SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: TRIAL TERM PART 17

- X

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

Petitioners,

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

INDEX NUMBER: 100125/2018

- 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.

- X

60 Centre Street
New York, New York
March 5, 2018

BEFORE:
HONORABLE SHLOMO S. HAGLER, Justice.

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(Continued on next page.)

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THE COURT: Let's go on the record. Good afternoon. I want to thank the parties for their patience. I did not anticipate having two back-to-back major cases, and we didn't even have room in the courtroom, let alone to have time to hear out two complicated cases.

The other one has its own set of facts. Obviously, this one is a different type of case, but I apologize for the delay. I didn't realize it would be back-to-back, and that was a scheduling issue. I appreciate you being able to come back this afternoon. It is a little more docile, a little more manageable for me to hear an argument. I couldn't hear both of them back-to-back and finish my calendar as you saw how many people we had here, in addition to that one large oral argument. So, thank you.

I've read the papers. We essentially have a Petition by the Petitioners seeking a preliminary injunction to stop the development of a certain building, which will -- I don't have -- I think it is 88th and Third Avenue. I won't talk about the address. We all know the address.

Then there is a cross-motion to dismiss essentially on two grounds:

One is an exhaustion of administrative remedies and, two, laches.

Deal with the cross-motions first.

MR. MOSS: I want to state for the record, Adam

Moss, from Corporation Counsel on behalf of BSA and DOB.

As I indicated, we have a brief affirmation in response to the PI motion. We indicated the City was not taking an explicit position on the PI motion.

I also indicated in that affirmation I was planning to submit a cross-motion to dismiss for lack of subject matter jurisdiction. That motion is forthcoming later this week. We just didn't have an opportunity to complete it, but I'm happy to talk about -- preview our motion. It is largely similar to arguments made by Co-Respondent.

THE COURT: For better or worse, I cannot comment on papers I have not seen. So you could make whatever arguments you want. I prefer to address the extant motion that is before me, and then if, if and when you make the motion, there will be opposition I assume to the motion, and we will address it then. But, right now it is premature to go through a motion that will probably be made in the future.

MR. MOSS: Understandable, Your Honor. I just wanted to notify the Court the motion was forthcoming, and to the extent it is similar in many respects to our Co-Respondents' opposition I'd be happy to preview our motion or discuss it.

THE COURT: I'd rather not preview a motion that is not before me.

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MR. MOSS: Fair enough, Your Honor.

THE COURT: The way we work in the Supreme Court is you make it; opposition; we schedule argument. I can't anticipate and give you a pre-determination of a motion --

MR. MOSS: I understand, Your Honor.

THE COURT: -- that has not been made yet. I don't want to waste my time and yours. And until I have a full record, I don't comment on anything, and I think it is premature. Once it is made, you'll have an opportunity to make the motion and argue it at a later time.

Clearly, this may be helpful to you because it brings up the same grounds. Listen carefully, and act accordingly with regard to that motion. I don't know what else to tell you.

MR. MOSS: Understood. Thank you, Your Honor.

THE COURT: So, counsel, your cross-motion.

MR. MOLLEN: Good afternoon, Your Honor. Scott Mollen, Herrick, Feinstein, counsel to DDG Partners LLC; 180 East 88th Street Realty LLC; Carnegie Green LLC; and, Allied Third Avenue LLC.

For the convenience of the argument with Your Honor's permission I'll refer to them as the "Developer," even though papers make clear their respective roles.

First of all, I want to thank the Court in advance for your patience in allowing us time to present this

argument. This morning's argument which we sat through was involving extremely important issues, as the Court observed, and we understand that. We too have very, very important issues to the people involved here.

Right now the current state of this development is that there are approximately 115 construction workers who don't know whether they will have a job in the morning, depending on what happens this afternoon in this courtroom. They are working on the job. They didn't come down to the courtroom, and we didn't want to do that, but in reality --

THE COURT: That would effectively stop the work. They would get their preliminary injunction. At least, a temporary one.

MR. MOLLEN: That is an accurate observation, Your Honor. We agree with you.

There is a very good reason why Justice Marcy Friedman denied the TRO application. She had the parties before her, and she asked a very important question. She asked, as the transcript indicates, she asked what has changed. This is a construction project, in essence, that had began back in 2016. There was a seven-month Stop Work Order by the Department of Buildings, but thirteen months --

THE COURT: I think it is in order to give me the history in a chronological order for the record to be clear. I know it, but I want the record to be perfectly clear.

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So tell me all the facts in terms of chronology. When was the permit first issued? When was it stopped? When was the appeal? When was the Partial Stop Work? When was it rescinded? When was the DOB's decision ultimately denying the Petitioners' appeal?

MR. MOLLEN: Your Honor, on July 28, 2014, the Developer filed the plans with the Department of Buildings, and those plans contemplated a combination of Lots 37 and 32, and it contemplated the development of a 32 story building.

THE COURT: I'm sorry for interrupting you. What is the new lot that was created?

MR. MOLLEN: The new lot is 138.

THE COURT: So, it did not incorporate the new lot into this picture yet?

MR. MOLLEN: At the time they were creating -- the building was going to be on Lot 37.

THE COURT: And 32?

MR. MOLLEN: And 32. The development rights.

THE COURT: That's the transfer development rights. Okay, fine.

MR. MOLLEN: Lot 138 was going to be approximately 4 feet in depth by 22 feet.

On March 13, 2015, the DOB approved excavation and foundation plans and the building's zoning. That is

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March 13, 2015.

On in April 2015, construction began and the foundation was completed.

THE COURT: When was the --

MR. MOLLEN: On June 9th.

THE COURT: You said construction began or construction complete?

MR. MOLLEN: The foundation was complete.

THE COURT: The foundation was complete on April 15th.

MR. MOLLEN: In April 2015.

THE COURT: I meant April of 2015.

MR. MOLLEN: On June 9, 2015, DOB approved the building and zoning plans.

On May 16, 2016, that is May 16, 2016, two elected officials wrote to the DOB requesting review.

THE COURT: Are they the same public officials that are in this lawsuit?

MR. MOLLEN: Yes -- well, no, that was Councilman Kallos and Borough President Brewer. It did not include Senator Krueger at the time.

THE COURT: Okay, fine.

MR. MOLLEN: The significance to us, Your Honor, in some of these cases, you have issues of constructive notice as opposed to actual notice.

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The record here shows direct involvement by opponents of this project. That is why I am taking time to make that point, and this building happens to be in an unlimited height zoning district, and that is significant.

And, on May 25, 2016, the DOB issued a Stop Work Order, and listed four objections.

DOB said that Lot 138 was not proper, that was the 4-foot by approximately 22-foot lot.

And then the other three objections related to access, egress and ingress.

On June 6, 2016, the Stop Work Order was reduced to a Partial Stop Work Order to permit certain safety work to proceed.

On June 7, 2016, the Developer filed a form which responded to the May 25th stop work notice, filed a form with the DOB.

The Developer explained to the DOB that there is no minimum size requirement for a zoning lot in this commercial district, and there is no requirement that a zoning lot be developed or improved.

On June 15, 2016, the DOB removed one objection, but that was not the minimum size objection.

On June 22, 2016, the Developer made an additional submission to the DOB justifying its position.

On July 12, 2016, the DOB denied the Developer's

position that it was advocating with respect to the minimum size, and the DOB took the position that the Developer had to provide a lot that was at least ten feet in depth.

