

TESTIMONY OF THE DEPARTMENT OF HOUSING PRESERVATION AND
DEVELOPMENT BEFORE THE NEW YORK CITY COUNCIL'S HOUSING AND
BUILDINGS COMMITTEE – WEDNESDAY, APRIL 7, 2010 – 1PM

GOOD AFTERNOON, CHAIRMAN DILAN AND MEMBERS OF THE HOUSING
AND BUILDINGS COMMITTEE. I AM JOSEPH ROSENBERG, DEPUTY
COMMISSIONER OF INTERGOVERNMENTAL RELATIONS AT THE
DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT. SITTING
NEXT TO ME IS MIRIAM COLON, ASSISTANT COMMISSIONER OF OUR
HOUSING INCENTIVES PROGRAM

I AM PLEASED TO BE HERE TO DISCUSS INTRO 66 WHICH CLARIFIES THE
DEFINITION OF 'COMMENCEMENT OF CONSTRUCTION' WHEN APPLYING
TO RECEIVE 421A BENEFITS.

THIS BILL RECTIFIES AN INEQUITY IN EXISTING LAW. WHEN THE
LANGUAGE WAS DRAFTED IT WAS ASSUMED THAT THE BUILDING OR
ALTERATION PERMIT ISSUED FROM THE DEPARTMENT OF BUILDINGS
WHICH IS NEEDED FOR "COMMENCEMENT OF CONSTRUCTION" UNDER
THE 421A PROGRAM WOULD BE BASED UPON ARCHITECTURAL,
STRUCTURAL AND PLUMBING PLANS APPROVED BY DOB. ALTHOUGH
WELL INTENTIONED, LINKING COMMENCEMENT OF CONSTRUCTION TO
THE APPROVAL OF THREE SETS OF PLANS HAS PROVEN TO BE AN
INACCURATE MEASURE OF CONSTITUTING WHEN CONSTRUCTION
STARTS. THE ARCHITECTURAL AND STRUCTURAL PLANS ARE APPROVED

BEFORE THE BUILDING OR ALTERATION PERMITS ARE ISSUED, BUT THE PLUMBING PLANS ARE NOT APPROVED UNTIL MUCH LATER. AS A RESULT, ALTHOUGH PHYSICAL CONSTRUCTION OF THE DEVELOPMENT HAS OCCURRED DUE TO THE ISSUANCE OF THE BUILDING OR ALTERATION PERMIT BASED UPON APPROVED ARCHITECTURAL AND STRUCTURAL PLANS; THE DEVELOPMENT FOR THE PURPOSE OF RECEIVING 421A BENEFITS IS NOT CONSIDERED TO HAVE STARTED CONSTRUCTION SINCE THE PLUMBING PLANS HAVE NOT AS YET BEEN APPROVED.

THE PROBLEM THAT THIS BILL ADDRESSES IS THAT SINCE A NUMBER OF DEVELOPERS DID NOT HAVE ALL THREE SETS OF THEIR PLANS APPROVED (I.E., STRUCTURAL, ARCHITECTURAL AND PLUMBING) BEFORE THEY BEGAN THEIR CONSTRUCTION, BOTH HPD AND THE NEW YORK CITY LAW DEPARTMENT HAVE CONCLUDED THAT THEY DID NOT COMMENCE CONSTRUCTION BEFORE THE NEW RESTRICTIONS IMPOSED ON 421A TAX EXEMPTION BENEFITS TOOK EFFECT.

THERE ARE FOUR (4) PROJECTS THAT APPLIED FOR 421A BENEFITS AND WERE DEEMED NOT TO HAVE COMMENCED BEFORE THE NEW 421A RESTRICTIONS TOOK EFFECT BECAUSE THEIR PLUMBING PLANS WERE NOT YET APPROVED. IF INTRO 66 IS PASSED, THESE PROJECTS WILL BE CONSIDERED TO HAVE FALLEN INTO THE PRE-JULY 1, 2008 CATEGORY AND WOULD GET AN AS-OF-RIGHT BENEFITS (10 OR 15 YEARS DEPENDING

ON LOCATION) OR A LONGER BENEFIT PERIOD IF THEY DECIDE TO PROVIDE AFFORDABLE HOUSING.

THIS BILL CORRECTS A WELL INTENDED BUT FACTUALLY INACCURATE REQUIREMENT AND IT PROVIDES SOME MUCH NEEDED CLARITY TO THE DEFINITION OF COMMENCMENT OF CONSTRUCTION. FOR THIS REASON WE ARE IN SUPPORT OF INTRO 66.

