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This memorandum is uncorrected and subject to revision before
publication in the New York Reports.

No. 85
Matter of GRA V, LLC, et al.,
Appellants,
v.
Meenakshi Srinivasan, et al.,
Respondents.

Submitted by Richard Lobel, for appellants.
Submitted by Leonard J. Koerner, for respondents.

MEMORANDUM:

The order of the Appellate Division should be reversed,
with costs, and the matter remitted to Supreme Court with
directions to remand to the New York City Board of Standards and
Appeals (BSA) for further proceedings in accordance with this
memorandum.

Petitioners brought this article 78 proceeding to annul a BSA resolution. The challenged resolution denied petitioners' appeal from a determination of the New York City Department of Buildings (DOB) that required petitioners to stop work on a proposed apartment building. The proposed building was not a permissible use under a newly-adopted amendment to the New York City Zoning Resolution. The DOB decided, and the BSA agreed, that petitioners had not acquired a vested right to build before the amendment was adopted.

Supreme Court rejected petitioners' claim and dismissed the proceeding. The Appellate Division, with two justices dissenting, affirmed. On appeal to this Court, however, the BSA concedes that it and the lower courts were in error and that its determination must be vacated. The only issue on which the parties now disagree is whether petitioners have established their right to proceed with their building as a matter of law, or whether the BSA should consider the matter further.

We are unable to say that petitioners' right to build is established as a matter of law by this record. While no legal obstacle to the building is apparent, the BSA, basing its decision on what it erroneously thought to be a fatal flaw in petitioners' application, may not have reviewed all other material aspects of it. The matter must therefore be remitted to the BSA to enable it to do so.

* * * * *

Order reversed, with costs, and matter remitted to Supreme Court, Bronx County, with directions to remand to respondent Board of Standards and Appeals of the City of New York for further proceedings in accordance with the memorandum herein. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

Decided June 4, 2009

SUPREME COURT BRONX COUNTY
Index No. 1036/06

To be argued by
LEONARD J. KOERNER
(15 Minutes Requested)

COURT OF APPEALS
STATE OF NEW YORK

GRA V, LLC and PARIS GIANNOPULOS,

Petitioners-Appellants,

For a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules,

-against-

MEENAKSHI SRINIVASAN, JAMES CHIN, SATISH
BABBAR, and JOEL MIELE, as COMMISSIONERS OF
THE BOARD OF STANDARDS AND APPEALS OF THE
CITY OF NEW YORK, AND THE BOARD OF STANDARDS
AND APPEALS OF THE CITY OF NEW YORK,

Respondents-Respondent.

RESPONDENTS' BRIEF

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Date Brief Completed: March 11, 2009

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¹ A new Building Code became effective on July 1, 2008. The sections of the Administrative Code cited in this brief are part of the prior Building Code in effect during the relevant time period.

COURT OF APPEALS
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CITY OF NEW YORK, AND THE BOARD OF STANDARDS
AND APPEALS OF THE CITY OF NEW YORK,

Respondents-Respondent.

RESPONDENTS' BRIEF

PRELIMINARY STATEMENT

In this CPLR Article 78 proceeding, petitioners-appellants GRA V, LLC and Paris Giannopoulos ("petitioners"), appeal from a Decision and Order (one paper) of the Appellate Division, First Department, entered July 29, 2008 (4a-29a)¹. That order affirmed, with two Justices dissenting, an order of the Supreme Court, Bronx County (Hunter, J.) dated October 3, 2006 and entered October 6, 2006, which dismissed the petition in this proceeding (7-11).

¹ Unless otherwise indicated, numbers in parentheses indicate pages in the Record on Appeal.

The petition sought a judgment setting aside the New York City Board of Standards and Appeals' ("BSA") determination that petitioner, GRA V, LLC., the owner of the premises located at 3329/3333 Giles Place, Block 3258, lots 5 and 7, Bronx, New York ("the premises"), did not acquire a common-law vested right to continue development of the premises as a multi-story building after the zoning of the area changed. Petitioner Paris Giannopoulos is the managing member of GRA V, LLC.

Counsel for respondents have recently learned that there have been instances in which the New York City Department of Buildings ("DOB"), with the knowledge of the BSA, has permitted property owners to amend building plans after zoning changes, to correct zoning non-compliances, and thereby obtain common law vested rights to construct buildings that were permissible under the prior zoning, but not the new zoning.