Now, I would just point out that at this point the building had already been designed as evidenced by the fact that they had already poured the foundation. So, this was not an insubstantial change to the Developer, and it involved substantial costs to revise the building design to accommodate the DOB's position. But, the Developer agreed to the DOB's position that they -- when I say, agreed to their position, we disagree to the statement, agreed it was necessary, because our position is that zoning laws are a derogation of the common law, and if there isn't a provision that bars a 4-foot lot, if there isn't a provision that specifies it must be buildable, then under controlling case law, the Zoning Law must be construed strictly and in favor of the property owner. And that was our position.

If we advocated that position, we would have, perhaps, a lengthy, expensive lawsuit with the Department of Buildings and the City. So, the Developer made a decision to try to work with the DOB, and they redesigned the building, revised the plan, and moved the egress access, two exits to Third Avenue. So, at this point the exits, while originally you had access on the 88th Street side, now the egress is on Third Avenue.

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On October 21, 2016, the Developer filed revised plans.

On October 27, 2016, three remaining objections were removed.

On December 21, 2016, the DOB accepted the Developer's new plans and lifted the Stop Work Order.

THE COURT: Give me that date again, it was a little too fast.

MR. MOLLEN: December 21, 2016.

THE COURT: Thank you.

MR. MOLLEN: Accordingly, on December 28, 2016, construction resumed.

So, in answer to Justice Friedman's question, construction had been ongoing since December 28, 2016.

THE COURT: What was the date of commencement of this action? I could look it up if you don't have it.

MR. MOLLEN: Your Honor, I don't want to give the wrong answer, but the TRO application was January 26, 2018.

THE COURT: Okay. So it is good enough. It is sometime in January of 2018 I would assume.

MR. LOW-BEER: The TRO happened, yes.

THE COURT: When did you first bring the action?

MR. LOW-BEER: Yes, January 26th, this action, yes.

THE COURT: This action was brought sometime in January of 2018, if not the 26th, somewhere in January,

correct?

MR. LOW-BEER: Yes.

THE COURT: It doesn't matter if it was a day or two off.

So, the 26th. So you would agree, fine. We all have the same date.

MR. MOLLEN: So, on March -- I'm sorry on December 8, 2016, the Petitioner filed a challenge, another challenge at the DOB.

THE COURT: December 8th, 2016.

MR. MOLLEN: Yes.

On March 22, 2017, the DOB rejected the challenge.

THE COURT: March 22nd, what year?

MR. MOLLEN: 2017.

THE COURT: A year later.

MR. MOLLEN: On June 15, 2017, the DOB rescinded its -- there had been a partial objection based on the lack of filing an exhibit, and the DOB rescinded that objection on June 15, 2017.

THE COURT: You have to explain that. How does that affect the construction?

MR. MOLLEN: Construction was proceeding.

THE COURT: It did not affect construction.

MR. MOLLEN: No, it did not affect construction.

THE COURT: So, let me understand carefully, to

make a long story short, after a lot of administrative hurdles at the DOB, for lack of a better term, the Developer started again construction on December 28, 2016, and has continued the entire time unaffected by any administrative stop work orders from the DOB?

MR. MOLLEN: The direct answer to your question is, yes, that's correct, and that's why the building today is up to the 16th floor. The concrete has been poured up to the 16th floor. It has been continuous since December 20, 2016.

Then on June 30, 2017, one of the Petitioners filed another challenge with the DOB.

On September 28, 2017, the DOB rejected that challenge. That is the Carnegie Hill Neighbors.

On October 30, 2017, the Carnegie Hill group filed an appeal at the BSA. So, there they filed an appeal at the BSA October 30, 2017.

And, Your Honor, I might point out during this 2016 period -- 2017 period, the opponents were advised by a recognized law firm, a zoning specialist at Carter Ledyard, during this period they also had an outside land use consultant, so all during this period construction was proceeding without anyone coming into court for any kind of an injunctive relief. These are Petitioners who had been advised by Carter Ledyard as well as an outside consultant Mr. Janes.

Some of these cases people claim that they didn't have actual notice, and this is a case where they not only had actual notice, but they were heavily involved in the process, writing and talking to the DOB, and doing the best they could to convince the DOB that they were right, and the DOB was wrong, and the Developer was wrong.

Now, after they filed their appeal at the BSA on October 30, 2017, the BSA, on December 26, 2017, issued 19 comments. So, the BSA through those 19 comments asked the opponents for additional information.

The BSA requested as part of their comments a more detailed statement of facts. The BSA was very focussed on the facts, and they wanted to also understand what the harm was to the opponents, and they also wanted to know whether they had raised each one of these objections to the DOB, had they given the DOB an opportunity to pass upon each one of the objections that they were now raising before the BSA.

The opponents, on February 7, 2018, only weeks ago, the opponents responded to the BSA and provided the BSA with their response to the 19 comments, which included Revised Statement of Facts.

Now, I think what is particularly significant, Your Honor, is the fact that the request for relief that they are asking this Court to make is virtually identical with the request that they made before the BSA.

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And, in our brief, at page 15, we presented a box that showed the exact wording.

THE COURT: I saw the box.

MR. MOLLEN: And word for word, most of that box, including that zoning lot or subdivision "is a sham and a nullity."

THE COURT: But I have to tell you, the relief that is being sought here is a preliminary injunction. The relief at the BSA is a direct appeal from the DOB as to their rejected appeal.

Obviously, they made more of in terms of the substance because the reason they are appealing is because they believe the DOB got it wrong with regard to the substance, and in order to prevail here, they are telling me the reason why the DOB was wrong. So, they have to be identical.

But, the relief before the BSA is a reversal of the DOB. The relief here is a preliminary injunction stopping the Developer, for lack of a better term, to halt the construction of the alleged offensive development.

MR. MOLLEN: My response to Your Honor's observation is as follows:

Number one, that is precisely why in our papers we address why they do not meet the tests for injunctive relief. So, under injunctive relief standards, they don't

meet the test. We're prepared to discuss that. That's number one.

Number two, they did not go into court and ask this Court to stay something pending a determination by the BSA. What they did is they tried to end run the BSA and to ask you their prayer for relief, which is the same prayer for relief that they have asked from BSA, which makes this case very different. This case is clearly distinguishable from somebody who timely -- "timely," that being the key word -- went in for injunctive relief, and their description of the issues as I said are the same.

And, interestingly, this Court, I fully understand that this Court has substantial experience with Article 78s including, including a decision or matter that is before Your Honor now that Your Honor recently ruled on, and that is the *Baychester* decision.

And, in *Baychester*, you had a pattern that was not as bad as our pattern. Our pattern is the worst pattern that I have ever seen for somebody to sit back and not come into court for thirteen months, to wait over a year to come in and seek injunctive relief, and then come in and say, By the way, we are asking for the same thing. We want you to rule on what the BSA is considering.

And, it is not even as if they are not pursuing the appeal before the BSA because on February 7th they recently

pursued the appeal and prosecuted the appeal.

And, what you said in the *Baychester* case, according to the transcript, which we did manage to obtain, you said (reading:)

"The courts very rarely interfere with the administrative processes below unless there is some exigent circumstances."

"I have not seen a trial court decision that I could recall in the last decade minimally where they have ever done that."

The argument that an Article 78 is not an adequate remedy due to timing, expense and delays involved, that is the process.

"Unfortunately, administratively it takes time."

And, you went onto say:

"I am not going to second guess the workings, inner workings of the BSA."