THANK YOU AND I WILL BE HAPPY TO ANSWER YOUR QUESTIONS.

Testimony of Kenneth K. Fisher

Before the New York City Council Committee on Housing & Buildings

In Support of Intro, 66

April 7, 2010

Good afternoon,

My name is Ken Fisher and I am a Member of the law firm of Cozen O'Connor. A substantial part of my practice involves development and real estate related issues. I chair the City Bar Association's Land Use Committee (although I am not appearing for the Association) and I have published articles on development in the New York Law Journal and other media.

Although my firm does not prepare 421-a benefit applications, I have had some involvement with processing such applications and in counseling clients on 421-a related issues. I closely followed the Council debate on this issue.

In 2006, the Council determined to capture some of the value from the extensive development then on-going in the city by creating an incentive for developers to provide affordable housing in certain areas or by collecting additional property taxes.

You recognized at that time that it would not be good public policy or fair to affect projects that were already in the pipeline and whose design and financing anticipated being in the 421-a program. Therefore, you provided that projects which had "commenced construction" by July 1, 2008, would be grandfathered, and eligible to participate under the previous guidelines.

However, you appropriately decided to extend this protection only to projects that were genuinely underway, not those where the owner of the property dug a hole in the ground but wasn't really ready to build. So, you required that the commencement of construction be based upon a building permit issued by DOB, and to guard against a bare-bones application, you required that the permit in turn be based upon approved architectural and structural plans, all completely reasonable and appropriate.

A problem has arisen because the amendment also provided that the building permit be "based upon" approved plumbing plans. Plumbing plans fall into a different category. Architectural plans and structural plans are critical to a building permit because DOB has to know that the zoning calculations are correct and that the building will be structurally sound. Plumbing plans, however, are commonly done separately from this process, often by licensed plumbers or engineers engaged specifically for this purpose. Plumbing plan approval is not required by DOB in order for a builder to pull a construction permit. Often, a builder won't submit the plumbing plans until the foundation is complete and steel has started to come out of the ground and they know that there will not be further changes to the design.

Even though there is no question that these builders have commenced construction as a matter of fact, if they obtained their plumbing plan approval even a day after their building permit, HPD's interpretation of the law requires them to determine that none of that work counts, and that the builder won't be deemed to have commenced construction until they pull some other permit or amendment, by which point the deadline has passed.

I don't think the Council's intention was to change construction industry practice. Certainly I was not aware at the time of any such intent and I didn't see any reporting about the change of the law from practitioners or industry organizations warning on this specific issue. Compliance would have been easy if the new requirement had been called out.

Instead, there are a group of builders, some of whom you will hear from today, who were caught unawares.

One is Zahav. Their permit was issued June 12, 2008. They immediately mobilized and drove the first pile on June 19. Their plumbing plans were approved the very next day. HPD's position is that they are required by the way the law was worded not to count any of that as the commencement of construction.

Fulton Housing is another case. Their architectural and structural plans were approved in the beginning of May, 2007. They pulled their construction permit and began work. Along the way, the property was re-zoned; work stopped and they redesigned the building. Even so, they started work again and got their plumbing plans approved on June 23, 2008, before the deadline. HPD's position is that that's not good enough, and that their commencement of construction date was later, after the deadline, when they pulled their plumbing permit, almost two years after they actually started.

In another case of which I am aware, the permit was issued on June 19, 2008; the plumbing plans were approved the very next day. HPD's position is that the project didn't "commence construction" until the plumbing permit was pulled later, although the words "plumbing permit" are not in the statute.

I have heard anecdotally from a number of consultants in this area that there are other cases out there as well. I don't think its huge numbers but I do think there are others who may not know to testify today; or even that their application is at risk (because there is some backlog in processing at HPD). Others may have abandoned their properties because they no longer work financially, the loss of 421-a benefits killing their chances for financing or for a return sufficient to cover their debt service.

The law has very real consequences, which I do not believe were intended by the Council. All of the buildings of which I am aware are too small to participate in programs such as 80/20 let alone to meet the affordable housing requirement without help from the City. If the owners are otherwise blocked from the 421-a program, they will have to try and pass the full cost of the property taxes on to their tenants or buyers. If the market will accommodate that, it means that those apartments will be out of reach to anyone who can't afford to pay what might be an extra thousand dollars a month in taxes. And in the case of a rental building, those units will be completely out of the rent stabilization system since rent regulations only apply to new buildings

if they receive 421-a benefits. If the owner can't find takers at that higher price, they may wind up losing the property, keeping the units off the market for some time and lowering service levels for anyone who is in the building.

