

297-12-A

APPLICANT – Law Office of Fredrick A. Becker, for 28-20 Astoria Blvd LLC, owners.

SUBJECT – Application October 17, 2012 – Appeal seeking a determination that the owner of the premises has acquired a common law vested right to complete construction commenced under the prior R6 zoning district. R6-A/C1-1 zoning district.

PREMISES AFFECTED – 28-18/20 Astoria Boulevard, south side of Astoria Boulevard, approx. 53.87' west of 29th Street, Block 596, Lot 45, Borough of Queens.

COMMUNITY BOARD #1Q

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 Montanez5
Negative:.....0

THE RESOLUTION –

WHEREAS, this is an application requesting a Board determination that the owner of the premises has obtained the right to complete construction of a seven-story mixed residential and commercial building under the common law doctrine of vested rights; and

WHEREAS, a public hearing was held on this application on March 19, 2013, after due notice by publication in *The City Record*, and then to decision on April 23, 2013; and

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

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

WHEREAS, the site is located on the south side of Astoria Boulevard, between 28th Street and 29th Street; and

WHEREAS, the site has a lot area of 6,701 sq. ft. and 45.85 feet of frontage along Astoria Boulevard; and

WHEREAS, the applicant proposes to develop the site with a seven-story mixed residential and commercial building with an FAR of 3.0, and 28 dwelling units (the “Building”); and

WHEREAS, the subject site is currently located partially within an R6B zoning district and partially within an R6A (C1-3) zoning district, but was formerly located within an R6 (C1-2) zoning district; and

WHEREAS, the Building complies with the former R6 (C1-2) zoning district parameters; specifically with respect to floor area; and

WHEREAS, however, on May 25, 2010 (the “Enactment Date”), the City Council voted to adopt the Astoria Rezoning, which rezoned the site to partially R6B and partially R6A (C1-3), as noted above; and

WHEREAS, as a result of the rezoning, the Building does not comply with the district parameters regarding maximum floor area; and

WHEREAS, a threshold matter for the vested rights analysis is that a permit be issued lawfully prior to the Enactment Date and that the work was performed pursuant to such lawful permit; and

WHEREAS, the applicant states that New Building Permit No. 402604669-01-NB (the “Permit”) was issued to the owner by the Department of Buildings (“DOB”) on

February 13, 2008; and

WHEREAS, the applicant notes that ZR § 11-31(c)(1) classifies the construction authorized under the Permit as a “minor development”; and

WHEREAS, the applicant notes that, per ZR §§ 11-331 and 11-332, where all work on foundations for a minor development has been completed prior to the effective date of an applicable amendment to the Zoning Resolution, work may continue for two years, and if after two years, construction has not been completed and a certificate of occupancy has not been issued, the permit shall automatically lapse and the right to continue construction shall terminate; and

WHEREAS, the applicant states that, as of the Enactment Date, the entire foundation for the building was completed; and

WHEREAS, accordingly, the applicant states, DOB recognized the owner’s right to continue construction under the Permit for two years until May 25, 2012, pursuant to ZR § 11-331; and

WHEREAS, however, as of May 25, 2012, construction was not complete and a certificate of occupancy had not been issued; therefore, on that date the Permit lapsed by operation of law; and

WHEREAS, by letter dated December 28, 2012, DOB confirmed that the Permit was lawfully issued; and

WHEREAS, the Board notes that when work proceeds under a valid permit, a common law vested right to continue construction after a change in zoning generally exists if: (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, specifically, as held in Putnam Armonk, Inc. v. Town of Southeast, 52 A.D.2d 10 (2d Dept. 1976), 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, 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, as to substantial construction, the applicant states that prior to May 25, 2010, the owner had completed the following work: demolition, excavation, footings and the entire foundation for the building, including foundation bracing and strapping, and underpinning existing foundations; since May 25, 2010, the applicant states that the entire structural steel framework for the building has been completed; and

WHEREAS, in support of this assertion, the applicant submitted the following evidence: invoices, concrete delivery slips, construction contracts, plans highlighting the work completed, and photographs of

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the site showing certain aspects of the completed work; and

WHEREAS, the Board has reviewed the representations as to the amount and type of work completed before and after the Enactment Date and the documentation submitted in support of these representations, and agrees that it establishes that substantial work was performed; and

WHEREAS, the Board concludes that, given the size of the site, and based upon a comparison of the type and amount of work completed in this case with the type and amount of work discussed by New York State courts, a significant amount of work was performed at the site during the relevant period; 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 and accordingly, these costs are appropriately included in the applicant's analysis; and

WHEREAS, the applicant states that prior to the Enactment Date, the owner expended \$1,539,000, including hard and soft costs and irrevocable commitments, out of \$4,583,000 budgeted for the entire project; and

WHEREAS, the applicant states that since the Enactment Date, the owner has expended \$148,285.45, including \$31,823.54 in soft costs; and

WHEREAS, as proof of the expenditures, the applicant has submitted construction contracts, copies of cancelled checks, invoices, and accounting tables; and

WHEREAS, thus, the expenditures up to the Enactment Date represent approximately 30 percent of the projected total cost; and

WHEREAS, the Board considers the amount of expenditures significant, both for a project of this size, and when compared with the 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 examines 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 states that if the owner is not permitted to vest under the former R6 (C1-2) zoning, the maximum permitted residential floor area ratio would decrease from the approved 3.0 FAR for the entire lot to 3.0 FAR for the R6A portion of the lot and 2.0 FAR for the R6B portion of the lot, representing a loss of 1,313 sq. ft. of buildable residential floor area in

the building; the applicant also notes that while the maximum permitted commercial floor area ratio is the same (2.0 FAR) under the former and current zoning, the maximum permitted community facility floor area ratio has been decreased from 4.8 FAR for the entire lot to 3.0 FAR for the R6A portion of the lot and 2.0 FAR for the R6B portion of the lot; and

WHEREAS, the applicant further states that complying with the current zoning would result in a reduction of dwelling units from 28 to 24, and the elimination of the community facility and commercial spaces at the site; and

WHEREAS, the applicant represents that the 1,313 sq. ft. loss in residential floor area, the loss of four units, and the elimination of the community facility and commercial spaces in the building would reduce the annual rental income from approximately \$884,500 to \$576,000; in addition, such changes to the building decrease its market value from \$10,614,000 to \$6,912,000; and

WHEREAS, the applicant states these decreases in income and market value exceed 30 percent of the original projected income and market value, while the difference in construction costs between completing the building as originally designed and completing the building to comply with the current zoning is only three percent; as such, the applicant asserts, the owner faces a serious financial hardship if a vested right to complete construction is not recognized; and

WHEREAS, the Board agrees that the reduction in the floor area and dwelling units of the building results in a significant loss of income and market value, which constitutes a serious economic loss, and that the evidence submitted by the applicant supports this conclusion; the Board also notes that the owner would incur additional costs in redesigning the building to comply with the current zoning; and

WHEREAS, in sum, the Board has reviewed the representations as to the work performed and the expenditures made both before and after the Enactment Date, the representations regarding 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.

Therefore it is Resolved that this application made pursuant to the common law of vested rights requesting a reinstatement of Permit No. 402604669, 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, April 23, 2013.

A true copy of resolution adopted by the Board of Standards and Appeals, April 23, 2013.

Printed in Bulletin No. 17, Vol. 98.

Copies Sent

To Applicant

Fire Com'r.

Borough Com'r.