Consequently, respondents no longer urge the position that they took below, and which was upheld by the Appellate Division - namely, that the foundation permit issued to petitioners was invalid because it was issued for the construction of a building that was not compliant with the express provisions of the Zoning Resolution - and, therefore, that petitioners could not acquire a vested right to complete the seven-story apartment building. As further detailed below, respondents, therefore, respectfully request that this Court

remand the matter to the BSA for DOB to consider whether petitioners can, as they represented before the BSA and in this proceeding, construct a zoning-compliant building above the existing foundation. If petitioners are able to make that showing, there will remain for determination by the BSA the issues of whether petitioners have completed substantial construction and incurred substantial expenditures in reliance on such permit and would face serious loss if vesting were denied, which they must show in order to obtain a common law vested right to proceed with the construction of a seven-story apartment building. Remand is necessary because the respective agencies have not previously considered these issues.

QUESTION PRESENTED

In view of DOB's change in policy in determining the validity of permits issued prior to zoning changes, should this Court remand this case to the BSA for DOB to determine whether petitioners are able to construct a zoning-compliant building above the existing foundation, as they have represented, and, if so, for the BSA to determine whether petitioners have completed substantial construction and incurred substantial expenditures in reliance on such permit and would face serious loss if vesting were denied?

JURISDICTIONAL STATEMENT

This Court has jurisdiction of this appeal pursuant to Civil Practice Law and Rules § 5601(a). The order appealed from finally determined the proceeding.

STATEMENT OF FACTS

The New York City Zoning Resolution.

The New York City Zoning Resolution ("ZR") divides the City into three basic use districts: Residential - R, Commercial - C. and Manufacturing - M. Within each district, the size or bulk of a building is also regulated. This is indicated by a number after the letter. The higher the number, the greater the bulk allowed.

Section 645(b) of Chapter 26 of the New York City Charter ("Department of Buildings") empowers the Commissioner of Buildings to approve plans for the construction and alteration of buildings "subject to review only by the [B]oard of [S]tandards and [A]ppeals as provided by law²." Under ZR § 23-

² Additionally, Admin. Code Section 27-197, "Revocation of Permit," provides that:

"The commissioner may, on notice to the applicant, revoke any permit for failure to comply with the provisions of this code or other applicable laws and regulations; or whenever there has been any false statement or any misrepresentation as to a material fact in the application or accompanying plans and papers upon the basis of which the permit was issued; or whenever any permit

633³, the street wall⁴ location of a new building on a narrow street⁵ must be located no closer to the street line⁶ than the street wall of the adjacent existing building (426).

New York City Building Code⁷

In accordance with Building Code §§ 27-157 and 27-164, which are set forth below, when DOB considers a permit application governed by ZR § 23-633, it requires an accurate boundary survey made by a licensed surveyor showing the location of the existing adjacent street wall. The purpose of the required survey is to properly identify existing adjacent

has been issued in error and conditions are such that a permit should not have been issued."

³ ZR § 23-633(a)(2) reads: "In the districts indicated, and for buildings developed or enlarged pursuant to the Quality Housing Program on narrow streets in R6 and R7 Districts without a letter suffix, the street wall of any development or enlargement on a zoning lot with at least 50 feet of frontage along a street line shall be located no closer to the street line than the street wall on an adjacent existing building."

⁴ "A 'street wall' is a wall or portion of a building facing a street." ZR § 12-10.

⁵ "Narrow street" is defined in ZR § 12-10 as any street less than 75 feet wide.

⁶ A 'street line' is a lot line separating a street from other land." ZR § 12-10.

⁷ A new Building Code became effective on July 1, 2008. The sections of the Administrative Code cited in this brief are part of the prior Building Code in effect during the relevant time period.

buildings to establish the setback requirements for a new building.

New York City Administrative Code

Title 27: Construction and Maintenance

Chapter 1: Building Code

Subchapter 1: Administration and Enforcement

Art. 11: Applications for new building permits

§ 27-157 Plans required.

All such applications shall be accompanied by architectural, structural, and mechanical plans, which shall be complete and of sufficient clarity to indicate the entire nature and extent of the proposed construction work and its compliance with the provisions of this code and other applicable laws and regulations.