"For the same reason this Court did not issue a TRO in early December, this Court will deny a preliminary injunction seeking the same now."

"I am not going to second guess the inner workings of the BSA."

And interestingly, you had a very interesting decision in a matter, *Mandl*, and in *Mandl* people came to you and said, Judge, there is an emergency. We need injunctive

relief."

Since it is a few years, I will say, it involved the coach.

THE COURT: I remember.

MR. MOLLEN: Okay. I was not -- I didn't want to be presumptuous. It involved a coach and there were playoffs that were coming.

THE COURT: I think they won the league without Mr. Mandl also. So I was right.

MR. MOLLEN: And, what you said in *Mandl* was (reading:)

The exhaustion doctrine bars judicial relief unless the petitioners exhaust all administrative remedies before commencing the proceeding.

And, you went onto say that judges must follow the rules of the game.

And you cited sound accepted principles of administrative law.

Those were the words of the Court.

And, the Court, you went onto say (reading:)

The Court may not disturb an administrative decision unless there is no rational basis for it in the record or the action is arbitrary and capricious.

And your decision in *Baychester*, your decision in in *Mandl* -- and by the way, apparently you've had a number

of these decisions because you also rendered a decision in the *London Terrace* case.

THE COURT: That's even older.

MR. MOLLEN: Yes, in *London Terrace*.

THE COURT: I remember that one too.

MR. MOLLEN: In the *London Terrace* case, the last quote I gave actually came from *London Terrace* which said, "unless there is no rational basis."

Now, your rulings are consistent with controlling precedent from the Court of Appeals and the Appellate Division. I have not seen a fact pattern, except *Baychester* was somewhat similar, where somebody goes into the BSA, doesn't have finality from the BSA, if they tried to say that there is an exception that allows them to run to court to seek the same relief.

They come up with several arguments. One of their arguments is, well, this is really just a pure question of law. That is one argument which we believe the record shows is absurd on its face for several reasons. It is absurd because if they were relying on the pure legal question at issue, then why did they file an appeal to BSA? If that exception applied here, why didn't they come to court initially? Instead, they went to the BSA.

I'm putting aside the fact that their papers made clear that there are issues of fact that should be

considered by the BSA. The Petition, at Paragraph 28, your own Petition, refers to the Developer having taken a dizzying -- these are their words -- dizzying, D-I-Z-Z-Y-I-N-G, number of steps to assemble or subdivide the zoning right.

That is cited at their brief at 12.

THE COURT: I noted those words also. It was an interesting adjective.

MR. MOLLEN: Yes.

Again, if it is a pure issue of law, why did they submit eight affidavits, 43 exhibits, including 319 pages that include architectural drawings, zoning calculations, allegations of intent?

THE COURT: Allegations of what?

MR. MOLLEN: Intent.

THE COURT: Intent.

MR. MOLLEN: They attributed intent to the Developer all throughout the papers.

What they have been doing is just what the courts have said they're not supposed to do. They are asking this Court to disrespect the BSA, to usurp the BSA because their prayer for relief is a determination that the zoning lot is improper.

Now, Judge Edmead had an interesting decision also in *Lee v. Chin*. In *Lee v. Chin*, the challenge was based on

a community's view that a zoning lot merger was improper because one of the lots involved a non-conforming use, and the community acknowledged that there was no express bar in the zoning resolution.

THE COURT: I think that is on appeal too that case, Judge Edmead's case.

MR. MOLLEN: The Court said they are not presenting a specific zoning resolution provision that clearly prevents it. The Court said it must defer to the agencies with expertise and dismiss the petition.

The community was there also arguing that somehow a transfer of air rights constituted an alteration of a building. And the Court dismissed the proceeding because there is a reason that these matters should be before the BSA.

By statute, the BSA is comprised of a licensed architect, an architect, engineer, professional planner, and the Court, when it reviews the work of the BSA and the Department of Buildings, should have a record that is a full record that reflects the thinking and analysis of the BSA and of the DOB, and not simply say, you know, we want a faster result.

And by the way, the Court of Appeals in the *Dreikausen* case used the term, this is the Court of Appeals term, Your Honor, it is not my term, it says that the case

before it seemed to be "a half-hearted injunction action."

If you look at these papers, two sentences, essentially two sentences on irreparable harm. You have a brief that is 48 pages. Irreparable harm is a couple of sentences.

When Judge Friedman asked, Why are you in here for emergency relief, their answer was, The statute of limitations, the four-month statute of limitations runs on Monday.

We were before Justice Friedman on a Friday.

And Justice Friedman, not satisfied with that answer said, Well, is there anything that is different? Your building has been in construction you have explained since 2016. Is there anything that is different that suddenly caused the need for injunctive relief?

And the answer is no. That is the answer that they gave. It was more a statute of limitations, citing the Court of Appeals that they didn't want -- *Dreikausen* decision, their point was that if you didn't go into court and you didn't seek an injunction then somebody later on would say, the court may later say it was moot, and they wanted to protect themselves by making a record that they had gone into court.

And when Justice Friedman heard their answer, she said, Application denied.

And, again we are talking about a drastic remedy, injunctive relief. There wasn't even an objection to setting today's date, which is five weeks from the time we appeared before Justice Friedman. We're talking about injunctive relief on a $300 million dollar development that currently has approximately 115 workers, employees a day, going to 300 workers.

We have people who bought homes, who signed contracts. They are expecting to move into their homes by a certain date or they lose the opportunity.

We have contracts out with subcontractors.

We have an open construction site in essence, because it is in construction with a 236-foot construction crane on the site now.

This weekend, you witnessed, take judicial notice, that is, it was windy, it snowed, it rained.

There is electrical equipment on the site that has been installed. There is mechanical equipment. There are construction materials. There are subcontractors who are delivering materials. The damage here to the Developer is absolutely enormous.

And interestingly, by the way, with respect to their own papers, they provided you with the letter from Mr. Janes, their zoning consultant. That is Exhibit 8 to our papers. And Mr. Janes said in his papers, he admitted

that this other cities, other jurisdictions in New York State have minimum size zoning laws, but not New York State -- I'm sorry, not New York City, I correct myself.

He also admitted that this is a large zoning lot, and because it is a large zoning lot, a large building is going to be built there. And he raised the question, is it really worth the effort because they are going to end up with a large building anyway? This is their expert raising those issues in Exhibit 8.

With respect to the status, because Your Honor wanted to know what is the status, it is important to know that the concrete superstructure has been poured through Floor 16.

In addition, a permanent sewer, water and electrical power systems have been installed.

Stairs have been poured through the fourteenth floor.

Shop drawings have been approved through the thirtieth floor for columns, through the twenty-fourth floor for penetrations, and through the twenty-fourth Floor for slabs and beams.

The sprinkler rough-in work has been completed on the first seven floors.

Mechanical duct work installation is substantially complete in the cellar through the fifth floor, and ongoing

through the seventh floor.

Concrete block has been installed through the seventh floor and is ongoing in the eighth and ninth floor.

Non-fire rated windows have already been installed in the seventh through the eighth floors and are in progress now. Materials are being delivered.

Fire rated windows are installed through the seventh floor with the eighth floor being done now.

The interior framing is in progress through the seventh floor.

A temporary roof, temporary roof has been installed on the twelfth floor.

Additional sections were added to the hoist, which it now reaches the thirteenth floor.

Installation of what they refer to as a cocoon, a mesh wrap around the building to protect construction crews, materials and tools from falling, is complete.

