145-12-A
APPLICANT – Law Offices of Marvin Mitzner LLC, for 339 W 29th LLC, owners.
SUBJECT – Application May 3, 2012 – Appeal challenging the determination of the Department of Buildings requiring the owner to obtain approval from the Landmarks Preservation Commission, prior to reinstatement and amendments of the permits. R8B zoning district.
PREMISES A.FFECTED – 339 West 29th Street, north side of West 29th Street between Eighth and Ninth Avenues, Block 753, Lot 16, Borough of Manhattan.
COMMUNITY BOARD #4M
ACTION OF THE BOARD – Appeal Denied.
THE VOTE TO GRANT –
Affirmative: 0
Negative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez 5
THE RESOLUTION –

WHEREAS, this appeal comes before the Board in response to a determination, dated April 3, 2012, signed by the Borough Commissioner of the Department of Buildings (DOB) with respect to DOB Application No. 103907337 (the "Final Determination"); and

WHEREAS, the Final Determination states, in pertinent part:

> Because the permit has already been revoked pursuant to the letter dated December 22, 2010, any reinstatement and amendment must comply with all current laws, including the requirement to obtain Landmarks Preservation Commission approval; and

WHEREAS, a public hearing was held on this appeal on September 25, 2012, after due notice by publication in *The City Record*, with a continued hearing on November 20, 2012, and then to decision on February 12, 2013; and

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

WHEREAS, State Assembly Member Richard Gottfried, State Senator Tom Duane, New York City Council Speaker Christine Quinn, and Manhattan Borough President Scott Stringer provided testimony or made submissions in opposition to the appeal asserting that the permit was invalid, and that the construction was performed illegally and in bad faith; specifically, the officials assert that the permits were obtained, in part, based on inaccurate self-certified plans and that they were properly revoked and work continued despite violations and stop-work orders prior to Landmarks Preservation Commission (LPC) historic district designation; and

WHEREAS, the Historic Districts Council, the Society for Architecture of the City, the West 29th Street Block Association, several historians, and other community members provided written and oral testimony in opposition to the appeal, citing primary concerns about the historic significance of the building; and

WHEREAS, Friends of the Hopper-Gibbons Underground Railroad and Lamartine Place Historic District provided written and oral testimony raising primary concerns that: (1) the building is subject to the jurisdiction of the LPC because the 2005 permit is not valid; (2) the permit cannot be cured; and (3) the Appellant does not have any vested rights to continue construction because it has misrepresented the amount of work performed; and

WHEREAS, DOB and the Appellant have been represented by counsel throughout this appeal; and

WHEREAS, the Appellant filed a companion Multiple Dwelling Law (MDL) waiver application under BSA Cal. No. 144-12-A, which is scheduled for decision April 23, 2013, pending LPC approval; and

WHEREAS, the site is located on the north side of West 29th Street, between Eighth Avenue and Ninth Avenue, within an R8B zoning district within the Lamartine Place Historic District; and

WHEREAS, the site has been occupied by a four-story and basement converted dwelling with ten units (two per floor); and

WHEREAS, the Appellant's proposal reflects the enlargement of the building to include extensions at the third and fourth floors, and a new fifth floor; an earlier iteration of the plans reflected a partial sixth floor (penthouse), which is no longer proposed; and

WHEREAS, the construction has been partially completed; and

WHEREAS, the enlargement required several waivers of MDL regulations; and

Procedural History

WHEREAS, in June 2004, the Appellant filed plans at DOB to vertically and horizontally enlarge the building – to horizontally enlarge the third and fourth floors and to construct a fifth floor and partial sixth floor; and

WHEREAS, on March 25, 2005, DOB issued a permit pursuant to the Professional Certification process; and

WHEREAS, the Appellant asserts that the alterations have not been completed but that the structural work for the horizontal and vertical enlargements was largely completed by 2006; the Appellant states that no structural work has been performed since 2009; and

