

354-05-BZY

MEETING OF: July 25, 2006
CALENDAR NO.: 354-05-BZY
PREMISES: 182 15th Street, Brooklyn
Block 1047, Tentative Lot 24

ACTION OF THE BOARD: Application denied.

THE VOTE TO GRANT:

Affirmative:.....0
Negative: Chair Srinivasan, Vice-Chair Babbar and Commissioner Collins.....3

THE RESOLUTION:

WHEREAS, this is an application under ZR § 11-331, to renew a building permit and extend the time for the completion of the required foundation of a proposed eleven-story multiple dwelling, filed on behalf of the developer; and

WHEREAS, a public hearing was held on this application on March 29, 2006 after due notice by publication in *The City Record*, with a continued hearing on April 25, 2006; and

WHEREAS, on April 25, the hearing was closed and the application was scheduled for decision on June 13, 2006; and

WHEREAS, on June 13, the hearing was reopened for submission of further evidence; after this evidence was submitted and testimony was taken, the hearing was again closed and the application was re-scheduled for decision on July 25, 2006; and

WHEREAS, the site was inspected by a committee of the Board, consisting of Chair Srinivasan, Vice Chair Babbar, and Commissioner Collins; and

WHEREAS, Community Board 7, Brooklyn, opposed the application, stating that the foundation was not complete and that several stop work orders and violations were issued; and

WHEREAS, additionally, the South Park Slope Community Group and the Concerned Citizens of Greenwood Heights opposed the application, stating that excavation was not complete, that work was done after hours, and that demolition occurred without a mechanical demolition permit; and

WHEREAS, certain elected officials, including State Senator Velmanette Montgomery, State Assemblyman James Brennan, Public Advocate Betsy Gotbaum, and City Councilmember Sara M. Gonzalez, also provided testimony in opposition to the application; and

WHEREAS, additionally, a group of neighbors to the site opposed the application, and were represented by counsel (hereinafter, "Opposition Counsel"); and

WHEREAS, the Board notes that some of the testimony provided by the above individuals and entities related directly to the application and the supporting evidence submitted by the applicant, as well as the technical findings set forth at ZR § 11-331; and

WHEREAS, some of the opposition testimony, however, reflected a general objection to any development on the site that does not comply with the new zoning district parameters (discussed below); and

WHEREAS, the Board understands that many community residents were particularly concerned about the size of the proposed building; and

WHEREAS, while testimony that reflected this sentiment was accepted into the record, the Board's determination as reflected herein is guided by applicable ZR provisions and certain legal principles, and was based on consideration of the legal claims made by the

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developer as well as the opposition's responses to these claims; and

WHEREAS, the subject site is located on the south side of 15th Street, 320 feet west of Fifth Avenue; and

WHEREAS, the subject site has a total lot area of 25,281 sq. ft.; and

WHEREAS, the site is proposed to be developed with an eleven-story, 62-unit multiple dwelling (hereinafter, the "Proposed Development"); and

WHEREAS, on July 20, 2004, the developer filed an application with the Department of Buildings (DOB) for a New Building permit, under Application No. 301791318-01-NB, for the Proposed Development; DOB subsequently approved this application on December 15, 2004; and

WHEREAS, on July 13, 2005, DOB issued demolition permits (301976556-01-DM and 301976565-01-DM), a construction fence permit (301976556-01-EQ-FN) and a shed permit (301976556-02-EQ-SH); and

WHEREAS, on September 12, 2005, DOB issued permits for a construction fence (301791318-01-EQ-FN) and a sidewalk shed (301791318-02-EQ-SH); and

WHEREAS, also on September 12, 2005, DOB approved a post-approval amendment to the New Building Permit application, and then issued New Building Permit No. 301791318-01-NB (hereinafter, the "NB Permit"); and

WHEREAS, on October 4, 2005, subsequent to a special audit review of the NB Permit, DOB issued a letter to the developer providing notice of its intent to revoke the NB Permit based on the objections raised during the audit; a stop work order (the "SWO") was also issued on this date; and

