212-08-A
APPLICANT – Greenberg Traurig by Deirdre Carson for Oliver Development, LLC, owner.
SUBJECT – Application August 1, 2008 – Appeal seeking a determination that the owner has acquired a common law vested right to continue development under the prior zoning district regulations. 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 appeal requesting a Board determination that the owner of the premises has obtained a vested right under the common law to complete construction of a proposed building at the referenced premises; and

WHEREAS, this application was heard concurrently with a companion application under BSA Cal. No. 202-08-BZY (the "BZY Application"), decided the date hereof, which requested a finding by the Board that the owner of the premises has obtained a right to continue construction pursuant to ZR § 11-331; and

WHEREAS, the Board notes that while separate applications were filed according to Board procedure, in the interest of convenience it heard the cases 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 members of the community also opposed this application, including 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 was invalid; (2) substantial construction was not undertaken; (3) the owner was aware of the proposed rezoning and therefore did not proceed in good faith; (4) the owner unreasonably delayed construction on the development; and (5) the owner is developing on a merged zoning lot; and

WHEREAS, the subject site is located on 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, at the time the permits were 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 maximum streetwall height of 45 feet, and a maximum building height of 55 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, it is from this order that the applicant appeals; and

WHEREAS, the applicant requests that the Board find that based upon the amount of financial expenditures, including irrevocable commitments, and the amount of work completed, the owner has a vested right to continue construction and finish the proposed development; and

WHEREAS, the Board notes that established precedent exists for the proposition that seeking relief pursuant to ZR § 11-30 et seq. does not prevent a property owner from also seeking relief under the common law; and

WHEREAS, as a threshold matter in determining this appeal, the Board must find that the completed work was conducted pursuant to a valid permit; and

WHEREAS, as reflected in the resolution for the BZY Application, the record for that case and the instant case contains sufficient evidence to make this finding; and

WHEREAS, turning to the substantive findings of the amount of work done and the amount of expenditure, the Board notes that a common law vested right to continue construction generally exists where the owner has undertaken substantial construction and made substantial expenditures prior to the effective date of an amendment; and

WHEREAS, as discussed by the court in Kadin v. Bennett, 163 A.D.2d 308 (2d Dept. 1990) "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, the applicant cites to Putnam Armonk, Inc. v. Town of Southeast, 52 A.D.2d 10, 15, 382 N.Y.S.2d 538, 541 (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, as to substantial construction, the applicant represents that after the issuance of the Permit, the following work was completed: (1) 100 percent of the excavation; and (2) installation of 91 friction piles, which comprises approximately 86 percent of the foundation work; and

WHEREAS, in support of this statement, the applicant has submitted photographs, cancelled checks, accounting tables, and invoices for labor and material; and

WHEREAS, the applicant cites to the same work and the same evidence as was presented in the BZY Application; and

WHEREAS, the Opposition argues that substantial construction, as required by the common law, was not undertaken because a proposed concrete slab, which is an element of the Building's foundation, has not yet been installed; and

WHEREAS, for the reasons set forth in the BZY Resolution, the Board finds that the concrete slab is not an element of the Building's foundation because it is not designed to support the Building; and

WHEREAS, assuming arguendo that the Opposition is correct, the applicant states that the balance of the construction work performed at the site would still qualify as "substantial work" based upon a comparison of the type and amount of work completed in the instant case with the type and amount of work discussed by New York State courts; and

WHEREAS, specifically, the Board has reviewed cases of which it is aware through its review of numerous vested rights applications, and agrees that the degree of work completed by the owner in the instant case is comparable to, or in excess of, the degree of work cited by the courts in favor of a positive vesting determination; and

WHEREAS, the Board notes that the appropriate comparison is between the amount of construction work here and that cited by other courts; and

WHEREAS, in light of such comparison, the Board can only conclude that the noted work is substantial; 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 the significant progress was made on foundations prior to the Enactment Date, and that said work was substantial; 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 included in the applicant's analysis; and

WHEREAS, as to costs, the applicant states that 26 percent of the budgeted expenditures for the proposed development had been either expended or committed pursuant to irrevocable contracts by the Enactment Date; and

WHEREAS, the Board notes that the budgeted expenditures included site purchase and financing costs, 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 and these particular disallowed costs, the Board concludes that the actual construction costs for the proposed development, both soft and hard, approximate $21.8 million; and