[E]ach plan or drawing shall contain the registration number, seal, signature, and address of the architect or engineer who prepared or supervised the preparation of the plans.

(a) Architectural plans shall contain at least the following data and information:

(1) Lot diagram showing compliance with the zoning resolution, and indicating the size, height, and location of the proposed construction and all existing structures on the site and their distances from lot and street lines, the established grade and existing curb elevations, and final grade elevations of the site shown by contours or spot grades at reasonable intervals. The lot diagram shall be drawn in accordance with an accurate boundary survey, made by a licensed surveyor, which shall be attached to and form part of the lot diagram (emphasis added).

* * *

(b) Structural plans shall contain at least the following data and information except as provided for in section 27-590 of article one of subchapter ten of this chapter:

(1) Foundation plans, floor plans, levels, and sections, showing all structural requirements.

* * *

(7) Foundation plans shall comply with the requirements of subchapter eleven of this chapter and shall show the plan locations, design elevations of the bottoms, and details as to sizes, reinforcements, and construction of all footings, piers, foundation walls, pile groups, and pile caps. The levels of footings of adjacent structures shall be indicated or, if the adjacent structures are pile supported, this shall be so stated. . . .

Art. 13: Applications for foundation and earthwork permits

§ 27-164 Plans required.

All such applications shall be accompanied by a lot diagram, as provided in paragraph one of subdivision (a) of section 27-157 of article eleven of this subchapter, and foundation plans, as provided in subdivision (b) of section 27-157 of article eleven of this subchapter, except that when the permit sought is solely for earthwork excavation or fill operations, the applicant shall submit, in lieu of foundation plans, plans showing the exact location, extent, and depth or height of the proposed excavation or fill operation (emphasis added).

Vesting of Permits after Zoning Changes

There are two ways a permit can vest, so that an owner may complete a structure under the terms of zoning requirements in effect prior to a zoning change resulting in a more restrictive requirement: (1) statutory vesting - ZR § 11-331 - if a lawful building permit⁸ has been issued and the foundation has been completed; and (2) common-law vesting - if a valid building permit has been issued and if there has been substantial construction and substantial expenditures in reliance on such permit and the owner would face serious loss if vesting were denied.

Permits issued to petitioners by DOB

When petitioners bought the premises, it was zoned R6 and consisted of two lots - one was vacant and one had a two-story frame house on it (377, 518). The R6 zone is appropriate for medium density housing of between three and twelve stories (110, n3). Petitioners intended to develop the property with a seven-story, 63-unit residential apartment building with 43,370 square feet of floor area (173). However, as is discussed herein at page 11, effective September 28, 2004, the zoning for

⁸ A "lawfully issued building permit" shall be a building permit which is based upon an approved application showing complete plans and specifications, and authorizes the entire construction and not merely a part thereof and is issued prior to any applicable amendment to the [Zoning Resolution]. ZR §§ 11-331 and 11-31 (267-268).

the area changed from R6 to R4A, which, in accordance with ZR § 21-13, only allows for the construction of one or two-family detached houses. To be allowed to continue to construct a seven-story building, petitioners would have had to have, by the date of the new zoning, a vested right to proceed either under the common-law or under ZR § 11-331. Thus, unless petitioners had such a vested right, their proposed 63-unit apartment building could not be constructed under the new zoning (111, ¶55).

On May 24, 2004, DOB issued permits authorizing the construction of retaining walls and fences to be installed as part of the site development of the premises (165, 242-245). Petitioners' architect, Donna DiFara, submitted plans for (1) foundation work and (2) a seven-story New Building ("NB") (110, ¶53).

Ms. DiFara's plans were fully reviewed by a DOB plan examiner (110, ¶53). DOB raised 30 objections to the NB plans on August 25, 2004 (249-253). The eighth objection asked petitioners to show compliance with the street wall location requirements of ZR § 23-633 (250). The issuance of the objections precluded the full approval of a permit for a New Building (232).

