

**167-14-A**

APPLICANT – Eric Palatnik, P.C., for 250 Manhattan LLC, owner.

SUBJECT – Application July 11, 2014 – Appeal seeking a determination that the owner has obtained a vested right to complete construction commenced under the prior C4-3(R6) zoning district. R6B zoning district. PREMISES AFFECTED – 250 Manhattan Avenue, between Powers Avenue and Grand Street, Block 2782, Lot 1, Borough of Manhattan.

**COMMUNITY BOARD #1M**

**ACTION OF THE BOARD** – Application granted on condition.

**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 six-story, mixed residential and commercial building under the common law doctrine of vested rights; and

WHEREAS, a public hearing was held on this application on March 24, 2015, after due notice by publication in *The City Record*, with a continued hearing May 12, 2015, and then to decision on June 2, 2015; and

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

WHEREAS, the subject site is located on the east side of Manhattan Avenue, between Powers Street and Grand Street, within an R6B zoning district; and

WHEREAS, the site has 25 feet of frontage along Manhattan Avenue, and 2,500 sq. ft. of lot area; and

WHEREAS, under construction at the site is a six-story, mixed residential and commercial building with 7,613sq. ft. of floor area (3.05 FAR) (5,483 sq. ft. of residential floor area (2.2 FAR) and 2,130 sq. ft. of commercial floor area (0.85 FAR)) and eight dwelling units and no accessory parking spaces (the “Building”); and

WHEREAS, the applicant represents that the Building complies with the parameters of the former C4-3 zoning district, which is an R6 equivalent, per ZR § 35-23(a); and

WHEREAS, on April 18, 2008, the Department of Buildings (“DOB”) issued New Building Permit No. 310058950-01-NB (hereinafter, the “New Building Permit”) authorizing construction of the Building; and

WHEREAS, on July 29, 2009, (hereinafter, the “Enactment Date”), the City Council voted to adopt the Greenpoint – Williamsburg Contextual zoning text amendment (the “Rezoning”), which rezoned the site from C4-3 (R6 Equivalent) to R6B; and

WHEREAS, as a result of the Rezoning, the Building no longer complies with the following zoning regulations: (1) residential floor area (a maximum residential floor area of 5,000 sq. ft. (2.0 FAR) is permitted, a residential floor area of 5,483 sq. ft. (2.2

FAR) is proposed); (2) commercial floor area (commercial floor area, including Use Group 6, is not permitted under the current R6B zoning regulations, but Use Group 6 commercial floor area of 2,130 sq. ft. (.85 FAR) is proposed); (3) maximum building height (a maximum building height of 50’-0” is permitted, but a building height of 55’-0” is proposed); (4) maximum wall height (a maximum wall height of 40’-0” is permitted, but a wall height of 45’-0” is proposed); and (5) maximum number of dwelling units (seven dwelling units are permitted, but eight dwelling units are proposed); and

WHEREAS, the applicant represents that, as of the Enactment Date, the applicant had obtained permits and completed, among other things, 94 percent of the building foundation; 15 percent of the masonry work; 10 percent of the metal decking; 25 percent of the concrete slab; trenching at the basement level of the building for plumbing work to be performed; construction of the interior walls at the sides of the building through the first floor; and partial construction of the steel frames for the second floor of the building; and

WHEREAS, as set forth below, to establish the owner’s entitlement to a vested right, the applicant relies on the work performed and the expenditures made prior to the Enactment Date, as well as the serious loss that would result from having to comply with the R6B zoning regulations; and

WHEREAS, a threshold matter for the vested rights analysis is that a permit be issued lawfully prior to the Enactment Date and that the work was performed pursuant to such lawful permit; and

WHEREAS, by letter dated November 8, 2014, DOB confirmed that the New Building Permit was lawfully issued, authorizing construction of the Building 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

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WHEREAS, as noted above, the applicant obtained a permit to construct the Building and performed certain work prior to the Enactment Date; and

WHEREAS, specifically, the applicant states that the work it performed constitutes substantial construction, in that, prior to the Enactment Date, it constructed 96 percent of the foundation and substructure, including all footings and foundation walls to the cellar, and constructed the elevator pit in the proposed cellar; and

WHEREAS, in support of this statement, the applicant has submitted the following: a breakdown of the construction costs by line item; copies of cancelled checks; construction permits; and photographs of the site; and

WHEREAS, the Board has reviewed the representations as to the amount and type of work completed before and after the Enactment Date and the documentation submitted in support of these representations, and agrees that it establishes that substantial work was performed; 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 represents that the total expenditure paid toward the construction of the Building prior to the Enactment Date is \$587,677 (\$121,186 in hard costs, \$138,277 in soft costs, and \$328,214 in irrevocable financial commitments entered into prior to the Enactment Date), representing approximately 27 percent of the \$2,167,500 estimated cost to complete the project; 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, 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, the applicant states that in order to comply with applicable zoning it will have to demolish the rear portion of the first floor perimeter walls of the building to a distance of approximately 39'-5" from the rear lot line, incurring an additional estimated cost of \$25,000; and

WHEREAS, the applicant states that in order to comply with the current building code it would have to demolish the shaft foundation structure and rebuild it to accommodate a larger shaft and elevator core, incurring

an addition estimated cost of \$75,000; and

WHEREAS, the applicant states that under the current zoning, it will have lost the right to develop 2,130 sq. ft. of commercial space as well as 483 sq. ft. of residential space, thereby eliminating from the project all of the commercial space and one of eight (8) planned dwelling units, significantly reducing the profit that will result from the planned development; and

WHEREAS, the applicant states that, in addition to the costs of removing work already performed, were it required to comply with the current zoning it would incur substantial architectural and filing fees associated with a redesign of the building; and

WHEREAS, the applicant further states that the value of the building constructed under the current zoning would be \$2,560,000 and the value of the building constructed under the zoning applicable before the Enactment Date would be \$3,611,000, thus, were the applicant required to building under the zoning applicable before the Enactment Date it would suffer a loss in value of approximately 30 percent; and

WHEREAS, thus, the applicant states that it would suffer a serious loss if the site were required to comply with the R6B district regulations; and

WHEREAS, the Board agrees that complying with the R6B district regulations would result in a serious economic loss for the applicant; 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 310058950, 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 2, 2015.

**A true copy of resolution adopted by the Board of Standards and Appeals, June 2, 2015.**

**Printed in Bulletin Nos. 23-24, Vol. 100.**

**Copies Sent**

**To Applicant**

**Fire Com'r.**

**Borough Com'r.**

