SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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SEN. LIZ KRUEGER, COUNCIL MEMBER BEN KALLOS, CARNEGIE HILL NEIGHBORS, INC., FRIENDS OF THE UPPER EAST SIDE HISTORIC DISTRICTS,

Petitioners,

Index No. 100125/2018

For a Judgment Pursuant to CPLR Art. 78 and a Declaration Pursuant to CPLR 3001

-against-

NEW YORK CITY DEPARTMENT OF BUILDINGS, NEW YORK CITY BOARD OF STANDARDS AND APPEALS, DDG PARTNERS LLC, 180 EAST 88th STREET REALTY LLC, CARNEGIE GREEN LLC, and ALLIED THIRD AVENUE LLC,

Respondents

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MEMORANDUM OF LAW OF RESPONDENTS DDG PARTNERS LLC, 180 EAST 88TH STREET REALTY LLC, CARNEGIE GREEN LLC, AND ALLIED THIRD AVENUE LLC IN OPPOSITION TO PETITIONERS' MOTION FOR A PRELIMINARY INJUNCTION AND IN SUPPORT OF CROSS-MOTION TO DISMISS THE ARTICLE 78 PETITION

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Respondents DDG Partners LLC ("DDG"), 180 East 88th Street Realty LLC ("Realty," and collectively with DDG, the "Development Respondents"), Carnegie Green LLC ("Carnegie Green"), and Allied Third Avenue LLC ("Allied," collectively with DDG, Realty, and Carnegie Green, the "Respondents"), by their attorneys, Herrick, Feinstein LLP, respectfully submit this Memorandum of Law (1) in opposition to the motion brought by Petitioners for a preliminary injunction, and (2) in support of Respondents' cross-motion to dismiss the Petition, pursuant to CPLR §§ 7804(f) and 3211(a)(2), for failure to exhaust administrative remedies.

Petitioners' corresponding application for a temporary restraining order was *denied* by Justice Marcy S. Friedman on January 26, 2018.

PRELIMINARY STATEMENT

This dispute arises out of the development of a condominium on 3rd Avenue and 88th Street in Manhattan. The development plans for this project have been fully vetted and approved at the highest level of the New York City Department of Buildings ("DOB"). Indeed, Realty, as the owner of the development parcel, already endured a costly, seven-month stoppage of work until DOB was fully satisfied that the development plans complied with zoning regulations. On December 21, 2016, Realty (the property owner) and DDG (responsible for development, construction, design, and management) were finally permitted to recommence construction. To meet their construction deadlines, which they must do to satisfy their lenders (amongst others), the Development Respondents have worked with great diligence and industry. They have poured sixteen floors of the building's structure, which has grown taller in full view of the public. Numerous condominium units have been sold, approximately 115 workers occupy the site daily, and construction has progressed significantly and continues to progress.

Now, more than *thirteen months* after Development Respondents recommenced work on the development, Petitioners raced into this Court, late on a Friday afternoon, urging that the

Court grant their application to halt work immediately. This feigned "emergency" application — which fails to identify any immediate, irreparable harm, or indeed, any harm whatsoever — is being made notwithstanding the following:

i. The DOB has already approved the development's plans after specifically considering and rejecting Petitioners' concerns;

ii. Through a pending appeal to the Board of Standards and Appeals ("BSA"), filed on October 30, 2017, Petitioners are currently *in the process* of administratively challenging DOB's approval;

iii. Petitioners failed to seek injunctive relief for more than a year even though they were well aware of the development plans and that construction was progressing; not only has this project received extensive media coverage, but Petitioners, themselves, have been directly and actively engaged in dialogue with the DOB *since May 2016*;

iv. Halting construction at this advanced stage would cost Realty approximately *$1.1 million per month* in carrying costs (construction loan costs, equipment storage fees, insurance, site safety, etc.), put the jobs of hundreds of construction workers at risk, jeopardize commitments to lenders and unit purchasers, and threaten damage to electrical and mechanical equipment and construction materials, including a 236-foot construction crane, already on the premises by leaving them subject to weather and other dangers of an open construction site, and cause other immediate, irreparable harm.

Given these circumstances, it was not surprising that Justice Friedman denied Petitioners' application for a temporary restraining order (TRO). As reflected in transcript of the hearing, when asked by Justice Friedman about whether something had happened or was about to happen that suddenly created a need for emergency relief, Petitioners' counsel in essence conceded that injunctive relief was wholly inappropriate:

> "No, your Honor. The reason we're here on a Friday afternoon is because the Buildings Department on September 28th denied the last challenge that the petitioners had brought and the four months statute of limitations runs on Monday, I believe. But not wishing to chance it, we thought it best to file today."

(Tr: 7:21-26.[1])

For the same reasons, as well as several others, Petitioners' application for a preliminary injunction — which would paralyze a $300MM development project — should be denied. As a

[1] See Mollen Aff. (hereinafter defined), Exhibit 34.

threshold matter, and also warranting dismissal of the Petition, the relief that Petitioners seek — an injunction pending a "decision on the merits" — is unobtainable as a matter of law, as the "merits" of Petitioners' underlying Article 78 Petition (seeking, *inter alia*, to "annul DOB's issuance of a building permit") cannot be heard in this Court without the Petitioners first exhausting their administrative remedies. Indeed, this very matter (involving the same building, the same developer, the same people, and the same factual and legal arguments) is *presently before the BSA*, where it appropriately belongs in the first instance and where Petitioners, themselves, appealed the DOB determination. In essence, Petitioners seek two, parallel bites at the same apple, threatening inconsistent, overlapping results and eviscerating the fundamental principles of an Article 78 proceeding. Indeed, Petitioners just served on Respondents (on February 7th) their most recent submission to the BSA, in response to questions raised by the BSA. In it, Petitioners simply cut-and-pasted their brief submitted to this Court and quite literally asked the BSA to do precisely what they ask of this Court[2]:

To the BSA	**To the Court**
The Board is called upon here to give a proper interpretation of the zoning provisions in the face of a deliberate attempt to circumvent and nullify them. *The question before the Board*, then, is first one of interpretation of the language and intent of the Zoning Resolution, and second whether credit is to be given to a transaction that seeks to avoid both.	*The Court* is called upon here to give a proper interpretation of the zoning provisions in the face of a deliberate attempt to circumvent and nullify them. *The question before the Court*, then, is first one of interpretation of the language and intent of the Zoning Resolution, and second whether credit is to be given to a transaction that seeks to avoid both.

Petitioners' brazen efforts to use this Court to "hedge their bet" must be rejected.

Even if this Court can entertain this application for an injunction despite the clear unsustainability of the "merits" of the Petition, Petitioners are barred from demanding

[2] Likewise, eight of the point headings set forth in Petitioners' moving brief are identical to those in Petitioners' "Revised Statement of Facts and Law," submitted to the BSA on February 7.

emergency relief by the doctrine of laches. In the context of a construction project, New York trial and appellate courts have consistently held that a plaintiff is not entitled to relief that would immediately shut down an ongoing construction project — at tremendous expense and risk to the owner/developer and everyone else involved in the project — if it sat back and watched the building be built over an extended period of time, without promptly seeking injunctive relief. These particular Petitioners have not only had constructive notice of the project, but *actual notice* for years. Indeed, they intimately involved themselves in the DOB's review process.

However, even if these threshold bars do not require denial of Petitioners' application and dismissal of the Petition, Petitioners cannot otherwise satisfy any elements necessary to obtain the drastic relief of a preliminary injunction.

First, Petitioners cannot establish — and barely even try to articulate — that they would suffer immediate, irreparable harm absent an injunction. The mere fact that Petitioners waited more than thirteen months to initiate the instant action and seek injunctive relief conclusively establishes that they would not suffer immediate harm if their motion is denied. As set forth above, Petitioners' admission in response to Justice Friedman's inquiry as to urgency for immediate relief belies any claim that such drastic relief is actually needed. (Tr. 7:21-26).

Other than generalized and vague allusions to their enjoyment of the "streetscape," disruption to "uniformity," and their personal beliefs as to the appropriate "qualities" of Upper East Side buildings, Petitioners did not and cannot articulate any purported "harm" about to emerge that was not present as the foundation and each floor of the building was constructed and each month passed with millions of dollars being invested into the project. Tellingly, when Petitioners' own land use consultant first analyzed this issue in April 2016, he cautioned

Petitioners that "[i]t needs to be said that this is a large zoning lot and something large will be built on this site, regardless of the success of any effort CHN undertake[s]."

In contrast, Realty would suffer extreme prejudice if construction was suddenly halted: an injunction would likely trigger problems with its lenders, put hundreds of construction workers out of work (the present workforce of approximately 115 workers is expected to more than double), jeopardize the many contracts negotiated for the project, and force Realty to address a 236-foot-high crane and partially-completed building exposed to the winter elements, among many other potential harms. Petitioners' vision of "preserving the status quo" would be catastrophic for Realty, harmful to the public, and violative of controlling judicial precedent.

Second, Petitioners cannot establish that they are likely to succeed on the merits of their claims. As an initial matter, it is well settled that the DOB's reasonable interpretation of the Zoning Resolution should be accorded great deference, and Petitioners offer no rational justification for this Court to depart from that standard here or to find that the DOB acted arbitrarily and capriciously. The DOB approved the plans after extensive review and analysis, including repeated consideration of Petitioners' concerns.

Moreover, Petitioners' contention that Realty improperly circumvented the Zoning Resolution (by creating a 10-foot lot to front East 88th Street so that the development would not be subject to regulations applying to buildings that lie along a street) is meritless. Unable to identify a provision in the Zoning Resolution that the development violates, Petitioners rely on cases from *Idaho* and *Massachusetts* in arguing that Realty's "literal" interpretation of the Zoning Resolution (as if "literal" is an insult) should be discarded because the 10-foot lot was created to avoid non-compliance (as if taking measures to comply with the law is a sin).

