, 2009; this grant and the term shall not prohibit the reinstatement of these permits pursuant to a grant made under BSA Cal. No. 212-08-A.

Adopted by the Board of Standards and Appeals, November 25, 2008.

A true copy of resolution adopted by the Board of Standards and Appeals, November 25, 2008.

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Copies Sent

To Applicant

Fire Com'r.

Borough Com'r.