

211-03-BZ

APPLICANT – Eric Palatnik P.C., for 5-33 48th Avenue Corporation, owner.

SUBJECT – Application December 27, 2007 – Extension of Time to Complete Construction of a previously granted Variance (§72-21) to permit the proposed expansion and the conversion of an existing warehouse to residential use, which expires on June 8, 2008, in an M1-4/R7A (LIC) zoning district.

PREMISES AFFECTED – 529-535 48th Avenue, north side of 48th Avenue between Fifth Street and Vernon Boulevard, Block 30, Lot 9, Borough of Queens.

COMMUNITY BOARD #2Q**APPEARANCES –**

For Applicant: Eric Palatnik.

ACTION OF THE BOARD – Application granted on condition.

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 a proposed mixed-use building under the common law doctrine of vested rights; and

WHEREAS, a public hearing was held on this application on February 12, 2008 after due notice by publication in *The City Record*, and then to decision on March 18, 2008; and

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

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

WHEREAS, the applicant proposes to develop the subject site with a four-story, six-unit mixed-use residential/community facility building, with a medical office on the first floor; and

WHEREAS, the subject premises is currently located within an R6B zoning district, but was formerly located within an R6 zoning district; and

WHEREAS, the proposed development complies with the former R6 zoning district parameters as to floor area, height, and front yard; and

WHEREAS, however, on May 11, 2005 (hereinafter, the “Enactment Date”), the City Council voted to adopt the Greenpoint-Williamsburg Rezoning, which rezoned the site to R6B, as noted above; and

WHEREAS, because the site is now within an R6B district, the proposed development would not comply with the floor area, height, and front yard parameters, rendering it a non-complying building; 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, on February 14, 2006, under BSA Cal. No. 145-05-BZY, the Board granted a renewal of NB Permit 301822981-01 (the “NB Permit”) subsequent to making the finding that the permit was validly issued by DOB to the owner of the subject premises and was in effect until the Enactment Date; and

WHEREAS, under BSA Cal. No. 145-05-BZY and pursuant to ZR § 11-331, the Board reinstated the NB Permit for one term of six months, to expire on August 14, 2006; 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, construction of the foundations was completed within six months of the Board’s reinstatement of the permit, but the proposed building was not completed within two years of the Enactment Date; and

WHEREAS, accordingly, the applicant is seeking an extension of time to complete construction; 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 June 11, 2007 and is therefore requesting to complete construction under the common law; 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 found that prior to the Enactment Date the owner had completed site preparation, excavation and backfill

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work to an extent which met the required findings of ZR § 11-331; and

WHEREAS, the applicant states that since the reinstatement of the permit under the prior grant, the owner has completed the entire structure of the building and has nearly completed stucco installation, framing, exterior waterproofing façade and windows; 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 \$917,399, including hard and soft costs and irrevocable commitments, out of \$2,790,975 budgeted for the entire project; and

WHEREAS, as proof of the expenditures, the applicant has submitted invoices, cancelled checks, and accounting reports; and

WHEREAS, the Board notes that the budgeted expenditures included site acquisition costs of \$1,485,280 which, for the purposes of its analysis here, the Board has excluded; and

WHEREAS, thus, based upon the applicant's representation as to the total project cost, the Board concludes that the actual construction costs for the proposed construction, both soft and hard, approximate \$1.3 million; and

WHEREAS, in relation to actual construction costs and related soft costs, the applicant specifically notes that the owner had paid \$561,397 for excavation, foundations, construction of the building structure, framing, exterior waterproofing, façade and window installation; and

WHEREAS, the applicant states that the owner also irrevocably owed an additional \$356,000 in outstanding bills for structural and façade work that was completed; 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

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needed 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 contends that the loss of the \$917,399 associated with project costs that would result if this appeal were denied is significant; 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 pouring a new foundation and cutting back the front of the building to provide a complying front yard; and

WHEREAS, further, as noted by the applicant, extensive demolition of the third and fourth floors, estimated at an additional \$1,561,280, would be necessary for a complying building, further compounding the economic harm to the owner; and

WHEREAS, additionally, the applicant explained the diminution in income that would occur if the floor area and height limits, and front yard requirements were imposed; and

WHEREAS, the applicant represents that a complying development would have no community facility space and fewer units, due to the R6B zoning district's required front yard, floor area and height restrictions; and

WHEREAS, the Board agrees that the need to redesign, the expense of demolition and reconstruction, the limitations of any complying development, and the \$917,399 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 NB Permit 301822981-01, 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.

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