New York law is clear that because zoning regulations are in derogation of the common law, they must be construed narrowly, may not be extended by implication, and any ambiguities are to be resolved in favor of the property owner. Here, Petitioners ask the Court to impose restrictions not reflected in the Zoning Resolution, divine the intent of the legislature and of the developer by poring through countless, highly technical land use submissions and communications with DOB, and make a determination on the same issues that are presently being evaluated by the BSA, even though New York case law holds that the BSA, which is comprised of experts in land use and planning, is entitled to deference and has the primary authority to review the DOB's determinations.

Third, Petitioners cannot establish that the balancing of the equities is in their favor. Petitioners' delay of more than one year in seeking injunctive relief constitutes unclean hands warranting denial of their motion, as does their efforts to have the "merits" of the same dispute heard in this Court and the BSA *at the same time*. In addition, where, as here, the party seeking the injunction would suffer no immediate, irreparable harm from the denial of the motion and the party opposing the motion would suffer significant harm, the equities do not favor the movant.

Accordingly, as Petitioners cannot establish their right to, or need for, injunctive relief, and because the (meritless) substance of the Petition belongs before the BSA in the first instance (where it has already been under review since October 2017), Respondents respectfully request that the Court deny Petitioners' motion for a preliminary injunction and dismiss the Petition.

STATEMENT OF FACTS

A. The Building and the DOB's Stop Work Order

On July 28, 2014, Realty filed plans for the construction and development of a 32-story, 467' tall condominium building with the Department of Buildings under the address of 1558

Third Avenue in Manhattan (the "Building"). (See McMillan Aff.[3] ¶ 3; Exhibit 1.) The Building is on a combined zoning lot ("Development Zoning Lot") consisting of two tax lots on Block 1516 in Manhattan — Lot 37 and Lot 32. (McMillan Aff. ¶ 6.) Lot 32 is improved with a six-story commercial building known as 1550-1556 Third Avenue, owned by Respondent Allied Third Avenue LLC (which has no affiliation with any of the other defendants). (Id.)

The Building is being constructed on Lot 37 and utilizes development rights attributable to Lot 32. Lot 138 (owned by Carnegie Green) is a separate tax lot that is adjacent to Lot 37. It has twenty-two feet of frontage on East 88th Street, and is a separate zoning lot that was created pursuant to DOB approvals following the procedures set forth in the Zoning Resolution of the City of New York (the "Zoning Resolution"). (Id.) Lot 138 had a four-foot depth at the time it was originally created on February 24, 2015 ("Original Lot 138"), but as described below was subsequently enlarged to have a depth of 10 feet. (Id.)

On March 13, 2015, the DOB approved the Building's excavation and foundation plans, as well as the Building's zoning. (McMillan Aff. ¶ 8; Exhibit 5.) Construction began in April 2015, and the Building's foundations were subsequently completed. (Id.) On June 9, 2015, the DOB approved the Building's building and zoning plans, allowing the Development Respondents to begin constructing the vertical component of the Building. (Id.; Exhibit 6.)

On May 16, 2016, as preparations for the first floor concrete pour were in progress, City Council Member (and now, Petitioner) Benjamin Kallos, together with Manhattan Borough President Gale Brewer, issued a letter to DOB Commissioner Rick Chandler requesting that the DOB review the DOB's June 9, 2015 approval, claiming that, although the plans were previously approved, Realty improperly created a four-foot lot fronting 88th Street (*i.e.,* the Original Lot 138). (McMillan Aff. ¶ 9; Exhibit 7.) Notwithstanding the fact that the Building is located in an

[3] "McMillan Aff." refers to the accompanying Affidavit of Joseph A. McMillan, Jr., sworn to February 15, 2018,

unlimited height district on a separate and distinct zoning lot, the letter argued that the creation of Original Lot 138 allowed Realty to build a taller building on the adjacent Lot 37 than was permissible under the Zoning Resolution. (Id.) Annexed to the letter was a memorandum authored by a zoning consulting firm, George M. Janes & Associates, which was engaged by Petitioner Carnegie Hill Neighbors ("CHN"). (Id.; Exhibit 8.) Significantly, the memorandum did not identify any specific provision of the Zoning Resolution that was violated, instead conceding, with respect to the Original Lot 138, that "*Zoning Resolution has no minimum lot size when the lot does not contain residences*." (Id., Exh. 8, at p. 6) (emphasis added).[4]

On May 25, 2016, the DOB issued a stop work order for the site and issued a "Notice of Intent to Revoke Approvals and Permits." (McMillan Aff. ¶ 10.) The notice stated four objections: one asserted that the Original Lot 138 was not properly formed, and the other three related to use of an easement over the Original Lot 138 as one of the Building's required means of egress. (Id.; Exhibit 9.)

On June 6, 2016, Realty submitted a request to the DOB to perform certain safety-related work, including completing of the first floor pour, locking off the crane pad, and general cleaning and protection. After follow-up discussions with the DOB, on June 28, 2016, the DOB reduced Realty's full stop work order to a partial stop work order to permit Realty to complete the specific work items requested for safety reasons. (Id. ¶ 11; Exhibit 10.)

B. Realty Adjusts its Building Plans to Conform with the DOB's Determinations

On June 7, 2016, Realty filed an AI1 form with the DOB, which included responses to the DOB's May 25, 2015 revocation notice. (McMillan Aff. ¶ 12; Exhibit 11.) In it, Realty

[4] Petitioners *falsely* state that there is no "evidence that DOB or anyone else noticed" the four foot lot before the spring of 2016. (Pet. Br. at 16). DOB explicitly approved the tax lot subdivision on November 14, 2014 (McMillan Aff. ¶ 7; Exhibit 2), and the zoning lot subdivision on February 24, 2015 (Id., Exhibit 3), which clearly showed the four foot lot. DOB also approved the subdivision to create the expanded 10-foot lot, as discussed below, on June 13, 2017. (Id., Exhibit 4.)

answered each of the DOB's four objections and provided information in support of Realty's previously approved plans. Realty showed, among other things, that the Original Lot 138 was created in full compliance with the Zoning Resolution, that there is no required minimum lot size in the commercial district in which the Building is located, and that there is no requirement that a zoning lot must be developed or improved. (Id.)

On June 15, 2016, the audit examiner removed one objection from the Notice of Intent to Revoke Permits. (Id. ¶ 13.) On June 22, 2016, Realty submitted additional paperwork to the DOB in the form of a ZRD1 and CCD1 to provide further responses to the remaining objections. (Id., Exhibit 12 and Exhibit 13). On July 12, 2016, the DOB issued denials to both the ZRD1, stating that the zoning lot must have a minimum dimension of 10 feet, and to the CCD1, to the use of the easement over the Original Lot 138 for egress. (Id. Exhibit 14 and Exhibit 15.)

In response to these denials, although Realty believed that it was permissible to have created a four-foot-deep Lot 138, Realty nonetheless (and at significant cost) revised the plans for the Building to reflect a reapportioned Lot 138 with a resulting depth equal to the 10 feet requested by the DOB (which reduced Lot 37 to provide the additional six feet of depth). (Id., ¶ 14.) The development plans were also modified to provide that all of the required means of egress were satisfied by exits onto Third Avenue. (Id.)

C. The DOB Approves the Revised Plans and Construction Recommences

At the request of the DOB, Realty filed revised plans with a new massing scheme with a 10-foot-deep lot on October 21, 2016 (the "Revised Plans"). (McMillan Aff. ¶ 15; Exhibit 16.) On October 27, the three remaining objections were cleared and the ZD1 was accepted to the DOB virtual folder. (Id. ¶ 16; Exhibit 17.) The same day, Realty renewed the project's New Building permit as part of a separate procedure. (Id. ¶ 17; Exhibit 18.) On December 21, the DOB accepted Realty's Revised Plans and a new ZD1 (Id.; Exhibit 19.), and lifted the Stop

Work Order. (Id.; Exhibit 20.) On December 28, 2016, the construction team remobilized back to site. (Id. ¶ 20.)

Separately, on December 8, 2016, Petitioner CHN filed a Zoning Challenge and Appeal, challenging the DOB's approval of the revised New Building permit. (Id. ¶ 21; Exhibit 24.) On March 22, 2017, the DOB rejected all of CHN's claims, except for the challenge based on a lack of recorded zoning lot exhibits for the reconfigured Lot 138, for which it issued a Notice of Intent to Revoke Permits. (Id.; Exhibit 25.) On June 15, 2017, the DOB rescinded the Notice of Intent based on its receipt of the recorded zoning lot exhibits. (Id.; Exhibit 26).

On June 30, 2017, CHN filed a Zoning Challenge and Appeal of the DOB's partial rejection of the claims contained within CHN's December 8, 2016 challenge. (McMillan Aff. ¶ 22.) On September 28, 2017, the DOB rejected CHN's June 30, 2017 Zoning Challenge. (Id.; Exhibit 27.) On October 30, 2017, CHN filed an appeal of the DOB's determination with the BSA. (Id. ¶ 25; Exhibit 29.) On December 26, 2017, the BSA issued a "Notice of Comments," requiring CHN to provide substantive comments to 19 questions and/or demands for further information, including demands for a more detailed statement of facts, an explanation as to how the community is harmed, and clarification as to whether CHN was seeking to raise an issue before the BSA that it never raised before the DOB. (Id. ¶ 26; Exhibit 30.) CHN's response to the Notice of Comments, and a "Revised Statement of Facts and Law," were submitted on February 7, 2018, the latter of which precisely tracks Petitioners' memorandum in this action. (Id. ¶ 27; Exhibit 31.)

