

**320-09-A**

APPLICANT – Kramer Levin Naftalis & Frankel, LLP, for 340 CS Holdings, LLC, owner.

SUBJECT – Application November 24, 2009 – Appeal seeking a common law vested right to complete construction commenced under the prior R6/C1-3 zoning district. R6A /C2-4 & R6B zoning district.

PREMISES AFFECTED – 340 Court Street, 283-291 Union Street, 292-298 Sackett Street, Block 339, Lot 19, Borough of Brooklyn.

**COMMUNITY BOARD #6BK**

APPEARANCES –

For Applicant: James Power.

**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 construction on a development consisting of a seven-story mixed-use residential/commercial/community building and 11 four-story townhouses under the common law doctrine of vested rights; and

WHEREAS, a public hearing was held on this application on February 2, 2010, after due notice by publication in *The City Record*, and then to decision on February 23, 2010; and

WHEREAS, the premises and surrounding area had a site and neighborhood examination by Chair Srinivasan; and

WHEREAS, Community Board 6, Brooklyn, recommends approval of the application; and

WHEREAS, the site is located on a through lot bounded by Sackett Street to the north, Court Street to the east, and Union Street to the south, and has a lot area of 43,753 sq. ft.; and

WHEREAS, the applicant proposes to develop the site with a seven-story mixed-use residential / commercial / community facility building and 11 four-story townhouses (the “Development”), a total of 119,271 sq. ft. of floor area (2.73 FAR), a base height ranging between 38’-0” and approximately 48’-8”, and a maximum building height of 70’-0”; and

WHEREAS, the portion of the subject site within 100 feet of Court Street is currently located within a C2-4 (R6A) zoning district and the remaining portion of the site is located within an R6B district; prior to the rezoning, the portion of the site within 150 feet of Court Street was located within a C1-3 (R6) district and the remaining portion was located within an R6 district; and

WHEREAS, the Development complies with the former C1-3 (R6) and R6 zoning district parameters; specifically with respect to floor area and height; and

WHEREAS, however, on October 28, 2009 (the “Enactment Date”), the City Council voted to adopt the Carroll Gardens/Columbia Street Rezoning, which rezoned the site to C2-4 (R6A) and R6B, as noted above; and

WHEREAS, the Development does not comply with the new zoning district parameters as to floor area and height; and

WHEREAS, because the Development is not in compliance with these provisions of the C2-4 (R6A) and R6B zoning district and work on the foundation was not completed as of the Enactment Date, the permits lapsed by operation of law; and

WHEREAS, the applicant now 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 construction; and

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

WHEREAS, the Board notes that Permit Nos. 30132200-01-EW-OT, 310153213-01-NB, 320023620-01-NB, 320023639-01-NB, 320023611-01-NB, 320029768-01-NB, 320029777-01-NB, 320037900-01-NB, 320031185-01-NB, 320022104-01-NB, 320020357-01-NB, 320020366-01-NB, 320020375-01-NB, (the “Permits”), which authorized construction of the Development pursuant to C1-3 (R6) and R6 zoning district regulations were issued on May 30, 2008, June 24, 2008, October 16, 2009, October 20, 2009, and October 21, 2009; and

WHEREAS, by letter dated December 23, 2009, DOB stated that the Permits were lawfully issued, authorizing construction of the proposed Development prior to the Enactment Date; and

WHEREAS, the Permits lapsed by operation of law on the Enactment Date because the plans did not comply with the new C2-4 (R6A) and R6B zoning district regulations and DOB determined that the Development’s foundation was not complete; and

WHEREAS, the Board has reviewed the record and agrees that the Permits were lawfully issued to the owner of the subject premises prior to the Enactment Date; and

WHEREAS, the applicant represents that if DOB had classified the Development as a major development pursuant to ZR § 11-31(c)(2)(i), it would have satisfied the vesting criteria of ZR § 11-331; 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

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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;” and

WHEREAS, the Board notes that ZR § 11-31(c)(1)(i) defines a “minor development” as the construction of any single building which will be non-conforming or non-complying under the provisions of any applicable amendment to the Zoning Resolution; and

WHEREAS, the Board further notes that ZR § 11-31(c)(2)(i) defines a “major development” as the construction of two or more buildings on a single zoning lot, which will be non-complying under the provisions of any applicable amendment to the Zoning Resolution; and

WHEREAS, the applicant states that because all of the proposed buildings on the subject site touch, DOB determined that the proposed development constitutes a single building for purposes of the Zoning Resolution, and therefore is defined as a “minor development;” and

WHEREAS, as a result, DOB concluded that the Development did not meet the vesting criteria for a minor development under ZR § 11-331, which requires that all foundation work for the development must be complete prior to the effective date of the rezoning; and

