

8-15-A

APPLICANT – Duval & Stackenfeld, for 180 Orchard LLC c/o Brack Capital Real Estate, owner.

SUBJECT – Application January 14, 2015 – BZY Minor Development (§11-332) to extend the time of construction for a minor development for a period of six months; Determination of common law vested rights. Building permit was obtained in 2005 and development was vested at date of Lower East Side rezoning in 2008. C4-4A zoning district.

PREMISES AFFECTED – 180 Orchard Street, bounded by Orchard, East Houston, Ludlow and Stanton Streets, approx. 220’ of East Houston, Block 00412, Lot 5, Borough of Manhattan.

COMMUNITY BOARD #3M

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 is an appeal requesting a Board determination that the owner of the subject premises has obtained a vested right under the common law to the construction of a 24-story, with mezzanine, mixed use building at the subject site; and

WHEREAS, this application was brought concurrently with a companion application under BSA Cal. No. 7-15-BZY (the “BZY Application”), decided as of 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 of the building pursuant to ZR § 11-332; and

WHEREAS, the Board notes that while separate applications were filed according to Board procedure the cases were heard together and the record for both cases is the same; and

WHEREAS, a public hearing was held on this application on June 2, 2015, after due notice by publication in The City Record, and then to decision on June 16, 2015; and

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

WHEREAS, the subject site is an L-shaped through lot with frontage on Orchard Street and Ludlow Street, between Houston Street and Stanton Street, within a C4-4A zoning district; and

WHEREAS, the subject site has 128’-3” of frontage along Orchard Street, 50’-1” of frontage along Ludlow Street, a depth ranging from 87’-10” to 175’-8”, and a total lot area of 41,501 sq. ft.; and

WHEREAS, under construction at the site is a 24-story, with mezzanine, mixed commercial and community facility building with 154,153.15 sq. ft. of floor area (the “Building”); and

WHEREAS, the Building will contain retail uses on the cellar and ground floors, community facility uses on the mezzanine and second floor and hotel uses throughout, as

well as an accessory parking garage¹; and

WHEREAS, on November 23, 2005, New Building Permit No. 104297850-01-NB (hereinafter, the “Permit”) was issued by the DOB permitting construction of the Building; and

WHEREAS, however, on November 19, 2008 (hereinafter, the “Enactment Date”), the City Council voted to adopt the East Village/Lower East Side Rezoning, which rezoned the site from C6-1 to C4-4A; and

WHEREAS, accordingly, the Building does not comply with the current zoning with respect to floor area, number of hotel rooms, lot coverage, density, building height and street wall location; and

WHEREAS, the applicant represents that the Building complies with the parameters of the former C6-1 zoning district; and

WHEREAS, as of the Enactment Date, the applicant had obtained permits for the development and had completed 100 percent of its foundations, such that the right to continue construction was vested pursuant to ZR § 11-331, which allows DOB to determine that construction may continue under such circumstances; and

WHEREAS, however, only two years are allowed for completion of construction and to obtain a certificate of occupancy; and

WHEREAS, in the two years subsequent to the Enactment Date, construction was not completed and a certificate of occupancy was not issued; and

WHEREAS, accordingly, an application was filed with the Board for an extension of time to complete construction and obtain a certificate of occupancy; and

WHEREAS, on March 15, 2011, the Board granted a two-year extension of time to complete construction and obtain a certificate of occupancy under BSA Cal. No. 201-10-BZY; and

WHEREAS, accordingly, the applicant had until March 15, 2013 to complete construction and obtain a certificate of occupancy; and

WHEREAS, on March 19, 2013, also under BSA Cal. No. 201-10-BZY, the Board granted a subsequent two-year extension of time to complete construction and obtain certificate of occupancy; and

WHEREAS, accordingly, the applicant had until March 19, 2015 to complete construction of the Building and obtain a certificate of occupancy; and

WHEREAS, as a consequence, on March 19, 2015, the Permit lapsed; and

WHEREAS, the applicant now seeks a two-year extension to complete construction pursuant to the common law doctrine of vested rights; 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, the Board notes its previous determination under BSA Cal No. 201-10-BZY that the Permit lawfully issued prior to the Enactment Date; and

¹ Pursuant to a special permit issued by the Department of City Planning on March 4, 2015, pursuant to ZR § 13-561, the applicant has increased the size of the accessory parking garage to accommodate 99 cars.

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WHEREAS, moreover, by letter dated May 26, 2015, DOB confirmed that the 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

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

WHEREAS, the Board notes that work completed prior to the Enactment Date constituted substantial construction and/or substantial expenditures as stated or implied in BSA Cal No. 201-10-BZY and the statutory renewal thereof; and

WHEREAS, the applicant submits, and the Board finds, that the work performed prior and subsequent to the previous approvals constitutes substantial construction and, similarly, that expenditures related thereto were similarly substantial; and

WHEREAS, the applicant notes that the Board's grant under BSA Cal No. 201-10-BZY included a finding that substantial expenditures were incurred at the Site; and

WHEREAS, specifically, the applicant notes that it has incurred additional construction costs and obligations of \$51,367,621 since the previous extension was granted by this Board such that the total construction expenditure and obligation to date for the Building is \$76,572,757;

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 in addition to the foregoing construction costs, it has spent approximately \$19.4 million in soft costs and \$27,756,918 in acquisition costs; and

WHEREAS, as noted, the applicant has submitted invoices and copies of cancelled checks; 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 applicant states that if it is not allowed to complete construction of the New Building it will incur a loss in excess of \$123,972,500 in funds spent and obligations incurred (including soft costs and construction costs incurred by the previous owner of the Site, which were included in the purchase price of the Building) and notes that demolition of the existing Building and construction of a new building which complies with the current C4-4A zoning regulations would cost in excess of \$60 million; and

WHEREAS, thus, the applicant states that it would suffer a serious loss if the site were required to comply with the C4-4A zoning regulations; and

WHEREAS, the Board agrees that complying with the C4-4A zoning 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. 104297850-01-NB, 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 two years from the date of this grant.

Adopted by the Board of Standards and Appeals, June 16, 2015.

**A true copy of resolution adopted by the Board of Standards and Appeals, June 16, 2015.
Printed in Bulletin Nos. 25-26, Vol. 100.**

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