Hereafter, Realty intends to file its opposition to CHN's appeal. CHN continues to prosecute its BSA appeal based on the same arguments raised here. (McMillan Aff. ¶¶ 28-29.)

D. The Status of the Development Project

Currently, the project is in the concrete superstructure phase; 16 floors have already been poured. (McMillan Aff. ¶ 30.) The 2nd through 16th floors, including a mezzanine level, were poured between February 27, 2017 and February 14, 2018. (Id.) A substantial amount of other work has already been completed and is ongoing, including, but not limited to:

- the permanent sewer, water and electrical power systems have been installed;
- stairs have been poured through the 14th floor;
- shop drawings have been approved through the 30th floor for columns, through the 24th floor for penetrations, and through the 24th floor for slabs and beams;
- sprinkler rough-in work has been completed on the 1st through 7th floors;
- mechanical ductwork installation is substantially complete in the cellar through the 5th floor and is ongoing through the 7th floor;
- concrete block has been installed through the 7th floor and is ongoing on the 8th and 9th floors;
- non-fire-rated windows have been installed through the 7th floor with the 8th floor in progress;
- fire-rated windows have been installed through the 7th floor with the 8th floor in progress;
- the interior framing is in progress through the 7th floor;
- installation of a temporary roof on the 12th floor is complete;
- additional sections were added to the hoist, which now reaches the 13th floor;
- installation of the cocoon—a mesh wrap-around the building to protect construction crews, materials, and tools from falling—is complete; and
- the total amount of awarded scope packages to 94% of direct work.

Work is continuing at a diligent pace. Furthermore, Realty has already sold 8 condominium units (at a total sales figure of $54,327,000, with deposits of $10,423,550), with many more expected to be sold in the coming months. (Id. ¶ 32.) This is an approximately $300,000,000 project, measured by anticipated total sellout.

E. The Development Project Provides Significant Benefits to the Public

In addition to providing homes for families, the public has realized and will continue to realize significant benefits from the Building. For example, the project currently employs approximately 115 construction workers daily, with that number set to increase to approximately 300 at its peak, and the project will employ 10 permanent property management staff. (McMillan Aff. ¶ 34.) Realty has awarded more than 30 trade contracts to independent contractors and subcontractors, and entered into more than 80 contracts with third-parties, including architects, engineers, and various consultants. (Id.) In total, Realty has executed trade subcontracts of $56,190,351 and placed material purchase orders in the amount of $5,952,839 with fabricators, artisans, suppliers and service providers. (Id.)

The City will also collect significant revenues from the Building, including, *inter alia*:

- Total projected property tax revenue of $2,045,335 annually -- in contrast to the $128,249 currently collected from the unimproved lots;
- Total projected mortgage recording tax revenue of $4,004,752; and
- Total projected residential closing tax revenue of $8,694,819. (Id. ¶ 35.)

Significantly, Realty has not applied for 421-a tax abatements. (Id. ¶ 36.) In addition to the hundreds of jobs that the Building will create and the millions of dollars in tax revenue that it will generate, Realty is targeting a Leadership in Energy and Environmental Design ("LEED") Silver Certification from the United States Green Building Council and will offer a 1,093 square foot community facility on the ground floor. (Id. ¶ 37.) Finally, in connection with project, Realty has secured Off-Site Inclusionary Housing certifications which will contribute to the creation of *95* affordable housing units in the neighborhood. (Id. ¶ 38.)

F. The Court Denies Petitioners' Application for a TRO

On January 26, 2018, the Petitioners moved, by Order to Show Cause, for a Temporary Restraining Order and a preliminary injunction. Following review of the submissions and oral

argument, Justice Marcy S. Friedman, denied Petitioners' request for a TRO and set a hearing date of March 5, 2018 for the preliminary injunction. (Mollen Aff.[5] ¶ 4; Exhibit 33.) Justice Friedman made her ruling following the admission of Petitioners' counsel, as noted in the Hearing transcript ("Tr."), that nothing had occurred to suddenly create their claimed need for emergency relief, and that Petitioners had simply "thought it best" to file their motion when they did. (See id. ¶ 5; Exhibit 34.)

ARGUMENT

It is well-settled that "the remedy of granting a preliminary injunction is a drastic one which should be used sparingly." Town of Smithtown v. Carlson, 204 A.D.2d 537, 537 (2d Dep't 1994); Koultukis v. Phillips, 285 A.D.2d 433, 435 (1st Dep't 2001); see also Putter v. City of New York, 27 A.D.3d 250, 253 (1st Dep't 2006) ("preliminary injunctions prevent litigants from taking actions that they are otherwise legally entitled to take in advance of an adjudication on the merits, [and accordingly] should be issued cautiously and in accordance with appropriate safeguards").

"It is well established that preliminary injunctive relief is a drastic remedy which will not be granted without a clear showing by the movant that (1) he is likely to succeed on the merits; (2) he will be irreparably harmed without the issuance of the injunction; and (3) the balance of the equities favors him." Mr. Dees Stores, Inc. v. A.J. Parker, Inc., 159 A.D.2d 389, 389 (1st Dep't 1990). "The plaintiff's rights must be certain as to the law and the facts and the burden of establishing such an undisputed right rests upon the plaintiff." Gulf & Western Corp. v. New York Times Co., 81 A.D.2d 772, 773 (1st Dep't 1981) (internal citation omitted).

Petitioners cannot satisfy their burden and, indeed, their Petition should be dismissed.

[5] "Mollen Aff." refers to the Affirmation of Scott E. Mollen, Esq., sworn to February 16, 2018.

POINT I.

PETITIONERS' MOTION FOR A PRELIMINARY INJUNCTION SHOULD BE DENIED IN ITS ENTIRETY AND THEIR PETITION SHOULD BE DISMISSED

In addition to the fact that the Building is in full compliance with the Zoning Resolution as has already been determined by the DOB, Petitioners' claim for injunctive relief fails because it is barred by the equitable doctrine of laches, Petitioners are already seeking precisely the same determination on the merits from the BSA, and Petitioners have not demonstrated (and cannot demonstrate) any irreparable harm.

A. The Threshold Bars: Exhaustion of Remedies and Laches

1. Petitioners' Article 78 Petition is Plainly Premature; Petitioners' Own BSA Appeal is Pending — Dismissal is Warranted

Through this motion, Petitioners ask this Court to "preliminarily enjoin any further construction of Realty's building at 180 East 88th Street *pending a decision on the merits*." (Pet. Br. at 48.) However, this Court cannot render a decision on the "merits" because Petitioners failed to exhaust their administrative remedies.

On October 30, 2017, Petitioners (and CHN, in particular) filed an appeal with the BSA as to the DOB's rejection of Petitioners' "ZRD1" challenge to the Building plans. (McMillan Aff. ¶ 25; Exh. 29.) The BSA appeal is still being actively prosecuted, with Petitioners having submitted a February 7, 2018 response to BSA's questions, which sought extensive clarification and supplemental information about Petitioners' position.

The "merits" of Petitioners' position in this Petition — whether the building permit should be annulled and whether the Building is in violation of the Zoning Resolution — are currently before the BSA through Petitioners' pending appeal. For example, the requests for relief are as follows:

BSA Appeal	**Article 78 Petition - Request for Relief**
"For all the foregoing reasons, the building permit issued to Realty should be declared null and void."	"[E]nter a judgment annulling DOB's issuance of a building permit to Realty . . . ."
"This is a challenge to a zoning lot subdivision whose only purpose is to evade the requirements of the zoning resolution. . . .The challengers contend that this zoning lot subdivision is a sham and a nullity."	"[E]nter a judgment . . . declaring that Realty's zoning subdivision, done for the sole purpose of evading the law, is a sham and a nullity. . .

(Compare McMillan Aff. Exhibit 29 with Mollen Aff. Exhibit 36.) Indeed, when Petitioners revised their statement to the BSA most recently, they did so by merely transposing their brief (including the text and eight of the point headings) in this action. (See McMillan Aff. Exh. 31.)

Under these circumstances, the BSA must first address the merits before Petitioners ask this Court to conduct the same analysis. Petitioners' demand that this Court adjudicate the merits while the BSA appeal is being prosecuted vitiates the basic premise of an Article 78 proceeding. It thus requires rejection of Petitioners' application for preliminary injunctive relief *and dismissal* of the Petition for lack of subject matter jurisdiction and in accordance with Article 78. See Mandl v. Bd. of Educ. of the City of N.Y., 31 Misc.3d 1231(A), *2 (Sup. Ct. N.Y. Cnty. May 18, 2011) (Hagler, J.) ("Article 78 . . . codifies the traditional doctrine of administrative law which required 'finality' and 'exhaustion' before seeking judicial review of an administrative determination. 'Finality' has been defined as the completeness of the administrative determination which is ripe for judicial review"); Delafield 246 Corp. v. Dep't of Bldgs. of City of N.Y., 218 A.D.2d 613, 614 (1st Dep't 1995); Gottlieb v. City of N.Y., 126 A.D.3d 903, 903, (2d Dep't 2015) (dismissal pursuant to CPLR 3211(a)(2) and Article 78 where petitioner failed to exhaust administrative remedies); Pocantico Home & Land Co. v. Union Free Sch. Dist. of Tarrytown, 20 A.D.3d 458, 463 (2d Dep't 2005).

