368-05-A
APPLICANT – Greenberg & Traurig, LLP for 400 15th Street, LLC, owner.
SUBJECT – Application December 22, 2005 – An appeal seeking a determination that the owner of said premises has acquired a common law vested rights to continue development commenced under the prior Zoning R6. New Zoning District is R6B as of November 16, 2005.
PREMISES AFFECTED – 400 15th Street, south side of 15th Street, 205'-5" west of intersection of 8th Avenue and 15th Street, Borough of Brooklyn.
COMMUNITY BOARD #7BK
For Applicant: Deidre Carson.
ACTION OF THE BOARD – Application granted.
THE VOTE TO GRANT –
Affirmative: Chair Srinivasan, Vice-Chair Babbar, Commissioner Chin and Commissioner Collins.....4
Negative:.....0
THE RESOLUTION –

WHEREAS, this is an appeal requesting a Board determination that the owner of the premises has obtained a vested right under the common law to complete a proposed development at the referenced premises; and

WHEREAS, this application was brought concurrently with a companion application under BSA Cal. No. 360-05-BZY (the "BZY Application"), decided the date hereof, which is a request to the Board for a finding that the owner of the premises has obtained a right to continue construction pursuant to ZR § 11-331; and

WHEREAS, the Board notes that while separate applications were filed according to Board procedure, in the interest of convenience, it heard the cases together and the record is the same for both; 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 May 2, 2006 and May 16, 2006, and then to decision on June 20, 2006; and

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

WHEREAS, Community Board 7, the Concerned Citizens of Greenwood Heights, and the South Park Slope Community Group appeared in opposition to the application; and

WHEREAS, certain elected officials, including State Senator Velmanette Montgomery, State Assemblyman James Brennan, and Public Advocate Betsy Gotbaum provided testimony in opposition to the application; and

WHEREAS, the above-mentioned elected officials, community groups, and neighbors (hereinafter, collectively referred to as the "opposition") opposed the granting of any relief to the applicant, for reasons discussed below; and

WHEREAS, the applicant states that the subject premises fronts on the south side of 15th Street between 7th and 8th Avenues, on a 7,656 sq. ft. lot, with frontage of approximately 75 ft. and a depth of 100 ft.; and

WHEREAS, the applicant proposes to develop the site with a five-story plus cellar residential building, with 7,035 sq. ft. of floor area (the "Building"); and

WHEREAS, the subject premises was formerly located within an R6 zoning district; and

WHEREAS, on November 16, 2005 (hereinafter, the "Enactment Date"), the City Council voted to adopt the Park Slope South rezoning, which rezoned the site to R6B; and

WHEREAS, the Building complied with the former R6 zoning district parameters as to floor area, setback and height; and

WHEREAS, however, because the site is now within an R6B district, the proposed development would not comply with these bulk parameters; and

WHEREAS, the applicant notes that the construction on the site was often constrained; and

WHEREAS, the applicant provided the following chronology of development on the site: (1) excavation commenced in May 2005; (2) during excavation, the owner discovered that the foundations of adjacent buildings were unstable and that soil conditions were worse than anticipated; (3) permits for construction were issued on July 8, 2005; (4) the discovered foundation and soil problems resulted in the need to redesign the foundation for the Building; (5) the redesign included work that had to be performed on adjacent buildings, but one adjacent building owner did not consent; (6) this adjacent owner filed suit and the court issued a restraining order on August 5, 2005, preventing construction or excavation within 25 ft. of the adjacent owner's building; and (7) revised foundation plans under the construction permit, which addressed the soil conditions, were approved by DOB on October 4, 2005; and

WHEREAS, the applicant claims that construction was thus limited to certain portions of the site and that further delays arose out of the need to redesign the foundation; and

WHEREAS, the applicant contends that the owner was unable to ascertain the extent of soil and adjacent property conditions prior to commencement of construction; and

WHEREAS, the Board agrees that such construction difficulties are normal within the City; and

WHEREAS, however, the Board notes that the owner could have simply started construction sooner to avoid the impact that these problems may have had on the course of construction; and

WHEREAS, the Board finds that ensuring that work is done appropriately based on an assessment of the conditions on the site is a responsibility of the developer, even where it is difficult to assess how

construction methods might need to be adjusted without first commencing construction; and

WHEREAS, thus, the Board bases its decision herein on the amount of work performed and expenditure made as of the Enactment Date, and is not granting any special exceptions in its analysis because the owner experienced construction difficulties; and

WHEREAS, the Board also notes in passing that work was performed at the site after the Enactment Date, but finds that the applicant conclusively established that this work was done with the express authorization of DOB, in furtherance of making the site safe; and

WHEREAS, notwithstanding the limited amount of time that construction was actually permitted, the applicant requests that the Board find that based upon the serious economic loss the owner would face if compelled to comply with the new zoning, the amount of work performed, and the amount of financial expenditures, including irrevocable commitments, the owner has a vested right to continue construction and finish construction of the Building; and

