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,

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

Index No.

-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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PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Dated: Brooklyn, New York
January 26, 2018

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Preliminary Statement

Petitioners Sen. Liz Krueger, Council Member Ben Kallos, Carnegie Hill Neighbors, Inc. ("CHN") and Friends of the Upper East Side Historic Districts ("FRIENDS") seek to annul a building permit and enjoin the ongoing construction by Respondents 180 East 88th Street Realty LLC ("Realty") and its parent DDG Partners LLC ("DDG," and, together with Realty, "the developer") of a residential building on Manhattan's Upper East Side. Petitioners also seek a declaration that this building, if completed, would be in violation of the New York City Zoning Resolution. This Petition is brought within four months of the denial by the New York City Department of Buildings ("DOB") of CHN's Community Appeal challenging Realty's permit. Petitioners seek an expeditious ruling on the merits of this Petition, which raises only a

pure question of law based on the plain language and clear and manifest intent of the Zoning Resolution.

The Court is called upon here to give a proper interpretation to 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.

Through a ministerial private transaction, Realty created a tiny new zoning lot ("the micro-lot"), initially only four feet deep and subsequently enlarged to ten feet, that purports to separate its building lot from 88th Street, and thereby to absolve it from complying with the zoning mandated for buildings fronting on 88th Street. By this trickery, the developer would build a building in a form that has been explicitly prohibited since enactment of the "tower-on-a-base" regulations of ZR§ 23-651 in 1994: a building set back from the sidewalk, leaving a gaping hole where zoning mandates a continuous street wall. This same trickery would also enable Realty to violate the 1983 "sliver regulations" of ZR § 23-692, titled "Height limitations for narrow buildings or enlargements," by constructing a tower 523 feet 8 inches tall, larger and closer to 88th Street than those regulations allow. It is questionable whether Realty would even be able to build such a tall building on this zoning lot if it followed the legal requirements of the Zoning Resolution.

Despite this trickery, the plain language of the Zoning Resolution prohibits this building in its current form. Moreover, the Zoning Resolution expressly prohibits, in its definition of "zoning lot," ZR § 12-10, any zoning lot subdivision that would result in a noncomplying building.

Realty purported to give substance to its zoning lot subdivision by transferring title to the micro-lot to a new "owner" created for the purpose: Carnegie Green LLC ("Carnegie

Green"). Carnegie Green, like the micro-lot that it owns, is a legal fiction, a puppet company controlled by the developer. Carnegie Green paid nothing for the micro-lot, because it got nothing. The micro-lot is valueless on its own. Because the Building Code requires that the micro-lot be "maintained and kept clear and unobstructed" as an emergency exit from Realty's new building, Realty retained an easement over it. It can never be used for any purpose other than as an entrance and exit plaza for the building behind it. The new building's main entrance is on 88th Street, and the building is being marketed as "180 East 88th Street," proclaiming that notwithstanding its denials, it does, in reality, front on 88th Street.

Only by violating the Zoning Resolution could Realty build a building that breaks the street wall on 88th Street and that is as tall as this. If allowed, this will not only lead to a building that violates zoning on this site, but will also provide a roadmap for the complete nullification of these and any other regulations dictated by fronting on a street or an avenue. Any owner who wants to set their building back from the street line and build a prohibited sliver building need only shave a tiny strip off the front of its zoning lot and "Poof!" – the regulations are gone.

Petitioners are requesting herewith a temporary restraining order and a preliminary injunction as well as a permanent injunction and annulment of Realty's building permit and of DOB's September 28, 2017 denial of their Community Appeal from denial of their initial Zoning Challenge. Petitioners also request that this Court expedite the hearing of this case, which involves no disputes of fact, but only questions of law concerning the interpretation of the Zoning Resolution.