In support of the original application for a foundation permit, Ms. DiFara submitted a stamped and signed⁹ Sanborn map¹⁰ in lieu of a lot diagram drawn in accordance with an accurate building survey made by a licensed surveyor as is required by Building Code §§ 27-157(a)(1) and 27-164 (115, ¶65). The Sanborn map showed that the nearest existing adjacent building to the premises had a zero set back from the street line (421-423, 426-427, 448-453). Consequently, petitioners' New Building plans and design were based on a zero setback from the street line. Ms. DiFara assured the reviewing plan examiner that the map accurately represented the conditions at the site (327).

Although it is not DOB's policy and it is contrary to Building Code §§ 27-157(a)(1) and 27-164 to accept a Sanborn map in the place of a survey, based on Ms. DiFara's representation regarding the accuracy of the Sanborn map, on September 2, 2004,

⁹ When an architect signs and seals the DOB application he/she states that "to the best of my knowledge and belief, the plans and work shown thereon comply with the provisions of the building code and other applicable laws and regulations."

¹⁰ A Sanborn map is a map published by the Sanborn Library LLC which notes that "the information contained in this product is believed by the publishers to be reliable, but its accuracy is not guaranteed. It was compiled from relevant public records, but it is not implied by the publishers (or any government agency) that it represents an 'official' replication thereof."

the plan examiner incorrectly accepted the application and approved the foundation permit and on September 7, 2004 DOB issued a permit only for excavation/foundation work to be performed in connection with the construction of a seven-story, 63-unit residential apartment house (165, 172, 327).

The Rezoning of the area

On September 8, 2004, the City Planning Commission ("CPC") adopted a ZR amendment (CPC Res. C040516 ZMX) which rezoned the area in which the premises is located from R6 to R4A (120, 232). The ZR amendment was approved by the City Council on September 28, 2004. Some foundation work had begun at the premises prior to September 28, 2004. However, DOB did not issue a permit authorizing the construction of a New Building at the premises prior to the September 28, 2004 enactment of the zoning amendment (151, 232).

Petitioners' professionally certified New Building application

On September 28, 2004, the day of the City Council's passage of the zoning amendment, a second architect, Nelson Ray, who was Ms. DiFara's partner, submitted a professionally certified application for a New Building on behalf of petitioners (233, 297). The professionally-certified NB application filed on September 28, 2004 included plans that were identical to the plans previously filed by architect DiFara in

the summer of 2004, to which the DOB had raised 30 objections on August 25, 2004 (235-236, 509).

Professional certification is an optional plan review procedure, which allows a professional engineer or registered architect to certify compliance with applicable laws and codes on applications filed by him/her as applicant. Such professionally-certified applications do not undergo full plan review by a DOB plan examiner (111-112, ¶56). Thus, notwithstanding the August 25, 2004 departmental objections to the same building plans, the professional certification process resulted in the issuance to petitioners of a partial permit¹¹ for the NB on the same day that the plans were filed, i.e., September 28, 2004 (173). But this professionally certified NB permit was issued later in the day, after the City Council had approved the zoning change¹². Thus, DOB did not issue a permit authorizing the construction of a New Building at the premises prior to the September 28, 2004 enactment of the zoning amendment (151, 232).

¹¹ The partial permit included all work types except plumbing and "Builder's Pavement Plan." Foundation and General Construction work types were included in the permit (233).

¹² The City Council adjourned at 3:20 PM on September 28, 2004. The New Building permit was issued at 3:56 PM on September 28, 2004 (151).

DOB's Stop Work Order, dated September 29, 2004 and Petitioners' application pursuant to ZR § 11-331

On September 29, 2004, a DOB inspection showed that the foundation at the premises was incomplete (263-264). As a consequence, and in light of the rezoning, on October 5, 2004, DOB issued a Stop Work Order, dated September 29, 2004, for all work at the premises. (263, 373-374). Petitioner filed an application under BSA Cal No 346-04-BZY seeking to continue construction at the site in accordance with ZR § 11-331, pursuant to the NB permit issued on September 28, 2004 (140).

DOB's audit

A December 10, 2004 DOB audit of the professionally-certified application for the NB permit resulted in the issuance of 32 objections (233, 258-261). As part of the DOB audit and further review of the application, DOB asked for an accurate survey showing the location of the adjoining property street walls (258, # 8).