WHEREAS, the Board notes that established precedent exists for the proposition that seeking relief pursuant to ZR 11-30 et seq. does not prevent a property owner from also seeking relief under the common law; and

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

WHEREAS, the applicant states that on July 8, 2005, a New Building permit (Permit No. 301748777; hereinafter, the "NB Permit") for the Building was issued by DOB; and

WHEREAS, the Board notes that the validity of the NB Permit was not questioned by the opposition or DOB; thus, it is not an issue in the instant application; and

WHEREAS, assuming that a valid permit had been issued and that work proceeded under it, the Board notes that a common law vested right to continue construction generally exists where serious loss will result if the owner is denied the right to proceed under the prior zoning, and the owner has undertaken substantial construction and made substantial expenditures prior to the effective date of a zoning change; 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 the serious loss finding, the applicant contends that the loss of floor area that would result if vesting was not permitted is significant; and

WHEREAS, the applicant notes that the permissible Floor Area Ratio (FAR) would decrease from 2.2 FAR to 2.0 FAR, but more importantly, because of the requirement for a setback at 40 ft., and the maximum height of 50 ft., the rezoning would require the owner to eliminate one full floor of the Building as proposed, and eliminate two units on the fourth floor; and

WHEREAS, the applicant states that this would result in an approximately one-third reduction in sellable floor area; and

WHEREAS, during the course of the public hearing process, the Board asked for further amplification of the owner's projected serious loss; and

WHEREAS, the Board suggested that design changes to the Building, such as a reduction in the floor to ceiling heights or a dropping of the height of the ground floor (proposed at 22.5 ft. from floor to ceiling), could avoid the projected loss of floor area; and

WHEREAS, the applicant responded by noting that a reduction in the floor to ceiling heights throughout the Building would decrease the desirability and marketability of the units, and therefore overall projected revenue would still be diminished; and

WHEREAS, further, in a submission dated June 6, 2006, the applicant stated that the first floor was designed with the above-mentioned floor to ceiling height, and was raised 4'-2" above grade level, in order to provide more marketable ground floor residential space, with windows that would look out above eye-level on the sidewalk; and

WHEREAS, further, this design allowed for a portion of the cellar to be above grade, which permits cellar windows; and

WHEREAS, the applicant states that if the ground floor were dropped 4.5 ft. into the cellar space in order to reduce the height of the building, the double-height area of the first floor would be reduced so that windows would be lowered to pedestrian eye-level, and the cellar height would be reduced so that no windows could be provided; and

WHEREAS, the applicant submitted a statement from a real estate broker, opining that such a redesign would diminish revenue from the ground floor unit from 600 to 450 dollars per sq. ft.; and

WHEREAS, the applicant also provided a

detailed chart in the June 6 submission, outlining what hard and soft costs already incurred would be impossible to recoup if the Building had to comply with the new R6 zoning; and

WHEREAS, this chart sets forth both the dollar amount and the justification for the conclusion that the costs would be wasted; and

WHEREAS, the applicant states that $577,492 of costs would be wasted if the Building is required to comply with the new zoning; and

WHEREAS, the Board agrees that a diminution in the value of units within the building because of the need to redesign coupled with $577,492 of wasted costs constitutes a serious economic loss, and that the supporting data submitted by the applicant supports this conclusion; and

WHEREAS, as a point of clarification, the Board notes that the instant application is not one for a variance based on hardship, but is rather an application for a finding that the owner has obtained a vested right to continue construction; and

WHEREAS, the vested rights doctrine is rooted in the 14th Amendment of the Constitution of the United States, and its application to construction in New York State has been guided and shaped by the courts; and

WHEREAS, unlike a variance, no showing of uniqueness is required, nor is the self-created hardship doctrine applicable; and

WHEREAS, further, the serious loss standard is not the same as the unnecessary hardship standard: the applicant does not have to show that no reasonable return could be gained from a development that complies with the new zoning; and

WHEREAS, a serious loss determination may be based in part upon a showing that certain of the expenditures could not be recouped if the development proceeded under the new zoning, but in the instant application, the determination was also grounded on the applicant's discussion of the diminution in income that would occur if the FAR, height and setback limitations of the new zoning were imposed; and

WHEREAS, as to substantial construction, the applicant states that the owner has completed demolition, land clearing and excavation; and

WHEREAS, the applicant also states that the owner has installed 164 out of the 200 required helical pile for underpinning, all of the required shoring, and one of the two necessary support walls for adjacent buildings; and

WHEREAS, in support of this statement, the applicant has submitted pictures, invoices for construction materials and labors, and plans reflecting the degree of underpinning and wall work completed; and

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

WHEREAS, the Board's conclusion is based upon a comparison of the type and amount of work completed in the instant case with the type and amount of work discussed by New York State courts; and