That's why I strongly urge you to adopt Intro. 66 and correct this anomaly. It does not in any way compromise what the Council intended in 2006. It's a matter of fundamental fairness.

I want to thank Chair Dilan for introducing the bill and to thank him and Speaker Quinn for scheduling this hearing and HPD for their position in support. I hope that the Committee and the full Council will join them in approving Intro. 66.

-end-

**TESTIMONY OF NICK PELUFFO,
1078 FULTON STREET,
ON INTRO. NO. 66
APRIL 7, 2010**

GOOD AFTERNOON. MY NAME IS NICK PELUFFO AND I AM HERE TODAY TO TESTIFY IN FAVOR OF INTRO. NO. 66.

OUR PROJECT AT 1078 FULTON STREET IN BROOKLYN CLEARLY DEMONSTRATES WHY THE COUNCIL SHOULD APPROVE THE CHANGE PROPOSED IN INTRO NO. 66.

CONSTRUCTION OF IMPROVEMENTS ON OUR PROJECT BEGAN AS SOON AS BUILDING PERMITS WERE ISSUED IN MAY OF 2007. THREE WALLS OF OUR FOUNDATION WERE COMPLETED AND THEN THE PROPERTY WAS REZONED.

ON OCTOBER 31, 2007, THE DEPARTMENT OF BUILDINGS INSPECTED THE PROPERTY AND ISSUED A STOP WORK ORDER, NOTING **"75% OF THE FOUNDATION COMPLETED."**

SO, IN FEBRUARY OF 2008, THE PREVIOUSLY APPROVED ARCHITECTURAL PLANS WERE AMENDED TO COMPLY WITH THE NEW ZONING AND BY MARCH, THE STOP WORK ORDER WAS RESCINDED AND CONSTRUCTION RESUMED UNDER THE ORIGINAL PERMIT.

PRIOR TO THE NEW 421-A RULES GOING INTO EFFECT, BUT NOT UNTIL JUNE OF 2008, PLUMBING PLANS WERE APPROVED BY THE DOB.

ON JULY 1, 2008, THE PROJECT HAD APPROVED ARCHITECTURAL, STRUCTURAL, AND PLUMBING PLANS AND CONSTRUCTION OF THE BUILDING'S FOUNDATION WAS COMPLETE. CONSTRUCTION HAS OBVIOUSLY **"COMMENCED"**.

UNDER THE RULES AS THEY EXIST TODAY THOUGH, CONSTRUCTION WON'T HAVE TECHNICALLY COMMENCED UNTIL MARCH 25, 2009, WHEN THE FIRST SUBSEQUENT PERMIT WAS PULLED BY OUR PLUMBER – TWO YEARS AFTER WE BEGAN CONSTRUCTION, WHEN MOST OF THE STRUCTURAL WORK WAS ALREADY COMPLETED!

OUR PROJECT HAS ALREADY SUFFERED THROUGH PROLONGED CONSTRUCTION AND CAN'T AFFORD ANY ADDITIONAL FINANCIAL SETBACKS. OUR BUILDING IS TOO SMALL TO QUALIFY FOR AFFORDABLE HOUSING PROGRAMS, SO WE WILL NOT BE ABLE TO GET 421-A BENEFITS UNLESS INTRO. NO. 66 IS ADOPTED.

WITHOUT 421-A, WE WOULD HAVE TO SET RENTS HIGH ENOUGH TO PAY THE FULL PROPERTY TAXES, WHICH COULD BE HUNDREDS OF DOLLARS A

MONTH PER UNIT. THAT WOULD MEAN EITHER WE WOULD HAVE TO RENT TO WEALTHIER TENANTS (IF WE COULD FIND THEM) – OR CHARGE RENTS THAT MIGHT NOT COVER THE COST OF OPERATING THE BUILDING. IN ANY EVENT, THE TENANTS WOULD NOT BE COVERED BY RENT STABILIZATION.

I DON'T THINK THAT THIS SCENARIO IS WHAT YOU INTENDED WHEN YOU CHANGED THE 421-A LAW AND I HOPE YOU WILL HELP US BY PASSING INTRO. NO. 66.

THANK YOU.

**TESTIMONY OF VERNON JACKSON DEVELOPMENT LLC
ON INTRO. NO. 66
APRIL 7, 2010**

GOOD AFTERNOON. MY NAME IS MICHAEL GUTERMAN AND I AM HERE TODAY TO TESTIFY IN FAVOR OF INTRO. NO. 66.

AS YOU KNOW, INTRO. NO. 66 REMOVES THE PLUMBING APPROVAL REQUIREMENT FROM THE CRITERIA FOR THE START OF CONSTRUCTION.