WHEREAS, on May 29, 2007, DOB granted approval for plans that reflect MDL measures and include the partial sixth floor (which was later subject to an objection for failure to comply with the "Sliver Law" at ZR § 23-692); and

WHEREAS, on October 21, 2008, DOB issued a

letter of intent to revoke because several outstanding objections had not been resolved; and

WHEREAS, on November 25, 2008, the Board decided companion appeals, pursuant to BSA Cal. Nos. 81-08-A and 82-08-A, which concluded that the Board, not DOB, has jurisdiction to waive requirements of the MDL (the "MDL Appeal"); and

WHEREAS, on March 11, 2009, DOB approved plans for an enlargement with a fifth floor, but without the partial sixth floor; this proposal also requires MDL waivers; and

WHEREAS, on March 13, 2009, DOB issued a bulletin related to MDL issues, in light of the MDL Appeal; and

WHEREAS, on May 27, 2009, DOB issued a letter of intent to revoke based on MDL non-compliance; and

WHEREAS, on July 23, 2009, DOB revoked the permit based on MDL non-compliance; and

WHEREAS, on October 13, 2009, the LPC designated the site and the area surrounding the site as the Lamartine Place Historic District; and

WHEREAS, on March 24, 2010, DOB approved revised plans, which address the MDL issues, but did not issue the permit; and

WHEREAS, on April 6, 2010, DOB rescinded its permit revocation; DOB later stated the rescission of the revocation was erroneous as the basis for the rescission was an application for a post approval amendment to remove the fifth floor and partial sixth floor, which was never issued and does not reflect the current proposal; and

WHEREAS, on December 22, 2010, DOB revoked the permit based on MDL non-compliance; and

WHEREAS, on May 30, 2011, DOB audited the permit and issued objections including those related to MDL non-compliance, the requirement for obtaining LPC approval, and Sliver Law non-compliance; and

WHEREAS, on April 3, 2012, DOB reissued the May 2011 objections which form the basis of the appeal; and

WHEREAS, additionally, throughout the DOB review process, DOB issued a series of violations including those related to construction safety, construction contrary to plan, and work without a permit; and

The Landmarks Law

> Administrative Code § 25-305(b)(1) Landmarks Preservation and Historic Districts - Regulation of construction, reconstruction, alterations and demolition
>
> Except in the case of any improvement mentioned in subdivision a of section 25-318 of this chapter and except in the case of a city-aided project, no application shall be approved and no permit or amended permit for the construction, reconstruction, alteration or demolition of any improvement located or to be located on a landmark site or in an historic district or containing an interior landmark shall be issued by the department of buildings . . . until the commission shall have issued either a certificate of no effect on protected architectural features, a certificate of appropriateness or a notice to proceed pursuant to the provisions of this chapter as an authorization for such work; and

The Appellant's Position

WHEREAS, the Appellant appeals DOB's decision that the permit was improperly revoked because LPC approval is not required and requests that the Board direct reinstatement of the 2005 permit, last renewed on April 30, 2009, based upon plans approved on March 11, 2009, which allowed for the enlargement of the building; and

WHEREAS, the Appellant's primary arguments are that (1) because the permit was issued prior to LPC's designation of the Lamartine Place Historic District, the proposal is not subject to LPC approval; (2) DOB improperly revoked the permit in 2009 and in 2010; (3) the absence of MDL waivers is a curable error that does not impair the permit's validity; (4) DOB and, in the alternate, the Board can reinstate the permit not subject to LPC approval; and (5) the amount of construction performed and expenditures satisfies the criteria for common law vested rights and allows for the continuation of construction; and

- LPC Approval is Not Required and DOB Improperly Revoked the Permit

WHEREAS, the Appellant asserts that LPC approval is not required because the permit was issued in 2005, before the LPC designation; and

WHEREAS, the Appellant asserts that the Landmarks Law is clear and that the issuance of a permit prior to landmark designation is the only requirement for exempting a site, that is later designated by LPC, from LPC review; and