WHEREAS, on November 11, 2005, DOB rescinded its notice of intent to revoke, finding that the objections were successfully resolved by the developer; the SWO was also lifted; and

WHEREAS, on November 14, 2005, DOB formally approved the revised plans that responded to the objections; and

WHEREAS, Opposition Counsel contested the validity of the NB Permit, but DOB confirmed that it was lawful when issued and in effect from September 12, 2005 (when it was initially issued) until October 4, 2005 (when the SWO was issued), and then from November 11, 2005 (when the intent to revoke was rescinded) until November 16, 2005 (the date of the rezoning); and

WHEREAS, when the NB Permit was issued and when construction commenced, the site was within an R6 zoning district; and

WHEREAS, the Proposed Development complied with the R6 zoning in terms of height and floor area; and

WHEREAS, however, as noted above, on November 16, 2005 (hereinafter, the "Rezoning Date"), the City Council voted to enact the Park Slope South rezoning proposal, which changed the site's zoning from R6 to R6B; and

WHEREAS, the Proposed Development would not comply with the new R6B district provisions concerning height and floor area; and

WHEREAS, specifically, the Proposed Development has a height of 131 feet (50 feet is the maximum permitted in the R6B zoning district) and an FAR of 2.38 (2.0 is the maximum permitted); and

WHEREAS, because the Proposed Development violated these provisions of the

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R6B zoning and work on the required foundation was not completed by the Rezoning Date, the NB Permit lapsed by operation of law; and

WHEREAS, the developer of the Proposed Development now applies to the Board to renew the NB Permit pursuant to ZR § 11-331, so that the Proposed Development may be fully constructed under the prior R6 zoning; and

WHEREAS, ZR § 11-331 reads, in pertinent part: "If, before the effective date of an applicable amendment of this Resolution, a building permit has been lawfully issued . . . to a person with a possessory interest in a zoning lot, authorizing a minor development . . . such construction, if lawful in other respects, may be continued provided that: (a) in the case of a minor development, all work on foundations had been completed prior to such effective date . . . In the event that such required foundations have been commenced but not completed before such effective date, the building permit shall automatically lapse on the effective date and the right to continue construction shall terminate. An application to renew the building permit may be made to the Board of Standards and Appeals not more than 30 days after the lapse of such building permit. The Board may renew the building permit and authorize an extension of time limited to one term of not more than six months to permit the completion of the required foundations, provided that the Board finds that, on the date the building permit lapsed, excavation had been completed and substantial progress made on foundations."; and

WHEREAS, the developer asserts that excavation was completed and that the required foundation was nearly complete as of November 15, 2005, one day prior to the Rezoning Date; and

WHEREAS, after the subject application had been filed, DOB informed the Board that it had issued a violation for mechanical demolition without the required permit and that this fact had not been disclosed by the developer in its initial application papers; and

WHEREAS, the violation (ECB Violation Number 34487161J), issued on August 23, 2005, noted, in sum and substance, that mechanical demolition was occurring at the rear of the site with a Volvo excavator, that no safety zone was provided, and that DOB records did not reflect a mechanical demolition permit; and

WHEREAS, as noted above, the developer had permits to perform demolition, but these permits only covered manual demolition, not mechanical; and

WHEREAS, during the course of the hearing process, DOB provided testimony that mechanical demolition is more hazardous than manual demolition and therefore requires a separate permit; and

WHEREAS, accordingly, the demolition permits obtained by the developer did not cover the use of the excavator to take down buildings (though it could be on-site for debris clean-up); and

WHEREAS, at the first hearing on this matter, conducted on March 29, 2006, the developer conceded that DOB issued the above-cited violation for mechanical demolition without a permit; and

WHEREAS, however, the developer claimed that mechanical demolition occurred on only one day (August 23, 2005, the day the violation was issued) for a four hour period, and then the excavator was taken off-site; and