The total amount of awarded scope packages is about 94 percent.

Now, in addition to having approximately 115 workers on the site now and having so many subcontracts out, the costs now are approximately $1.1 million per month, per month, and that includes construction loan costs on a $153 million construction loan, includes storage rental cost, the site team, safety costs, insurance.

In addition, since materials have been ordered and service contracts have been signed, if work had to stop, that work may have to be re-bid. We don't know how fast we could mobilize against these crews. We don't know how fast we could obtain material, putting aside any damage to the material due to the elements that are already on the site.

And then we have the homeowners who signed contracts. And when people sign a contract to buy a home they don't do it in the abstract. They make a decision whether to renew their lease, whether to sell their home that they are in, and here we have over $50 million in sales from homeowners.

In addition, we have, as I mentioned, 236-foot tall construction crane. The longer this takes to build this project, the longer this community has to live with a 236-foot construction crane.

Now, of course, we take appropriate measures from a safety point of view without question. But no developer and the City doesn't want a tall construction crane to be on site longer than it has to be.

And, in the building itself, as I indicated, there is already electrical and mechanical equipment.

So when one weighs the damage to the Developer, it is enormous here. It is enormous.

I'd like to touch for a moment on public benefit.

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THE COURT: I'd like to start wrapping up. I'd like to have an opportunity for opposition, and I have other cases as well.

MR. MOLLEN: With respect, to the benefits to the public, because as Your Honor raised the issue, it is an injunction motion, so I have to address the elements of the injunction, and there is significant benefits to the public as well.

This is a site that was generating about $128,000 in tax revenue. It is going to go to approximately $2,045,000 annually. The mortgage recording revenue alone is $4 million, and projected residential closing tax revenue is $8.694 million. Approximately $14 million of benefits to the City.

This project as was noted, this development as was noted by one of the real estate publications had been praised for its design. Unlike many of the typical new glass and steel buildings, the Developer was praised for developing a building with a masonry exterior to be contextual with the area.

In addition, the Developer is seeking LEED Certification from a environmental point of view and obtained offsite inclusionary housing certificates.

This Developer rejected the idea of 421, is not getting the benefit of 421. This Developer spent money to

purchase inclusionary housing certificates, which will help subsidize approximately 95 affordable homes in the community, and will employee, besides the 115 going to 300 employees, because 115 at the moment, it is expected as progress moves forward will have 300 workers on the job, but this will also include ten permanent jobs.

With respect to the injunctive relief, we have cited case after case that says you have to timely move. The record shows construction starting in 2016, over a year without going into court.

Before Justice Friedman, when she wanted to know, Have you gone for a stay, they responded by saying, Well, there was a seven month deal, being the Stop Work Order. She was looking to hear, had you gone into court because after the Stop Work Order was lifted, you had over a year period with no effort to go into court.

We have listed in our papers numerous factual issues so that can't been an excuse.

With respect to the cases that we have cited from the Appellate Division, and I'm referring specifically, Your Honor, to *Save the Pinebush*, *Stockdale*, *Birch Tree*, *Perry-Gething*, these cases dealt with the doctrine which I haven't mentioned yet, and that is laches argument. Laches argument is very applicable here.

As I said in some cases, I have seen fact patterns

and I argued before Judge Knipel the litigation relating to the Pierhouse project next to the Brooklyn Bridge, the hotel and condominium, where Judge Knipel denied injunctive relief, and the Appellate Division confirmed. We contended that we complied with the law, on the merits we complied with the law, but on statute of limitations grounds, we were correct.

The argument was made by the opponents that they didn't know what was going on, and we were citing cases that talked about the duty of inquiry, the duty of notice. This fact pattern is far worse than any of these cases because they were directly involved with the process.

Now what they have done is they have come in with some affidavits in reply, and what they have said in their reply is, Well, the reason we didn't in come to court is because, in essence, we got legal advice from a lawyer at Carter Ledyard who said we can't go into court because there is a BSA action pending. That is one affidavit.

Another affidavit said, I agree that was the advice we got from Carter Ledyard, but also I think they said there were three unnamed lawyers, whose names they didn't name, who said the same thing in connection with unrelated matters over the last two years.

Look, if they didn't get appropriate legal advice, you don't destroy a $300 million project because they didn't

get appropriate legal advice.

Their expert told them this is going to be a big building. They were talking to the DOB throughout. And, if they had timely done it, and this goes back to the question you asked in the beginning, if they had promptly gone in and said, Judge, we need a stay because something is going to happen, and be respectful of the DOB jurisdiction and the BSA jurisdiction, wait until the DOB renders a decision, that is one thing. That is not directly before Your Honor.

They are asking you to make the same ruling they asked the BSA to make. They came in here. So then the argument is what about the injunctive relief? They refer to the *Lesron* case, and they cite that.

The *Lesron* case, which had a very strong dissent, but I understand dissent is not a majority opinion, but in *Lesron* the fact pattern was totally different. There was no demolition started. The project hadn't begun. The court made it clear in the record that they anticipated construction, so substantial money had not been spent.

Here, tens of millions dollars have been spent, putting aside the irreparable harm to the workers on the jobs who, by the way, most of these workers are not residents of the Upper East Side who don't like the design.

As their expert Mr. Janes had said, and his words were very, very important, he said, This is a large zoning

lot. You are going to end up with a large building here.

He said (reading:)

The subdivision has already been filed and approved, however, and so may be legally difficult to rollback the action at this time.

He went onto say (reading:)

In most jurisdictions in New York State, subdivision regulations prevent the creation of unbuildable lots. In New York City, a lot must be at least seventeen hundred square feet it if contains residences, but our Zoning Resolution has no minimum lot size when the lot does not contain residences.

And, he goes on, and this is their expert, not ours, he goes onto say (reading:)

It needs to be said, this is a large zoning lot, and something large will be built on this site, regardless of the success of any effort finding the neighbors undertaking.

And he goes on.

So, Your Honor, they haven't shown likelihood of success. They haven't shown immediate irreparable harm. The trial courts, that is a drastic relief, and it has to be not a generalized harm, it must be specific, and it must be timely.

And on the balancing of the equities, it doesn't

come close given the fact pattern of waiting over a year to go into court after the client is up to the sixteenth floor with the impact on the workers, on the purchases.

THE COURT: Counsel, thank you. You are starting to repeat yourself.

MR. MOLLEN: I appreciate it, Your Honor.

THE COURT: I need to get other cases going. I also want to hear opposition.

Thank you.

MR. LOW-BEER: Thank you, your Honor.

THE COURT: Where do we start?

MR. LOW-BEER: Where do we start?

Well, first of all, you know, I feel like this is a reply almost, so anyway let me just make a couple of points.

THE COURT: You have the floor.

MR. LOW-BEER: Okay. So first of all, if I may, Your Honor, I don't believe that they actually moved on laches grounds.

THE COURT: It is in their brief.

MR. LOW-BEER: Both the City and the Developer, their motion is only on exhaustion grounds. I'm reading from it, and it is the last line, and it says that you could order dismissing Petitioners' Article 78 Petition for failure to exhaust administrative remedies and awarding Respondents such other and further relief as the Court deems

just and proper.

THE COURT: I believe we had multiple briefs on this issue, and it was addressed.

MR. LOW-BEER: It was amply addressed in the briefs.

THE COURT: And it was opposed by you.

MR. LOW-BEER: I'm sorry?

THE COURT: And it was opposed.

MR. LOW-BEER: Oh, yes.