Petitioners urgently seek an injunction now to preserve the status quo and to prevent irreparable harm. Realty has now partially built 14 of the 32 stories – approximately 150 feet of

the proposed 523 feet[1] – of its illegal building. Absent an injunction, the developer will complete the building, causing irreparable harm to the integrity of the streetscape that the Zoning Resolution intends to preserve, and to Petitioners' enjoyment of it. Absent an injunction, even if the courts ultimately determine that Petitioners' case was meritorious, they may be unable to obtain relief because the case may be deemed moot. *See, e.g., Dreikausen v. Zoning Bd. of Appeals*, 98 N.Y.2d 165 (2002).

The balance of the equities lies with Petitioners. While they were exhausting their administrative remedies at the Department of Buildings ("DOB"), the developer was building at breakneck speed, relying on After Hours Variances to build at night and on weekends without the required justification, and relying on a permit riddled with illegalities small and large, seeking to moot any adverse court decision by establishing facts on the ground.

DOB took an inordinate amount of time to decide Petitioners' challenges. Realty first obtained a building permit in July 2015. At that time, DOB was apparently unaware that Realty had created a micro-lot to evade zoning. CHN learned of this from its consultant in the spring of 2016, and informed Petitioner Council Member Ben Kallos and Borough President Gale Brewer, who in turn wrote to DOB. DOB immediately issued a stop-work order. However, for reasons that it never explained, it lifted that order in December 2016. From then until September 28, 2017, CHN and Council Member Kallos pressed DOB to render decisions, first on CHN's initial Zoning Challenge and then on its Community Appeal. During two time periods, DOB misinformed CHN of the status of its challenges, further increasing delays. It was not until September 28, 2017, two days after CHN's President, Willem van der Valk, personally questioned

[1] The upper floors have much high ceiling heights – hence the fact that Realty has poured the concrete for 43 percent of the floors, but only 29 percent of the building's projected height.

the Mayor at a town hall meeting concerning DOB's delays, that DOB finally denied CHN's Appeal.

Parties[2]

Petitioner Sen. Liz Krueger is the New York State Senator for the 28th Senate District, which includes the Upper East Side and East Midtown neighborhoods of Manhattan. Since being elected to the State Senate in 2002, Senator Krueger has worked closely with local elected officials, community residents, and civic organizations on a wide range of land use, zoning, and historic preservation issues.

Petitioner Council Member Ben Kallos is a member of the New York City Council. He represents the Fifth District in Manhattan, which covers most of the eastern portion of the Upper East Side, including Yorkville, Carnegie Hill, and Lenox Hill. He has actively opposed inappropriate development, including the recent crop of "superskyscrapers" in his district and in other parts of Manhattan. On May 16, 2016, together with Manhattan Borough President Gale Brewer, he challenged the legality of this building by writing to the Department of Buildings. He subsequently endorsed the initial Zoning Challenge and the Community Appeal of CHN. On April 19, 2017, he wrote to the DOB Borough Commissioner to express his concern about the DOB's repeated issuance of After Hours Variance permits for construction at 180 East 88th Street.

Council Member Kallos' Affidavit in support of this Petition, sworn to January 24, 2018, is attached to the Petition as Exhibit A.

Petitioner Carnegie Hill Neighbors was formed in 1970 to address planning, preservation and neighborhood improvement issues on Manhattan's Upper East Side between 86th

[2] The description of the parties and the statement of facts in this Memorandum of Law are virtually identical to those sections in the Verified Petition.

and 96th Streets and between Fifth and Third Avenues.[3] CHN worked for the designation of the first Carnegie Hill historic district in 1974 and the expanded historic district in 1993. CHN has members who live immediately adjacent to, or within a few hundred feet of, the new building, and who would be directly affected by its breach of the street wall and other requirements of the Zoning Resolution. Among those members are: Sandra Salmans, 170 E. 88th St., Apt. 2G; Walter and Ann Grist, 200 East 89th Street, Apt 42S; Robert Kramer, 170 E. 88th St., PH8A, and Adele Morrissette, 170 East 88th Street, Apt 2E. Because of its effect on the midblock streetscape and its flagrant attempt to circumvent the Zoning Resolution, and because of the precedent that its approval would set, CHN has assiduously opposed this building from the outset.

