

**SHORT FORM ORDER/JUDGMENT**

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. JOSEPH P. DORSA  
Justice

IAS PART 12

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In the matter of the Application of

ZARA REALTY HOLDING CORP. and KEN  
SUBRAJ,

Index No.: 23139/06

Motion Date: 3/14/06

Petitioner,

Motion No.: 35

- against -

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

MEENAKSHI SRINIVASAN, SATISH BABBAR  
and CHRISTOPHER COLLINS, 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.

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The following papers numbered 1 to 9 on this motion:

	<u>Papers Numbered</u>
Petitioners' Notice of Petition & Petition- Affirmation-Affidavit(s)-Service-Exhibit(s) & Memorandum of Law	1-5
Respondents' Answer, Memorandum of Law & Record of Proceedings	7-9

By notice of petition and petition, petitioner seeks an order of the Court, granting petitioner a final judgment, nullifying and setting aside the determination by the Board of Standards and Appeals of the City of New York (BSA), under Calendar No. 364-05A; declaring the BSA's application of laws and regulations of the City and State of New York in regard to

Calendar No. 364-05A, to be unlawful and a violation of the State Constitution; declaring petitioners in Calendar No. 364-05A, to have satisfied the common-law doctrine of vested right; directing the BSA to direct the Department of Buildings to reinstate and reissue the previously revoked permit, effective September 3, 2004.

Petitioner also files a Memorandum of Law in support.

Respondent files an answer in opposition and a Memorandum of Law in support of the opposition.

Petitioner, Zara Realty Holding Corp. (Zara), is the developer/owner of two adjacent lots located at 87-30 and 87-32 167<sup>th</sup> Street, Queens, N.Y. On or about July 31, 2003, petitioner's predecessor-in-interest applied for and received permission to develop two three story, three family buildings on the lots located as above.

On or about September 3, 2004, the developer sought construction permits for the proposal from the Department of Buildings (DOB). DOB granted a construction work permit for the site 87-32, but erroneously denied a permit for the 87-30 site. The sites always were treated as and intended to be an integral project.

On September 22, 2004, DOB issued an acknowledgment that their denial of the permit for 87-30 was in error. In fact, there was no need for a "Site Safety Plan" and said requirement was waived.

Petitioner's plans which were approved were compliant with R-5 zoning for that area.

On October 13, 2004, the area was rezoned from R-5 to R-4A.

On December 14, 2004, DOB issued a permit for 87-30 which allowed for construction which was R-5 compliant. On February 7, 2005, DOB issued a "stop-work" order when the construction was 85 percent complete.

On November 12, 2005, petitioner requested a reissuance or reinstatement of the work permit; said request was denied on November 18, 2005. An appeal was filed and subsequently denied on September 20, 2006. The work permit for 87-32, however, virtually an identical building adjacent to 87-30 was granted.

It is worth noting, as petitioner points out, that without

the completion of the building located at 87-30, the building located at 87-32 is neither R-5, nor R-4A compliant, as the 87-32 building lacks the side yard which the companion structure would otherwise provide.

Petitioner maintains that the determination of the BSA in denying the work permit for the building located at 87-30 167<sup>th</sup> Street was "arbitrary and capricious," and without a sound basis.

"Capricious action in a legal sense is established when an administrative agency on identical facts decides differently (Matter of Fitzgerald v. State Div. of Public Serv. of State of N.Y., 262 AppDiv 393, 397) (Matter of Lefrak Forest Hills Corp. v. Galvin, 40 AD2d 211, 217 aff'd 32 NY2d 796, cert. den. sub nom. Baum v. Lefrak Forest Hills Corp., 414 US 1004)." Matter of Italian Sons & Daughters of Am.-Amici Lodge No. 255 v. Common Council of Buffalo, 89 AD2d 822, 823, 453 NYS2d 962 (4<sup>th</sup> Dep't. 1982).

To grant the necessary permits for one building while simultaneously denying permission to build, in fact in this instance, complete an identical adjacent building is nothing, if not capricious. Matter of Conversions for Real Estate, LLC v. Zoning Bd. of Appeals of Inc. Vil of Roslyn, 31 AD3d 635, 636, 818 NYS2d 298 (2d Dep't. 2006).

Petitioner maintains further that respondent should be directed to grant petitioner a reinstatement or reissuance of the work permit in question where because of the substantial expenditure and substantial construction already completed petitioner has established his vested rights to finish the project as planned.

As the Courts have recognized, "...[c]ontrary to respondents' further contention... New York City Zoning Resolution... does not codify or abolish the common law doctrine of vested rights. ...[T]here 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." (citations omitted) Matter of Estate of Kadin V. Bennett, 163 AD2d 308, 309, 557 NYS2d 441 (2d Dep't 1990).

In this instance, the uncontroverted evidence is that the building in question, located at 87-30 167<sup>th</sup> Street, was nearly 85 percent complete before the stop work order was issued; that but for the DOB's own error in denying the initial work permit in

the first instance, petitioner would have had a valid permit ab initio; and, that the DOB issued petitioner a work permit allowing a building conforming to R-5 after the area was rezoned from R-5 to R-4A.

It is evident therefore that the DOB's actions in revoking petitioner's work permit and the BSA's conclusion upholding the DOB's actions were not "...rationally based on substantial evidence." Matter of Steam heat v. Silva, 230 AD2d 800, 802, 646 NYS2d 537 (2d Dep't 1996).

Accordingly, upon all of the foregoing, it is hereby

ORDERED and ADJUDGED that the petition is granted as follows:

1) The determination of respondent, Board of Standards and Appeals of the City of New York, dated September 19, 2006, in BSA Calendar No. 364-05A, is vacated and annulled; and, the

2) Bureau of Standards and Appeals is directed to direct the Department of Buildings to reissue and reinstate the revoked permit, nunc pro tunc, effective September 3, 2004, in accordance with the R-5 zoning regulations in place at that time.

This constitutes the decision and judgment of the Court.

Dated: Jamaica, New York  
May 2, 2007

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**JOSEPH P. DORSA**  
**J.S.C.**