

353-05-BZY

APPLICANT – Cozen & O'Connor for Emet Veshlom Development, LLC, owner.

SUBJECT – Application December 14, 2005 – Proposed extension of time to complete construction of a minor development pursuant to Z.R. §11-331 for a 38 unit multiple dwelling and community facility under the prior Zoning R6. New Zoning District is R6B as of November 16, 2005.

PREMISES AFFECTED – 614 7th Avenue, Brooklyn, northwest corner of 7th Avenue and 23rd Street, Block 900, Lot 39, Borough of Brooklyn.

COMMUNITY BOARD #7BK

APPEARANCES –

For Applicant: Peter Geis.

ACTION OF THE BOARD – Application denied.

THE VOTE TO GRANT –

Affirmative:0

Negative: Chair Srinivasan, Vice-Chair Babbar, and Commissioner Collins.....3

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 required foundation of a proposed five-story multiple dwelling, filed on behalf of the developer; and

WHEREAS, a public hearing was held on this application on March 29, 2006 after due notice by publication in *The City Record*, with continued hearings on April 25 and June 6, 2006; on June 6, the matter was set for decision; and

WHEREAS, on July 18, 2006 the matter was reopened for a further hearing on August 15, 2006, on which date the matter was again set for decision on September 12, 2006; and

WHEREAS, the site was inspected by a committee of the Board, consisting of Chair Srinivasan, Vice-Chair Babbar, and Commissioner Collins; and

WHEREAS, Community Board 7, Brooklyn, opposed the application, stating that the foundation was not complete and that several stop work orders and violations were issued; and

WHEREAS, additionally, the South Park Slope Community Group and the Concerned Citizens of Greenwood Heights opposed the application, stating that the foundation work was not complete, that work was done after hours, that work was done in an unsafe manner, and that the permit under which performed was done was revoked, and only reissued one day before the rezoning; and

WHEREAS, certain elected officials, including State Senator Velmanette Montgomery, State Assemblyman James Brennan, Public Advocate Betsy Gotbaum, and City Council members Sara M. Gonzalez and Bill de Blasio, also provided testimony in opposition to the application; and

WHEREAS, the Board notes that some of the testimony provided by the above individuals and entities related directly to the application; and

WHEREAS, some of the opposition testimony, however, reflected a general objection to any development on the site that does not comply with the new zoning

district parameters (discussed below), or that interferes with the vista in Greenwood Cemetery of the Minerva statue and its alignment with the Statue of Liberty; and

WHEREAS, the Board understands that many community residents were particularly concerned about the size of the proposed building, and with the potential interference with the vista; and

WHEREAS, while testimony that reflected this sentiment was accepted into the record, the Board's determination as reflected herein is guided by applicable legal principles, and was based on consideration of the legal claims made by the applicant as well as arguments made by the Department of Buildings (DOB); and

WHEREAS, the subject site is located on the northwest corner of 7th Avenue and 23rd Street; and

WHEREAS, the subject site has a total lot area of approximately 10,016 sq. ft.; and

WHEREAS, the site is proposed to be developed with a five-story, 38-unit multiple dwelling (hereinafter, the "Proposed Development"); and

WHEREAS, on August 3, 2005, pursuant to DOB's professional certification program, the developer pre-filed an application for a New Building permit, under Application No. 301984191-01-NB, for the Proposed Development; and

WHEREAS, New Building Permit No. 301791318-01-NB (hereinafter, the "NB Permit") was subsequently obtained by the developer on August 31, 2005, and work commenced shortly thereafter; and

WHEREAS, as discussed in greater detail below, DOB states that the NB Permit was obtained based upon a set of plans with a perforation date of August 30, 2005; and

WHEREAS, the applicant states that excavation commenced on September 19, 2005, and that concrete was first poured and concrete blocking was first installed on September 22, 2005; and

WHEREAS, on October 5, 2005, DOB initiated a special audit review of the NB Permit (the "Audit"), and certain zoning and Building Code objections were raised; and

WHEREAS, the specific audit objections concern ZR requirements related to floor area, lot coverage, height and setback, and inner courts, and Building Code requirements related to sprinklers, construction classification, and exit passageways (hereinafter, the "Objections"); and