It is axiomatic that, under Article 78, Petitioners must first exhaust all available administrative remedies before obtaining judicial review. See CPLR § 7801; Mandl, 31 Misc.3d 1231(A) at *2 (Hagler, J.) ("The exhaustion doctrine bars the petitioner from obtaining judicial review unless he or she exhausts all administrative remedies prior to commencing the Article 78 proceeding"); Lehigh Portland Cement Co. v. N.Y. State Dep't of Envtl. Conservation, 87 N.Y.2d 136, 140 (1995); Watergate II Apartments v. Buffalo Sewer Auth., 46 N.Y.2d 52, 57 (1978); Young Men's Christian Ass'n v. Rochester Pure Water Dist., 37 N.Y.2d 371, 375 (1975); Dozier v. New York City, 130 A.D.2d 128 (2d Dep't 1987). The doctrine of exhaustion "reliev[es] the courts of the burden of deciding questions entrusted to an agency, preventing premature judicial interference with the administrators' efforts to develop, even by some trial and error, a coordinated, consistent and legally enforceable scheme of regulation and afford[s] the agency the opportunity, in advance of possible judicial review, to prepare a record reflective of its 'expertise and judgment.'" Watergate, 46 N.Y.2d at 57 (citations omitted).

This rule is particularly apt in the context of the review of DOB determinations by the BSA. Application of Chelsea Bus. & Prop. Owners Assn., LLC v. City of New York, 30 Misc. 3d 1213(A) *3 (Sup. Ct. N.Y. Cnty. Jan. 10, 2011) ("As to whether exhaustion of administrative remedies before the BSA is required, the Court of Appeals has frequently recognized that the BSA is comprised of experts in land use and planning and that its interpretation of the Zoning Resolution is entitled to deference."); Haddad v. Saltzman, 188 A.D.2d 515, 517 (2d Dep't 1992) (an action challenging the "legality, within the purview of the New York City Zoning Resolution," of a building's construction is "within the specialized knowledge and experience of the administrative bodies authorized to administer and enforce the ordinance" and should be remanded to the BSA for determination).

The BSA is constituted under the City Charter as a panel of experts, with three of its five members required to be a registered architect, a licensed professional engineer and a city planner, each with at least ten years' professional experience. (Charter § 659.) The BSA has the authority to interpret the Zoning Resolution, and has jurisdiction to "hear and decide appeals from and review . . . any order, requirement, decision or determination of the commissioner of buildings." (Charter § 666(6)(a); see also Zoning Resolution § 72-01(a) (BSA's jurisdiction to "hear and decide appeals from and review interpretations of this Resolution").)

Because of the BSA's expertise, courts have consistently recognized the pivotal role of the BSA's review of DOB determinations, and have dismissed claims by parties claiming to be aggrieved by DOB determinations where they have not exhausted their administrative remedies by appealing to the BSA. See, e.g., Towers Mgmt. Corp. v. Thatcher, 271 N.Y.94, 97-98 (1936); Contest Promotions-NY LLC v. New York City Dep't of Bldgs., 93 A.D.3d 436, (1st Dep't 2012); Koultukis v. Phillips, 285 A.D.2d 433, 435 (1st Dep't 2001); Delafield 246 Corp. v. Dep't of Bldgs., 218 A.D.2d 613, 614 (1st Dep't 1995); Weismann v. City of New York, 96 A.D.2d 454, 456 (1st Dep't 1983); Vandoros v. Hatzimichalis, 131 A.D.2d 752, 754 (2d Dep't 1987); Meyermac Elmhurst Inc. v. Esnard, 111 A.D.2d 789, 789-90 (2d Dep't 1985). In an early case on the subject, the Appellate Division stressed that the BSA's appellate review of DOB determinations "insures the benefit of trained and competent expert opinion and judgment, applied to the facts of each particular case by an experienced tribunal." People ex rel. Broadway & 96th St. Realty Co. v. Walsh, 203 A.D. 468, 474 (1st Dep't 1922).

Failure to exhaust review by the BSA is fatal when challenging a DOB determination:

> The failure to exhaust administrative remedies is dispositive. The matter should have been presented to the Board of Standards and Appeals, who had primary jurisdiction and the necessary expertise to consider the issue in the first instance, or at least on review from the determination of the

> Department of Buildings . . . . Particularly in a case like this, where the issue is complex, involving the interpretation of various zoning resolutions, the issue should be presented in the first instance to the administrative body with the necessary expertise to consider the underlying merits.

Weismann, 96 A.D.2d at 456-57.

The initial deference to the BSA particularly applies when a plaintiff argues that the DOB unreasonably interpreted a statute. As the Court of Appeals has held, "a claim that [a] statute was being unreasonably interpreted must be raised first by administrative review before the Board of Standards and Appeals." Young Men's Christian Assn., 37 N.Y.2d at 375-76 (internal quotation omitted) ("A reviewing court usurps the agency's function when it sets aside the administrative determination on a ground not therefore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action.") (quoting Unemployment Comm. v. Aragon, 329 U.S. 143, 155 (1946)).

Petitioners — recognizing that they face an exhaustion-of-remedies impediment — offer two unavailing arguments as to why they can present their petition to this Court before exhausting their remedies before the BSA. First, Petitioners assert that all they are asking for is a "pure statutory reading" for which deference need not be given to the BSA. This argument is manifestly belied by Petitioners' own motion papers which recount, in their own words, the "dizzying number of steps" involved here and the countless exchanges and submissions of highly technical land use analysis involving the DOB. In asking this Court to wade through that pile-high morass — as evidenced by Petitioners' massive *48-page, 32-footnote brief, 40 exhibits, and 5 affidavits* — to determine that DOB acted improperly in weighing the factual circumstances, obviously asks well beyond "pure statutory interpretation." These exhibits include mathematical calculations, drawings and charts, and references to a multitude of complex land use regulations.

Likewise, the BSA's "Notice of Comments" — which Petitioners responded to on February 7 — evidences the intensive factual nature of the matter by demanding that Petitioners, *inter alia*, "provide a more detailed Statement of Facts," "explain how the community is harmed by this proposed project," and "provide an analysis supporting your claim that the permit was improperly used." (McMillan Aff. Exh. 30.) As aptly captured by Justice Madden in Chelsea Bus. and Prop. Owners Ass'n:

> Here, at this stage of the proceedings and on the record before this court, it cannot be said that the DOB determinations at issue, are questions of 'pure legal interpretations of statutory terms.' Rather, the legal analysis is fact driven and requires, *inter alia*, an intricate analysis of criteria for evaluating and categorizing use within the contextual framework of the ZR. . . . Issues of this nature and complexity should be presented in the first instance to BSA, 'the administrative body with the necessary expertise to consider the underlying merits.'

30 Misc. 3d 1213(A) at *3-4 (citing Weissman, 96 A.D.2d at 456).

Second, Petitioners suggest that they need not exhaust their remedies before seeking injunctive relief because the BSA cannot issue such relief. However, this argument is disingenuous and inapt here in that Petitioners neither exclusively seek injunctive relief through their petition nor do they seek injunctive relief pending the BSA appeal. Rather they seek an injunction so that this Court can decide the "merits" — *i.e.,* to up-end the DOB determination, a matter which Petitioners have conceded (by bringing the BSA appeal) is appropriately determined by the BSA. Unsurprisingly, Petitioners offer no case where this court and the BSA have simultaneously conducted, and competed in, substantive proceedings on the identical issue.

Moreover, Petitioners, in filing an appeal with the BSA, recognized that the appropriate forum for challenging the DOB determination was the BSA. Although Petitioners may be able to initiate a court proceeding to challenge any final BSA determination, it is improper to ask this Court to adjudicate the same issue at the same time that the BSA is considering. Obviously,

Petitioners did not *exhaust* their administrative remedies as they are in the middle of pursuing those remedies. Petitioners' actions undercut the very premise of an Article 78 proceeding.

2. Petitioners' Demand for Relief is Barred by the Doctrine of Laches

There is no denying that Petitioners waited for more than one year to seek injunctive relief while they, literally, watched the building rise from the ground to a height of 16 stories at the tremendous expense and effort of the Development Respondents. Controlling judicial precedent holds that Petitioners cannot sit on their hands and then claim the need for "emergency" relief.

"Laches is an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party." In re Linker, 23 A.D.3d 186, 189 (1st Dep't 2005) (quotation marks omitted); White v. Priester, 78 A.D.3d 1169, 1171 (2d Dep't 2010). It is well settled that where a party "fail[s] to timely safeguard [its] interests by promptly seeking an injunction, the proceeding is barred by the doctrine of laches." Save the Pine Bush Inc. v. City Eng'r of City of Albany, 220 A.D.2d 871, 872 (3d Dep't 1995); see also, Stockdale v. Hughes, 189 A.D.2d 1065, 1068 (3d Dep't 1993) (holding that a party's failure to "make sufficient efforts to safeguard their rights . . . by failing to seek an injunction or stay to prevent construction" constitutes laches).