WHEREAS, the Appellant asserts that the undisputed fact that its permit was first issued in 2005, prior to the October 13, 2009 date that the designation of the Lamartine Place Historic District was finalized, is controlling and satisfies the Landmarks Law exemption; and

WHEREAS, the Appellant asserts that LPC did not designate the historic district until October 13, 2009, four and one-half years after the issuance of the permit; and

WHEREAS, the Appellant asserts that, per the Administrative Code (AC), even if the permit had been issued one day prior to LPC designation, that would be sufficient to exempt the project from LPC jurisdiction; and

WHEREAS, the Appellant asserts that permit issuance prior to LPC designation alone establishes the right to continue construction without LPC review, and the amount of work performed is irrelevant; and

WHEREAS, further, the Appellant asserts that DOB improperly revoked the permit on July 23, 2009 for failure to obtain MDL approval and on December 22, 2010 for failure to obtain LPC approval in accordance with AC § 25-305(b)(1) because (1) it had other remedies than revocation and (2) the permit was issued in 2005, before the LPC designation; and

WHEREAS, the Appellant asserts that the permit revocation was an abuse of discretion and DOB could have issued a Stop Work Order rather than a revocation; and

- Permit Validity and Reinstatement

WHEREAS, the Appellant asserts that the permit was valid as it can be corrected consistent with prior examples of permits being corrected; and

WHEREAS, the Appellant contends that DOB has been inconsistent with regard to its position on what is a correctable error in the context of permit validity and that DOB, within the scope of its powers and consistent with its prior positions, may deem the permit cured by the Board's grant of waivers under MDL § 310, and allow for its reinstatement; and

WHEREAS, the Appellant asserts that the failure to obtain MDL waivers from the Board prior to permit issuance is a correctable error and that permit issuance prior to designation establishes the right to continue without LPC review, even if no work is performed pursuant to the permit; and

WHEREAS, the Appellant asserts that DOB took a different position about permit validity and correctable errors in BSA Cal. No. 125-11-A ("East 6th Street"), a common law vesting case for a site that had been the subject of an earlier MDL waiver case (under BSA Cal. No. 217-09-A); and

WHEREAS, specifically, the Appellant cites to a DOB letter associated with East 6th Street in which DOB said that "such reinstatement would not present a correctable error issue for DOB as long as the Board also granted the applicant vested rights under the old R7-2 zoning"; and

WHEREAS, the Appellant asserts that DOB's analysis in East 6th Street is applicable here in that if the Board were to approve the companion MDL § 310 application, the error of the permit would be correctable; and

WHEREAS, the Appellant asserts that the intervening rezoning at issue in East 6th Street is analogous to the intervening LPC designation here in that both are changes in law that can be resolved subsequent to a retroactive MDL approval; and

WHEREAS, the Appellant asserts that the infirmity caused by DOB's prior policy of granting MDL waivers is correctable by application to the Board pursuant to MDL § 310, which the Appellant is pursuing by companion application (BSA Cal. No. 144-12-A); and

WHEREAS, the Appellant cites to the Board's decision in East 6th Street for the point that it was "within DOB's and the Board's authority to determine that the corrected permit is valid;" and

WHEREAS, the Appellant also cites to the Board's decisions in two vested rights cases, which went on to litigation – BSA Cal. No. 85-06-BZY/Menachem Realty v. Srinivasan, Index No. 9054/07 (2d Dept. 2009) and BSA Cal. No. 17-05-A/GRA V v. Srinivasan, 12 N.Y.3d 863 (2009); and

WHEREAS, the Appellant asserts that in Menachem, the court reversed the Board's decision, which had supported DOB's determination that certain permit errors were not correctable and in GRA, the Board accepted DOB's position that plans can be amended to correct zoning defects after zoning changes; and

WHEREAS, the Appellant asserts that DOB may reinstate the revoked permit and that, in the alternate, the Board may reinstate the permit *nunc pro tunc*, without requiring LPC approval; and