WHEREAS, in relation to actual construction costs and related soft costs, the applicant specifically notes that the owner had paid $2,123,150 for construction and construction management fees, $58,144 for general conditions work, and $16,788 for temporary utilities and power; and

WHEREAS, other costs included $672,632 for architectural and engineering services and plans, $140,235 for other design consultants, $210,704 for testing and inspections, and $22,722 on permits and fees; and

WHEREAS, the applicant further states that the owner also irrevocably owed an additional $1,228,000 in connection with the proposed development, because it had executed a binding contract for concrete work; and

WHEREAS, the total of these construction-related costs and commitments is approximately $4.5 million, which means that approximately 20.5 percent of the construction related project costs have been expended or committed; and

WHEREAS, based upon its review of the expenditures and commitments made by the owner and the evidence submitted in support of them, the Board agrees that such costs are substantial; and

WHEREAS, absent any other consideration, the Board would find that the degree of work done and expenditures incurred would be sufficient to meet the common law vesting standard; and

WHEREAS, as to the serious loss that the owner would incur if required to construct the Building under the current zoning, the applicant states that the floor area would be reduced from 61,031 sq. ft. to 43,631 sq. ft. (from an FAR of 2.7 to an FAR of 2.2); and

WHEREAS, the applicant further states that the current zoning would require a reduction in the base height of the Building from 60 feet to 45 feet, and a reduction in the total building height from 70 feet to 55 feet, resulting in the loss of the top two floors of the Building; and

WHEREAS, the applicant states that this would lead to financial loss because approximately 30 percent of the floor area would be lost; and

WHEREAS, serious loss can be substantiated by a determination that there would be diminution in income if the FAR requirement of the new zoning were imposed; and

WHEREAS, the applicant states that a 30 percent reduction in floor area would result in a net loss of $11,758,645 in rental income, assuming a 5.5 percent capitalization rate; and

WHEREAS, the Board agrees that the significant reduction in floor area will result in a serious loss; and

WHEREAS, the Board notes that the applicant would also suffer financial loss under the current zoning because further architectural and engineering costs would be required to reconfigure and redesign the Building to account for the loss of the top two floors; and

WHEREAS, the Board additionally notes that a serious loss 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 Board further notes that the Building would have to be redesigned at significant cost, and that the prior architectural and engineering costs related to the plans accepted by DOB could not be recouped; 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 of the premises as of the Enactment Date; and

WHEREAS, at hearing, the Opposition argued that the instant application must be denied because the owner was aware of the City's intention to rezone the subject site and should therefore not be able to take advantage of the vested rights doctrine to escape the zoning change; and

WHEREAS, the Board notes that ignorance of a zoning change is not a condition to the vesting of a permit; and

WHEREAS, the Opposition also argued that the subject application must be denied because the owner did not begin construction of the Building until several years after purchasing the subject site in 2004, and should not be afforded relief for its purportedly self-created delay; and

WHEREAS, the Board notes that the purchase date of the subject site has no bearing on the analysis of

whether the applicant's rights have vested under the common law; and

WHEREAS, the Opposition also argued that the subject application must be denied because the owner "manipulated the system" by developing on a merged zoning lot; and

WHEREAS, the Board notes that real estate development routinely includes the development of merged zoning lots, in which parties enter into an agreement to allocate floor area between different portions of the resulting zoning lot, and that the merger of a zoning lot is not a ground for denial of the instant application; and

WHEREAS, as discussed in the BZY Resolution, the Opposition also expressed concerns about various other aspects of this application; and

WHEREAS, the Board asked the applicant to respond to these concerns, and for the reasons set forth in the BZY Resolution, the Board finds that none of these contentions negates a determination that the owner has obtained a vested right to continue construction of the proposed enlargement; and

WHEREAS, while the Board is not swayed by any of the Opposition's arguments, it nevertheless understands that the community and the 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, the owner has met the test for a common law vested rights determination, and 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 the common law and is entitled to the requested reinstatement of the Permit, and all other related permits necessary to complete construction.

Therefore it is Resolved that this appeal made pursuant to the common law of vested rights requesting a reinstatement of New Building Permit No. 302290777-01-NB, as well as all related permits for various work types, either already issued or necessary to complete construction, is granted, and the Board hereby extends the time to complete the proposed development for four years from the date of this resolution, to expire on November 25, 2012.

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.
Printed in Bulletin No. 46, Vol. 93.

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