THE COURT: I think now to say that the issue of exhaustion of remedy is the only issue I think is --

MR. LOW-BEER: No, no.

THE COURT: I apologize. I thought you were trying to say that you were not adequately notified --

MR. LOW-BEER: No, no, no.

THE COURT: -- of the laches argument. I misunderstood your argument.

MR. LOW-BEER: I'm just making the point. And, you know, I frankly am mystified by it except that Mr. Mollen very skillfully actually has sort of spoken out of both sides of his mouth, if I may use that expression, but arguing two totally contradictory positions.

One, that we were we were required to exhaust before coming to court and seeking an injunction. And on the other hand, that we waited too long to seek an

injunction. I mean, it can't possibly be both, and I don't know why that is, why they left laches out of the notice of motion.

THE COURT: I hear what you're saying. They're contradictory.

MR. LOW-BEER: We argued. So, okay.

Secondly, I just wanted to make a few corrections with regard to the facts. So, in their initial filing in February of 2014, it is it Exhibit O to our Petition, it was on February 25, 2014, they did not file for a four-foot lot. They filed for a 30-foot lot which they said shall be left, and I'm quoting, "shall be left unimproved or developed with a compliant commercial or community facility building."

Now, they say, well, actually you could build a shed there. But, the fact is this is the main entrance to the residential portion of their building. It is 180 East 88th Street. That is the address of it. That is where the lobby is. So, there are emergency exits onto Third Avenue, but the main entrance to the residential portion of the building is not on Third Avenue. It is on 88th Street, and that means that this micro-lot can never be built on, will never be built on as a practical matter, even though the Building Code might conceivably allow -- I don't know how it could allow for it if that is the entrance for their building.

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THE COURT: Can you address that issue? Does our Zoning Resolution require that the lot be buildable?

MR. LOW-BEER: No, it does not require that it be buildable.

However, our contention is that this is a sham transaction. It is done for the sole purpose of evading the Zoning Resolution, and it doesn't require an examination of their intent. It is objectively obvious in the same way you would analyze a financial transaction and say, does this have any real economic reason for being other than tax avoidance? So here does the creation of this zoning lot have any conceivable land use reasoning for happening.

THE COURT: Is it required under the Zoning Resolution that it have a purpose?

MR. LOW-BEER: No.

THE COURT: Isn't that a derogation of common law?

MR. LOW-BEER: Okay. So first of all, if I may, there is an express provision in the Zoning Resolution, and it is Section 1120-22 of the Zoning Resolution that says that whenever there is an ambiguity in the Zoning Resolution, the provision which is more restrictive or imposes higher standards or requirements shall govern.

So I would submit that this express provision in the Zoning Resolution overrides it to the extent that that is still --

Proceedings

THE COURT: What express provision? I don't understand what you just said.

What provision in the Zoning Law prohibits this micro-lot?

MR. LOW-BEER: Well, we argued that both the Sliver Rule -- that this was done to evade the Sliver Rule and the Tower-On-A-Base Rule and that the building violates the plain language of those rules.

THE COURT: So isn't what you are asking more legislation that they amend the Zoning Resolution that you can't do this?

MR. LOW-BEER: Well, Your Honor, I think we have also --

THE COURT: You said approval would have more say than I would.

MR. LOW-BEER: We also cited ample case law to the effect that where the result of an interpretation of the Zoning Resolution is to totally nullify and negate to produce an absurd result.

THE COURT: Let's go to that.

MR. LOW-BEER: Okay.

THE COURT: Is there unlimited height zoning restriction in this?

MR. LOW-BEER: Yes, yes, this is not about height.

THE COURT: So what are you concerned about? If it

goes up, let's say -- you are not concerned about 32 stories going up?

MR. LOW-BEER: No.

THE COURT: So you are concerned about the width of the building?

MR. LOW-BEER: We're concerned about two rules, Your Honor:

The Sliver Building Rule and the Tower-On-A-Base Rule.

THE COURT: Tower-On-A-Base.

How would you like this building to change? Tell me your idea.

MR. LOW-BEER: How it would change? Well, I actually, I think that question is better addressed to the Developer how it would change, but I would say --

THE COURT: What do you find obnoxious about this, or offensive?

MR. LOW-BEER: Well, Your Honor, what I really find obnoxious is that it is gross violation of Tower-On-A-Base Rule and a Sliver Building Rule.

So Tower-On-A-Base Rule requires that buildings in this district be built up to the sidewalk. I mean they are not -- that rule was expressly written to prevent the very thing that the Developer decided to do here, namely, set its building back 30 or 40 feet from the sidewalk.

Proceedings

And this case is important because this is a blueprint for how anybody who wants to not comply with this rule and with the Sliver Building Rule can do so at absolutely no cost to themselves and with complete immunity. I mean nobody has to follow those rules anymore.

So, this is not just a one off, this is a complete nullification of the rules of the Zoning Resolution, and because it is so directly, not only contrary to, but nullifying those rules, we submit that is contrary to the Zoning Resolution.

THE COURT: How did the DOB allow it then? They didn't see it.

MR. LOW-BEER: Well, they initially did not allow it.

THE COURT: Initially they did. They revoked the permits later.

MR. LOW-BEER: They said (reading:)

Zoning Lot cannot be subdivided for the sole purpose of avoiding a zoning lot requirement, in this case a street law requirement.

THE COURT: That's why they're required to be 10 by 22.

MR. LOW-BEER: No.

THE COURT: No.

MR. LOW-BEER: No?

Proceedings

THE COURT: So I misunderstood everything that Mr. Mollen just said in the papers.

MR. LOW-BEER: Well, he didn't -- I don't know that he addressed this.

THE COURT: Are you arguing that the DOB bought your argument and you prevailed?

MR. LOW-BEER: No, no, we did not prevail. The DOB changed its position, but it never explained why, the shift from saying four feet. They said, Okay, we agree with you that you can have this micro-lot even though it nullifies the applicable zoning, but you got to make it ten feet, not four.

And then they explained why ten feet as opposed to four feet was okay, but they never explained why it was okay to subdivide a zoning lot for the sole purpose of avoiding a zoning lot requirement, which is what this is, whether it is four feet or ten feet.

THE COURT: How do we know it was the sole purpose to evade the Zoning Resolution? How do you know that?

MR. LOW-BEER: Well, because there is no -- so far, including in its papers in this Court, the Developer has not articulated any conceivable purpose, and in fact, initially, in their first plan, the DOB objected on two grounds.

One was this, that they subdivided it for the sole purpose; the other was that they had not provided the

required means of egress.

THE COURT: That is a good point.

MR. LOW-BEER: And the reason that the DOB said they had not required -- that they had not met this requirement was because, although they had an easement going over the micro-lot flowing into the street, the DOB said, Well, that is a separate zoning lot, so you can't have an easement over that. That is not good. It has to be directly onto the street.

And so, even though it remains a part, an integral part of their development --

THE COURT: That's why they changed the means of egress to Third Avenue.

MR. LOW-BEER: Yes, they had to do that because they insisted they must have this little strip of micro-lot because otherwise they'd have to comply with the Zoning Resolution, which they didn't want to do. So they shifted around their design to provide two modes of egress onto Third Avenue, but there is no -- nobody has yet articulated any conceivable land use, legitimate land use reason.

There is an illegitimate one, which is they wanted to avoid the Tower-On-A-Base Rule and the Sliver Rule. You can't take an action that has the sole purpose of avoiding legal rules, and claim that that is a legal transaction.