Laches is often applied in challenges to construction projects where, as here, the objecting party observes ongoing construction activities but fails to timely assert its claims or to seek injunctive relief. See, e.g., Birch Tree Partners, LLC v. Zoning Bd. of Appeals, 106 A.D.3d 1083, 1083-84 (2d Dep't 2013) (adjoining property owner's challenge barred by laches where one residence and foundation for second residence completed before challenge filed); Perry-Gething Foundation v. Stinson, 218 A.D.2d 791, 793 (2d Dep't 1995) (challenge to subdivision barred where plaintiff failed to commence suit until the defendant "had completed the bulk of the

construction and incurred a great deal of expense"); Save the Pine Bush Inc., 220 A.D.2d at 872; (challenge to road construction barred where petitioners "did not seek any injunctive relief until . . . [the] Loop Road was well under construction . . ."); Stockdale v. Hughes, 189 A.D.2d 1065, 1067-68 (3d Dep't 1993) (challenge to building permit barred where "many of the petitioners lived immediately adjacent to" the challenged project but "failed to make sufficient efforts to safeguard their rights here by . . . seek[ing] an injunction or stay to prevent construction); Eberthart v. La Pilar Realty Co., 45 A.D.2d 679, 680 (1st Dep't 1974) (challenge to zoning variance barred where "petitioners slept on their rights for the greater part of a year" despite the "continuing construction, obviously indicating the expenditure of much additional money."); Caprari v. Town of Colesville, 199 A.D.2d 705, 706, 605 N.Y.S.2d 157, 158 (3d Dep't 1993) ("In view of petitioners' and plaintiffs' failure to timely safeguard their interests by seeking an injunction, despite the obvious presence of ongoing construction on [the] property, proceedings and action are barred by the doctrine of laches and rendered moot.").

By way of example, in Save the Pine Bush, the Court affirmed the trial court's dismissal of petitioners' request for an injunction precluding construction of a road. In rejecting petitioners' argument that the permit allowing the work was improperly issued, the court reasoned that petitioners failed to seek injunctive relief until *four* months after the permit was issued and the work was well under way. The petitioners' claim was therefore barred by the doctrine of laches. Id., 220 A.D.2d at 871.

In this case, Petitioners unreasonably delayed in asserting their claims and bringing this motion, warranting application of the laches doctrine. Petitioners acknowledge that, with the exception of the seven-month period when the stop-work order was in place, "the developer has engaged in construction from the time the permit was first granted, effective July 7, 2015." (Pet.

Br. at 23). Indeed, despite the fact that the DOB approved the Revised Plans on December 21, 2016, Petitioners still waited *more than thirteen months* from that time to file their "emergency application" — during which Realty expended many millions of dollars constructing fourteen (and now sixteen) floors of the building in plain sight, entered into contracts with construction professionals, made commitments to lenders, and sold units. The issues here were publicly disclosed long ago and widely discussed. Indeed, Petitioners were intimately involved in these discussions. Though Respondents vigorously dispute the characterizations asserted in Petitioners' Affidavits, it is critical to note that Petitioners readily admit knowledge of the development plans by no later than *spring of 2016*. (Kallos Aff., ¶ 13; Van Der Walk Aff., ¶ 5.)

Where, as here, parties engaged in a development project have completed substantial construction and incurred a great deal of expense, while the petitioning parties had not just constructive notice but actual notice, observed the continuing construction and failed to safeguard their interests, New York's appellate courts have consistently applied the doctrine of laches to bar the petitioners' claims. Thus, under controlling decisional precedent, Petitioners' claims here are barred by the equitable doctrine of laches.

B. Petitioners Cannot Demonstrate Immediate Irreparable Harm

A showing of irreparable harm has been described as "the single most important requirement with regard to the granting of a preliminary injunction." L-3 Commc'ns. Corp. v. Kelly, No. 14971-05, 2005 WL 3304130, at *4 (Sup. Ct. Suffolk Cnty. Aug. 18, 2005), aff'd, 36 A.D.3d 762 (2d Dep't 2007). Irreparable harm is an injury which is "immediate, specific, nonspeculative and nonconclusory." McGann v. Inc. Vill. of Old Westbury, 170 Misc. 2d 314, 316, (Sup. Ct. Nassau Cnty. Sept. 16, 1996).

Said another way, "[a]llegations that irreparable injury will occur must be supported factually and convincingly. The mere apprehension of irreparable harm will not suffice."

Kaufman v. Axelrod, 135 Misc. 2d 293, 299 (Sup. Ct. N.Y. Cnty. Apr. 22, 1987); Art Capital Grp., LLC v. Getty Images, Inc., 24 Misc. 3d 1247(A) *9 (Sup. Ct. N.Y. Cnty. Jul. 30, 2009) (denying plaintiffs' motion for a preliminary injunction because, *inter alia*, "plaintiffs' assertions [were] conclusory and insufficient to establish that immediate and irreparable harm would result absent granting injunctive relief").

1. Petitioners Cannot Show That They Will Suffer Immediate, Irreparable Harm If an Injunction Is Not Granted

The instant application necessarily fails as a threshold matter because Petitioners cannot demonstrate that they would suffer any immediate, irreparable harm if this Court were to deny their request for a preliminary injunction.[6]

Indeed, Petitioners barely try to demonstrate that they would suffer any immediate harm, dedicating only a few sentences in a 48-page brief to explaining their purported "harm." Petitioners suggest in passing that, absent relief, the "building will likely be completed during the course of this litigation" and, in an unspecified way, that it will harm "the integrity of the streetscape." (Petitioners' Br. at 42). Likewise, Petitioners' affidavits are wholly unpersuasive as to harm, merely making the generalized, vague and unsupported assertions, for example, that the new building will impact the "uniformity of the mid-block human-scale streetscape" on the block on which they "shop." (Levy Aff., ¶ 7.)

Similarly, when pressed by the BSA to identify "how the community is harmed" by the Building, Petitioners could not say any more than that zoning regulations "are designed to

[6] Although Petitioners rely heavily on Dreikausen v. Zoning Board of Appeals of City of Long Beach, 98 N.Y.2d 165 (2002), that decision does not support their position. In that matter, the application for temporary injunctive relief was *rejected* at the trial level and was characterized by the Court of Appeals as a "half-hearted request for injunctive relief" made only after there has been "substantial completion of the project." Id. at 174. Moreover, the Court of Appeals merely recognized that a petitioner must *apply* for injunctive relief in a timely fashion to avoid a determination of mootness of an appeal taken after construction is finished. Nothing in this decision supports the imposition of an injunction, especially under the circumstances present here, where Petitioners observed more than 13 months of construction before they sought injunctive relief.

protect the streetscape and the pedestrian experience, all of which are important to appellants specifically and to the community in general." (McMillan Aff. Exh. 31, at page 4.)

These generalized platitudes offer no explanation as to how Petitioners or the community will actually be harmed by the construction of the Building other than by having an apparent dislike for it (which as an aside, Development Respondents actually took great efforts to design the building, and in particular its masonry façade, to have a point of resonance with pre-war buildings on the Upper East Side, in contrast to many of today's steel and glass towers). (McMillan Aff. ¶ 4.)[7] Notably, Petitioners' own consultant advised them, in a memo provided to the DOB, that their efforts would, even if successful, only have slight impact: "*It needs to be said that this is a large zoning lot and something large will be built on this site, regardless of any effort CHN undertake[s]*." (McMillan Aff. Exh. 8, at page 6.)

Additionally, they do not explain the "urgency" — *i.e.*, why this relief is needed *right now*, as opposed to a year ago, or next month, etc. Other than the fact that Petitioners perceived that their deadline to file an Article 78 proceeding was about to expire, they offer absolutely no explanation for the timing of their filing or the need for *immediate* relief. Indeed, at oral argument on the TRO application, Petitioners' counsel affirmatively acknowledged that nothing "has happened this week with the construction that has changed the ongoing nature of the construction in a fashion that you consider significant." (Mollen Aff., Exh. 34 at p. 7.) Petitioners' counsel also readily admitted that their fear ("rightly or wrongly") about the statute of limitations was the only motivation for the application and the only "reason that we're here." (Id., at pp. 7-8.) Counsel's explanation of the "urgency" was circular in logic, arguing merely that without immediate relief their case "will become moot." (Id. at p. 6). In other words,

[7] As described by *New York Lifestyles Magazine,* "DDG has done it again with their fantastic design by harkening the pre-war style in their designs and building a 21st-century iconic building."

Petitioners need immediate relief because they want ultimate relief — that is not legally sufficient, identifiable irreparable harm, and they are not entitled to relief neither now nor later.

Any argument that Petitioners would be irreparably harmed without injunctive relief is further belied by Petitioners' failure to seek injunctive relief in the face of the Building's continued, visible construction over the past thirteen months since the DOB approved the Revised Plans. Instead of initiating a lawsuit to halt construction, Petitioners sat back and watched as hundreds of workers constructed floor after floor of the building, day after day. Had Petitioners actually believed that they would be immediately and irreparably harmed by continued construction through the pendency of this action, they would have or should have made their application well before substantial work on the buildings was completed, not after. For this reason alone, Petitioners' application should be denied.

Accordingly, Petitioners cannot satisfy "the single most important requirement" to obtain the drastic remedy of a preliminary injunction. L-3 Commc'ns. Corp., 2005 WL 3304130, at *4.