WHEREAS, the developer concluded that no time advantage was gained from the single day of mechanical demolition; and

WHEREAS, at the next hearing, conducted on April 25, 2006, the developer again stated that mechanical demolition only occurred for between two and four hours on August 23, 2005; that mechanical demolition was not reinitiated; and that the rest of the demolition was done under the issued demolition permits for manual demolition; and

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WHEREAS, in response to an inquiry about the mechanical demolition from the Board, the developer made the following statement: "But here, somebody tried to do something, they did it wrong, they got caught, they stopped, and it was done right, and that's what happened"; and

WHEREAS, based on these representations, made over the course of two hearings, the Board accepted the developer's position that mechanical demolition only occurred on one day, and then proceeded to an analysis of whether excavation was complete and whether substantial progress had been made on the required foundation; and

WHEREAS, however, the Board was later informed that there was evidence that purportedly showed that mechanical demolition was not limited to one day, as claimed by the developer, but actually occurred over the span of approximately ten business days, from August 22, 2005 until September 10, 2005; and

WHEREAS, the Board scheduled a subsequent hearing on June 13, 2006 for review of this evidence, which was in the form of video footage, taken by certain neighbors of the subject site; and

WHEREAS, the video shown at this hearing by Opposition Counsel was a compilation of various individual videos taken by different neighbors; some of the separate videos included a date stamp, though some did not; and

WHEREAS, at the request of the Board, Opposition Counsel later submitted affidavits from the individuals who shot the video, attesting to the dates on which the video was taken; and

WHEREAS, further, DOB reviewed the video footage, and opined that mechanical demolition was depicted on certain occasions; specifically, DOB stated that mechanical demolition appears in footage taken on August 22, August 23, August 24, August 30, September 6, and September 8, 2005; and

WHEREAS, Opposition Counsel argues that a significant time advantage was gained by the developer through the illegal mechanical demolition, and that the Board should discount a certain percentage of the excavation and foundation work as a result; and

WHEREAS, the Board reviewed the video evidence and agrees that illegal mechanical demolition occurred on more than one day, contrary to the developer's prior assertions; and

WHEREAS, further, in light of this evidence, the developer concedes that mechanical demolition occurred on days other than August 23, 2005; and

WHEREAS, however, the developer contends: (1) that the Board can not consider the illegal demolition; and (2) that even if the Board were to consider the illegal demolition and subtract the time advantage gained because of it, the deduction would not be so significant that a favorable determination under ZR § 11-331 could not be rendered; and

WHEREAS, in support of the first contention, the developer argues that ZR § 11-331 does not give the Board any express authority to consider the effect, if any, of illegal demolition; and

WHEREAS, specifically, the developer asserts that the plain language of ZR § 11-331 limits the scope of the Board's inquiry to a technical determination as to the completion of excavation and the degree of progress on foundation construction; and

WHEREAS, the Board questions whether the plain language of this section functions as, or should function as, a shield against Board consideration of any and all illegal pre-excavation development activity when a developer is attempting to vest a construction project; and

WHEREAS, this is especially true where, as here, impermissible development

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activity may have a direct nexus to the ability to complete excavation and make substantial progress on foundations prior to a zoning change; and

WHEREAS, additionally, if the Board, when hearing applications under ZR § 11-331, was compelled to disregard the impermissible acts of developers merely because they occurred pre-excavation, it would mean that developers would have an incentive to ignore, once a building permit is obtained, other construction-related laws, rules and regulations during site preparation or demolition, safety related or otherwise, if such requirements were time-consuming; the only possible penalty would be DOB enforcement action, a risk developers might be willing to assume given that it would not negatively affect an application under ZR § 11-331; and

WHEREAS, to avoid such gamesmanship, the Board finds that it must have the latitude to evaluate on a case by case basis the effect, if any, that impermissible pre-excavation work at the site had on the ability to meet the technical thresholds set forth at ZR § 11-331; and