WHEREAS, on October 11, 2005, subsequent to the Audit, DOB issued a letter to the developer and the project architect providing notice of its intent to revoke the NB Permit based on the Objections (the "Notice of Intent"); a stop work order (the "October 11 SWO") was also issued on this date; and

WHEREAS, the applicant states that as of October 11, 2005, approximately 86 percent of the concrete blocking and cement work has been performed; and

WHEREAS, DOB notes that the NB Permit was formally revoked on November 3, 2005 (the "Revocation"), because the applicant did not provide a

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response to the Objections that precipitated the Notice of Intent; and

WHEREAS, the applicant represents that work resumed on November 10, 2005, the day on which a response to the Audit was finally submitted to DOB by the applicant; and

WHEREAS, the applicant states that this response was allegedly conditionally accepted by DOB on November 10, and the developer believed that work could resume; and

WHEREAS, however, DOB disputes that the October 11 SWO was lifted on November 10; and

WHEREAS, DOB notes instead that on November 15, 2005, under the same DOB application number, the NB Permit was reissued, as evidenced by a letter from the Deputy Borough Commissioner of DOB's Brooklyn office (the "November 15 Letter"); and

WHEREAS, DOB states that and the conditional audit acceptance was not formalized until November 15, 2005 and that the October 11 SWO was in effect until then; and

WHEREAS, the applicant states that no work was performed on November 15, 2005; and

WHEREAS, when construction commenced, the site was within an R6 zoning district; and

WHEREAS, the Proposed Development complied with the R6 zoning in terms of height and floor area; and

WHEREAS, however, as noted above, on November 16, 2005 (hereinafter, the "Rezoning Date"), the City Council voted to enact the Park Slope South rezoning proposal, which changed the site's zoning from R6 to R6B; and

WHEREAS, the Proposed Development would not comply with the new R6B district provisions concerning height and floor area; and

WHEREAS, specifically, the Proposed Development has a height of 68 feet (50 feet is the maximum permitted in the R6B zoning district) and an FAR of 3.0 (2.0 is the maximum permitted); and

WHEREAS, because the Proposed Development violates these provisions of the R6B zoning and work on the required foundation was not completed by the Rezoning Date, the reinstated permit lapsed by operation of law; and

WHEREAS, the developer of the Proposed Development now applies to the Board to renew the NB Permit pursuant to ZR § 11-331, so that the Proposed Development may be fully constructed under the prior R6 zoning; 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 as set forth in Section 11-31 paragraph (a), 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, ZR § 11-31(a) reads: "For the purposes of Section 11-33, relating to Building Permits Issued Before Effective Date of Amendment to this Resolution, the following terms and general provisions shall apply: (a) 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, and is issued prior to any applicable amendment to this Resolution. In case of dispute as to whether an application includes "complete plans and specifications" as required in this Section, the Commissioner of Buildings shall determine whether such requirement has been met."; and

WHEREAS, the Board notes that the central issue in this case is whether the NB Permit satisfies the requirements of ZR § 11-31(a); and

WHEREAS, in a submission dated March 28, 2006, DOB stated that its position was that the reissued permit lapsed by operation of law on the Rezoning Date; and

WHEREAS, in its second submission, dated April 11, 2006, DOB stated that because the October 11 SWO was not formally lifted until November 15, 2005, the Board should not consider work performed from November 10 until November 15; and

WHEREAS, in a submission dated May 9, 2006, DOB states that the NB Permit as obtained on August 31, 2005 was invalid and properly revoked, given that that the plans on which it was based presented the ZR and Building Code non-compliances referenced above; and

WHEREAS, DOB asked that the Board not consider any work performed under the NB Permit, but only consider that work performed after the reissued permit was obtained on November 15, 2005; and

WHEREAS, DOB states that a reissued permit "should be considered a new permit for vesting purposes lest an applicant benefit from work retroactively legitimized in error"; and

WHEREAS, DOB also indicates in its May 9 submission that it was auditing the plans on which the reissued permit was based; and

WHEREAS, in its final submission, dated July 13, 2006, DOB reports that this second audit revealed that the plans upon which the reissued permit was obtained were acceptable, but maintains its position that the

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professionally certified NB Permit was not valid upon issuance on August 31, 2005 and properly revoked; and