THE COURT: So you believe they should have gone up

to the sidewalk.

MR. LOW-BEER: It's not that I believe that is what the Tower-On-A-Base Rule provides.

THE COURT: It shouldn't be the setback that they currently have, and it should be 45 base on the bottom?

What was the second thing.

MR. LOW-BEER: No, no, no. No.

So, what the Tower-On-A-Base Rule requires, that the front of the building be matching more or less the neighboring buildings, so it has to come up to the sidewalk, and it has to in height roughly match. It has to be I think between 60 and 85 feet in height, and then it can have a setback.

THE COURT: So, it is the same. It has to go up to the sidewalk, and it has to meet the other building near it, essentially.

MR. LOW-BEER: Something like -- essentially.

THE COURT: That is your offensive conduct you're saying.

MR. LOW-BEER: That's number one.

THE COURT: Okay.

MR. LOW-BEER: The second is the Sliver Building Rule. The Sliver Building Rule provides that if you have a narrow lot, you can't build a tall building on it within a hundred feet of the street line.

So, if you look at our little map on page 13 of our brief, it shows what used to be Lot 40. That is a typical zoning lot on a Manhattan side street. It goes 100 feet back from the sidewalk.

So in that, what used to be Lot 140, you could not build an unlimited height building. Your height would be limited to 100 feet under the Sliver Building Rule. The rest of it they could build as high as they want, but not not within 100 feet of that street line.

THE COURT: So, you're saying if -- let's assume the zoning, they didn't have this new lot. They could only build 100 feet.

MR. LOW-BEER: Yes, new lot or no new lot, the Sliver Building -- the micro-lot, the micro-lot?

THE COURT: If you don't have the micro-lot.

MR. LOW-BEER: If you don't have the micro-lot, they could only -- on that portion of their lot, they couldn't go higher than 100 feet, but the rest of their lot they could go.

THE COURT: Aren't they more than 100 feet up now?

MR. LOW-BEER: They are more than 100 feet up.

THE COURT: What do we do now? I tell them to remove the remainder -- let's say for argument sake, they said they have sixteen floors up. Let's say it is 160 feet. They should cut off 60 feet of the building.

MR. LOW-BEER: I'm not, I'm not sure what, you know, as to, I mean, what the remedy should be.

THE COURT: It is too late, no?

MR. LOW-BEER: Well, it is not too late because --

THE COURT: The building foundation is up.

MR. LOW-BEER: -- buildings -- maybe they have to demolish part of it.

THE COURT: Do you have case law that would back up that proposition?

MR. LOW-BEER: Yes.

THE COURT: As a matter of fact, case law is the opposite.

MR. LOW-BEER: Yes, yes. Yes, Your Honor, we cited, for example, Vitiello versus -- or maybe we -- I don't know if we cited this case, but there are cases, there are mootness cases in which plaintiffs had sought preliminary injunctions.

THE COURT: At the very beginning?

Find me one case where the courts have required lopping off of a building -- prior to a preliminary injunction being sought, the building was up.

So, let me just rephrase that. That was inartfully stated.

I have not seen a case where, at the later stage and the building has been up that you come in for

preliminary injunction and you get that relief.

You are correct, if it is at the construction stage or the preliminary stage, there has been case law saying you are on notice.

But here, they had approval from the DOB, and as a matter of fact, you made it very clear they even got variances to build it in in expedited manner rather than in an ordinary manner for the regular hours that is required under the the Department of Buildings rules.

MR. LOW-BEER: Right.

THE COURT: So why would that occur given your conduct?

MR. LOW-BEER: I'm sorry.

THE COURT: Let me rephrase.

The case law that you cite are only the cases where it was at the preliminary stages of construction.

You cite no case and I know of no case where the courts have required essentially the demolishing of the offensive part of the building after the construction already was substantially complete.

MR. LOW-BEER: Well, as I mentioned, there are cases like that. I mean *Parkview Associates*.

THE COURT: Let me finish what I have to say. I respect what you're saying.

Cite me one case where the courts have given you

that relief, not the preliminary stages, once it was substantially complete.

I read all the cases. I didn't see one.

MR. LOW-BEER: In *Parkview Associates*, we didn't cite that case, but it is a case in which the court ordered twelve stories removed from a building.

THE COURT: An Appellate Court?

MR. LOW-BEER: Yes, yes, the Court of Appeals I believe it was.

THE COURT: After it was already complete?

MR. LOW-BEER: Yes, it was complete.

THE COURT: Were they on notice prior to the construction?

MR. LOW-BEER: Were they on notice?

THE COURT: Again, you are not understanding what I'm asking you. Maybe I'm not being clear.

I agree with you that there has been case law that where you preliminarily put the parties on notice and seek an injunction, and then it goes all the way, that the courts may have the authority to seek some demolition of the building. That is not my question.

My question is that if you don't seek the preliminary injunction and now sixteen stories are up, can I, after the sixteen stories have been complete, require them let's say to reduce it by six stories, to make it

100 feet pursuant to the Zoning Resolution? That's my question.

MR. LOW-BEER: In *Parkview Associates*, the developer contended that it had made a mistake in reading the applicable zoning.

THE COURT: Okay.

MR. LOW-BEER: And the Buildings Department gave it a permit, and it built the building, and the Court of Appeals said it had to take a building down.

THE COURT: But, here is the opposite facts. Here they have the moniker of the DOB, which says that every single objection that you file with the DOB, they rejected. It may be incorrect later, but right now, they have been acting in a manner consistent with the DOB and the Zoning Resolution pursuant to the DOB's rules and regulations.

At this juncture, it is usually the courts that adhere and defer to the DOB and the BSA in the interpretation of the Zoning Resolution.

And I did read some case law where it is a pure legal question. The courts don't need BSA involvement. You can't seriously tell me that this is a pure legal determination. There are so many facts that have to be decided, whether it is a 30 foot lot by 22, should it be four by 22, should it be ten by 22.

MR. LOW-BEER: But, your Honor, this essentially --

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THE COURT: You would need four architects and four engineers to explain this, and even then we have ten different opinions.

MR. LOW-BEER: Well, I submit that the past history is one thing, and the arguments about laches and exhaustion so on do turn on that.

THE COURT: Let me let you finish.

MR. LOW-BEER: BSA is not going to address those arguments. That is not for the BSA.

THE COURT: You are correct.

And let me say this very clearly, and I disagree with Mr. Mollen's presentation, there are certain circumstances where exhaustion of remedies is not necessary, and that is the minority, that is the exception to the rule, and the cases that I had dealt with clearly with the general rule, and here there is not complete relief that the board or the BSA can give the Petitioners herein, and that is a preliminary injunction, and it would basically moot out of the entire issue if they await the BSA's determination.

My question is you didn't start right away. You waited thirteen months to come, and as a result sixteen stories are up.

If you had come to me, quite frankly, at pre-construction stage, we are talking something different, and I believe the cases you cited, the *Lesron Junior v.*

Feinberg case 13 AD 2nd 90, it is a 1961 case from the First Department would be applicable, but with a very different set of circumstances.

And Judge Friedman rightfully zeroed in on the irreparable harm, and how do you come to the court thirteen months later and expect the Court to stop everything in the middle.

MR. LOW-BEER: Well, if I may, your Honor, I mean those are two separate issues.

THE COURT: I understand that.

