

41-11-A

APPLICANT – Eric Palatnik, P.C., for Sheryl Fayena, owner.

SUBJECT – Application April 12, 2011 – Appeal seeking a determination that the owner has acquired a common law vested right to continue development under the prior R-6 zoning district. R4 zoning district. PREMISES AFFECTED – 1314 Avenue S, between East 13th and East 14th Streets, Block 7292, Lot 6, Borough of Brooklyn.

COMMUNITY BOARD #15BK

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez5
Negative:.....0

THE RESOLUTION –

WHEREAS, this is an application requesting a Board determination that the owner of the premises has obtained the right to complete construction of a two-story, single-family residential building under the common law doctrine of vested rights; and

WHEREAS, a public hearing was held on this application on September 17, 2013, after due notice by publication in *The City Record*, with continued hearings on November 26, 2013, and January 14, 2014, and then to decision on February 4, 2014; and

WHEREAS, the subject site is located on the south side of Avenue S, between East 13th Street and East 14th Street, within an R4-1 zoning district; and

WHEREAS, the site has 20 feet of frontage along Avenue S, and a total lot area of 2,000 sq. ft.; and

WHEREAS, the site is occupied by a two-story, single-family residential building which, in 2006, was enlarged at the rear, resulting in an increase in floor area from 1,971 sq. ft. of floor area (0.99 FAR) to 2,709 sq. ft. of floor area (1.4 FAR) (the “Building”); and

WHEREAS, the applicant represents that the Building complies with the parameters of the former R6 zoning district; and

WHEREAS, on January 11, 2006, Alteration Permit No. 302066136-01-AL (hereinafter, the “Alteration Permit”) was issued by the Department of Buildings (“DOB”) permitting construction of the Building; and

WHEREAS, however, on February 15, 2006, (hereinafter, the “Enactment Date”), the City Council voted to adopt the Homecrest Rezoning, which rezoned the site from R6 to R4-1; and

WHEREAS, the Building, which is a single-family residence with 2,709 sq. ft. of floor area (1.4 FAR), no side yards, and a rear yard with a depth of 17 feet, does not comply with the current zoning, which allows only single-family residences with a maximum FAR of 0.75, one side yard with a minimum width of eight feet, and a

rear yard with a minimum depth of 30 feet; and

WHEREAS, as of the Enactment Date, the applicant had obtained permits but had not completed construction; and

WHEREAS, accordingly, the applicant now seeks recognition of vested right 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, by letter dated September 11, 2013, DOB stated that the Alteration Permit was lawfully issued, authorizing construction of the proposed 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 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 noted above, the applicant obtained a permit to enlarge the Building at the rear 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 performed: 100 percent of the excavation, footings, concrete walls, exterior, roof finish, skylights, windows, and 50 percent of the electrical and exterior stucco finish; 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

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site; and

WHEREAS, at hearing, the Board requested further documentation regarding the timing of the work performed; and

WHEREAS, in response, the applicant provided affidavits from the owner of the site and from a neighbor; both affidavits attest to the timing and nature of the work performed prior to the Enactment Date; 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 for the enlargement is \$77,600 (including \$51,000 in hard costs), or approximately 61 percent, out of the \$127,610 cost to complete; and

WHEREAS, as noted, the applicant has submitted copies of cancelled checks and affidavits in support of this representation; 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 examines 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 notes that the R4-1 floor area and yard regulations are significantly more restrictive than the R6 regulations; specifically, whereas a residence with a 3.0 FAR and no side yards or rear yard is permitted in an R6 zoning district (because the

site is within a 100 feet of a corner), in an R4-1 district, the maximum permitted FAR is 0.75, and one side yard with a minimum width of eight feet and a rear yard with a minimum depth of 30 feet are required; and

WHEREAS, accordingly, the applicant states that, in order to comply with the R4-1 regulations, it would have to restore the building to its prior condition, which even under the R4-1 regulations would be non-complying; and

WHEREAS, the applicant represents that restoring the building to its prior condition would result in a serious economic loss to the applicant, because all monies spent to date will be lost and additional expenditures will be required, without any increase in the value of the Building; and

WHEREAS, the Board agrees that complying with the R4-1 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. 302066136-01-AL, 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, February 4, 2014.

A true copy of resolution adopted by the Board of Standards and Appeals, February 4, 2014.

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Copies Sent

To Applicant

Fire Com'r.

Borough Com'r.

