

64-08-A

APPLICANT – Law Office of Fredrick A. Becker, for JN520 LLC, owners.

SUBJECT – Application March 28, 2008 – an Appeal seeking a determination that the property owner has acquired a common law vested right to continue construction commenced under the prior R6 Zoning District.

PREMISES AFFECTED – 74 Grand Avenue, (a/k/a 72-96 Grand Avenue) Grand Avenue between Myrtle Avenue and Park Avenue, Block 1892, Lots 48 & 58, Borough of Brooklyn.

COMMUNITY BOARD #2BK

APPEARANCES –

For Applicant: Lyra J. Altman and Matthew Barnett.

ACTION OF THE BOARD – Appeal 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 five-story residential building under the common law doctrine of vested rights; and

WHEREAS, this application was brought subsequent to a companion application under BSA Cal. No. 208-07-BZY, which was 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 separate applications were filed and that the applicant withdrew the application for the statutory vested rights case on April 15, 2008; the record is the same for both cases; and

WHEREAS, a public hearing was held on this application on April 8, 2008, after due notice by publication in *The City Record*, and then to decision on April 15, 2008; and

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

WHEREAS, Community Board 2, Brooklyn, recommends approval of the application; and

WHEREAS, City Council members David Yassky and Letitia James provided testimony in support of the application; and

WHEREAS, the site is located on the west side of Grand Avenue, between Myrtle Avenue and Park Avenue and has a lot area of 25,000 sq. ft.; and

WHEREAS, the applicant proposes to develop the site with a five-story residential building, with 55,000 sq. ft. of floor area (2.2 FAR), a total height of 55 feet, and a base height of 45 feet (the “Building”); and

WHEREAS, the subject premises is currently

located within an R6B zoning district, but was formerly located within an R6 zoning district; and

WHEREAS, the Building complies with the former R6 zoning district parameters; specifically with respect to floor area, FAR (2.2 FAR was the maximum permitted), and total height and base height (55 feet and 45 feet, respectively, were the maximum permitted); and

WHEREAS, however, on July 25, 2007 (the “Enactment Date”), the City Council voted to adopt the Fort Greene/Clinton Hill rezoning, which rezoned the site to R6B, as noted above; and

WHEREAS, the Building does not comply with the R6B zoning district parameters as to height, FAR, and floor area; and

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

WHEREAS, the Board notes that New Building Permit No. 301943529 (the “Original Permit”), which authorized the development of a five-story residential building pursuant to R6 zoning district regulations was issued on June 13, 2007; and

WHEREAS, the Original Permit lapsed by operation of law on the Enactment Date because the plans did not comply with the new R6B zoning district regulations and DOB determined that the Building’s foundation was not complete; and

WHEREAS, on September 6, 2007, the applicant amended the building plans under a post approval amendment (PAA) to reflect a three-story building that complies with R6B zoning district regulations; and

WHEREAS, the applicant continued as of right construction at the site pursuant to the PAA; and

WHEREAS, when the companion application, under BSA Cal. No. 208-07-BZY was filed at the Board, DOB stated its opposition to the application because it determined that the Original Permit was superseded by the PAA and, accordingly, the Original Permit could not be renewed; and

WHEREAS, DOB stated its position that the applicant could not seek relief under the vested rights statute while it continues construction pursuant to an as of right permit; and

WHEREAS, the applicant asserted that it maintained a right to renew the Original Permit because (1) the plans associated with the Original Permit were valid under the prior zoning and (2) the plans associated with the PAA were valid under the new zoning; and

WHEREAS, additionally, the applicant noted that the foundation for the three-story building and the five-story building were identical and that other features of the three-story building under construction could ultimately be used for the five-story building if the Original Permit were to be renewed; and

WHEREAS, at the February 26, 2008 hearing for

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BSA Cal. No. 208-07-BZY, the Board asked DOB whether it would maintain its opposition to the vesting claim if the applicant were to withdraw the PAA and request that the Board consider whether a right to continue construction arose during the time when the Original Permit was in effect; and

WHEREAS, DOB responded that it would not object to the renewal of the Original Permit if the applicant withdrew the PAA; and

WHEREAS, accordingly, the applicant has agreed to withdraw the PAA under DOB's direction; and

WHEREAS, the validity of the Original Permit has not been challenged; and

WHEREAS, accordingly, for the purpose of the vesting application, only the Original Permit, and the work performed pursuant to it, are relevant and have been considered; and

