

307-08-BZY

APPLICANT – Howard Zipser, Akerman Senterfitt LLP, for 163 Orchard Street LLC, owner.

SUBJECT – Application December 17, 2008 – Extension of time to complete construction (§11-331) of a minor development commenced prior to the amendment of the zoning district regulations. C4-4A Zoning District.

PREMISES AFFECTED – 163 Orchard Street, through lot between Orchard and Houston Street between Stanton and Rivington Street, Block 416, Lot 58, Borough of Manhattan.

COMMUNITY BOARD #3M

APPEARANCES –

For Applicant: Calvin Wong.

ACTION OF THE BOARD – Application granted.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice-Chair Collins, Commissioner Otley-Brown, Commissioner Hinkson and Commissioner Montanez.....5

Negative:.....0

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 an 11-story transient hotel (Use Group 5) building; and

WHEREAS, a public hearing was held on this application on March 3, 2009, after due notice by publication in *The City Record*, with continued hearings on March 24, 2009 and March 31, 2009, and then to decision on April 21, 2009; and

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

WHEREAS, the subject site is a through-block site with frontages on Orchard Street and Allen Street between Stanton Street and Rivington Street; and

WHEREAS, the site has a width of 26’-6” and a depth of 87’-6”, and a total lot area of approximately 2,319 sq. ft.; and

WHEREAS, the site is proposed to be developed with an 11-story transient hotel (Use Group 5) building (the “Building”); and

WHEREAS, the Building is proposed to have a total floor area of approximately 13,911 sq. ft. (5.99 FAR), a street wall height of 22’-0” and a building height of 132’-0”; and

WHEREAS, the site was formerly located within a C6-1 zoning district; and

WHEREAS, on July 8, 2008, New Building Permit No. 104762570-01-NB (the “Permit”) was issued by the Department of Buildings (“DOB”) permitting construction of the Building, and work commenced on July 28, 2008; and

WHEREAS, on November 19, 2008 (hereinafter, the “Enactment Date”), the City Council voted to enact the East Village / Lower East Side Rezoning, which changed

the zoning district to C4-4A; and

WHEREAS, the applicant represents that the Building complies with the former C6-1 zoning district parameters; specifically, the proposed 5.99 FAR, street wall height of 22’-0” and building height of 132’-0” were permitted; and

WHEREAS, because the site is now within a C4-4A zoning district, the Building would not comply with the maximum FAR of 4.0, the minimum required street wall height of 40’-0”, or the maximum total building height of 80’-0”; and

WHEREAS, because the Building violated these provisions of the C4-4A zoning district 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 November 24, 2008 halting work on the building; 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 C6-1 zoning district; 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,

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and is issued prior to any applicable amendment to this Resolution;” and

WHEREAS, the record indicates that a permit was issued to the owner by DOB on July 8, 2008 authorizing construction of a ten-story transient hotel (Use Group 5) building; and

WHEREAS, the applicant states that on October 24, 2008, a PAA application to amend the permit an 11-story hotel was approved by DOB; and

WHEREAS, by letter dated February 13, 2009, DOB stated that the Permit was lawfully issued on December 5, 2007; and

WHEREAS, DOB then initiated a special audit review of the Permit on February 20, 2009, and certain zoning and Building Code objections were raised (the “Objections”); and

WHEREAS, by letter dated March 27, 2009, DOB reported that the Objections had been resolved and therefore, the Permit was lawfully issued; and

WHEREAS, thus, the Board finds that the Permit was lawfully issued by DOB on July 8, 2008; and

WHEREAS, accordingly, the Board finds that the record contains sufficient evidence to satisfy the findings set forth in ZR § 11-31(a) and that 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 July 28, 2008 and was completed on November 15, 2008, and that substantial progress was made on the foundation as of the Enactment Date; and

WHEREAS, further, an affidavit of the contractor states that the entire site was excavated as of the Enactment Date; 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 approximately 80 percent of the foundation was complete as of the Enactment Date; and

WHEREAS, specifically, the applicant states that as of the Enactment Date, all shoring and underpinning was complete, all of the required 26 H-piles and foundation rebar was installed and 246 of the 450 cubic yards of concrete for the foundation was poured; and

WHEREAS, a Stop Work Order was issued by DOB on September 3, 2008 which was not fully rescinded until November 10, 2008, at hearing the Board asked why any work performed during that period should be considered; and

WHEREAS, in response, the applicant states that,

to ensure the stability of the neighboring building, part of the eastern portion of the site was backfilled and temporary bracing was installed immediately after the issuance of the September 3, 2008 Stop Work Order, under the supervision of DOB, and should therefore be considered as progress on the foundations; and

WHEREAS, the applicant further states that after the backfilling and bracing were performed, DOB issued a second Stop Work Order on September 10, 2008 which was partially lifted on September 15, 2008 to install rakers and shoring, and partially lifted on September 30, 2008 to permit installation of mat slab and foundation walls; and

WHEREAS, the applicant states that concrete pouring for additional underpinning resumed on October 3, 2008 after the stop work order was partially lifted, and concrete pouring for the mat slab began on October 22, 2008, when the pour was permitted; and

WHEREAS, the applicant states that all work performed between the issuance of the stop work order on September 3, 2008 and its full lift on November 10, 2008 was authorized by DOB; and

WHEREAS, the DOB Building Information System indicates that the stop work order was partially lifted on September 15, 2008 and September 30, 2008 to perform the aforementioned work; and

WHEREAS, the applicant states that the subject application considers only work performed before the Enactment Date which was authorized by DOB; and

WHEREAS, the Board notes that the Stop Work Order issued by DOB on November 24, 2008 indicated that the foundation was approximately 70 percent complete as of the Enactment Date; and

WHEREAS, the applicant states that other essential work required to complete the foundation includes preparation, mobilization and excavation and that the total completed work comprises approximately 80 percent to 85 percent of the work required to complete the foundation

WHEREAS, the applicant states that if underpinning work were not considered, 164 of the 268 cubic yards of concrete required for the foundation was poured as of the Enactment Date, which is 61 percent of the concrete required to be poured to complete the foundation; and

WHEREAS, an affidavit by the project manager states that three additional days would be necessary to pour the remaining 204 cubic yards of concrete to complete the foundation; and

WHEREAS, the applicant has also submitted financial documents, including invoices, cancelled checks, contracts, concrete pour tickets, a foundation survey, and dated photographs which reflect significant expenditure associated with the excavation and foundation work incurred as of the Enactment Date; and

WHEREAS, specifically, the applicant states

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\$404,844, or approximately 49 percent, of the total estimated foundation cost of approximately \$816,000 was spent 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, accordingly, based upon its consideration of the arguments made by the applicant 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. 104762570-01-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 October 21, 2009.

Adopted by the Board of Standards and Appeals, April 21, 2009.

**A true copy of resolution adopted by the Board of Standards and Appeals, April 21, 2009.
Printed in Bulletin Nos. 16-17, Vol. 94.**

Copies Sent

To Applicant

Fire Com'r.

Borough Com'r.