Petitioners' request that DOB vacate the Stop Work Order

By letter dated December 13, 2004, petitioners' attorney requested that DOB vacate the Stop Work Order and reinstate the revoked building permits (150). DOB responded by issuing a "DENIED" stamp, dated December 27, 2004, on petitioners' request letter (150).

Proceedings before the BSA

At a BSA hearing held on January 11, 2005 on petitioners' statutory vesting application under BSA Cal No 346-04-BZY, petitioners indicated their intent to file an appeal to the BSA from DOB's December 27, 2004 denial of petitioners' December 13, 2004 request that DOB vacate its stop work order, issued on October 5, 2004, and reissue the NB permit (140-141). Thus, petitioners asked that decision on their application under BSA Cal No. 346-04-BZY on statutory vesting be adjourned pending outcome of the appeal (141).

On January 27, 2005, petitioners filed an application to the BSA under Calendar No. 17-05-A, seeking a determination that they had a common-law vested right to continue with construction under the prior R6 zoning because they had undertaken substantial construction and had a validly issued permit (146-149, 152-164).

On May 24, 2005 Janine A. Gaylard, DOB Assistant General Counsel, wrote to the BSA (421-424) informing it that DOB had determined that petitioners' foundation permit had not been properly issued (421-422), that the foundation permit had lapsed by operation of law due to the rezoning, since the project did not vest pursuant to ZR § 11-31 (422), and that petitioners would need to submit revised plans before DOB could

reach a determination regarding the ability of the existing foundation to remain unmodified (422).

Attached to Ms. Gaylard's letter was a memorandum, dated May 9, 2005, from DOB Bronx Borough Commissioner Marshall Kaminer detailing the non-compliance (426-427). He discussed a reconsideration that was provided by Bronx Code and Zoning Specialist, Kalyan Bhattacharyya, P.E., on May 4, 2005 (429). The reconsideration related to DOB's eighth objection to petitioners' application for a new building permit (429, 431). Borough Commissioner Kaminer stated that "this consideration did not address nor accept applicant's statements regarding the foundation" (427). In her letter, Ms. Gaylard noted that "at one point, there was a dispute over whether the house or garage established the setback requirement as the adjacent building, and that the reconsideration "served to make clear that the required setback may be determined using the garage, and is therefore 1.9 feet" (422, n. 2).

On May 24, 2005, petitioners submitted the Sanborn map, a revised survey, updated on April 7, 2005, and revised plans to the BSA in support of the application (440-472). The survey showed that the nearest adjacent building, a garage, had a 1.9-foot setback from the street line, not the zero setback that had been shown on the Sanborn map submitted with the first NB application in the summer of 2004 (454-454). Thus, in order

to comply with the R6 zoning, the proposed seven-story building would have to be set back 1.9 feet from the street. Petitioners have consistently represented that they are able to construct their proposed building, by modifying their plans to set it back 1.9 feet on the existing foundation (414, 442, 443, App. Br. 2, 12).

On June 7, 2005 DOB submitted a statement in response to the petitioners' May 24, 2005 submission (478-482). The DOB stated, in part:

Appellant has repeatedly tried to separate the proposed building design from the proposed foundation design, arguing that the foundation as drawn and poured is compliant with the pre-September 28, 2004 zoning regardless of whether the building design violates zoning. However, contrary to the representations made by Appellant, the building design and the foundation design cannot be separated for zoning purposes. As already discussed, since a foundation permit undergoes review with respect to zoning and overall structure, it is necessarily issued in reference to a proposed building. The foundation design for the proposed building does not conform to the requirements of ZR § 23-633. Moreover, Appellant has yet to demonstrate how the existing foundation will accommodate the necessary setback of the building.

Appellant's position is contrary to Department policy and procedure for the issuance of foundation permits. Moreover, Appellant's argument that the foundation design can be separated from the building design would encourage developers cognizant of a zoning change to file haphazard applications for foundation permits with the

idea that they could simply "fix" the building design after the effective date of the zoning change.

* * *

[T]he fact that no above grade structure has been built at the premises is not relevant to the validity of the Foundation Permit. Similarly, the amount of deviation of the setback does not effect [sic] the validity of the permit. A permit is either valid or invalid. A permit does not become valid because it is slightly invalid. As a ministerial agency, the Department does not have the discretion to make such a determination.