2. Respondents Would Suffer Immeasurable Prejudice from an Injunction

While Petitioners will not suffer harm if their motion for a preliminary injunction is denied, Realty would suffer immensely if the Court halts construction. Petitioners ask for the "status quo" to be maintained, but the status quo under their skewed view is not keeping things static, but, instead, putting a screeching halt to ongoing construction, with major ramifications:

- An injunction would jeopardize the current construction and consultant staff retained on the project, resulting in the immediate loss of hundreds of jobs;
- Realty would be exposed to risk that hundreds of its subcontractors will walk off their jobs, forcing Realty to rebid and renegotiate with subcontractors (at a time that the market for construction costs have been increasing) and sign new contracts, causing further significant delays and expense;
- Realty would stand to lose approximately $1,100,000 per month in estimated carry costs while the project is stalled, including approximately $442,000 per month in construction loan costs, $157,500 in equipment (crane, hoist, etc.) storage rental costs, $290,000 in site team and safety costs, and $96,000 in insurance;

- Any delays to the ongoing work would place a significant financial and schedule strain on the project and impede Realty's ability to meet requirements set forth by Realty's $153MM loan, possibly necessitating involvement of banking regulators;
- There would be substantial costs associated with discarding or storing construction materials that are already in transit to the project site and would force material production to be placed on hold, exposing the project to further delay;
- A delay in construction would likely result in the rescission by purchasers of units in contract if Realty was unable to deliver by the dates specified in the contracts or the offering plan, which account for more than $50MM in sales and $10MM in deposits;
- A work stoppage would require Realty to spend substantial sums to safely maintain a 236-feet tall construction crane, currently on the site of the Building, as well as to keep the unfinished Building, stretching 213 feet into the air, secure and clean, to protect the Building and to avoid a nuisance to the community;
- An unfinished site, with electrical and mechanical equipment and construction materials, would create a visual eyesore that could negatively impact local and neighboring businesses, and leave the Building open to weather-related damage; and
- Purchasers would be delayed in obtaining their new homes. Indeed, buyers may have already arranged to vacate their current residences. Moreover, in light of now public knowledge that interest rates are rising, purchasers would risk receiving higher interest rates on their mortgages or having to renegotiate terms of their mortgages if they are unable to close on their purchases. (McMillan Aff. ¶ 40.)

These are only some of many examples of harm which Realty would suffer if the Court freezes construction of the Building. Petitioners' inability to even articulate any conceivable irreparable harm, especially when considered together with the immense prejudice Respondents would suffer from an injunction, warrants denial of Petitioners' application.

C. Petitioners Cannot Demonstrate a Likelihood of Success on the Merits

"To sustain its burden of demonstrating a likelihood of success on the merits, the movant must demonstrate a clear right to relief which is plain from the undisputed facts. Where the facts are in sharp dispute, a temporary injunction will not be granted." Related Props., Inc. v. Town Bd. of Town/Vill. of Harrison 22 A.D.3d 587, 590 (2d Dep't 2005) (internal citations omitted).

1. The DOB's Determination on this Issue Must be Given Deference

The Petitioners cannot demonstrate likelihood of success. The DOB has already approved the development plans after extensive review and dialogue, including with Petitioners.

By way of background, the DOB issued a stop work order preventing construction of the premises for nearly seven months in response to Petitioners' concerns that the four-foot lot fronting East 88th Street did not comply with the Zoning Resolution. The DOB specifically instructed Realty that its lot, which extended to 88th Street, could not "be subdivided so as to leave a tract of land with only a 4' depth," and that the subdivided lot fronting 88th Street "could only be formed as a zoning lot if it has a minimum of ten linear feet in depth." (McMillan Aff. Exh. 14, at p. 4.) In accordance with this determination, Realty revised the building plans for the Building to reflect the enlargement of the lot fronting 88th Street from four feet to 10 feet in depth. In other words, Realty took the steps necessary to address the issues raised by the DOB.

Despite the fact that Petitioners raised challenges to the DOB, the DOB approved Realty's plans as complying with the Zoning Resolution and lifted the stop work order that same day. Thus, after more than a seven-month delay in construction, Realty's construction team recommenced work on December 28, 2016. (McMillan Aff. ¶ 20.)

The DOB's approval, determining that the Building is being built in accordance with the Zoning Resolution, must be given substantial deference. London Terrace Assocs., L.P. v. DHCR, 35 Misc. 3d 525, 530 (Sup. Ct. N.Y. Cnty Jan. 18, 2012) (Hagler, J.) ("[A] court may not disturb an administrative determination unless there is no rational basis for it in the record or the action is arbitrary or capricious"); Soho Alliance v. New York City Bd. of Standards and Appeals, 95 N.Y.2d 437, 440 (2000) (BSA determination "may not be set aside in the absence of illegality, arbitrariness or abuse of discretion").

Indeed, this Court has long recognized that "BSA and DOB are responsible for administering and enforcing the zoning resolution, and their interpretation must therefore be given great weight and judicial deference, so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute." Chelsea Bus. & Prop. Owners' Ass'n, LLC v. City of N.Y., 107 A.D.3d 414, 415 (1st Dep't 2013) (citing Appelbaum v. Deutsch, 66 N.Y.2d 975, 977 (1985)); see also Lee v. Chin, 1 Misc. 3d 901(A) *36 (Sup. Ct. N.Y. Cnty. Oct. 29, 2003) (internal citations omitted) ("[S]ince the Zoning Resolution is silent as to whether a zoning lot may be merged under these circumstances, the Court must defer to the governmental agency charged with the responsibility of administering the statute as long as its interpretation is not irrational or unreasonable.").

No such irrational or unreasonable interpretation is present here. There is no justifiable basis for Petitioners' claim that the DOB's determination should be overturned. Accordingly, Petitioners are manifestly unlikely to succeed on the merits of their claims.

2. Petitioners' "Sham" Theory is Without Basis in Law or Fact

Petitioners' primary argument — as reflected in their overlapping Third and Fifth Causes of Action — is that the Building is a "sham" because Respondents created a separate 10-foot "unbuildable lot" to front East 88th Street so that it could avoid zoning restrictions applicable to buildings that run along a street line. (See Pet. Br. at 38-40.) Petitioners offer no viable legal support to support their theory (and, as a matter of fact, the reconfigured Lot 138 is demonstrably buildable). Petitioners' conspiracy theories aside, Realty acted as it did to ensure that the development would be *in compliance with* the zoning regulations. There is no law that forbids deliberate compliance.

Petitioners assert that it is not in the City's interest for a developer to use a subdivision in this manner. Petitioners rely on inapposite, out-of-state law (from Idaho and Massachusetts)

about "sham transactions" and make the desperate argument that Lot 138 should be disregarded as a separate zoning lot because, though technically compliant, its existence somehow runs afoul of legislative intent.[8] This "Hail-Mary" argument is certainly not likely to succeed, especially where, as here, the DOB expressly approved Realty's Revised Plans after DOB's senior officials extensively reviewed the Zoning Resolution's requirements as they relate to the Building.

Petitioners ignore the fact that the Building's zoning lot was established, and Lot 138 was subdivided, in accordance with all applicable provisions of the Zoning Resolution, as confirmed by the DOB on December 21, 2016. (McMillan Aff. Exhs. 19-20.) Indeed, Petitioners' own zoning consultant, George M. Janes, in a memorandum prepared for Petitioners and submitted to the DOB through City Council Member Benjamin Kallos, dated April 2, 2016, admitted that Petitioners' position is without support in the applicable statutory law: "[i]n most jurisdictions in New York State, subdivision regulations prevent the creation of unbuildable lots," while New York City's "*Zoning Resolution has no minimum lot size when the lot does not contain residences*." (McMillan Aff. Exh. 8 at 6) (emphasis added). In approving Realty's revised plans, DOB also, of course, had access to additional information, including DOB's prior determinations that other lots 10 feet in depth were likewise acceptable for zoning purpose. (See, e.g., McMillan Aff. Exhibit 23) (holding that a 10' x 20' foot lot is acceptable).

Despite Mr. Janes' memo on behalf of the Petitioners to the contrary, Petitioners contend that Realty violated the Zoning Resolution by creating an "unbuildable lot." However, the Zoning Resolution does not mandate that a zoning lot must be large enough to accommodate a

[8] Petitioners also erroneously rely on the Court of Appeals decision in For the People Theatres of New York v. City of New York, 29 N.Y.3d 340 (2017) for the proposition that transactions that have "no legitimate purposes, including real property transactions such as the one at issue here, are nullities without effect." (Pet. Br. at 38.) However, For the People has nothing to do with a real estate transaction, let alone nullifying a transaction or ascertaining its purpose; rather it addresses a challenge to the constitutionality of a zoning ordinance relating to sexually explicit materials. The case offers no support to Petitioners.

building. (See ZR § 12-10.) It is well-settled that "zoning ordinances are in derogation of common law rights and, accordingly, must be strictly construed so as not to place any greater inference upon the free use of land than is absolutely required." Exxon Corp. v. Bd. of Standards & Appeals of City of N.Y., 128 A.D.2d 289, 295–96 (1st Dep't 1987); City of N.Y. v. The Black Garter, 273 A.D.2d 188, 189 (2d Dep't 2000) ("Zoning ordinances are to be strictly construed against the municipality which has enacted and seeks to enforce them."). As such, the provisions of such ordinances and regulations "may not be extended by implication." 440 E. 102nd St. Corp. v. Murdock, 285 N.Y. 298, 304 (1941).

For example, in Lee v. Chin, a community organization brought an Article 78 proceeding for annulment of an administrative determination of the BSA which upheld building permits issued for construction of an 18-story building. The court dismissed the petition because the Zoning Resolution did not "expressly prohibit" the challenged zoning lot merger:

> Again, since the Zoning Resolution is silent as to whether a zoning lot may be merged under these circumstances, the Court must defer to the governmental agency charged with the responsibility of administering the statute as long as its interpretation is not irrational or unreasonable.

Lee v. Chin, 1 Misc. 3d 901(A), at *17-18.

As in Lee, the subdivision here is not prohibited by the Zoning Resolution. An "intent" test is absent from the Zoning Resolution and is not pertinent to its operation. The Zoning Resolution permits an owner to subdivide a zoning lot freely, provided that the subdivision does not result in zoning noncompliance at the time it is made and that the proper legal instruments are recorded. It would be an improper use of DOB's administrative authority to impose additional requirements that are outside of this plain text of the Zoning Resolution. This framework has been implemented and relied upon by property owners, lenders, investors, and title companies for four decades; there is no basis for DOB to change its standards now.

