



NYC Department of Buildings
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By Hand

May 24, 2005

Honorable Members of the Board
Board of Standards and Appeals
40 Rector Street, 9th Floor
New York, NY 10006

Re: Calendar # 17-05-A
3329-3333 Giles Place, Bronx, New York
Block 3258, Lots 5 and 7
Application No. 200869024-01-FO

Dear Honorable Members of the Board:

The Department of Buildings (the “Department”) respectfully submits this statement to inform the Board of its determination regarding Application No. 200869024-01-FO (the “Foundation Permit”) issued on September 7, 2005. At the hearing on March 15, 2005, the Department requested the opportunity to compare a site survey with the Sanborn Map that was submitted in lieu of a survey for the Foundation Permit. The survey was required so that the Department could make a determination as to whether the proposed construction complied with the Zoning Resolution independent of the issue of the permit’s lapse by operation of law. Since the Applicant¹ did not respond with the required survey, the Department requested in its March 29, 2005 submission that the Board direct the Applicant to produce the required survey. The Board did so, and the Applicant has since produced the required survey. Based on this survey, the Department’s determination is that the Foundation Permit was not validly issued and does not authorize lawful construction. The Department respectfully requests that the Board weigh this determination in its consideration of whether or not Applicant has secured vested rights under the common law, and find that common law vested rights cannot attach to the invalidly issued Foundation Permit.

The Foundation Permit was Not Properly Issued

As discussed in prior submissions, the Department accepted a Sanborn map that was stamped and signed by the architect in lieu of the required survey when it reviewed and approved the Foundation Permit on September 2, 2004 that was subsequently issued on September 7, 2004. This survey was required to satisfy the objection raised on the August 25, 2004 examination of the Foundation Permit. This objection specified, “Show compliance with the

¹ “Applicant” refers to GRA V LLC, represented by Sheldon Lobel and Associates in this appeal.

street wall location requirements of Zoning Resolution Section 23-633.” The purpose of the survey is to account for adjacent buildings to establish the application of the Quality Housing requirements for setback in the Zoning Resolution. Based on the architect’s representations that the Sanborn map accurately represented the site conditions, the plan examiner approved the permit so that foundation work could start.

However, a comparison of the survey and the Sanborn map reveals that the map does not accurately depict the site conditions. According to the Sanborn map, the nearest adjacent building had a zero setback from the street line, but according to the recently received survey, the nearest adjacent building is set back 1.9 feet. Therefore, the proposed construction must be set back 1.9 feet in order to comply with zoning. Since the Foundation Permit was issued based on a proposed structure located at the street line that is contrary to zoning, the Foundation Permit was not validly issued. (See, Memorandum of Bronx Borough Commissioner, Marshall Kaminer, P.E., dated May 9, 2005 attached hereto as Exhibit 1.) Applicant will need to submit revised plans before the Department can reach a determination regarding the ability of the existing foundation to remain unmodified. (See reconsideration attached hereto as Exhibit 2, issued on May 4, 2005: “Plot Plan A-1 needs to be revised to show proper setback of 1.9 ft.”)

As discussed in Mr. Kaminer’s memo (Exhibit 1), the May 4, 2005 reconsideration does not address or accept the existing foundation. The reconsideration only addresses the setback requirement of the building.² Moreover, the possibility of keeping the foundation to the street line unmodified and of changing the building design to reflect the necessary 1.9 feet setback does not validate the permit. Since a foundation permit undergoes review with respect to zoning and overall structure, it is necessarily issued in reference to a proposed building. To the extent the proposed foundation was filed in connection with a building that would violate ZR § 23-633, no permit should have been issued for its construction.