WHEN BEGINNING CONSTRUCTION FOR A BUILDING, TWO MAIN ITEMS ARE NEEDED, STRUCTURAL PLANS FOR THE SUPER STRUCTURE AND ARCHITECTURAL PLANS FOR THE BASIC LAYOUT OF THE ENTIRE PROJECT. ARCHITECTURAL PLANS INCLUDE A NUMBER OF PLUMBING ELEMENTS BUT NOT THE PLUMBING, MECHANICAL AND HVAC COMPONENTS NEEDED FOR THE BUILDING TO ULTIMATELY HAVE SUCH ELEMENTS. IT IS RATHER COMMON TO BEGIN WITHOUT THAT ELEMENT HAVING APPROVAL AS PLUMBING PERMITS ARE USUALLY PULLED LATER IN THE PROCESS BY A LICENSED PLUMBER.

IN STARTING OUR PROJECT IN THE SECOND QUARTER OF 2008, WE OBTAINED A NEW BUILDING PERMIT WITH THE STRUCTURAL AND ARCHITECTURAL APPROVAL, BUT THE PLUMBING COMPONENT WAS MISSING. SUCH PLANS WERE ACTUALLY SUBMITTED IN MAY 2008, BUT NOT APPROVED UNTIL JULY 2008. THEORETICALLY, WE COULD HAVE SELF-CERTIFIED THE PLANS, BUT WE FELT AT THE TIME THAT IT WAS BETTER TO HAVE DOB APPROVAL. AND IT IS UNDERSTOOD THAT I BELIEVE MOST COUNCIL MEMBERS PREFER DOB REVIEW TO SELF-CERTIFICATION AS WELL.

BUT IN TRYING TO DO THE RIGHT THING, WE UNWITTINGLY PLACED OURSELVES ON THE WRONG SIDE OF THE JUNE 30, 2008 DEADLINE FOR SUCH APPROVAL AS WE BELIEVED OUR NEW BUILDING PERMIT WOULD BE SUFFICIENT. BUT UNDER CURRENT LAW IT IS NOT. INTRO. NO. 66 CORRECTS THIS ISSUE.

OUR PROJECT IS IN AN EXCLUSIONARY ZONE AND TO MEET THE REQUIREMENTS FOR 421-A IN SUCH ZONE WOULD HAVE DISASTEROUS CONSEQUENCES.

LIKE MANY PROJECTS PLANNED IN 2007 AND 2008, OUR PROJECT WILL HAVE ITS FINANCIAL DIFFICULTIES, WITH OR WITHOUT 421-A. BUT BEING FORCED TO FOREGO 421-A OR MEET THE REQUIREMENTS OF THE EXCLUSIONARY ZONE WILL HAVE AWFUL REPERCUSSIONS. THE PROJECT WILL LOSE ITS VIABILITY, POSSIBLY NOT SELLING AT ALL. THIS WOULD FORCE THE LOSS OF JOBS IN OUR COMPANY AND LIMIT ANY OTHER PROJECTS WE MIGHT THINK OF MOVING FORWARD WITH.

IF WE HAD KNOWN THAT OUR APPLICATION SUFFERED SUCH A TECHNICAL ERROR, WE MOST PROBABLY WOULD HAVE NOT MOVED SO QUICKLY FORWARD. HPD POINTED THIS ERROR OUT TO US IN FEBRUARY OF THIS YEAR AND BY THEN WE WERE TOO FAR ALONG IN CONSTRUCTION.

WE WOULD LIKE TO THINK THAT OUR BUILDING WOULD BE AN ASSET TO LONG ISLAND CITY, BUT WE ARE CONCERNED THAT IF IT IS NOT VIABLE, IT WILL BECOME A BLIGHT. WE URGE THAT THE COUNCIL REMOVE THIS TECHNICALITY FROM THE LAW AND MOVE INTRO. NO. 66 FORWARD EXPEDITIOUSLY

WE AGAIN THANK THE COUNCIL AND THE COMMITTEE FOR THIS OPPORTUNITY TO COMMENT.

**TESTIMONY OF MARTIN WERBER, 40 GOLD STREET
ON INTRO. NO. 66
APRIL 7, 2010**

GOOD AFTERNOON. MY NAME IS MARTIN WERBER AND I AM HERE TODAY TO TESTIFY IN FAVOR OF INTRO NO. 66.