Petitioner Friends of the Upper East Side Historic District was founded 35 years ago for the purpose of preserving the architectural legacy, livability, and sense of place of the Upper East Side of Manhattan, generally covering the area between East 59th and East 96th Streets, and from the East River to Central Park.[4] FRIENDS has been a leader in successful efforts to improve the zoning laws governing the area's avenues and its residential side streets. Under the leadership of its founder, Halina Rosenthal, FRIENDS was instrumental in achieving contextual zoning for much of the neighborhood in the 1980s. Following that spirit, the organization has often intervened on issues involving changes in bulk.

Several members of FRIENDS, including its President, Franny Eberhart, and members of the Board of Directors including Jeanne Sloane, Erin Gray, and Patricia Sullivan, live

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[3] CHN's mission, members, and actions concerning 180 East 88th Street are described in greater detail in the Affidavit of Willem L. van der Valk, sworn to January 25, and attached to the Petition ("Pet."), as Exhibit B. Mr. van der Valk is President of CHN.

[4] FRIENDS' mission, members, and actions concerning 180 East 88th Street are described in greater detail in the Affidavit of Rachel Levy, sworn to January 25 (Pet. Exh. C). Rachel Levy is Executive Director of FRIENDS.

within two blocks of the subject building site and are directly affected by the threat of non-contextual development there. They enjoy the current uniformity of the mid-block human-scale streetscape on East 88th Street and recognize that those are qualities FRIENDS has fought long and hard to protect.

Respondent New York City Department of Buildings is an agency of the City of New York charged with issuing building permits and hearing challenges to same. DOB issued a permit for construction of 180 East 88th Street that Petitioners contend allows violations of the Zoning Resolution. DOB denied CHN's Zoning Challenge to that permit and, on September 28, 2017, its subsequent Community Appeal from that denial. The Petition herein challenges that denial.

Respondent New York City Board of Standards and Appeals is a board appointed by the Mayor, empowered under the City Charter and Administrative Code to hear appeals from permitting decisions of the New York City Department of Buildings. On October 30, 2017, Petitioners appealed DOB's denial of the Community Appeal to the BSA. That appeal has not yet been calendared.

Respondent DDG Partners LLC ("DDG") is a Delaware limited liability company, first registered with the New York State Department of State ("DOS") on March 24, 2008. DDG has a New York office at 60 Hudson Street, 18th floor, New York, NY 10013. According to its website, DDG's Chairman and CEO is Joseph A. McMillan, Jr., and it is engaged in real estate development in New York, California, and Florida. Among the developments shown on the website under the tab "Portfolio" is 180 East 88th Street. DDG is named there as "Developer," "Architect," "Builder," and "Property Manager."

Respondent 180 East 88th Street Realty LLC is a Delaware limited liability company, first registered with the New York State Department of State on November 27, 2013. Its address is c/o DDG Partners LLC, 60 Hudson Street, 18th floor, New York NY 10013. It is the fee owner of tax lot 37, on which 180 East 88th Street is being built. It is also the mortgagor of that property. Realty's authorized signatory on virtually all the recorded documents related to the tax and zoning lots at issue here is Joseph A. McMillan, Chairman and CEO of DDG. On information and belief, Realty is wholly owned and controlled by DDG.

Respondent Carnegie Green LLC is a Delaware limited liability company registered in New York on August 6, 2015. Its address is c/o DDG Partners LLC, 60 Hudson Street, 18th floor, New York NY 10013. It is the fee owner of purported tax and zoning lot 138, which it acquired for no consideration from Realty. The authorized signatory on many of the documents recorded on behalf of Carnegie Green is Joseph A. McMillan, Chairman and CEO of DDG. On information and belief, Carnegie Green was created by, and is wholly owned and controlled by, DDG, and exists for the sole purpose of holding nominal title to lot 138, which in turn was created for the sole purpose of avoiding the requirements of the Zoning Resolution.