WHEREAS, the Appellant asserts that DOB's position that reinstatement of the permit, after a successful MDL waiver application before the Board still triggers LPC review is erroneous; and

WHEREAS, the Appellant states that DOB's position is not supported by the AC, is contrary to fundamental fairness, and inconsistent with the litigation associated with 515 East 5th Street v. Board of Standards and Appeals, Index No. 117203/08; and

WHEREAS, the Appellant asserts that the Board's position is that if an MDL application is granted, the original permit is "reinstated" and a new permit is neither requested nor necessary; and

WHEREAS, specifically, the Appellant cites to the City's answer in East 5th Street, which stated that:

> Pursuant to MDL § 310 Petitioners [site owners] may appeal this determination [to issue objections relating to the MDL] to the BSA and seek a hardship waiver from the BSA that would allow them to use the fire safety mechanisms they have installed or plan to install. If the BSA grants the hardship waivers, Petitioners' permits may be reinstated, their construction will be deemed lawful, and the instant proceeding will be deemed moot; and

WHEREAS, the Appellant concludes that once the MDL waivers are granted, the permit will become valid and DOB and the Board can both reinstate without the requirement for LPC review; and

WHEREAS, further, the Appellant asserts that Charter § 666(7) gives the Board authority to modify the

application "of the strict letter of the law, so that the spirit of the law shall be observed" and to do "substantial justice" and, thus, the Board can direct the reinstatement; and

- A Common Law Vested Right to Continue Construction

WHEREAS, the Appellant asserts that the permit should be reinstated under the theory of substantial justice and the common law doctrine of vested rights; and

WHEREAS, the Appellant cites to the criteria set forth in New York State case law that the Board has followed in common law vested rights cases: (1) substantial construction has been completed; (2) substantial expenditures have been made; and (3) serious loss to the owner would result under the new requirements; and

WHEREAS, the Appellant submitted an analysis and evidence in support of its claim that the amount of construction it completed satisfies the three elements of the common law vested rights analysis including a description of the amount of work performed, expenditures, and the loss that would be incurred to remove the enlargement to the building; and

WHEREAS, finally, the Appellant asserts that the vested rights doctrine applies to sites subject to landmark designation, and cites to the Court of Appeals for the 9th Circuit's decision in R.C. Hedreen Co. v. the City of Seattle, 74 F.3d 1246 (1996) for the point that the vested rights doctrine applies in the landmark designation context; and

The Department of Buildings' Position

WHEREAS, DOB asserts that (1) reinstatement of the permit is subject to LPC approval because the permit, issued prior to LPC designation, was invalid; (2) it appropriately exercised its authority by revoking the permit; and (3) it does not have the authority to reinstate the permit without LPC approval; and

- The Requirement for LPC Approval

WHEREAS, DOB finds that because the permit was invalid, LPC approval is required; and

WHEREAS, DOB asserts that it has not been inconsistent or arbitrary and capricious as to what constitutes a correctable error; and

WHEREAS, as to the Appellant's assertion that DOB's actions are inconsistent with the prior decision in East 6th Street, DOB notes that as in the subject case, it issued a vertical extension permit for East 6th Street despite MDL violations; and

WHEREAS, DOB states that shortly before the Board directed the revocation of the East 6th Street permit for MDL noncompliance, a rezoning occurred that further prohibited the enlargements that were the subject of the revoked permits; and

WHEREAS, DOB notes that the Appellant for East 6th Street then successfully obtained an MDL waiver under MDL § 310 from the Board, which allowed part of the extension to be built (BSA Cal. No. 217-09-A) and then sought relief again (BSA Cal. No. 125-11-A) to secure the common law vested right to complete construction under the revoked permit (as amended by BSA's decision in BSA Cal. No. 217-09-A) under the old zoning regulations; and

WHEREAS, DOB states that during the proceedings of the East 6th Street common law vested rights application, it informed the Board that:

> if this Board directs DOB to reinstate permit 104744877 with the plans and MDL waiver previously approved in BSA Cal. No. # 217-09-A, such reinstatement would not present a correctable error issue for DOB as long as this Board also granted the applicant vested rights under the old R7-2 zoning
> (DOB January 10, 2012 submission in Cal. No. 125-11-A)(emphasis added); and

WHEREAS, DOB asserts that the quoted language is consistent with DOB's position in the subject case and that without a ruling in BSA Cal. No. 125-11-A granting vested rights to continue construction under old zoning, the Appellant in that case was in a position analogous to Appellant in this case (i.e., having a permit revoked for MDL errors with a subsequent change in law); and

WHEREAS, DOB states that in both cases, the MDL error would not be deemed correctable, and new construction would have to comply with current law (i.e., new zoning in 125-11-A and LPC designation in the instant case); however, as per the above BSA Cal. No. 125-11-A quote, if the Board granted vested rights under old zoning (which it ultimately did), then the Appellant was restored to a position before the change in law, thus making the MDL error correctable; DOB made an analogous statement in its September 11, 2012 submission in this case, saying:

> If, however, the Board finds good faith reliance and reverses [rather than simply reinstating] the permit revocation, then LPC approval would be necessary only to the extent that a new Post Approval Amendment ("PAA") needs to be filed to address deviations from the last approved PAA prior to LPC designation; and

WHEREAS, accordingly, DOB concludes that it has not been inconsistent regarding its policies of correctable and non-correctable errors in the above-referenced cases; and

WHEREAS, DOB states that if the Board finds good faith reliance and reverses the permit revocation, then LPC approval would be necessary only to the extent that a new PAA needs to be filed to address deviations from the last approved PAA prior to LPC designation; and

WHEREAS, therefore, in determining whether to

grant the MDL waiver and to rescind the permit revocation, DOB respectfully requests that the Board review the plans submitted in connection with the PAA issued on or about March 11, 2009, the last approved PAA prior to LPC designation as any deviations from these previously approved plans will require a new PAA and the requisite LPC approval prior to DOB's renewal of the permit; and

- DOB Properly Revoked the Approval at Issue

WHEREAS, DOB asserts that it properly revoked the approval because it was, undisputedly, not in compliance with the MDL; and

WHEREAS, DOB states that there was ample notice to the Appellant of the MDL deficiency before the revocation took place; and

WHEREAS, specifically, DOB asserts that the Appellant was on notice that DOB improperly waived the MDL as a necessary precondition to the approval as of November 25, 2008, when the Board decided the MDL Appeal, finding that DOB did not have the authority to so waive the MDL; and

WHEREAS, DOB notes that more than six months after the Board's decisions on appeal, the Appellant had not addressed the MDL violations, and, thus, DOB issued objections and an intent to revoke letter dated May 27, 2009 (the "May Intent Letter") and the Appellant had still failed to remedy the MDL objections for an additional two months when DOB finally revoked the approval and permit on July 23, 2009 (the "July Revocation"); and

WHEREAS, DOB states that even after the revocation, the Appellant could have obtained the MDL waiver and reinstated the permit without being affected by any change in law, as the district in which the premises is located was not designated by LPC until October 13, 2009; and

WHEREAS, DOB states that, however, the Appellant did not even get plans approved to remedy the MDL issues until about March 24, 2010 (and the PAA based on these plans was never issued), 16 months after the MDL Appeal was decided, and approximately ten months after the notice of intent to revoke; and

WHEREAS, DOB asserts its position that it has the authority to revoke approval of construction documents that it issued in error; and

WHEREAS, DOB cites to AC § 28-104.2.10, which provides, in relevant part:

> Revocation of approval. The commissioner may, on notice to the applicant, revoke the approval of construction documents for failure to comply with the provisions of this code *or other applicable laws or rules …; or whenever an approval has been issued in error and conditions are such that approval should not have been issued.* Such notice shall inform the applicant of the reasons for the proposed revocation and that the applicant has the right to present to the commissioner or his or her representative within 10 business days of personal service or 15 calendar days of the posting of service by mail, information as to why the approval should not be revoked. (emphasis added); and