WHEREAS, further, the Board disagrees that it is bound solely and completely by the language of ZR § 11-331 when reviewing applications made under this section; and

WHEREAS, the Board's authority to renew building permits pursuant to ZR § 11-331 is conferred by ZR § 72-01(c), which references ZR § 73-01; and

WHEREAS, ZR § 73-01, in sum and substance, provides that, in harmony with the general purpose and intent of the ZR, the Board may grant renewals under ZR §§ 11-31 to 11-33; this includes ZR § 11-331; and

WHEREAS, the preamble of the ZR sets forth its purpose and intent, and reads, in pertinent part: "This Resolution is adopted in order to promote and protect public health, safety and general welfare."; and

WHEREAS, thus, the Board can only grant a renewal pursuant to ZR § 11-331 if doing so is in harmony with this purpose and intent; an absolute prohibition on Board consideration of pre-excavation activities that are unlawful and therefore potentially unsafe is contrary to the stated intent of the ZR, since, as discussed above, an incentive to engage in such activities in order to complete excavation and progress on foundation work would be created; and

WHEREAS, the Board concludes that the above-cited ZR provisions provide it with the basis to review concerns related to pre-construction activity notwithstanding the language of ZR § 11-331; and

WHEREAS, however, the Board notes that it is not opining that all violations of Building Code or other construction-related laws before or during excavation and foundation work would necessarily be relevant in an application made under ZR § 11-331; the Board is aware that major construction projects present ample opportunity for enforcement action by DOB, and that violations are issued in response to occurrences that may be unavoidable or are minor in nature, or that may not have any bearing on how quickly construction will progress; and

WHEREAS, also in support of the first contention, the developer states that the Board has, in other applications, ignored illegal demolition and the resulting potential time advantage; and

WHEREAS, specifically, the developer cites to two prior Board decisions on applications made under ZR § 11-331: (1) 166-05-BZY, concerning 1669/71 West 10th Street, Brooklyn; and (2) 168-05-BZY, concerning 6422 Bay Parkway, Brooklyn; and

WHEREAS, however, these cases are factually dissimilar from the instant matter; and

WHEREAS, in 166-05-BZY, demolition work proceeded without a permit and a

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violation was issued by DOB; however, the illegal demolition occurred, and was cited by DOB, approximately 14 months prior to the commencement of excavation, thus eliminating the potential that a time advantage was obtained; and

WHEREAS, in 168-05-BZY, the demolition work was in fact permitted; DOB merely issued a violation for failure to remove windows in the building being demolished; and

WHEREAS, additionally, as noted by the developer, the Board was not made aware of the DOB violations in either of these two cases, and did not deliberate upon or reference them in its resolutions; and

WHEREAS, the Board does not express an opinion as to whether the outcome would have changed in either case had it been aware of the violations, but observes because it did not even know of them, neither case can stand for the proposition that the Board has previously ruled that illegal demolition is not a relevant consideration under any circumstances in this type of application; and

WHEREAS, in sum, the Board finds that the developer's first contention is without merit; and

WHEREAS, in support of the second contention, the developer claims that any time advantage gained from the illegal mechanical demolition was minimal and would not affect a determination under ZR § 11-331 that excavation had been completed and substantial progress was made on foundations as of the Rezoning Date; and

WHEREAS, in support of this argument, the developer has submitted testimony from a construction manager, which suggests that, at most, only six days would have been lost from the construction schedule; and

WHEREAS, Opposition Counsel, citing to a report prepared by its own expert, suggests that anywhere from 9 to 14 working days would have been lost; and

WHEREAS, DOB likewise cited to its expert, and notes that if demolition had been performed by hand, it would have taken so long that excavation could not have commenced until after the SWO was in effect (October 4, 2005); thus, DOB concludes that excavation and foundation work only could have been performed on three business days (from November 11, 2005, the date that the SWO was rescinded, until the Rezoning Date); and