WHEREAS, the Board agrees with DOB that any work performed after the Enactment Date (and pursuant to the PAA) cannot be considered for vesting purposes; and

WHEREAS, when a valid permit has been issued and work has proceeded under it, the Board notes that 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: demolition, foundation work, underpinning and shoring for adjacent properties; and

WHEREAS, in support of this assertion, the applicant submitted the following evidence: photographs of the site showing the amount of work completed, a work schedule, concrete pour tickets, a construction log, affidavits from the contractor and

architect, and copies of cancelled checks; and

WHEREAS, the Board notes that construction continued after the date the PAA was issued, but it has not considered any of this work; and

WHEREAS, the applicant submitted records, which reflect the work completed between the issuance of the Original Permit and the Enactment Date; and

WHEREAS, the Board notes that the applicant initially sought to renew the permits pursuant to ZR § 11-331 and provided documentation of the work performed at the site in support of the claim that prior to the Enactment Date: (1) excavation had been completed and (2) substantial progress had been made on the foundation; and

WHEREAS, the applicant asserted that any unexcavated portion of the site provided a necessary staging area and means for construction vehicle access; and

WHEREAS, although the Board rejected the applicant's assertion that excavation had been completed as required by ZR § 11-331 because it determined that the amount of the site that was unexcavated exceeded the customary amount required for staging and vehicle access, it recognized that the amount of excavation and foundation work was substantial; and

WHEREAS, as noted above, the applicant withdrew the application seeking the renewal of the Original Permit pursuant to ZR § 11-331, but the record for both cases is the same; 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 applicant's analysis; and

WHEREAS, the applicant states that, prior to the Enactment Date, the owner expended or became obligated for the expenditure of \$1,285,874.46 out of \$12,781,619.00 budgeted for the entire project; and

WHEREAS, the Board notes that this includes \$1,070,733.70 for the foundation costs, which represents 82 percent of the total projected cost for the foundation;

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and

WHEREAS, thus, the expenditures up to the Enactment Date represent approximately ten percent of the projected total cost; and

WHEREAS, as proof of the expenditures, the applicant has submitted cancelled checks and an accounting report; 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, the Board has considered the costs for the following: architectural services, demolition, excavation, concrete pours, underpinning, shoring, other construction work, engineering, and DOB fees; and

WHEREAS, the Board has not considered the cost for any expenditures, other than irrevocable financial commitments, for work performed after the Enactment Date, pursuant to the PAA; and

WHEREAS, as to the serious loss finding, the applicant contends that the loss of approximately \$1,285,874.46 associated with pre-Enactment Date project costs that would result if vesting were not permitted is significant; 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 decreased level of return for the project if the height and floor area limitations of the new zoning were imposed; and

WHEREAS, specifically, the applicant notes that the permitted floor area would decrease from 55,000 sq. ft. (2.2 FAR) to 50,000 sq. ft. (2.0 FAR); and

WHEREAS, the applicant notes that the 5,000 sq. ft. loss in floor area represents a loss of seven upper floor apartments and the reconfiguration of the remaining units; and

WHEREAS, the Board notes that upper floor apartments command a premium and that the loss of these and the associated revenue of \$2,677,600.00 (which includes a reduction for the construction associated with the top floor that could not be built); and

WHEREAS, the Board agrees that the need to

redesign the building, coupled with \$1,285,874.46 of actual expenditures that could not be recouped, 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 Building had accrued to the owner of the premises as of the Enactment Date; and

WHEREAS, as to the amount of work performed, the Board reiterates that the degree of construction at the site was sufficient to meet the minimum requirements established by New York courts for such a finding; 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 the common law and is entitled to the requested reinstatement of the Original Permit, and all other related permits necessary to complete construction; and

WHEREAS, the Board notes that the applicant will withdraw the PAA and re-establish the Original Permit under DOB's direction.

Therefore it is Resolved that this appeal made pursuant to the common law of vested rights requesting a reinstatement of the Original Permit associated with DOB Application No. 301943529, 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, April 15, 2008.

A true copy of resolution adopted by the Board of Standards and Appeals, April 15, 2008.

Printed in Bulletin Nos. 16-17, Vol. 93.

Copies Sent

To Applicant

Fire Com'r.

Borough Com'r.