WHEREAS, DOB also states that the work performed under the NB Permit, from around August 31 to October 10, 2005, should not be considered by the Board during its assessment of whether excavation was complete and substantial progress was made on foundations; and

WHEREAS, DOB notes in its July 13 submission that pursuant to ZR § 11-31(a), a lawfully issued permit must be based on an approved application showing “complete plans and specifications”; and

WHEREAS, DOB states that it would undermine its professional certification program to allow work performed under an invalid professionally certified permit to be considered in applications under ZR § 11-331, and that it would invite developers to make poor filings in order to commence work as soon as possible and finish foundation construction prior to a rezoning; and

WHEREAS, leaving aside these policy concerns, the Board concurs with DOB’s position that work performed under the NB Permit from the time that it was obtained until the October 11 SWO should not be considered in this application; and

WHEREAS, the Board notes that ZR § 11-31(a) provides that questions about the validity of a new building permit that arise during a ZR § 11-331 application shall be resolved by the Commissioner of DOB; and

WHEREAS, here, DOB audited the professionally certified NB Permit and concluded that it was so defective that the Notice of Intent was issued, and later, after no response was received from the developer or the developer’s representatives, that it should be revoked in its entirety; and

WHEREAS, in sum, since the NB Permit was invalid when obtained through professional certification and was revoked subsequent to the Audit, and since the reissued permit was obtained on November 15, 2005, one day prior to the Rezoning Date, the Board can only consider construction done thereafter; and

WHEREAS, as noted above, the applicant states that no work was performed on November 15, 2005; and

WHEREAS, thus, the excavation and foundation work performed by the applicant was completed without a lawful building permit in place; and

WHEREAS, since ZR § 11-311 requires that such work be undertaken pursuant to a lawfully issued permit, the instant application must be denied; and

WHEREAS, the applicant makes numerous arguments as to why DOB’s position should not be relied upon by the Board: (1) the Audit and Objections, and consequently, the Revocation, are defective because the DOB auditor reviewed an allegedly outdated set of plans; (2) the Revocation was improper in that it was contrary to what the applicant believes is DOB’s normal practice; (3) DOB has previously stated that deficiencies in the plans underlying a building permit can be cured prior to a rezoning without any penalty to the developer in a ZR § 11-331 application; (4) the October 11, 2005 SWO was

improperly issued, in direct contradiction to the Building Code and DOB policy; (5) that none of the Objections relate to excavation or foundation work; (6) DOB only changed its position based upon political criticism and press coverage; (7) DOB has a history of making errors and that the Board should not credit its version of events; and (8) the policy considerations concerning professional certification and the incentive to “beat the clock” are inappropriate bases for DOB’s position as to the validity of the NB Permit; and

WHEREAS, as to the argument that the DOB auditor reviewed the wrong set of plans, the applicant initially stated that the actual DOB approved plans that should have been reviewed were dated September 1, 2005, and presumably would not have resulted in the Objections, the October 11 SWO or the Revocation; and

WHEREAS, late in the hearing process, the applicant submitted to the Board what appears to be the September 1 set of plans; these plans are perforated “Approved 09 01 2005 DOB BKLYN” and stamped “Approved Per OPPN #5/02 Professional Certification Brooklyn 3B”; and

WHEREAS, the Board conducted a hearing where both the applicant and DOB discussed the relevance of these September 1 plans; and

WHEREAS, at this hearing, DOB explained to the Board that it had no official record of the September 1 plans, and that they should not be considered the approved record set; and

WHEREAS, in a submission dated August 22, 2006, DOB elaborated on this explanation, stating that it reviewed the September 1 plans on a preliminary basis, and concluded that the zoning calculations reflected in this set of plans is sufficiently changed from the August 30 plans that the filing of what is known as a Post-Approval Amendment (“PAA”) was required; and

WHEREAS, according to DOB, the processing of a PAA involves more than just the perforation and stamping of plans; in addition, a fee must be paid, the PAA form must be professionally certified, other forms must be amended and submitted, and the amended set of plans must be microfilmed and placed in the job folder; and

WHEREAS, DOB states, and the applicant does not dispute, that no PAA was filed in conjunction with the September 1 plans; and

