

**233-10-A**

APPLICANT – Rothkrug Rothkrug & Spector, LLP, for Alco Builders Incorporated, owners.

SUBJECT – Application December 23, 2010 – Appeal seeking a common law vested right to continue development commenced under the prior R6 Zoning District. R4-1 zoning district.

PREMISES AFFECTED – 90-22 176<sup>th</sup> Street, between Jamaica and 90<sup>th</sup> Avenues, Block 9811, Lot 61(tent), Borough of Queens.

**COMMUNITY BOARD #12Q**

APPEARANCES –

For Applicant: Todd Dale.

**ACTION OF THE BOARD** – Appeal granted.

**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 of a three-story three-family residential building under the common law doctrine of vested rights; and

WHEREAS, a public hearing was held on this application on December 13, 2011, after due notice by publication in *The City Record*, with continued hearings on February 28, 2012 and March 20, 2012, and then to decision on April 3, 2012; 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, the site is located on 176<sup>th</sup> Street between Jamaica Avenue and 90<sup>th</sup> Avenue and has a lot area of 5,280 sq. ft.; and

WHEREAS, the applicant proposes to develop the site with a three-story three-family residential building (Use Group 2), with approximately 10,623 sq. ft. of floor area (1.72 FAR) (the “Building”); and

WHEREAS, the applicant states that the subject site is one of five tax lots (comprising two zoning lots) that were planned to be developed with a total of five three-story, three-family residential buildings; and

WHEREAS, the applicant notes that the Board previously granted an extension of time to complete construction pursuant to ZR § 11-332 for the other four buildings (BSA Cal. Nos. 283-09-BZY through 286-09-BZY); and

WHEREAS, the applicant further notes that two of the adjacent buildings for which the Board granted an extension of time to complete construction under BSA Cal. Nos. 283-09-BZY through 286-09-BZY are located on the subject zoning lot (the “Adjacent Buildings”); and

WHEREAS, on October 7, 2008, under BSA Cal. No. 230-07-BZY, the Board denied an application for an extension of time to complete construction for the subject building pursuant to ZR § 11-331, predicated on the Department of Buildings’ (“DOB”) determination that the

permit was invalid; and

WHEREAS, specifically, the Board found that, pursuant to DOB’s determination, the applicant did not meet the ZR § 11-331 threshold requirement that the “building permit has been lawfully issued” prior to the effective date of the amendment to the Zoning Resolution; and

WHEREAS, the applicant represents that it has since resolved all objections to the permit with DOB, and now seeks a determination that the owner has obtained the right to complete construction pursuant to the common law doctrine of vested rights; and

WHEREAS, the subject premises is currently located within an R4-1 zoning district, but was formerly located within an R6 zoning district; and

WHEREAS, on July 5, 2007, DOB issued New Building Permit No. 402568431-01-NB (the “NB Permit”) for the Building; and

WHEREAS, however, on September 10, 2007 (the “Enactment Date”), the City Council voted to adopt the Jamaica Rezoning, which rezoned the site to R4-1, as noted above; and

WHEREAS, because the site is now within an R4-1 district, the Building would not comply with the new zoning restrictions; and

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

WHEREAS, the Board notes that, as discussed in its denial of BSA Cal. No. 230-07-BZY, DOB revoked the NB Permit on June 17, 2008 based on an outstanding objection concerning the noncompliance of the plans with the required dimensions of an inner court; and

WHEREAS, the applicant states that it has since resolved all objections pertaining to the inner court, and DOB has submitted an Objection sheet dated February 4, 2009, indicating that the objection related to the inner court (ZR § 23-85) has been removed; and

WHEREAS, by letter dated November 3, 2011, DOB rescinded the permit revocation; and

WHEREAS, by letter dated November 10, 2011, DOB states that the NB Permit was lawfully issued, authorizing construction of the Building prior to the Enactment Date; and

WHEREAS, the Board has reviewed the record and agrees that the NB Permit was lawfully issued to the owner of the subject premises prior to the Enactment Date; and

WHEREAS, the Board notes that when work proceeds under a valid 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 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

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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 work at the site: 100 percent of the excavation work and approximately 35 percent of the foundation work, including the pouring of concrete for footings and foundation walls; and

WHEREAS, in support of this assertion, the applicant submitted the following evidence: a foundation plan, construction contracts, an affidavit from the owner, concrete pour tickets, and photographs of the site showing the amount of work completed prior to the Enactment Date; 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 \$32,273, including hard and soft costs and irrevocable commitments, out of \$250,000 budgeted for construction of the Building; and

WHEREAS, as proof of the expenditures, the applicant has submitted construction contracts, copies of cancelled checks, invoices, and accounting tables; and

WHEREAS, thus, the expenditures up to the Enactment Date represent approximately 13 percent of the projected total cost; 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, as to serious loss, the Board considers not only whether certain improvements and expenditures could not be recouped under the new zoning, but also considerations such as the diminution in income that would occur if the new zoning were imposed and the reduction in value between the proposed building and the building permitted under the new zoning; and

WHEREAS, the applicant states that if the owner is not permitted to vest under the former R6 zoning it would be impossible to develop the remainder of the zoning lot without demolishing the Adjacent Buildings, which are located on the subject zoning lot; and

WHEREAS, accordingly, the applicant represents that the inability to vest under the former R6 zoning would result in the loss of the entire Building; and

WHEREAS, the Board agrees that the inability to construct any building on the subject zoning lot under the R4-1 regulations without demolishing the Adjacent Buildings, constitutes a serious economic loss, and that the evidence 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 Buildings had accrued to the owner of the premises as of the Enactment Date.

*Therefore it is Resolved* that this appeal made pursuant to the common law of vested rights requesting a reinstatement of New Building Permit No. 402568431-01-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, April 3, 2012.

**A true copy of resolution adopted by the Board of Standards and Appeals, April 3, 2012  
Printed in Bulletin No. 15, Vol. 97.**

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