Respondent Allied Third Avenue LLC ("Allied") is a New York limited liability company first registered on March 15, 2005. Its address is c/o Muss & Muss, 118-35 Queens Blvd., 16th floor, Forest Hills, NY 11375. Allied is the owner of tax lot 32, on the southwest corner of Third Avenue and 87th Street. On information and belief, Allied is not related to DDG. By virtue of a Zoning Lot Development and Easement Agreement dated December 11, 2013, tax lot 32 was merged into the zoning lots owned by Realty, and Allied ceded air rights to DDG, including the right to cantilever its building over Allied's building on lot 32. Allied is a necessary party to this action because its rights may be affected.

FACTS

A. The Building Site and Realty's Micro-Lot

On the Upper East Side of Manhattan, on block 1516, Realty is building a 32-story mixed use tower 523 feet high with a non-commercial art gallery on one floor and the rest of the building devoted to residential use. This development spans three tax lots, lots – lots 37, 32 and 138 – in a C1-9 district. At ground level, the building's footprint is on the L-shaped lot 37, with 40 feet of frontage on the west side of Third Avenue and a 22-foot wide panhandle pointing north toward 88th Street and separated from that street only by the empty space of the 10 by 22 foot strip that is lot 138.

Lot 32, owned by Respondent Allied, is to the south of the new building, stretching to the corner of Third Avenue and 87th Street.[5] It is improved with a 6-story building fronting on Third Avenue adjoining the south side of the new building and a 5-story building on the corner. To Petitioners' knowledge, Allied is not related to the developer. Tax lot 32 and tax lot 37, owned by Realty, have been merged into a single zoning lot.[6] The new building obtains air rights from lot 32, and will also be cantilevered 14.5 feet over the adjoining 6-story building on that lot. Including the cantilever, the portion of the new building that fronts on Third Avenue is 54.25 feet wide.

A plan of the assembled site from the developer's Zoning Plot Diagram Form (PD1) (*see also* Pet. Exh. D) is shown here:

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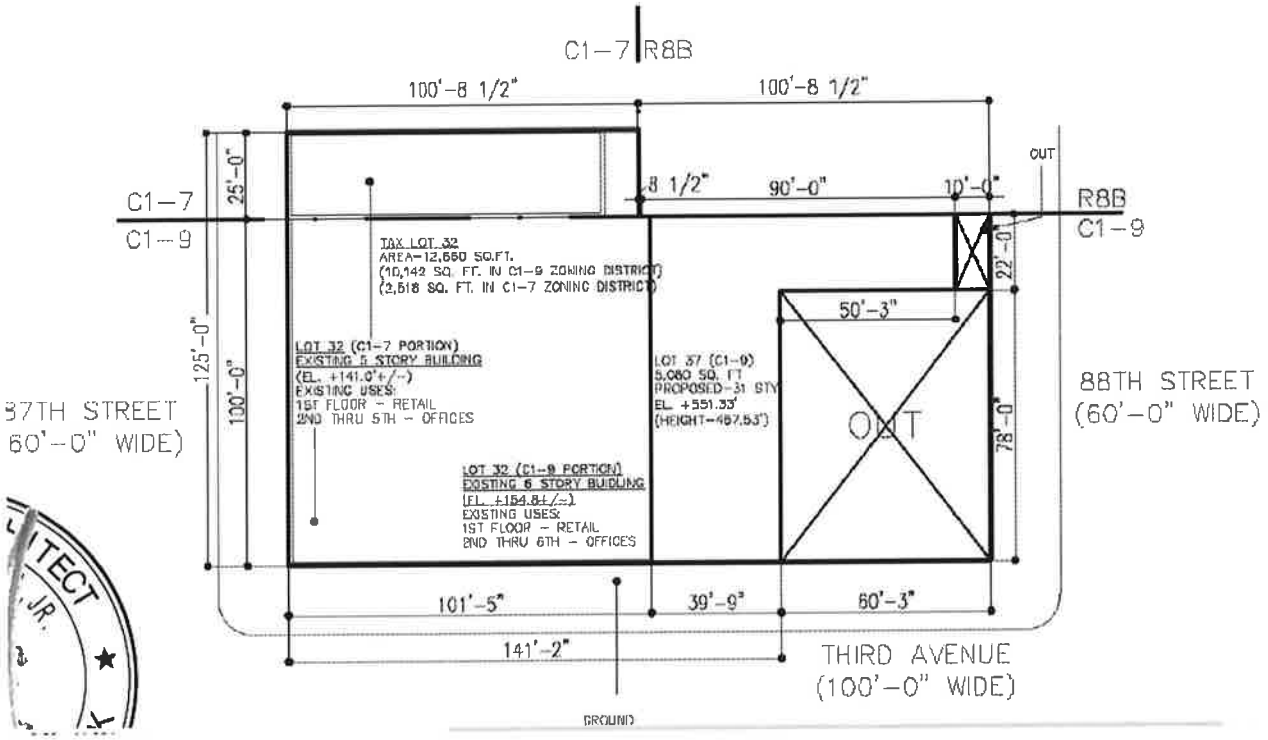
[5] The tax lots on the Third Avenue block between 87th and 88th Streets to the north of lot 37 are not part of the development lot. These are lot 39, fronting on Third Avenue, and lot 40, on the corner of 88th Street and Third Avenue.