WHEREAS, DOB states that aside from perforation of purported new plans, none of the other steps were taken; and

WHEREAS, DOB states that it has no microfilm record of the September 1 plans, nor were they in the job file; and

WHEREAS, in sum, DOB concludes that the September 1 plans were never accepted as the new record plans, superseding the August 30 plans, and that the Audit and Revocation were proper; and

WHEREAS, the applicant, in a submission dated September 5, 2006, states that the August 30 plans are not the official plans that should have been audited; and

WHEREAS, the applicant’s contends that the

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August 30 plans were only filed at the pre-filing stage and were prepared before the redesign of the building (which is reflected in the September 1 plans); and

WHEREAS, the applicant theorizes that the September 1 plans were actually the plans that were submitted in conjunction with the obtainment of the NB Permit, and that the perforation took place one to two days later; and

WHEREAS, the applicant suggests that the date discrepancy reflects nothing more than a delay in the perforation due to the high volume of work in the Brooklyn office of DOB; and

WHEREAS, under this theory, the applicant suggests that no PAA was necessary, because the issuance of the NB Permit was based upon the September 1 plans; and

WHEREAS, the applicant attempts to support this theory by noting the following: (1) the August 30 plans were on 11 by 17 inch paper, and thus were too small to be the record set; (2) the actual record set is also never put in the job folder, but is kept as a rolled set in a different area of DOB's borough office; and (3) the perforation and the stamp were placed on the September 1 plans by a DOB employee, and they therefore constitute DOB-approved documents; and

WHEREAS, the applicant's alternative argument is that even if the September 1 plans were brought to DOB after the issuance of the Permit, the failure to comply with the PAA requirements is nothing more than a clerical error; and

WHEREAS, the applicant characterizes the PAA form as the equivalent of a "cover letter"; and

WHEREAS, in support of these arguments, the applicant submitted an affidavit from the project architect and from an expeditor who states that he has experience in DOB filing procedure; and

WHEREAS, the architect states that the building was redesigned and new plans were completed on or about August 23, 2005 and that the redesign was reflected in the September 1 plans; and

WHEREAS, the architect claims that his office contacted DOB when the Audit was initiated, and at a subsequent meeting, the DOB auditor was informed that the wrong plans were being reviewed; and

WHEREAS, the expeditor states that, based upon his knowledge of DOB generally, approved plans are not located in the job folder, but are "stored separately from the physical files"; and

WHEREAS, the expeditor also states that perforation is done by a clerk, and that plans may not be perforated until a few days later after they are submitted; and

WHEREAS, the Board has reviewed the submissions of both DOB and the applicant; and

WHEREAS, at the outset, the Board notes that the argument that DOB audited the incorrect set of plans was made for the first time by the applicant during the course of the hearing process; and

WHEREAS, the Board observes that the applicant's argument is an appeal of the Revocation, DOB's

determination that the deficiencies revealed in the Audit provided a sufficient basis for the Revocation of the NB Permit; and

WHEREAS, the Revocation was a final determination of DOB; and

WHEREAS, the Board notes that while it has jurisdiction over appeals from such final determinations, no such appeal was taken within thirty days of the date of the decision, as required by the City Charter and the Board's Rules of Practice and Procedure, even though the project architect conceded in his most recent affidavit that his office believed that DOB was reviewing the incorrect plans when the Audit was in process; and

WHEREAS, this argument is time-barred, because an appeal of the Revocation must have been filed with the Board within 30 days of its issuance by DOB, not close to nine months later in the context of an application made under ZR § 11-331; and

WHEREAS, however, even assuming *arguendo* that the applicant's argument should be entertained, the Board does not find it persuasive; and

WHEREAS, first, the applicant did not provide any explanation for its contention that record plans are kept in a location besides the job folder at the DOB offices; in fact, no description of this location was offered, aside from the vague assertion that record plans are "stored separately"; and

WHEREAS, in a submission dated July 6, 2006, the Concerned Citizens of Greenwood Heights submitted the 11 by 17 inch set of the August 30 plans – with an August 30, 2005 perforation – and stated that, based upon their review, the set was identical to the microfilmed set of plans on file at DOB; and