Likewise, Petitioners' assertion that any subdivision must have a "legitimate land use purpose" (Pet. Br. at 35) imposes a test not present in the Zoning Resolution. Petitioners argue for a subjective, *ad hoc* standard, even though the Zoning Resolution contains an objective test for zoning lot subdivisions. The plain language of the Zoning Resolution states that a "zoning lot may be subdivided into two or more zoning lots, provided that all resulting zoning lots and all buildings thereon shall comply with all of the applicable provisions of this Resolution." (ZR § 12-10.) This condition — the only condition for the subdivision of a zoning lot — is simple and easy to administer. The Zoning Resolution allows zoning lots to be enlarged or subdivided freely, provided that this condition is met. In this case, the zoning compliance of the current zoning lots was established on December 21, 2016 when DOB approved the zoning lot subdivision and the zoning compliance of the Building on its new zoning lot.

Ultimately, the standard Petitioners suggest is wholly irrational. They argue that a zoning lot subdivision should only be allowed if it enables construction of a building that would be complying were it not for the subdivision. (Pet. Br. at 35.) Thus, only subdivisions with a zero-effect are permissible under this theory. Effectively, without a legal basis to vindicate their dissatisfaction with the design of the Building, Petitioners are asking the Court to enact new zoning regulations governing the creation and subdivision of zoning lots. Such responsibility is properly within the purview of the New York City Planning Commission, which has the expertise and a defined process for the consideration and enactment of new zoning regulations.

3. Lot 138 is Buildable; Petitioners' "Unbuildable Lot" Premise is False

Moreover, and although it is not a legal necessity, as matter of fact, *Lot 138 is buildable*. As per the architect massing diagrams annexed to Respondents' papers, Lot 138 can support an independent commercial building to house, for example, a tea shop, a cellphone retailer, a newsstand, or other small structure. (McMillan Aff. ¶ 45; Exhibit 32.)

In other words, even though Realty need not prove that Lot 138 can support a buildable structure, it can. Thus, the very core of Petitioners' position — *i.e.,* that this Court must effectively re-write the Zoning Resolution to disallow unbuildable lots — rings hollow.

4. Lot 138 is not Required to Provide Legal Egress from the Building

Through the Fourth Cause of Action, Petitioners argue that Lot 138 "is an integral and inseparable part of Realty's development," somehow thus invalidating the subdivision. (Pet. Br. at 37.) In fact, the Building stands alone on Lot 37, and does not rely on Lot 138 for zoning or Building Code compliance. The independence of the Building is demonstrated by DOB's approval of the revised building permit on December 21, 2016, which measures zoning and Building Code compliance on the Building's own zoning lot alone, without regard to Lot 138.

In particular, Petitioners repeatedly state that Lot 138 is required to provide legal egress from the Building (see Pet. Br. at 3, 10, 14, 16, 19, 20, 37), and that, without such egress, the Building is in violation of the Building Code (BC 1027.6), which requires that a building exit onto a public way. This assertion is simply false. Both of the Buildings' required means of egress are provided *onto Third Avenue*, as shown on the DOB-approved plans.[9] There is no basis to Petitioners' assertion that Lot 138 is an integral part of the development.

5. The Building Does Not Violate the "Sliver Law"

Through its First Cause of Action, Petitioners argue that Realty's building violates the "Sliver Law" of Zoning Resolution § 23-692, which limits the height of street walls of narrow buildings. This claim reflects a fundamental misapplication of the Sliver Law.

[9] The initially approved building plans did contemplate that one of the two required means of egress would be provided over Lot 138, and this egress was reflected in the Egress Restrictive Declaration (McMillan Aff. ¶ 18; Exh. 21.) However, the building plans were subsequently revised to provide the required two means of egress exiting directly on Third Avenue, with no egress reliant on Lot 138. (See McMillan Aff. Exhibit 22.) Because the Egress Restrictive Declaration is not required for emergency egress, it can be cancelled with the written consent of DOB (Exh. 21 at Paragraph 3.)

The Sliver Law provisions apply to "portions of buildings with street walls less than 45 feet in width." (ZR § 23-692.) A "street wall" is defined as a "wall or portion of a wall of a building facing a street." (ZR § 12-10.) The Sliver Law does not apply here because the Building has no street frontage on East 88th Street. The Building cannot have a "street wall" with regard to East 88th Street because its zoning lot does not have a "street line" on East 88th Street.

Without support in the law, Petitioners attempt to apply zoning regulations applicable to a street on which Realty's zoning lot has no frontage, which is contrary to the basic administration of zoning in New York City. Petitioners' novel argument is that the court should apply zoning regulations without regard to the legally-established zoning lot — *i.e.*, "A street wall is not necessarily along the street line, but only facing that line," and thus "faces" East 88th Street. (Pet. Br. at 27.) In lay terms, what Petitioners are suggesting is that a building can "face" a street, for purposes of the Sliver Law, even if there is an intervening zoning lot (with, perhaps, another structure sitting on it) between the building and the street.

A fundamental tenet of New York City zoning is that a building's zoning compliance is measured with reference to its "zoning lot." The Department of City Planning's Zoning Handbook (2011) states that "The zoning lot is the basic unit for zoning regulations. . . ." (p. 149).[10] Throughout the Zoning Resolution, zoning compliance for floor area, height and setback, yards, and other regulations is measured based on the parameters of a zoning lot.[11] Many of

[10] See also, Norman Marcus "Air Rights in New York City: TDR, Zoning Lot Merger and the Well-Considered Plan," Brooklyn Law Review Vol. 50, Summer 1984, No. 4, at 869 (Marcus, the former Counsel to the New York City Planning Commission, describes the zoning lot as "the basic unit for land use control").

[11] See, e.g., Zoning Resolution § 12-10 (DEFINITIONS) "Building. A 'building' is any structure which: (a) is located within the lot lines of a zoning lot . . . ."; § 12-10 (DEFINITIONS) "Floor Area Ratio. Floor area ratio is the total floor area on a zoning lot, divided by the lot area of that zoning lot."; § 23-15 (Maximum Floor Area Ratio in R10 Districts): ". . . the floor area ratio on a zoning lot shall not exceed 10.0."; § 23-65(a) (Applicability of tower-on-a-base regulations): "The tower-on-a-base regulations of Section 23-651 shall apply to any such building that . . . (2) is located on a zoning lot that fronts upon a wide street and is either within 125 feet from such wide street frontage along the short dimension of the block or within 100 feet from such wide street frontage along the long dimension of the block."; § 23-47 (Minimum Required Rear Yards): "In all districts, as indicated, a rear yard with a

these regulations measure compliance from the "street line," which is defined in the Zoning Resolution as "a lot line separating a street from other land." (ZR § 12-10.) The height and setback regulations, in particular, including the Sliver Law regulations, measure compliance from the zoning lot's street line — the streets on which the zoning lot has frontage. Ultimately, the term "street wall" is only definable with regard to a particular "street line."

Petitioners' interpretation of the Sliver Law would make a zoning lot subject to the height and setback regulations of each of the streets bounding a block, regardless of any intervening lots in certain directions. This interpretation would lead to absurd results, and has no support in the Zoning Resolution. Given the grid street system of much of Manhattan, almost every building wall is opposite, or "faces," one of the streets that bound a block. But, of course, each of a building's walls could not be subject to the different set of height and setback regulations applicable to each street that it "faces" through intervening lots.[12]

Realty's zoning lot does not have frontage on East 88th Street, and therefore the height and setback regulations applicable to that street, including the Sliver Law, are inapplicable.

6. The Building is in Compliance with "Tower-On-A-Base" Regulations

Through its Second Cause of Action, the Petitioners argue that Realty's Building violates the tower-on-a-base regulations of Zoning Resolution § 23-651 because it does not have a street wall and base built along East 88th Street. This argument exhibits the same fundamental deficiency as the First Cause of Action in that it ignores the fact that Lot 138 is not part of the Building's zoning lot, and thus the street wall regulations of § 23-651 applicable to East 88th

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depth of not less than 30 feet shall be provided at every rear lot line of any zoning lot . . . ."

[12] Without reference to a particular street line, there is no reference point for measuring the width of the applicable street wall. Thus, if Petitioners' approach to the Sliver Law is taken to its logical conclusion, the Building's street wall "facing" East 88th Street would be the entire northern wall of the Building, which is 100 feet in width, and therefore *not subject* to the Sliver Law limitations.

Street do not apply to the Building.

The tower-on-a-base regulations apply to buildings that are "located on a zoning lot that fronts upon a wide street and is either within 125 feet from such wide street frontage along the short dimension of the block or within 100 feet from such wide street frontage along the long dimension of the block." (ZR § 23-65(a).) The regulations, provided below, require affected buildings to be built with street walls that are located within eight feet of the applicable street line, for 70 percent of their width:

> (b) #Building# base regulations
>
> (1) #Street wall# location
>
> (i) On a #wide street#, and on a #narrow street# within 125 feet of its intersection with a #wide street#, the #street wall# of the base shall occupy the entire #street# frontage of a #zoning lot# not occupied by existing #buildings#. At any height, at least 70 percent of the width of such #street wall# shall be located within eight feet of the #street line#, and the remaining 30 percent of such #street wall# may be recessed beyond eight feet of the #street line# to provide #outer courts# or balconies.

These provisions are, by their express terms, only applicable to a zoning lot's "street frontage" and a "street wall" facing a "street line." As discussed above, these concepts are relevant only where a zoning lot has a "street line" on a particular street. The Building has a street line on Third Avenue and fully complies with the tower-on-a-base regulations applicable to that street, with a street wall along Third Avenue. Petitioners do not suggest otherwise.

