

**214-13-A**

APPLICANT – Slater & Beckerman, P.C., for Jeffrey Mitchell, owner.

SUBJECT – Application July 15, 2013 – Appeal seeking a determination that the owner has acquired a common law vested right to complete construction under the prior R3-2 zoning district. R3-X zoning district.

PREMISES AFFECTED – 219-08 141st Avenue, south side of 141st Avenue between 219th Street and 222nd Street, Block 13145, Lot 15, Borough of Queens.

**COMMUNITY BOARD #13Q**

**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 Montanez .....5  
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, two-family residential building under the common law doctrine of vested rights; and

WHEREAS, a public hearing was held on this application on January 28, 2014, after due notice by publication in *The City Record*, and then to decision on February 25, 2014; and

WHEREAS, the premises and surrounding area had site and neighborhood examinations by Commissioner Hinkson and Commissioner Montanez; and

WHEREAS, the subject site is located on the corner of the intersection of 141st Avenue and 219th Street, within an R3X zoning district; and

WHEREAS, the site has 100 feet of frontage along 141st Avenue, 59.88 feet of frontage along 219th Street, and a lot area of 6,455 sq. ft.; and

WHEREAS, the site is a single zoning lot comprising Lots 14 and 15; and

WHEREAS, Lot 14 is occupied by a two-story single-family dwelling with 1,942 sq. ft. of floor area; Lot 15 is occupied by a two-story, two-family dwelling (the “Building”) with 1,920 sq. ft. of floor area, which was constructed as a semi-detached building with the existing dwelling on Lot 14 pursuant to permits that were initially issued in 2006; therefore, the total floor area proposed for the site is 3,862 sq. ft. (0.59 FAR); and

WHEREAS, the applicant represents that the Building complies with the parameters of the former R3-2 zoning district, as well as the open space provisions of the Zoning Resolution prior to the April 30, 2008 citywide text amendment; and

WHEREAS, on July 27, 2006, Alteration Permit No. 402424747-01-NB (the “New Building Permit”) was issued by the Department of Buildings (“DOB”) permitting construction of the Building; and

WHEREAS, however, on April 30, 2008, (the “Text Enactment Date”), the City Council voted to adopt the Yards Text Amendment (the “Text Amendment”), which increased the amount of open space required on

the site; later that year, on September 4, 2008 (the “Rezoning Date”), the City Council voted to adopt the Laurelton Rezoning, which rezoned the site from an R3-2 zoning district to an R3X zoning district; and

WHEREAS, the Building, which is a two-family, semi-detached building with side yard widths of 8’-0” and 16’-9”, a front yard depth of 17’-0”, and a rear yard with a depth of 16’-9”, does not comply with the current zoning, which allows only single- and two-family detached buildings and requires two side yards with minimum widths of 10’-0” and 20’-0”, a minimum front yard depth of 18’-0”, and a minimum rear yard depth of 30’-0”; and

WHEREAS, as of the Text Enactment Date, which, as noted above, preceded the Rezoning Date, the applicant had obtained permits but had not completed construction; and

WHEREAS, the applicant represents that although it completed foundations in September 2007, construction stalled in 2008 and the Building was not completed within two years of the Text Enactment Date (or the Rezoning Date); and

WHEREAS, accordingly, the applicant now seeks recognition of a 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 Text Enactment Date and the Rezoning Date and that the work was performed pursuant to such lawful permit; and

WHEREAS, by letter dated November 15, 2013, DOB stated that the New Building Permit was lawfully issued, authorizing construction of the proposed Building prior to the Text Enactment Date (and the Rezoning 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

**214-13-A**

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 Text Enactment Date and the Rezoning Date; and

WHEREAS, specifically, the applicant states that the work it performed constitutes substantial construction, in that, prior to the Text Enactment Date and the Rezoning Date, it completed the excavation, footings, foundation, exterior walls, and roof construction; 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 inspection reports; contractor payment requests; photographs of the site; and an affidavit from the owner of the site attesting to the timing and nature of the work performed prior to the Text Enactment Date and the Rezoning Date; and

WHEREAS, the Board has reviewed the representations as to the amount and type of work completed before the Text Enactment Date and the Rezoning 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 construction of the Building is \$153,044.50, or approximately 54 percent, out of the \$282,850 cost to complete; and

WHEREAS, as noted, the applicant has submitted a breakdown of costs and expenditures, copies of cancelled checks, and an affidavit 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 states that the owner would incur a loss of \$233,044.50 if the Building must be modified to comply with the post-Text Amendment open space requirements and the R3X district regulations; specifically, as noted above, wider side yards and deeper front and rear yards would be required; and

WHEREAS, therefore, the applicant states that the Building would have to be completely demolished at a cost of \$80,000; because the owner has already spent \$153,044.50, the applicant states that that entire amount would be lost as well; further, constructing the new, complying building is estimated to cost \$259,000; and

WHEREAS, the applicant also notes that because the owner currently resides in the building on Lot 14 and has mortgaged the entire lot, having to build a complying building on the site instead of the Building would jeopardize the owner’s ability to finance both buildings; and

WHEREAS, accordingly, the applicant represents that complying with the current zoning regulations would result in a serious loss to the owner; and

WHEREAS, the Board agrees that complying with the open space requirements of the Text Amendment and the R3X 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 before the Text Enactment Date and the Rezoning 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. 402424747-01-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 four years from the date of this grant.

Adopted by the Board of Standards and Appeals, February 25, 2014.

**A true copy of resolution adopted by the Board of Standards and Appeals, February 25, 2014.**

**Printed in Bulletin Nos. 8-9, Vol. 99.**

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