MR. LOW-BEER: There is irreparable harm here because this case -- basically I think what your Honor is saying is that the case is already moot, but the mootness cases, at least the ones that I know of like, *Dreikausen*, like *Weeks Woodlands*, like City Neighbors are all cases in which the construction was substantially completed.

THE COURT: This is substantially complete. You got more than fifty percent of the building done.

MR. LOW-BEER: Well, fifty percent is not substantially completed.

THE COURT: It is more than a hundred feet.

MR. LOW-BEER: Sorry?

THE COURT: Let me make it very clear, I like to be direct.

According to your analysis, since the Developer for

lack of a better term, violated, according to you, the various provisions of the Zoning Law, they are not set back, -- strike that, they're not up to the sidewalk, and they couldn't do the Sliver Rule because they're not set back a hundred feet, according to you, they have to demolish the entire building in order to go forward and comply with the Zoning Resolution, isn't that correct?

MR. LOW-BEER: No.

THE COURT: How do you move the building to the sidewalk? How would you do that? How do you move the building? I don't know of a building being moved.

MR. LOW-BEER: Well, they could build more. They could add to build.

THE COURT: You want them to add more out?

MR. LOW-BEER: Yes, your Honor.

THE COURT: So you have to add on to the building. So, according to your analysis, you would have to add a hundred feet of space going all the way up?

MR. LOW-BEER: Your Honor, can I make one other point though because I could see that you are not persuaded by this argument.

But, in any event, even if this case were moot, as the Court of Appeals said in Dreikausen, "The courts have still retained jurisdiction," I'm quoting, "in instances where novel issues or public interest warrant continuing

review." That is in *Dreikausen*, 98 NY 2nd at 173 and 174, and they're citing *Friends of the Pine Bush v. Planning Board 86*.

THE COURT: This is a purely private dispute among this building. It doesn't involve ten other buildings in the City. It involves one project on 88th and Third. It is not the case we heard in the morning which involves individuals that are disabled in order to get into the subway and that we should have handicapped accessible means to get there.

This is a private transaction. And, quite frankly, if the BSA determines that what they did was a runaround, then the DOB will know for every other case to deny it. They will have precedent.

So, quite frankly, the best approach here is to let the BSA determine the issue. And if you feel the BSA did not determine it correctly, if it is irrational, if it is arbitrary and capricious, you file an Article 78 from there, and then the courts, the trial court here and the Appellate Division, maybe even the Court of Appeals will weigh in, but that precedent will guide us all.

This is not going to be a lasting decision. There is none that I know of. You have not cited another landlord or another developer that has done this, and it is not something that all of the public would be concerned about.

It is one neighborhood with an unlimited --

MR. MOLLEN: Height.

THE COURT: -- height requirement, and it will be a big building, and according to you be bigger if you did what you were supposed to do. You would get a larger building on this lot, rather than a smaller building.

Yes, because you are telling me that you just have to build out more. You are adding both to the building in order to comply. That's what you told me.

MR. LOW-BEER: It could be larger in one direction and lower on the other.

THE COURT: But there is no height restriction. So they could go up to thirty stories anyhow.

MR. LOW-BEER: There are no height restrictions, but there are formulas that do determine the height, such as floor area ratio.

THE COURT: The FAR, I got it. I deal with condemnations. I deal with FAR. That's how the City pays, based upon FAR. I'm familiar with it. Also depends on the best and highest use.

I also wanted to state, Carter Ledyard is probably the City's lawyer that does the bulk of their condemnations so they know what FARs are as well.

MR. LOW-BEER: Right.

And there are also cases, Your Honor, such as the

one cited I believe by my adversaries of *Haddad v. Saltzman* and *Chelsea Business and Property Owners*, in which this Court has stayed the case, and let the BSA render its decision, and then taken up the issue again.

And it is true that, as Mr. Mollen pointed out, we did not specifically ask for an injunction pending a decision by the BSA, but basically because that just didn't occur to us, but we certainly have no objection to that route if, if that would be something that the Court would entertain.

THE COURT: Okay. Anything else you want to add?

MR. LOW-BEER: Well, I'd just like to say something about irreparable harm.

THE COURT: I'm going to give you ten minutes uninterrupted. I'm not going to have any reply. We just ran the clock out. You get the last word.

MR. LOW-BEER: I mean for my adversaries, they seem really contemptuous of the motion that the Petitioners are going to suffer irreparable harm because, obviously, they don't have a lot of respect for the Zoning Resolution, so they don't think that it matters if they violate the Tower-On-A-Base Rule or Sliver Rule or any rule of the Zoning Resolution.

But, the notion that these do not constitute irreparable harms is certainly contrary to what things the

Court of Appeals has said, and to the very reason for being the Petitioner, a non-profit organization. So, I don't think it is appropriate to say that there wouldn't be irreparable harm, and the irreparable harm, which maybe we have already suffered, but would be that the case would become moot and we couldn't effectually get relief.

So, my clients thought they were required to exhaust their remedies. Perhaps, they were mistaken, but on the other hand that is what both the City and my adversaries are very strenuously contending that we can't be here because we haven't exhausted our remedies.

So, how can they say both, that we had to exhaust our remedies before coming to court, but we are too late to come to Court. That just doesn't make sense.

And then on the balance of the equities, there is a strong public interest. They cite a case *United for Peace and Justice vs. Bloomberg,* in which the court said that the factors to be considered are the interest of the general public whether the plaintiff was guilty of unreasonable delay, and whether the plaintiff has unclean hands.

And, I would submit that the interests of the general public are at stake here because this sets a precedent that would allow any developer who prefers not to abide by these rules not to do so.

And, in fact, they didn't want a building that

comes up to the street wall, street line. So, cutting off this sliver of land and giving it to an entity that they also control, they didn't lose anything at all by doing that. In fact, it just enabled them to do what they wanted, namely, violate the Zoning Resolution.

So, well, anyway, I think I've made the point, sir.

THE COURT: Thank you. I'm not going to hear any oral argument.

MR. LOW-BEER: Hold on one second.

(Pause.)

MR. LOW-BEER: My co-counsel says I omitted a couple of points.

One is what we are asking for now is just to stop construction. It is not really the phase of the case where we decide what happens next, what is the ultimate remedy.

And, secondly, there is a specific provision in the Zoning Resolution which we did cite which says that you can't subdivide a zoning lot to cause a noncompliance.

Now, you know they say this subdivision avoids a noncompliance. And if you read the words very literally may be it is so. But, if you look at the intent of that provision to prevent a subdivision that allows a noncompliance, it is clearly applicable here, and what they are doing is doing this for the sole purpose, it is an illegal purpose, of creating a a non-complying building.

Proceedings

Thank you. Thanks for your time.

THE COURT: As I said, I don't need any further reply. I've been at this oral argument for the better part of an hour and a half, and there was ample opportunity for oral argument. There was a voluminous amount of material that was provided to the Court, both in memoranda of law, fifty page memoranda, and huge amount of exhibits, affidavits, affirmations. The record is complete. There is no necessity for further papers and oral argument.

Given the circumstances, this Court will rule from the bench. Normally I would not do so because if this Court takes the time to rule, quite frankly, it could be several months later, and the building would probably be more substantially complete than it is now.

At the very outset, this Court asked the parties to go through the facts, the chronological order of events here. What is interesting here is that the plans were filed in July of 2014, albeit, not with the micro-lot.

There were all types of DOB approvals in 2015. I'm not going to go through all the gory details. The record will speak for itself.

In May of 2016, some public offerings sought and requested DOB to rescind the permit. The DOB did so several days later in May of 2016. There was Partial Stop Work Order issued in June.