[6] Zoning lots may comprise two or more tax lots owned by different parties that have been merged for zoning purposes. This allows the construction of taller buildings which take unused floor area from adjacent lower buildings.



Detail of Realty's Form PD1

To the developer, the long panhandle fronting on 88th Street was an essential asset because, under §§ 1021.1 and 403.5.2 of the New York City Building Code, buildings of this height require two routes of egress. The frontage on both 88th Street and Third Avenue gave this site the capacity to meet that standard. On the other hand, it had problems deriving from its frontage on 88th Street. Because of the sliver regulations, the tower portion of the building could not extend into the panhandle, which extends back 100 feet from the street line on 88th Street. The height of that portion of the building would be limited to 100 feet.[7] And because of the tower-on-base regulations, the building would have to have a base at least 60 feet high along the street line, or within eight feet of the street line, on 88th Street. Moreover, as explained in the Affidavit of Petitioners' consultant, George M. Janes (Pet. Exh. E), the interplay between the sliver regulations

[7] By cantilevering over lot 32, the portion of the building facing Third Avenue (former lots 37 and 38) gains sufficient width so as not to be governed by the sliver regulations of ZR § 23-692.

and the tower-on-a-base regulations would have made the development unbuildable in its present form.

The developer purported to solve all of its problems with a trick that would nullify the Zoning Resolution: by severing a narrow strip along the street line of 88th Street and declaring that strip a separate zoning lot, it would eliminate the frontage on 88th Street. With no frontage, there would be no street wall; no street wall, no way of applying the sliver or tower-on-a-base regulations to the new building.

Realty's zoning lot subdivision and the subsequent transfer of the micro-lot to Carnegie Green lacked any true substance. Realty and Carnegie Green were both created and controlled by DDG Partners LLC ("DDG"), which states on its website that it is building "a luxury condominium with grand proportions" at 180 East 88th Street.[8] They share the same address c/o DDG Partners LLC, 60 Hudson Street, 18th floor, New York, NY, 10013. The person signing the deeds and other recorded title documents on behalf of those companies is, with few exceptions, the chairman and chief executive officer of DDG, Joseph A. McMillan.[9] The Real Property Transfer Report form RP-5217NYC (Pet. Exh. G) that accompanied the deed states that there was no consideration for the conveyance and confirms that the grantor and grantee are "Related Companies or Partners in Business."

In short, Carnegie Green is nothing more than the alter ego of Realty and DDG. No independent party would have accepted, even as a gift, an unbuildable micro-lot, subject to an easement of egress prohibiting any kind of impediment to passage, while assuming the risk of injury to persons passing over the land, the responsibility for payment of taxes, and even shared

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[8] *See* Pet. Exh. F (http://180e88.com/ , accessed from http://ddgpartners.com/portfolio/ , Jan 10, 2018).