On July 13, 2005 petitioners submitted a Foundation Location Survey (534-535). On August 2, 2005, they made another submission to the BSA in support of the application (560-574). Petitioners generally argued that the degree of noncompliance was de minimis, that the foundation permit had to be considered separately from the new building permit, that there is no requirement that the foundation be set back in accordance with ZR 23-633(a)(2), that no non-compliance had been created at the premises, and that petitioners should have the right to bring the unbuilt portion of the structure into complete compliance (562).

On August 9, 2005, the BSA voted on the application, denying it unanimously by a vote of 4 to 0 (575-577). The BSA denied petitioners' application under BSA Cal No 346-04-BZY on the question of statutory vesting, based on (i) DOB's

determination that the rezoning was effective before the professionally certified New Building permit had been issued and, therefore, that petitioners did not have a valid building permit before the rezoning (138-145, 233)¹³ and (ii) DOB's determination that the foundation permit issued on September 7, 2004 lacked the mandated survey showing compliance with the Zoning Resolution and, therefore, was issued erroneously. Based on DOB's determination that a valid permit did not exist, the BSA did not determine if the findings of a common law vesting case had been met - that the construction work at the site and petitioners' expenditures were substantial and that the potential loss from a denial would be serious (144-145).

The BSA incorporated its findings into a Resolution adopted on August 9, 2005 (138-145).

Petitioner's Article 78 Proceeding

By Notice of Petition, dated September 9, 2005, filed in Supreme Court, New York County, petitioners commenced the instant proceeding seeking a judgment pursuant to Article 78 of the Civil Practice Law and Rules setting aside, as arbitrary and capricious, the BSA's determination that the owner of the premises did not acquire a common-law vested right to continue

¹³ Petitioners did not challenge the BSA determination on Cal. No. 346-04-BZY, relating to their statutory vesting application, or the applicability of ZR § 11-331 in this proceeding.

development under regulations applicable to an R6 zoning district (12-22). Respondents sought a change of venue to Bronx County, which was granted on February 23, 2006 (133, ¶91). On May 1, 2006 petitioners served an Amended Verified Petition (62-76). Respondents served a verified Answer to the Amended Petition, dated July 20, 2006 (105-137).

DECISION IN SUPREME COURT

In a decision and judgment, dated October 3, 2006 and entered October 6, 2006, the Supreme Court (Hunter, J.) denied petitioners' application, pursuant to Article 78, and dismissed the petition in its entirety, finding that the BSA's decision was not arbitrary or capricious (7-11).

DECISION AND ORDER AT THE APPELLATE DIVISION

The Appellate Division affirmed, on a three to two vote (4a-29a). The three-justice majority observed that "[r]espondents take the consistent position that a foundation permit should be examined as part of an entire construction, for both validity and vesting purposes" (9a), and further noted:

[E]ven where DOB erroneously issues a permit due to its own initial failure to notice that a builder's plans do not comply with code provisions, no vested rights are acquired, since the permit could not have been validly granted in the first place (see *Matter of Perrotta v. City of New York*, 107 AD2d 320, 324-325

[1985], *affd* 66 NY2d 859 [1985]
(8a).

The dissent took the view that DOB erred in "maintaining that the foundation permit is inseparable from the planned building" (26a), and that the zoning noncompliance was de minimis and readily cured and, therefore, that petitioners should have been permitted to correct their building plans (26a-27a).

ARGUMENT

COUNSEL FOR RESPONDENTS HAVE RECENTLY LEARNED THAT DOB HAS TAKEN THE POSITION, RECOGNIZED BY THE BSA, THAT A BUILDING PERMIT AND THE SUPPORTING ARCHITECTURAL PLANS CAN BE AMENDED AFTER A ZONING CHANGE WITH RESPECT TO A ZONING NON-COMPLIANCE IN THE ORIGINAL BUILDING PLANS, WHICH POSITION IS INCONSISTENT WITH THE POSITION THAT RESPONDENTS HAVE TAKEN THROUGHOUT THIS LITIGATION. FOR THAT REASON, RESPONDENTS NO LONGER ADVANCE THE ARGUMENT MADE BELOW AND UPHELD BY THE APPELLATE DIVISION, AND RESPECTFULLY REQUEST THAT THIS MATTER BE REMANDED TO THE BSA FOR FURTHER CONSIDERATION.