Instead, as with their Sliver Law argument, the Petitioners try to apply these regulations to any face of a Building regardless of intervening zoning lots between the building and street. This interpretation is contrary to the language of the Zoning Resolution and dictates an impossible result: Because the zoning lot in this case does not have any street frontage on East 88th Street, the Building's northern wall cannot be located within eight feet of that street line.

A final matter of note is the BSA's question, in its Notice of Comments for Petitioners: "*Please clarify if the non-compliances raised in your Statement of Facts were raised at the Department of Buildings. Please note that any issues raised that have not been addressed by the Department of Buildings may not be part of this appeal.*" (McMillan Aff. Exh. 30.)

It is Respondents' understanding that this comment was issued by the BSA because the final determination that is the subject of the BSA appeal (and this Petition) is the DOB's September 28, 2017 denial of CHN's June 30, 2017 zoning challenge. However, the "Sliver Law" and "tower-on-a-base" arguments made in the BSA appeal (and in the Petition) were not articulated to the DOB in Petitioners' June 30, 2017 zoning challenge or the April 11, 2017 zoning challenged referenced in the June 30th challenge. (McMillan Aff. ¶ 24; Exh. 28.) The BSA likely noticed this anomaly. On this basis, and consistent with the BSA's Rules of Practice and Procedure, Respondents expect the BSA "to decline to consider new arguments not presented to — and decided by — DOB in the first instance."[13] That makes sense, as the BSA would not have the benefit of consideration by the DOB.

The fact that the BSA is still in the process of determining the proper scope of review of the DOB determination only further exemplifies the clear prematurity of Petitioners' application to this Court. Moreover, a similar issue is presented here as was raised by the BSA. How can Petitioners demand that this Court find that DOB acted arbitrarily and capriciously in rejecting Petitioners' arguments about the Sliver Law and tower-on-a-base regulations if Petitioners did not even raise those arguments to the DOB in its zoning challenges?

The short answer is that Petitioners cannot do so. See e.g., Collins v. Amrhein, 144 A.D.2d 461, 462-63 (2d Dep't 1998) ("[i]t is well settled . . . that a petitioner may not raise new

[13] See Mollen Aff. ¶ 6; Exhibit 35, a September 20, 2017 Resolution issued by the Board of Standards and Appeals, denying an appeal by *Sky House Condominium*.

claims in a proceeding pursuant to CPLR article 78 that were not raised in the administrative hearing under review"); Yarbough v. Franco, 95 N.Y.2d 342, 347 (2000); Fanelli v. New York City Conciliation and Appeals Bd., 90 A.D.2d 756, 757 (1st Dep't 1982); Daniel v. N.Y. State Div. of Hous. and Cmty. Renewal, 179 Misc. 2d 452, 465 (Sup. Ct. N.Y. Cnty. Nov. 2, 1998).

D. A Balancing of the Equities Heavily Favors Respondents

"In balancing the equities, the court should consider various factors, including the interests of the general public, whether plaintiff was guilty of unreasonable delay, and whether plaintiff has unclean hands." United for Peace & Justice v. Bloomberg, 5 Misc. 3d 845, 849 (Sup. Ct. N.Y. Cnty. Aug. 25, 2004).

Here, although Petitioners were aware that the Development Respondents were constructing the Building in accordance with the Revised Plans approved by the DOB, they waited more than thirteen months to initiate this action and seek injunctive relief. Petitioners' unreasonable and extreme delay amounts to unclean hands, warranting the denial of Petitioners' motion. United for Peace & Justice, 5 Misc. 3d at 849 ("Although plaintiff comes to court seeking equity, the above chronology establishes plaintiff does not come to court with 'clean hands', because plaintiff is guilty of inexcusable and inequitable delay.").

Moreover, a balancing of the equities cannot favor Petitioners where, as here, "plaintiff[s] will not suffer irreparable injury absent the relief requested," but "defendants would suffer such irreparable injury because of the preliminary injunction." Scotto v. Mei, 219 A.D.2d 181, 184-85 (1st Dep't 1996); Scott v. City of Buffalo, 16 Misc. 3d 259, 292 (Sup. Ct. Erie Cnty. Nov. 9, 2006), aff'd, 38 A.D.3d 1287 (4th Dep't 2007) ("When balancing the equities and upon weighing the hardships that might be imposed, where the balance appears to favor the defendants, the preliminary injunction must be denied."). Here, the equities not only fail to tip the balance in favor of Petitioners (which they have the burden to show), they weigh in Respondents' favor.

Indeed, as discussed above, while Petitioners would not suffer any harm in the absence of an injunction, Respondents will suffer substantial prejudice if the injunction was granted and construction halted.

Additionally, the equities cannot balance in favor of a petitioner who abuses the judicial system. Commencing an appeal to the BSA, and then initiating a duplicative Article 78-styled action before the BSA appeal has been determined, is an extraordinary waste of judicial resources, as well as an act that has already imposed substantial costs upon the Respondents.

Accordingly, the Court should deny Petitioners' motion for a preliminary injunction.

POINT II

IF RESTRAINTS ARE NEVERTHELESS ISSUED, PETITIONERS SHOULD BE REQUIRED TO POST A SUBSTANTIAL BOND

If Petitioners' request for a preliminary injunction is granted — which it should not be for the many reasons discussed herein — it is critical that the Court order Petitioners to post a substantial undertaking.

CPLR 6312(b) provides, in pertinent part, that

> [P]rior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff if it is finally determined that he or she is not entitled to an injunction, will pay the defendant all damages and costs which may be sustained by reason of the injunction.

As a result, Petitioners are required to post an undertaking if this Court issues a preliminary injunction. See Ying Fung Mo v. Hohi Umeki, 10 A.D.3d 604, 605 (2d Dep't 2004) (internal citations and quotation marks omitted) ("CPLR 6312(b) clearly and unequivocally requires the party seeking an injunction to give an undertaking.").

Such undertaking must be capable of compensating Respondents for the serious financial loss which would likely result if an injunction is in place and Petitioners ultimately do not

succeed on the merits. As the First Department has consistently held, the amount of the undertaking should be "rationally related to the damages defendant might suffer should the court later determine that the injunctive relief was unwarranted." 3636 Greystone Owners, Inc. v. Greystone Bldg., 4 A.D.3d 122, 123 (1st Dep't 2004); Madison/Fifth Assocs. LLC v. 1841-1843 Ocean Parkway, LLC, 50 A.D.3d 533, 534 (1st Dep't 2008) (same); see also Scotto v. Mei, 219 A.D.2d at 185 (1st Dep't 1996) (holding that the lower court "erred in granting a preliminary injunction, with serious financial consequences for defendants, without requiring the posting of an undertaking by plaintiff").

Significantly, when calculating the amount of the undertaking, a Court should consider all of the potential damages that the enjoined party may suffer as a result of the injunction, as the damages recoverable from the issuance of an erroneous injunction are generally limited to the amount of the undertaking. Bonded Concrete, Inc. v. Town of Saugerties, 42 A.D.3d 852, 855 (3d Dep't 2007); Crown Wisteria, Inc. v. F.G.F. Enterprises Corp., 168 A.D.2d 238, 241 (1st Dep't 1990) (stating that, in the absence of bad faith, "damages arising from improperly issued injunctive relief are only recoverable in an action on the undertaking"). Such potential damages include the "attorneys' fees incurred in connection with vacating the restraint." Drexel Burnham Lambert Inc. v. Ruebsamen, 171 A.D.2d 457, 458 (1st Dep't 1991).

Respondents estimate, through a sworn affidavit, that Realty would lose approximately $1,100,000 per month in carrying costs while the project is stalled — and that does not account for the vital threat posed by such a halt to Realty's financing, sales contracts, and contracts with construction professionals. (McMillan Aff. ¶ 41.)

Though recognizing that "damages that defendant might incur" is a critical factor in setting the undertaking, Petitioners argue that their status as non-profits should be the

determining factor. That the faces of this action are non-profit organizations does not in any way lessen this very real harm suffered by Realty. Moreover, neither Friends of the Upper East Side Historic Districts nor the Carnegie Hill Neighbors, Inc. submitted *any information* about its finances, the nature of its financing or the capabilities of its constituents to pay a bond. Although there certainly are non-profit organizations and community organizations that do not have access to resources, that is not true of all and cannot simply be presumed by the Court.[14] Here, for example, Petitioners have retained a private expert and counsel, rather than have them appointed by an organization that provides legal services to the indigent, such as the Legal Aid Society.

The actual aggregate cost that would be inflicted by the injunction sought by Petitioners, while not presently ascertainable, is believed to be no less than $6.6MM (six months of approximate carrying costs), and therefore, Respondents respectfully request that, in the event the instant motion is granted, the Court order Petitioners to post an undertaking in at least that amount.

[14] The non-profits referenced in Petitioners' cases include a drug rehabilitation center seeking to enjoin the cut-off of the electrical service and a community organization for low-income housing alleging violations of the Fair Housing Act. Even there — with very different non-profits and dynamics than here — the critical factor in the court's setting of a nominal bond was that "Defendants have not shown what their damages would be if the injunction were to be incorrectly granted." Broadway Triangle Cmty. Coalition v. Bloomberg, 35 Misc.3d 167 (Sup. Ct. N.Y. Cnty. Dec. 23, 2011); Daytop Village, Inc. v. Consol. Edison Co. of New York, 61 A.D.2d 933, 935 (1st Dep't 1978). Here, where the Development Respondents are at risk for enormous damages, that is certainly not the case.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that the Court deny Petitioners' motion a preliminary injunction, dismiss the Petition, and issue such further relief as the Court may deem just and proper.

Dated: New York, New York
February 16, 2018

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