MY BROTHER AND I MANAGE THE FAMILY REAL ESTATE BUSINESS. WE ARE NOT MAJOR DEVELOPERS. MY PARENTS WERE HOLOCAUST SURVIVORS WHO CAME HERE AFTER WWII TO LIVE THE AMERICAN DREAM. MY FATHER BOUGHT THE FIRST PARCEL AT WHAT IS NOW KNOWN AS 40 GOLD STREET JUST ABOUT 30 YEARS AGO. IT HAD ALWAYS BEEN HIS DREAM TO BUILD SOMETHING NEW THERE AND TO CONTRIBUTE TO THE NEW YORK SKYLINE, WHICH HE LOVES SO MUCH.

WE BEGAN CONSTRUCTION IN THE FINANCIAL DISTRICT, PURSUANT TO ARCHITECTURAL AND STRUCTURAL PLANS APPROVED ON JUNE 4, 2008 AND A BUILDING PERMIT ISSUED ON JUNE 12, 2008. OUR FIRST FOUNDATION PILE WAS DRIVEN ON JUNE 19, 2008. THE PLUMBING PLANS FOR THE JOB WERE APPROVED ON JUNE 20, 2008, THE VERY NEXT DAY.

ACCORDING TO THE STANDARD THAT WAS IN EFFECT WHEN WE DROVE OUR FIRST PILE, OUR BUILDING COMMENCED CONSTRUCTION PRIOR TO JULY 1, 2008.

WE PROCEEDED BASED ON THE UNDERSTANDING THAT WITH PROPERLY APPROVED PLANS, A BUILDING PERMIT, AND A FOUNDATION THAT WAS NEARLY COMPLETE, WE WOULD QUALIFY FOR 421-A BENEFITS AS THE COUNCIL INTENDED WHEN IT CHANGED THE LAW A YEAR EARLIER.

UNLIKE ARCHITECTURAL OR STRUCTURAL PERMITS, WHICH THE DEVELOPER OR HIS ARCHITECT WILL PULL FROM DOB, PLUMBERS ARE A SKILLED TRADE THAT TYPICALLY PULL THEIR OWN PERMITS FOR THE JOBS THEY ARE HIRED TO WORK ON. AS SUCH, PLUMBING PERMITS ARE RARELY PULLED WHEN A FOUNDATION IS BEING BUILT AND PLUMBING PLANS ARE OFTEN SUBMITTED ONLY AFTER THE BUILDING PERMIT IS ISSUED TO TAKE INTO ACCOUNT ANY LAST MINUTE CHANGES.

WE WOULD NOT HAVE STARTED CONSTRUCTION WITHOUT BELIEVING 421-A WAS AVAILABLE. WITHOUT 421-A, THE PROJECT WILL BE PERSONALLY DISASTROUS AND POSSIBLY NON-VIABLE. THANK YOU FOR THIS OPPORTUNITY TO SPEAK IN FAVOR OF INTRO. NO. 66.

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. 66 Res. No. _____

in favor in opposition

Date: _____

(PLEASE PRINT)
Name: Robert S Altman (w/ Mike Guterman)

Address: 27 Whitehall St., 4th Fl, NYC 10024

I represent: Vernon Jackson Development LLC

Address: _____

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. 66 Res. No. _____

in favor in opposition

Date: _____

(PLEASE PRINT)
Name: Nick Peluffo

Address: 1078 Fulton St

I represent: Brooklyn NY

Address: Fulton Housing LLC

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. 66 Res. No. _____

in favor in opposition

Date: April 7, 2010

(PLEASE PRINT)
Name: Martin Werber

Address: 40-52 75 St, Elmhurst NY

I represent: Zahav Properties

Address: 40-52 75 St

▶ Please complete this card and return to the Sergeant-at-Arms ◀

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. 66 Res. No. _____

in favor in opposition

Date: _____

(PLEASE PRINT)

Name: Kenneth K. Fisher

Address: Cojen O'CONNOR

I represent: 277 Park Ave NYC

Address: _____

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**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. 66 Res. No. _____

in favor in opposition

Date: _____

(PLEASE PRINT)

Name: Michael GUTERMAN

Address: 335 Lexington Ave, NYC, NY

I represent: Vernon Jackson Development LLC

Address: 810-17 Jackson Ave, LIC, NY

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**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. 66 Res. No. _____

in favor in opposition

Date: 4-7-10

Name: Joseph Rosenberg (PLEASE PRINT) Deputy Commissioner

Address: 100 GOLD ST

I represent: HPD

Address: _____

Please complete this card and return to the Sergeant-at-Arms

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. 66 Res. No. _____

in favor in opposition

Date: 4-7-10

Name: Miriam Colon (PLEASE PRINT) ASSISTANT Commissioner

Address: 100 GOLD ST

I represent: HPD

Address: _____

Please complete this card and return to the Sergeant-at-Arms