WHEREAS, the logical conclusion is that the 11 by 17 set of plans that the audit was based upon is a reduced copy of what was officially offered as the record set when the NB Permit was obtained; and

WHEREAS, therefore, even if the applicant is correct in its assertion that the large set of the record plans are stored somewhere besides in the job folder, this does not mean that the auditor reviewed an incorrect set of plans; and

WHEREAS, second, the Board disagrees that the alleged perforation of the September 1 plans by a DOB employee constitutes an official recognition by DOB of said plans as the record set; and

WHEREAS, DOB explained all of the additional steps that must be undertaken to make an official submission of revised plans, none of which occurred here; and

WHEREAS, DOB does not consider these requirements to be clerical in nature, and the Board agrees that permit applicants at DOB have a fundamental responsibility to ensure that submissions are made according to proper procedure; and WHEREAS, third, the applicant was unable to provide proof that the September 1 plans were microfilmed, or that a rolled set exists in the unspecified location at the DOB offices; and

WHEREAS, in fact, the Board notes that DOB's Building Information System (BIS) reflects that a microfilming fee was paid on August 31, 2006 (the day

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the NB Permit was issued); DOB stated at hearing that the microfilm does not reflect the September 1 plans and that the only microfilm available is of the August 30 plans; and

WHEREAS, additionally, as noted above, the Concerned Citizens of Greenwood Heights stated that it had reviewed the microfilmed plans at DOB, and that the microfilm reflects the August 30 plans; and

WHEREAS, the Board finds the contention that the August 30 plans were not the plans upon which the NB Permit was based to be illogical in light of the fact that they were microfilmed on the date the NB Permit was obtained and a fee for microfilming was paid; and

WHEREAS, the Board observes that there would be no reason to have the August 30 plans perforated and then microfilmed if the September 1 plans were to be the plans of record; and

WHEREAS, finally, the project architect, in his most recent affidavit, states that his office cannot verify that the September 1 plans were in fact filed with DOB on August 31, 2005; and

WHEREAS, the architect states “we cannot state to the Board precisely what happened at the DOB on the dates of August 31, 2005 and September 1, 2005.”; and

WHEREAS, in sum, the Board does not find the applicant’s contention that DOB audited the incorrect set of plans, even if properly before the Board, to be credible or supported by any evidence; and

WHEREAS, finally, it must be noted that the applicant failed to submit corroborating evidence in support of the contention that the project architect notified DOB during the Audit that the incorrect plans were being reviewed; and

WHEREAS, neither the applicant nor the architect submitted any documentation, such as a dated letter to DOB, that supports the contention that DOB was put on notice that its auditor was reviewing the incorrect plans; and

WHEREAS, it strains credulity that the developer would fail to aggressively appeal, either at DOB or at the Board, what is contended to be an improper permit revocation when the right to develop under the prior zoning was at stake; and

WHEREAS, moreover, the Board finds it ironic that in its initial papers related to the instant application, no mention of the allegedly faulty Audit was made; and

WHEREAS, in fact, the initial papers do not mention the Revocation at all; and

WHEREAS, instead, the applicant’s revised Statement, dated February 10, 2006, merely states that the NB Permit application was initially approved on August 31, 2006 – no mention is made of plans dated September 1, 2005; and

WHEREAS, likewise, in its April 11, 2006 submission, the applicant again makes no mention of any deficiencies in the Audit or Revocation; and

WHEREAS, a prior affidavit from the project architect, attached to the April 11, 2006 submission, also does not allege that the Audit was in any way improper; and

WHEREAS, the applicant did not allege that the

Audit was defective until its June 27, 2006 submission, after DOB expressed its position that work undertaken pursuant to the revoked NB Permit should not count towards a vesting determination; and

WHEREAS, based upon the above, the Board questions whether this argument is made in good faith; and

WHEREAS, as to the second argument noted above (that the Revocation was improper and contrary to DOB’s normal practice), the applicant states that it occurred during the middle of a dialog between the developer’s representatives and DOB as to how to resolve the Audit, and that a meeting to discuss them was scheduled for November 4, 2005; and

WHEREAS, the applicant states that based on its experience with DOB, it is unusual that a revocation was issued while discussions were apparently initiated; and

WHEREAS, the Board restates its position that any challenge to the Revocation is time-barred; and