WHEREAS, the developer suggests that all of these time estimates, including that of its construction manager, are essentially guesses, and that it would be arbitrary for this Board to favor one estimate over another without some basis; and

WHEREAS, leaving aside the contentions of the various experts, the Board observes that there is a nexus between the impermissible mechanical demolition and the ability to complete excavation and make substantial progress on foundations; and

WHEREAS, moreover, illegal mechanical demolition occurred even after DOB issued a violation against it; and

WHEREAS, a logical conclusion is that mechanical demolition continued at the site because it assisted the developer in completing the demolition more quickly than by hand demolition alone, and enabled the commencement of excavation and foundation construction at an earlier date; and

WHEREAS, nevertheless, the Board agrees that given the conflicting expert testimony, it is very difficult to fashion a precise and reasonable deduction from the total development time; and

WHEREAS, for this reason, the Board declines to base its determination herein on the supposition that excavation would not have been completed or substantial progress would not have been made by the Rezoning Date but for the illegal mechanical demolition;

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and

WHEREAS, instead, the Board's denial of the instant application is predicated on serious concerns about the credibility of the developer; and

WHEREAS, as discussed above, the developer stated without hesitation at the first and second hearings that illegal mechanical demolition occurred on only one day - when this was not the case - and inappropriately minimized the importance of the mechanical demolition on this basis; and

WHEREAS, the Board cannot tolerate such a significant pattern of misrepresentation, especially where so much of the Board's deliberation on an application for the right to continue construction under ZR § 11-311 depends on its confidence in the accuracy of the information provided by the developer; and

WHEREAS, it is a particular concern that the misrepresentations concern a fact that has a fundamental bearing on the Board's technical analysis; as noted above, demolition occurred immediately before excavation commenced; thus, any time advantage gained during demolition has a direct relationship to the completion of excavation and the degree of foundation construction; and

WHEREAS, forthrightness on the part of the developer is thus crucial to the Board's understanding of how, and to what extent, work progressed prior to the rezoning; unfortunately, here, the developer was less than candid; and

WHEREAS, further, the Board observes that though the developer ultimately conceded that mechanical demolition occurred on days other than August 23, 2005, no explanation of the earlier misrepresentations was subsequently offered; and

WHEREAS, in sum, the Board finds that the credibility of the developer in the instant matter is significantly and irretrievably compromised such that a favorable determination on the application is not warranted; and

WHEREAS, the Board notes that the developer's misrepresentations during the administrative hearing process on this application, even though not made under oath, provide an independent grounds on which the Board may deny the application (See e.g. Holy Spirit Assoc. v. Rosenfeld, 91 A.D.2d 190 (2nd Dep't, 1983); Ostorff v. Sacks, 64 A.D.2d 708 (2nd Dep't, 1978); Pioneer-Evans Co. v. Garvin, 191 A.D.2d 1026 (4th Dep't, 1993)); and

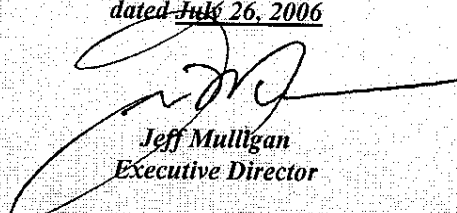
WHEREAS, because the Board finds that the application may be appropriately denied on this basis, it declines to render a determination on the technical findings set forth at ZR § 11-331, or on other issues raised by Opposition Counsel.

Therefore it is Resolved that this application to renew Permit No. 301791318-01-NB pursuant to ZR § 11-331 is denied.

Adopted by the Board of Standards and Appeals, July 25, 2006.

CERTIFICATION

*This copy of the Resolution
dated July 25, 2006
is hereby filed by
the Board of Standards and Appeals
dated ~~July~~ 26, 2006*



**Jeff Mulligan
Executive Director**