WHEREAS, DOB also states that it is undisputed that it issued the approval in error and that significantly more notice was provided to Appellant between the May Intent Letter and the July Revocation than was required by Code; and

WHEREAS, DOB states that it is under no obligation to refrain from revoking the Approval for more than 15 days after the notification required by Code and that because it waited approximately two months after this notification (and about eight months after the MDL Appeal) to revoke the Approval, DOB's revocation in this case was clearly proper; and

- Buildings May not Reinstate the Revoked Permit

WHEREAS, DOB asserts that because: (1) it properly revoked the approval because of MDL violations; and (2) the building was subsequently designated to be within a historic district subject to LPC's jurisdiction, it may not properly reinstate the approval and permit (either on equitable grounds or otherwise) without LPC approval; and

WHEREAS, DOB asserts that as of October 13, 2009, LPC designated the historic district, and thus, any new permit, or change from an existing permit, would require LPC approval (see AC § 25-305(b)(1)); and

WHEREAS, DOB states that it cannot "reinstate" the permit in the sense of the term used in AC § 28-105.9 as such reinstatement triggers compliance with all laws at the time application for reinstatement is made; and

WHEREAS, DOB asserts that, with respect to the job at the subject premises, this means that the Appellant would need to obtain LPC approval for all construction, including the extension on the third and fourth floors and the addition of the fifth floor; and

WHEREAS, accordingly, DOB asserts that because the approval had been properly revoked, DOB could not reinstate and allow the Appellant to avoid the construction regulations imposed by its new designation within a historic district; and

WHEREAS, DOB states that while DOB allows correction of minor construction document deficiencies after a change in applicable law (e.g., LPC designation), such correction is only allowed *before* permit revocation, or when the permit revocation was in error; and

WHEREAS, DOB states that furthermore, and as explained at the hearing on these matters, its position is that failure to obtain a discretionary approval from another agency as a necessary precondition to a permit (e.g., the Board's MDL waiver) is considered a major deficiency and renders the permit invalid and such deficiency cannot be corrected without compliance with the new law; and

WHEREAS, DOB states that it does not have the authority to change its position on revocation in this case by considering factors of equity, such as its original erroneous waiver of the MDL; and

WHEREAS, DOB asserts that an exclusive list of the Commissioner of Buildings' powers and duties is set forth in NYC Charter § 645(b), and while this list covers such technical matters as the examination of plans, issuance of certificates of occupancy, and enforcement of construction laws, it does not grant the Commissioner equitable powers; and

WHEREAS, finally, DOB states that in the exercise of its technical power under the Charter, it properly revoked the Approval, and it has no powers to reinstate after a change in law, either on equitable grounds or otherwise; and

Conclusion

WHEREAS, the Board upholds DOB's determination for the following primary reasons (1) the AC requires LPC approval for reinstated permits; (2) the AC supports DOB's decision to revoke the permit; (3) there is no basis for DOB or the Board to reinstate the permit without LPC approval; and (4) a vested rights analysis is not applicable; and

WHEREAS, the Board finds that the language of AC § 25-305(b)(1), which states that LPC approval is required for a proposal on a site within LPC jurisdiction prior to DOB's issuance of a permit, is clear and unambiguous; and

WHEREAS, the Board also agrees with DOB that the AC requires a revoked permit to follow the code and laws at the time of reinstatement and, therefore, the permit is subject to LPC approval prior to reissuance; and

WHEREAS, in the context of a case subject to the Landmarks Law, the Board concludes that there is no basis for it to direct DOB to reinstate the permit, contrary to the AC, after a potential approval of MDL waivers; and

WHEREAS, the Board states that although the basis for DOB to revoke the permits is not the issue on appeal, if it were, the basis for the revocation is clear in that DOB issued its notice of intent to revoke in July 2009, the Board rendered its decision in the MDL Appeal in November 2008, and DOB issued its MDL bulletin in March 2009; and