WHEREAS, further, the Board finds the applicant’s contention irrelevant: even if what transpired is unusual, the applicant does not dispute the factual assertion that there was not a sufficient response to the Notice of Intent; and

WHEREAS, additionally, the applicant has submitted no evidence of the alleged scheduling of the November 4 meeting, and DOB states that it has no record of it; and

WHEREAS, accordingly, the Board rejects the applicant’s second argument; and

WHEREAS, as to the third argument (that DOB has previously stated that deficiencies in the plans underlying a building permit can be cured prior to a rezoning without any penalty to the developer in a ZR § 11-331 application), the applicant states that in a comparable application brought under BSA Cal. No. 354-05-BZY, DOB noted on the record that an applicant has the right to amend plans in order to correct ZR and Building Code deficiencies; and

WHEREAS, the applicant notes that in its April 11, 2006 submission on Cal. No. 354-05-BZY, DOB stated that work performed prior to such amendment could still count towards a determination that excavation was complete and substantial progress was made on foundations; and

WHEREAS, in this April 11 submission, DOB states that after an audit revealed potential issues with the building permit in question, a notice of intent to revoke the permit was issued; and

WHEREAS, DOB goes on to state that the developer worked with DOB to resolve the audit, and that it ultimately withdrew the notice of intent, finding that the developer’s response sufficiently demonstrated that the permit should not be revoked; and

WHEREAS, DOB also asserted in this submission that the notice of intent was not a determination that the plans and specifications were not complete and that the building permit was not legally issued; and

WHEREAS, DOB concluded that since the permit was never revoked, it was lawfully issued; and

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WHEREAS, the Board has reviewed these statements and finds that the applicant's reliance upon them in support of its argument is misplaced: in the instant application, unlike in BSA Cal. No. 354-04-BZY, there was an affirmative DOB determination that the ZR and Building Code non-compliances were fatal to the validity of the permit such that revocation was required; and

WHEREAS, here, since there was a revocation of the NB Permit based upon non-compliance with zoning and Code, a determination that it was not a lawfully issued permit for purposes of a ZR § 11-331 application was appropriately reached; and

WHEREAS, however, in BSA Cal. No. 354-04-BZY, since the developer there worked with DOB to resolve the outstanding objections, there was no revocation, and no opportunity to reach a conclusion that the permit in question did not comply with ZR § 11-31(a); and

WHEREAS, in other words, once a permit is revoked, the available cure of resolving the outstanding objections in order to prevent revocation and a determination of invalidity is foreclosed; the only "cure" is the reinstatement of the permit, which, as stated by DOB, is akin to the issuance of a new permit; and

WHEREAS, accordingly, the Board rejects the applicant's third argument; and

WHEREAS, as to the fourth argument (that the October 11 SWO was issued in direct contradiction to the Building Code and DOB policy), the applicant states that had it not been issued, work could have continued to the point of full completion of foundations, such that the instant application would not have been necessary; and

WHEREAS, the applicant states that, pursuant to Building Code § 27-197, SWOs may only be issued when there is an imminent peril to life or property; and

WHEREAS, the applicant also argues that DOB's Operational Policy and Procedure Notice #2/04 (the "PPN") provides that a SWO can only be issued with a notice of intent to revoke a permit when the reason for possible revocation presents an imminent peril to life or property; and

WHEREAS, the applicant states none of the ZR and Building Code provisions cited in the Objections, if violated, would represent an imminent peril to life or property; and

WHEREAS, first, the Board notes that the instant application is not an appeal challenging the authority of DOB to issue the October 11 SWO; and

WHEREAS, like the Revocation, had the developer wished to pursue such an appeal, it should have been filed at the Board within 30 days of its issuance; and

WHEREAS, further, the Board notes that DOB's authority to issue a stop work order is derived from Building Code § 26-118, which provides, in sum and substance, that an order to stop work may be issued at any time when it is found that building work is being executed in violation of the provisions of any law rule or regulation enforceable by DOB; and

WHEREAS, this broad grant of authority does not

depend upon a finding that work represents an imminent peril to life or property; and

WHEREAS, Building Code § 27-197 actually refers to immediate suspension of a permit, which is a distinct action from an order to stop work; and

