

297-12-A

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

SUBJECT – Application April 6, 2015 – Extension of Time to complete construction in connection with a previously approved common law vested rights application. 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 00596, Lot 0045, Borough of Queens.

COMMUNITY BOARD #1Q

ACTION OF THE BOARD – Application granted.

THE VOTE TO GRANT –

Affirmative: Chair Perlmutter, Vice-Chair Hinkson, Commissioner Ottley-Brown and Commissioner Montanez.....4
Negative:.....0

THE RESOLUTION –

WHEREAS, this application seeks a determination from the Board that the owner of the subject site has obtained the right to complete construction of a five-story, mixed residential and community facility building under the common law doctrine of vested rights; and

WHEREAS, a public hearing was held on this application on August 25, 2015, after due notice by publication in *The City Record*, with a decision rendered on that date; 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, under construction at the site is 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, on February 13, 2008, the Department of Buildings (“DOB”) issued New Building Permit No. 402604669-01-NB (hereinafter, the “Building Permit”) authorizing construction of the Building; 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 floor area ratio and building height; 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, subsequently, the applicant sought a two-year extension to complete construction pursuant to the common law doctrine of vested rights, which the Board granted on April 23, 2013, under the subject calendar number (the “Previous Grant”); and

WHEREAS, the Board notes its determination in the Previous Grant that the Permit lawfully issued prior to the Enactment Date; and

WHEREAS, the Board notes that when work proceeds under a lawfully-issued 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 AD 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 AD 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 noted above, the applicant obtained

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a permit to construct the Building and performed certain work prior to the Enactment Date; and

WHEREAS, the Board notes that work completed prior to the Enactment Date constituted substantial construction and/or substantial expenditures as stated or implied in the Previous Grant; and

WHEREAS, the applicant submits, and the Board finds, that the work performed prior and subsequent to the Previous Grant constitutes substantial construction and, similarly, that expenditures related thereto were similarly substantial; and

WHEREAS, specifically, the applicant notes that as of the Enactment Date, the owner of the site had completed demolition, excavation, footings and the entire foundation of the subject building, including foundation bracing and strapping and underpinning of the existing foundation; and

WHEREAS, the applicant notes further that construction pursuant to the initial permits continued after the Enactment Date; and

WHEREAS, the applicant notes further that as of May 25, 2012, the following work was complete: (1) demolition; (2) excavation; (3) footings and foundation work; and

WHEREAS, the applicant represents that a substantial portion of the structural steel for the building was also complete as of May 25, 2012; and

WHEREAS, the applicant states that subsequent to the Previous Grant it was able to obtain financing contingent thereupon, and that it obtained new construction loans in August of 2013, and re-commenced construction in September of 2013; and

WHEREAS, the applicant states that since the Previous Grant, the following additional work has been performed: (1) completion of the building exterior; (2) all rough plumbing, including sections; (3) installation of all framing, sheetrock and floors; (3) rough electrical work; (4) roof work; (5) HVAC installation; (6) connection to gas, water and sewer lines; and (7) controlled inspections, TR1s, TR2s, and TR3s; and

WHEREAS, the applicant notes that the Previous Grant included a finding that substantial expenditures were incurred at the Site; 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 notes that, as reflected in the Previous Grant, as of the Enactment Date, soft cost expenditures accepted by the board were \$520,000.00 and

A true copy of resolution adopted by the Board of Standards and Appeals, August 25, 2015.

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To Applicant

Fire Com'r.

Borough Com'r.

hard cost expenditures were \$1,019,000.00, for a total expenditure of \$1,539,000.00; and

WHEREAS, the applicant represents that in addition to the foregoing expenditures made prior to the Enactment Date, the applicant has incurred an additional \$3,576,000.00 in hard and soft costs since the Previous Grant, including \$3,105,000.00 in hard costs and \$471,000.00 in soft costs; and

WHEREAS, the applicant has submitted payments and receipts to substantiate the foregoing claim; 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 articulated in the Previous Grant, and as the applicant re-states, if the applicant is not allowed to complete construction of the building under the previous zoning the number of units it could construct would be reduced from 28 to 24, with a decrease in market value of more than \$3,000,000.00; and

WHEREAS, in addition to the loss of \$3,000,000.00, the applicant would incur additional loss if required to reconfigure the now substantially completed building, in the amount of \$3,600,000.00; and

WHEREAS, thus, the applicant concludes and the Board find that if the applicant were not allowed to complete construction under the Building Permit, it would incur a loss of \$6,600,000.00; 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 has accrued to the owner of the premises.

Therefore it is Resolved, that this application made pursuant to the common law doctrine of vested rights requesting a reinstatement of Permit No. 402604669-01-NB, 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, August 25, 2015.