On October 4, 2004, the Foundation Permit was revoked by operation of law based on the adoption of the zoning amendments, since the project did not vest pursuant to ZR § 11-31. The foundation’s non-compliance with the Quality Housing provisions of zoning, however, is a separate ground for revocation. The Applicant must submit plans to correct the existing conditions in order to bring the construction in compliance with zoning. However, pursuant to the New York City Administrative Code Section 27-196, the reinstatement must “comply with all the requirements of this code and other applicable laws and regulations in effect at the time of the application for reinstatement.” Therefore, the review would be undertaken pursuant to the new zoning.

Vested Rights Do Not Attach to an Invalidly Issued Permit

A common law vested right to complete a nonconforming building matures when substantial work is performed and obligations are assumed in good faith reliance on a permit legally issued. And basic to traditional vested rights jurisprudence is the tenet that there is no right to reliance upon an invalid building permit. See, Reichenbach v. Windward at Southampton (80 Misc 2d 1031, 1034, aff’d 48 Ad2d 909, lv dismissed 38 NY2d 912).

As discussed, the Foundation Permit was not validly issued. Furthermore, the Applicant cannot be said to have constructed in “good-faith reliance” on the foundation permit, since the

² At one point, there was a dispute over whether the house or garage established the setback requirement as the “adjacent building.” The reconsideration serves to make clear that the required setback may be determined using the garage, and is therefore 1.9 feet.

permit was issued based on Applicant's own incorrect assertions regarding the site. Here, the architect knew or should have known that only a survey could determine the actual set-back condition of the adjacent building, and instead submitted a Sanborn map. Moreover, construction done pursuant to a partial permit, as is the instant case, goes with no assurance that other permits will be issued. See, Riverdale Community Planning Association v. Crinnion, 133 N.Y.S. 2d 706,709. Therefore, any work done before obtaining a permit authorizing the entire construction is done at the Applicant's risk, a risk that Applicant compounded by not undertaking the proper diligence regarding the conditions at the site.

The Department's audit of the new building permit that was filed under professional certification on September 28, 2004 (the "Professionally Certified Permit") revealed that the Professionally Certified Permit was simply a re-filing of the new building application that had failed to obtain full approval, but rather resulted in the issuance of the Foundation Permit alone on September 7, 2004. (See, Objection 2a of Special Audit Objections attached hereto as Exhibit 3: "Submitted plan is exactly the same set of plans that was examined and disapproved under a different pending new building application." See also objection 9a.) The fact that Applicant attempted to re-file a permit under professional certification that had already been disapproved in several respects calls into question any good faith reliance argument.³ (See Objection Sheet for Foundation Permit attached hereto as Exhibit 4.) Instead, it would appear that Applicant simply desired to obtain an expedited approval of the application prior to the zoning change.

Conclusion

The facts do not support the grant of common law vested rights. Any work performed or obligations assumed were not done pursuant to a validly issued permit.⁴ Moreover, Applicant's haphazard submission of a Sanborn map instead of a survey to establish conditions at the site that were crucial to the analysis of whether the Foundation Permit complied with zoning would appear to be motivated by a desire to beat the zoning clock. Applicant's later professional certification of an application that it knew or should have known would not have been approved since it was a re-filing of an application that had already failed to obtain full approval is further evidence of Applicant's motives to rush in an application. The Department respectfully requests that the Board uphold the Department's revocations and stop-work orders.

Sincerely,

Janine A. Gaylard
Assistant General Counsel

³ Architect Raymond Nelson was the architect that filed the Professionally Certified Permit, since Donna Difara, the architect of record for the Foundation Permit surrendered her self-certification privileges in 2003.

⁴ The Department already determined earlier in this proceeding that the Professionally Certified Permit was not issued before the effective date of the zoning amendments and as such may not be considered for vesting purposes. The Department has also already determined that no permit was issued meeting the statutory vesting requirements of ZR §11-31 and ZR§ 11-331.

cc: Patricia J. Lancaster, F.A.I.A., Commissioner
Marshall Kaminer, P.E., Borough Commissioner, Bronx
Basil Szpylka, Deputy Borough Commissioner, Bronx
Cheryl Leon, Acting Borough Manager, Bronx
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