WHEREAS, further, the Board finds that the PPN does not limit DOB's ability to proceed under Building Code § 26-118; rather, it merely references a form of letter that may be used if it is determined that the reasons for revocation present peril; and

WHEREAS, accordingly, the Board rejects the applicant's fourth argument; and

WHEREAS, as to the fifth argument (that none of the Objections relate to excavation or foundation construction), the Board notes that ZR § 11-31(a) specifically provides that a lawfully issued permit is one based on plans showing the entire proposed development, and not a portion thereof; and

WHEREAS, any non-compliance reflected in the plans, regardless of the section of the building depicted, is relevant as to ZR § 11-31(a); and

WHEREAS, accordingly, the Board rejects the applicant's fifth argument; and

WHEREAS, as to the sixth argument (that DOB only changed its position based upon political criticism and press coverage), the applicant notes that this change arose around the same time that there was allegedly negative press coverage and criticism of DOB from elected officials; and

WHEREAS, however, even if there was a proven correlation in time between the alleged negative press coverage/criticism and DOB's change in position, the Board observes that any conclusions about causation are, at best, unsubstantiated speculation; and

WHEREAS, the Board further observes that like any party to a public hearing process that extends over numerous hearings, with multiple submissions and many complicated issues, DOB is entitled to refine or modify its position; and

WHEREAS, accordingly, the Board rejects the applicant's sixth argument; and

WHEREAS, as to the seventh argument (that DOB has a history of making errors and that the Board should not credit its version of events), the applicant cites to an erroneous revocation of the reissued permit, which allegedly occurred on June 5, 2006; and

WHEREAS, the applicant states that this is an example of how easily miscommunication can occur at DOB, and suggests that the developer should not be penalized because the Revocation was issued one day prior to a scheduled November 4 meeting to discuss the Objections; and

WHEREAS, the applicant did not provide any evidence of this alleged erroneous revocation into the record; and

WHEREAS, however, even if it did occur, the Board would not find it significant; and

WHEREAS, as noted above, there is no evidence that a meeting was scheduled for November 4, 2005; and

WHEREAS, further, there is nothing in the record to suggest that that the Revocation was issued in error or

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reflected a lack of communication at DOB; and

WHEREAS, accordingly, the Board rejects the applicant's seventh argument; and

WHEREAS, as to the eighth argument (that the policy considerations concerning professional certification and the incentive to commence work as soon as possible are inappropriate bases for DOB's position as to the NB Permit), the applicant notes that professional certification results in a permit with the same legal status as a permit that is issued after DOB plan examination, and that there was no effort to beat the clock here, as evidenced by the fact that original plans were allegedly drafted in 2004 and demolition of the improvements that formerly occupied the site occurred in April of 2005; and

WHEREAS, however, as stated above, the Board does not concur with DOB's position because it is concerned about the integrity of the professional certification program or incentives to commence work improperly, though these are obviously legitimate considerations; and

WHEREAS, rather, the Board bases its concurrence on its reading of the plain language ZR § 11-31(a), which requires that a lawfully issued building permit be based on complete plans and specifications, and otherwise be approvable, as determined by the Commissioner of Buildings; and

WHEREAS, the NB Permit does not meet this test, as evidenced by the Objections and the failure to cure the objections prior to the Revocation; and

WHEREAS, accordingly, the Board rejects the applicant's eighth argument; and

WHEREAS, in sum, the Board finds: (1) that the NB Permit, when obtained by the developer through professional certification, was not based on complete plans and specifications, was not approvable, and was invalid; (2) that the Board can properly exclude from its consideration the work performed under the NB Permit from the time it was pulled until the issuance of the October 11 SWO; and (3) that none of the applicant's arguments to the contrary are persuasive; and

WHEREAS, thus, because all excavation and foundation work was performed under an invalid permit, which is impermissible as per ZR § 11-331, the Board concludes that the application must be denied.

Therefore it is Resolved that this application to renew DOB Permit No. 301984191-01-NB pursuant to ZR § 11-331 is denied.

Adopted by the Board of Standards and Appeals, September 12, 2006.

A true copy of resolution adopted by the Board of Standards and Appeals, September 12, 2006.

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Copies Sent

To Applicant

Fire Com'r.

Borough Com'r.