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In July of 2016, the DOB denied the Developer's position that a 4-by-22 lot is permissible under the Zoning Resolution and required that there be a 10-by-22 lot. The Developer complied with the DOB's request.

In October of 2016, the remaining objections were rescinded by the DOB.

Finally, in early December 2016, the DOB removed the Stop Work Order. The Developer then started construction on December 28, 2016.

There were all types of appeals that were then filed. Essentially, they were all denied and rejected.

In 2017, there was an appeal to the BSA.

I was told that the last administrative posture at the BSA was February 7, 2018, was response to the comments that the BSA wanted.

On January 26, 2018, approximately thirteen months from the time of construction, the Petitioner sought a TRO from this Court. Justice Friedman presided. She heard oral argument. Justice Friedman on that date declined to issue a preliminary injunction citing no emergency irreparable harm that would justify such temporary restraining order. However, Justice Friedman permitted the Petitioners to reapply to this Court for that TRO. That never occurred.

The return date is today, which is several weeks later. Again, obviously, there has been no showing of

irreparable harm or emergency as set forth by Justice Friedman on January 26, through today's date March 5, 2018.

The Petition -- strike that.

The order to show cause seeks a preliminary injunction. As we all know, the case law is quite clear on the standard for a preliminary injunction. There are three elements:

The likelihood of success on the merits, immediate irreparable harm, and balancing the equities.

With regard to likelihood of success on the merits, here, the record is not so clear that would show that the Respondents have violated the Zoning Resolution. Quite frankly, the DOB, in the course of two years, with excruciating detail, required responses, comments and rulings. The DOB in its infinite wisdom is the agency charged with effectuating the Zoning Resolution found that they were in compliance -- strike that -- that the Respondents were in compliance with the Zoning Resolution.

At the very least, there are questions of fact as to whether the Respondents violated the Zoning Resolution. The record is very complicated. This does not seem to be a case that is amenable to a quick decision with regard to this complex factual and legal issues with regard to the Zoning Resolution, and the issues that were discussed below by the administrative agency. This Court cannot as a matter

of law determine at this juncture whether or not there was a violation of the Zoning Resolution.

Secondly, there must be immediate irreparable harm in this regard. The record is clear that the building has been under construction for more than thirteen months. There are sixteen stories that have been constructed. There has been development on that site that can be seen by all, by the public, including the Petitioners. They knew this building was going up in haste. As a matter of fact, the Petitioners point out to the tens of variances that the DOB issued to permit the work to be done outside the regular hours.

The Petitioners put in affidavits, affirmations contending that they received advice from counsel, that they were not permitted to seek a preliminary injunction until such time as they exhausted administrative remedies with BSA. That is not the state of the law.

Quite clearly, *Lesron* and others cited by worthy counsel for Petitioner cited the cases that show when there cannot been complete relief given to the Petitioner, they need not exhaust their administrative remedies because the Department of Buildings as well as the BSA could not give them an adequate remedy at law which would be the halting of the construction of this building during the pendency of the administrative processes. That is black letter law.

Quite frankly, the memo by Petitioner spells it out clearly, and that is the state of the law. The reason that it is such is because if the Petitioners wait until there is a determination by the administrative agency at that time it will moot out the construction and the building would be up.

The problem with this application in terms of the immediate irreparable harm is that that there was a delay of thirteen months. That is very different from *Lesron* and the progeny of cases that came after which provided in the preliminary stages of a development that the better approach would be to seek a preliminary injunction, and then either stay the proceedings so BSA or the proper agency could determine the complex issues such as the alleged violation of the Zoning Resolution, or the Court directly as a matter of law can do so. This was not done in this case. It is just too late to seek a preliminary injunction thirteen months later.

Counsel states that there is an exception to the mootness rule because the interest of the public, that too is not pressing at this time. There has been no cases that counsel has brought to this Court's attention wherein there has been an alleged deviation in the Zoning Resolution so they can avoid the Zoning Resolution.

Quite frankly, the best approach would be to allow the BSA to conduct its inquiry and do its job as it is the

agency that is charged with such determinations. Once the BSA determines it, the public would know, and it would be an isolated incident with regard to this building and would not affect any other buildings.

And, quite frankly, they'd be on notice of this loss as well because its filing in public records, and it would be a proceeding that the BSA would make public as well. So, I am not concerned that this would let the floodgates out, and that everyone would disregard the Zoning Resolution as a result of this private dispute between the Petitioners herein and this one building.

If it becomes more endemic, then the better approach is to go to our public officials who are charged with the amendments of the Zoning Resolution so that there would be a proper remedy if there is such a pattern.

Going to balancing of the equities. In this case, because of the unreasonable delay of the Petitioners, the balancing of equities does not favor the Petitioners. They knew quite well that the building was going up in haste and sat on their rights for thirteen months, sat on their rights for another several weeks for a TRO. There is no balancing of the equities that would favor the Petitioner.

There is nothing that I could do at this juncture given the substantial completion of the project, the development site. Frankly, there has been tens of millions

of dollars of expenses that have been accrued, and to stop all that without there being a BSA determination would not favor the Petitioners. Quite frankly, it would weigh in favor of the Respondent given that the DOB has decided with the Respondent in stating that they have complied with the Zoning Resolution.

Therefore, this Court denies the Petitioners' request for preliminary injunction.

Off the record.

(A discussion was then held off the record.)

THE COURT: Let's go back on the record.

Now let's address the cross-motion.

Normally, as the parties all acknowledge that in general, the proper procedure for administrative proceedings is that one must exhaust administrative remedies before they could seek redress in court. There is, however, an exception, when the parties seek a preliminary injunction to stop and halt the construction. Given that this Court has denied the preliminary injunction, there is no exception any more to that rule.

(Pause.)

THE COURT: Let's go back on the record.

Secondly, there is also no reason to issue a stay as there was in the *Haddad* case. There is nothing here that meets the exception that is it is in interest of the public.

That it is a novel issue.

The better approach would be go the normal way, to the BSA. Let them decide this very difficult issue. I cannot, even if I wanted to, decide this as a matter of law, and that would be another exception given the factual disputes, given the record is so voluminous. So this is no necessity to have this case here any more at all.

Third, there has been substantial laches in terms of preceding the preliminary injunction, and there is no reason for the Court to decide this. Given the unreasonable delay, I think the better approach would be for this Court to defer to the agency that is charged with the interpretation of the Zoning Resolution, let it go its ordinary course, and then, obviously, you could file whatever Article 78 you would like at that time.

Therefore, this Court is granting the Respondent's cross-motion.

I am not dismissing it completely because the City has not moved, and that may be another point at a later point in time. There is no relief that has been sought as for the City of New York.

MR. MOSS: I mean, as mentioned earlier, I am happy to make an oral motion at this time.

THE COURT: There is no oral motions that you could make. You have to put in the papers. So, I'll await it,

and maybe the Petitioners will agree even to go to the BSA. Maybe you could work it out.

So, therefore, this Court denies the Petitioners' preliminary injunction, grants in part the Respondents' cross-motion to dismiss for the reasons stated on the record.

This Court has not ruled upon Respondent City of New York's application which is either pending or will be pending in the near future.

Thank you.

Order the record.

(Proceedings recessed.)

CERTIFIED TO BE A TRUE
AND CORRECT TRANSCRIPT

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MARGARET BAUMANN
OFFICIAL COURT REPORTER

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