Respondents have argued, throughout this litigation, that a building permit may properly be determined by DOB to have been invalidly issued if it is based upon plans that show a noncompliance with the requirements of the Zoning Resolution in effect at the time of the rezoning, and that no amendment of those plans can retroactively validate a permit after a zoning

change. However, since counsel for respondents have recently learned of instances in which DOB, with the knowledge of the BSA, permitted such amendments, respondents no longer advance that argument, which was upheld by the Appellate Division.

Petitioners have represented to the BSA and throughout this proceeding that they are willing and able to modify their plans to provide a seven-story building with the required setback on the existing foundation. In light of the change of position of the DOB, recognized by the BSA, respondents submit that a remand to the BSA is required in order for DOB to determine whether petitioners can, in fact, do so.

Since it was not established that petitioners had a valid building permit before the effective date of the applicable zoning change, neither the BSA nor the Courts below made the findings necessary to determine whether petitioners had a vested right to complete construction. Thus, upon remand, if DOB determines that the amended plans comply with the provisions of the Zoning Resolution in effect at the time of their initial submission such that petitioners have a valid permit, the BSA would consider whether petitioners have shown that they have completed substantial construction and incurred substantial expenditures in reliance on such permit and would face serious loss if vesting were denied -- the requirements for common law vesting. On remand, the issue of statutory vesting will not be

considered, since petitioners did not complete their foundation, nor did DOB issue a permit authorizing the construction of a New Building at the premises prior to the September 28, 2004 enactment of the zoning amendment (ZR §§ 11-331 and 11-31) and, indeed, they did not pursue their statutory vesting claim in this proceeding.

CONCLUSION

**THE MATTER SHOULD BE REMANDED TO
THE BSA FOR FURTHER CONSIDERATION
OF PETITIONERS' COMMON LAW VESTED
RIGHTS CLAIM.**

Respectfully submitted,
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By: 
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of Counsel.

March 11, 2009

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COURT OF APPEALS
STATE OF NEW YORK

GRA V, LLC and PARIS GIANNOPULOS,

Petitioners-Appellants,

For a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules,

-against-

MEENAKSHI SRINIVASAN, JAMES CHIN, SATISH
BABBAR, and JOEL MIELE, as COMMISSIONERS OF
THE BOARD OF STANDARDS AND APPEALS OF THE
CITY OF NEW YORK, AND THE BOARD OF STANDARDS
AND APPEALS OF THE CITY OF NEW YORK,

Respondents-Respondent.

RESPONDENTS' BRIEF

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ARGUMENT 20

COUNSEL FOR RESPONDENTS HAVE RECENTLY LEARNED THAT DOB HAS TAKEN THE POSITION, RECOGNIZED BY THE BSA, THAT A BUILDING PERMIT AND THE SUPPORTING ARCHITECTURAL PLANS CAN BE AMENDED AFTER A ZONING CHANGE WITH RESPECT TO A ZONING NON-COMPLIANCE IN THE ORIGINAL BUILDING PLANS, WHICH POSITION IS INCONSISTENT WITH THE POSITION THAT RESPONDENTS HAVE TAKEN THROUGHOUT THIS LITIGATION. FOR THAT REASON, RESPONDENTS NO LONGER ADVANCE THE ARGUMENT MADE BELOW AND UPHELD BY THE APPELLATE DIVISION, AND RESPECTFULLY REQUEST THAT THIS MATTER BE REMANDED TO THE BSA FOR FURTHER CONSIDERATION. 20

CONCLUSION 22

THE MATTER SHOULD BE REMANDED TO THE BSA FOR FURTHER CONSIDERATION OF PETITIONERS' COMMON LAW VESTED RIGHTS CLAIM. 22

TABLE OF AUTHORITIES

CASES

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STATUTORY AND REGULATORY MATERIALS

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New York City Zoning Resolution [ZR] § 11-31 8, 14, 22

ZR § 11-331 8, 9, 13, 18, 22

ZR § 12-10 5

ZR § 21-13 9

ZR § 23-633 4-5, 9, 16, 17

¹ A new Building Code became effective on July 1, 2008. The sections of the Administrative Code cited in this brief are part of the prior Building Code in effect during the relevant time period.