WHEREAS, accordingly, the Board notes that the Appellant had time to pursue an MDL waiver, prior to the revocation, and failed to do so; and

WHEREAS, the Board notes that, instead, the Appellant pursued an MDL cure and received approval and a rescission of the revocation based on MDL reliant drawings in February and April 2010, but still did not pursue the MDL waiver or correct any illegalities on the site based on the permit, and thus the permit was again revoked in December 2010; and

WHEREAS, the Board agrees with DOB that the permit was properly revoked in December 2010 (one and one-half years prior to the filing of this appeal) and therefore the appeal of the revocation is untimely; however even if the permit revocation is considered, the basis for such revocation is grounded in law since the MDL waiver was erroneous, and therefore the permit was not valid when issued; and

WHEREAS, the Board does not take a position regarding DOB's policy on what is a correctable error; however, it notes that the Appellant has not established that precedent requires that it correct the failure to secure the required MDL waiver on equitable grounds; and

WHEREAS, the Board also accepts DOB's assertion that cures to permits that require discretionary actions are not considered correctable unless the agency correcting them instructs DOB to reinstate the permit, which the Board finds to be consistent with DOB's position in East 6th Street; and

WHEREAS, the Board distinguishes the facts in Menachem and GRA, which both involved vested rights in a zoning context; and

WHEREAS, the Board accepts DOB's position that certain errors in certain contexts are not correctable, such as in BSA Cal. No. 121-10-A (25-50 Francis Lewis Boulevard), in which it upheld DOB's determination that the sequencing of permits including demolition was not a correctable error; and

WHEREAS, the Board also notes that the Appellant has not cited any cases that involve the requirement of sequencing or another agency's discretionary approval to discredit DOB; and

WHEREAS, although the Board does not find that the vested rights criteria applies to the subject case, it does note that a valid permit prior to the rezoning date is a threshold element for a vesting application, similar to the requirement that a valid permit be issued prior to landmark designation; and

WHEREAS, the Board cites to the Zoning Resolution and case law for the prerequisite of a valid permit: "[t]he provisions of this Section shall apply to minor developments, major developments or other construction authorized by building permits lawfully issued before the effective date of an applicable amendment of this Resolution" (ZR § 11-33) and New York State courts which repeat that vested rights can only be obtained where there is reliance on a valid permit (See Perrotta v. Department of Buildings, 107 A.D.2d 320, 325 (N.Y. App. Div. 1st Dept. 1985);

Village of Asharoken v. Pitassy, 119 A.D.2d 404, 417 (N.Y. App. Div. 2nd Dept. 1986); and Natchev v. Klein, 41 N.Y.2d 834, 834 (1977)); and

WHEREAS, the Board notes that in Perrotta, DOB erroneously issued a permit due to its own initial failure to notice that a builder's plans did not comply with zoning regulations, and the court agreed with DOB that the permit was not valid and stated that "[a] determination as to whether [a] petitioner had vested rights under [its] building permit must, of necessity, involve an examination of the validity of the permit, as well as compliance with technical provisions of the Zoning Resolution, and this is clearly an appropriate inquiry for agency expertise" (107 A.D.2d at 324); and

WHEREAS, the Board notes that the courts have upheld agencies' determinations regarding permit validity on the principle that they were reasonable and based on substantial evidence, without evaluating the criteria for assessing permit validity; and

WHEREAS, the Board notes that only Menachem questions DOB's and the Board's conclusion on permit validity as DOB ultimately conceded in GRA that minor zoning non-compliance was curable; Menachem, similarly involved minor non-compliance not associated with the rezoning (the absence of a ramp and tree pits); and

WHEREAS, the Board distinguishes the MDL Appeal as a case where the Board actually directed DOB to revoke the permit, which is not the case here (the Board also notes that in the MDL Appeal, the permit had actually lapsed by operation of law prior to the Board's decision and, thus, the revocation took place after the rezoning); and