WHEREAS, the applicant represents that the foundation for the seven-story mixed-use portion of the Development was completed prior to the effective date of the rezoning; therefore if DOB had classified the Development as a major development, it would have satisfied the vesting criteria of ZR § 11-331 because the foundations for at least one building in the development were completed prior to the effective date of the rezoning; 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 the Enactment Date, the owner had completed the following: 100 percent of site preparation for the entire site, 100 percent of excavation and foundation work for the seven-story mixed-use portion of the Development, including the pouring of 2,003 cubic yards of concrete, or 73 percent of the concrete required for all of the foundations; and

WHEREAS, the applicant represents that the construction completed thus far constitutes the most difficult and complex portions of the Development; and

WHEREAS, the applicant states that the remaining work required to complete the structural foundation consists of the completion of form work for the townhouses, the placing of rebar, and the pouring of concrete, which will not present any particular complications or delays; and

WHEREAS, the applicant states that work pursuant to the Permits was performed for 200 working days prior to the Enactment Date, and that approximately 320 more working days are required to complete the Development, including approximately 40 days of work to fully complete the excavation and foundations for the townhouses; and

WHEREAS, in support of these assertions, the applicant submitted the following evidence: photographs of the site showing the amount of work completed prior to the Enactment Date; concrete pour tickets; a construction contract; a construction log; affidavits from the owner, contractor, and engineer; a letter of completion from DOB regarding Job No. 310132200; and copies of cancelled checks; and

WHEREAS, the Board has reviewed the representations as to the amount and type of work completed before 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

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applicant's analysis; and

WHEREAS, the applicant states that prior to the Enactment Date, the owner expended \$11,271,781, including hard and soft costs and irrevocable commitments, out of \$61,664,800 budgeted for the entire project; and

WHEREAS, as proof of the expenditures, the applicant has submitted a construction contract, cancelled checks, accounting tables, and concrete pour tickets; and

WHEREAS, in relation to actual construction costs and related soft costs, the applicant specifically notes that the owner had paid \$5,781,132 in costs related to site preparation, excavation, installation of foundations, architectural and engineering fees; and

WHEREAS, the applicant further states that the owner also irrevocably owes an additional \$5,490,049 in connection with costs committed to the development under irrevocable contracts prior to the Enactment Date; and

WHEREAS, thus, the expenditures up to the Enactment Date represent approximately 18 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 the serious loss, the applicant represents that the rezoning would result in a serious loss for the owner, as it would decrease the maximum floor area of the project by 14,677 sq. ft., from 119,270 sq. ft. to 104,593 sq. ft.; and

WHEREAS, the applicant states that the decrease in floor area would result in the loss of one entire townhouse (2,234 sq. ft.) in the R6B portion of the site and 12,344 sq. ft. of residential floor area in the seven-story mixed-use residential/commercial/ community facility building proposed for the C2-4 (R6A) portion of the site; and

WHEREAS, the applicant represents that, based on anticipated sales prices, the total diminution of revenue would equal approximately \$12,900,000 for the seven-story mixed-use building and \$2,200,000 for the townhouses; and

WHEREAS, further, the applicant states that the remaining townhouses would have to be redesigned to comply with the new maximum base height of 40 feet, which would be achieved by lowering the floor-to-ceiling heights, resulting in decreased sales prices for

the townhouses and an economic loss of approximately \$2,000,000; and

WHEREAS, the applicant further states that a full redesign of the seven-story mixed-use building would be required because the elimination of floor area on the upper floors would alter the unit mix of the project, thereby affecting the apartments on the lower floors; and

WHEREAS, the applicant represents that the redesign would result in \$1,000,000 in additional architectural and engineering costs, and \$1,878,000 in additional soft costs and carrying costs; and

WHEREAS, the Board agrees that the loss of one of the townhouses and the reduction in floor area of the seven-story mixed-use building, and the diminution in value because of the need to redesign, constitutes 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 Development had accrued to the owner of the premises as of the Enactment Date.

*Therefore it is Resolved* that this appeal made pursuant to the common law of vested rights requesting a reinstatement of the New Building Permits associated with DOB Application Nos. 310153213-01-NB, 320023620-01-NB, 320023639-01-NB, 320023611-01-NB, 320029768-01-NB, 320029777-01-NB, 320037900-01-NB, 320031185-01-NB, 320022104-01-NB, 320020357-01-NB, 320020366-01-NB and 320020375-01-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 four years from the date of this grant.

Adopted by the Board of Standards and Appeals, February 23, 2010.

**A true copy of resolution adopted by the Board of Standards and Appeals, February 23, 2010.**

**Printed in Bulletin Nos. 8-9, Vol. 95.**

**Copies Sent**

**To Applicant**

**Fire Com'r.**

**Borough Com'r.**