WHEREAS, specifically, the Board has reviewed the cases cited in the applicant's December 21, 2005 submission, as well as other cases of which it is aware through its review of numerous vested rights applications, and agrees that the degree of work completed by the owner in the instant case is comparable to the degree of work cited by the courts in favor of a positive vesting determination; 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; accordingly, these costs are appropriately included in the applicant's analysis; and

WHEREAS, the applicant states that the owner has already expended or become obligated for the expenditure of $3.45 million of a $7 million project; and

WHEREAS, however, the Board notes that these totals include the purchase price; and

WHEREAS, the applicant states that this cost may properly be included in an analysis of expenditure; and

WHEREAS, the Board agrees that there is no impediment to consideration of such a cost, but also notes that it is not required; and

WHEREAS, the Board has not analyzed purchase price in its past consideration of vested rights cases, and declines to do so here; and

WHEREAS, while it is reasonable to conclude that a purchase price is based upon the zoning in effect at the time of the purchase, the Board notes that this is not always the case, and further observes that not all transactions are recent or arms-length; and

WHEREAS, thus, the Board finds that the relevance of this cost may be difficult to ascertain in many circumstances; and

WHEREAS, the Board concludes that it better to assess expenditure in light of total development costs absent the purchase price; and

WHEREAS, here, the stated acquisition price is $2.2 million; subtracting this amount from both the expenditure total and the development costs means that the owner expended or committed approximately $1.25 million out of $4.8 million (or approximately 26 percent); and

WHEREAS, the applicant states that other expenses relate to excavation, foundation work, architectural and engineering fees, insurance and filing fees, taxes, surveying costs, and a small amount of miscellaneous costs, among other items; and

WHEREAS, furthermore, as to actual construction

costs related to foundation construction, the Board observes that the applicant has spent approximately $381,000 out of the expected total cost of $780,000, as illustrated in a chart provided in the applicant's initial submission; and

WHEREAS, as proof of the expenditures, the applicant has submitted an affidavit from the owner, bank statements, invoices for excavation and foundation work, checks and invoices for the other professional work, and proof of payment for the other items; and

WHEREAS, the Board considers the amount of expenditure and irrevocable commitments significant, both in of itself for a project of this size, and when compared against the development costs (minus the purchase price); 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 the prior zoning; and

WHEREAS, in sum, the Board has reviewed the representations as to serious loss, the work performed, and the expenditures made, and the supporting documentation for such representations, and agrees that that the applicant has satisfactorily established that a vested right to complete construction of the Building had accrued to the owner of the premises as of the Enactment Date; and

WHEREAS, the opposition expressed concerns about various aspects of this application; and

WHEREAS, specifically, the opposition contended: (1) that the foundation was not complete; (2) that the percentage of foundation work was not sufficient to sustain a positive vesting determination; (3) that work was done illegally after-hours or in an unsafe manner; (4) that there were DOB violations issued that resulted in stop-work orders; and (5) that the purchase price was excessive and would skew the analysis if folded in; and

WHEREAS, the Board notes that there is no requirement under the common law of vested rights that the foundation for the development under consideration be completed; and

WHEREAS, as to the progress on foundations, the Board reiterates that the degree of construction at the site was substantial enough to meet the guideposts established by case law for such a finding; and

WHEREAS, as to impermissible work, the Board observes that no evidence of impermissible after-hours or weekend work was submitted into the record; and

WHEREAS, DOB's Building Information System records for the subject premises indicates that only one of the numerous complaints lodged with DOB from May 2005 (commencement of excavation) to November 16, 2005 (the date of the rezoning) was for after-hours work, and that this complaint was inspected, no work was observed, and no violation was issued; and

WHEREAS, as to the stop-work order contention, the Board notes that the only stop-work order issued by DOB was issued after the Enactment Date, because the zoning had changed; and

WHEREAS, finally, any concern that the owner overpaid for the site is rendered moot by the Board's removal of acquisition costs from the considered expenditures; and

WHEREAS, the Board understands that the community and the elected officials worked diligently on the Park Slope South rezoning and that the Building does not comply with the new R6B zoning parameters; and

WHEREAS, however, the applicant has met the test for a common law vested rights determination, and the Board has determined that the equities in this case, given the established serious loss, and the degree of work performed and expenditures made, weigh in the favor of the owner; and

WHEREAS, accordingly, based upon its consideration of the arguments made by the applicant and the opposition 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 the common law and is entitled to the requested reinstatement of the NB Permit, and all other related permits necessary to complete construction.

Therefore it is Resolved that this appeal made pursuant to the common law of vested rights requesting a reinstatement of DOB Permit No. 301748777, 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, June 20, 2006.

A true copy of resolution adopted by the Board of Standards and Appeals, June 20, 2006.
Printed in Bulletin Nos. 26, Vol. 91.
Copies Sent
To Applicant
Fire Com'r.
Borough Com'r.