WHEREAS, the Board notes that in the MDL Appeal, the revocation was by the Board in the context of an interpretive appeal, rather than by DOB during the course of remedying its error; and

WHEREAS, the Board finds that the only relevant questions are those associated with whether the permit was issued prior to the historic district designation and the Board agrees with DOB that permit issuance must mean issuance of a *valid* permit; and

WHEREAS, the Board accepts DOB's determination that the permit is not valid since it was issued absent the Board's MDL waivers and thus was MDL non-compliant; and

WHEREAS, further, the Board notes that there was not a permit in place at the time of the historic district designation; and

WHEREAS, the Board agrees with DOB that the Appellant misreads the Board's answer in the East 5th Street litigation to say that once an MDL is granted, such permit will become valid; and

WHEREAS, the Board finds that the Appellant's arguments regarding vesting are misplaced as there is not any precedent, which extends the vesting doctrine to landmarking as neither the Zoning Resolution nor New York State case law have set forth findings for allowing a property owner to establish a vested right to continue construction on a site not affected by a zoning change but, rather affected by an LPC designation; and

WHEREAS, the Board distinguishes zoning changes and LPC designation in that in the rezoning context, the work being performed would not be allowed under the new zoning scheme, whereas the proposal and work in the landmark context may ultimately be allowed, but is just subject to LPC review and approval so the standard may be different; and

WHEREAS, the Board finds that the Appellant's reliance on the Seattle case Hedreen is misplaced in that it involved a moratorium on landmarking a historic theater to allow for construction, was decided against the developer who sought to extend the moratorium on landmarking, and did not involve New York State laws or statutes; further, against the Appellant's case, the court actually said: "Hedreen asks us to broaden the scope of the vesting doctrine to cover the proceedings and designating ordinances authorized by the landmarks ordinance. The Washington Supreme Court has recently expressed its unwillingness to expand the doctrine, which is one of the most protective of developers' rights in the country. [Erickson, 872 P.2d at 1096-97] We too are unwilling to expand it and we decline Hedreen's invitation"; and

WHEREAS, the Board notes that the AC clarifies that a continued right to construct on a site affected by an LPC designation is achieved by establishing the issuance of the permit prior to designation and not through the showing of work done and expenditures as in a rezoning action; and

WHEREAS, accordingly, the Board finds that the Appellant's analysis regarding work performed and expenditures is irrelevant in the context of seeking exemption from LPC review post-designation; and

WHEREAS, the Board concludes that, contrary the Appellant's contention, questions of fairness are beyond the scope of its administrative appeals and that, instead, it relies on the text of the AC; and

WHEREAS, accordingly, the Board has not considered questions of fairness; and

WHEREAS, as to the Board's Charter authority regarding hardship, the Board does not find that LPC review and approval constitutes a hardship to be remedied by its general Charter authority; the Board asserts that the Appellant has the ability to obtain approval from LPC; further, the Board cannot make the finding that the spirit of the law is preserved and substantial justice is done; and

WHEREAS, the Board finds that if it were to instruct DOB to reinstate the permit, it would be tantamount to waiving the AC related to permit reinstatement under current law and the basis would be in equity; and

145-12-A

WHEREAS, the Board finds that the Appellant has mischaracterized the Board's statements in the East 5th Street litigation and that the meaning of the Board's statement was that there would be a potential for reinstatement after an MDL approval, not that a reinstatement was guaranteed or even warranted; and

WHEREAS, based on the above, the Board agrees with DOB that LPC approval is required and the permit should not be reinstated without it.

Therefore it is Resolved that the instant appeal, seeking a reversal of the Final Determination, dated April 3, 2012, determining that *inter alia* LPC approval is required, is hereby denied.

Adopted by the Board of Standards and Appeals, February 12, 2013.

A true copy of resolution adopted by the Board of Standards and Appeals, February 12, 2013.
Printed in Bulletin No. 7, Vol. 98.

Copies Sent
To Applicant
Fire Com'r.
Borough Com'r.