[9] *See* http://ddgpartners.com/executive-team/, visited 10/27/17.

liability for a $47,500,000 mortgage on the entire building site including the micro-lot. Amended and Restated Acquisition Loan Mortgage (Pet. Exh. H) (ACRIS ID 2016010401058003).

In law and in fact, Realty's building still faces 88th Street, and the micro-lot, whose sole purpose is to evade the Zoning Resolution, is a nullity.

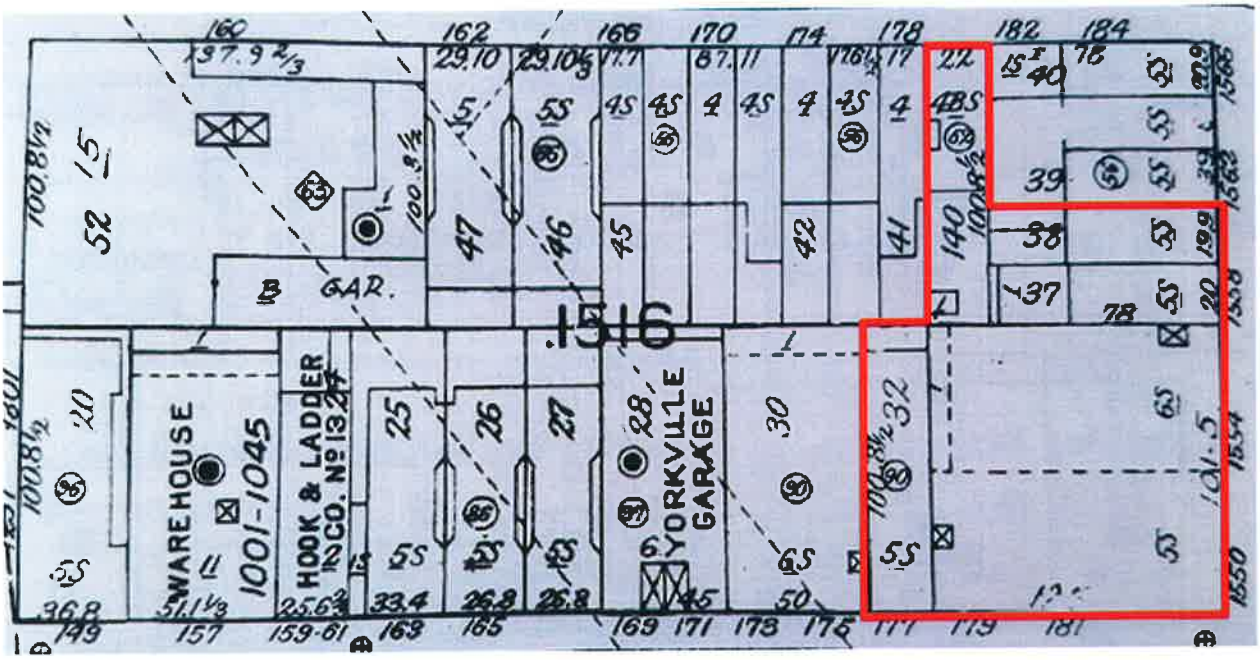
B. Realty's Assemblage and Subdivision of the Tax and Zoning Lots

The assemblage and subdivision of Realty's zoning lot occurred through a dizzying number of steps beginning in or about December 2013 and ending in or about May 2017. As shown on the map below (*see also* Exh. I), prior to the initiation of the present development, the area at issue was comprised of tax lot 32 (the air rights parcel on the corner of Third Avenue and 87th Street owned by Allied), and lots 37 and 38 (fronting on Third Avenue, owned by Realty), and 140 (the panhandle fronting on 88th Street, also owned by Realty).

The first steps. completed in 2015, resulted in the creation of a four-foot deep micro-lot (lot 138), the combination of Realty's three tax lots (37, 38, and 140) into a single tax lot (lot 37), and the merger of that lot 37 with Allied's lot 32 into a single zoning lot. Those steps were as follows.

On December 11, 2013, Realty entered into a Zoning Lot Development And Easement Agreement ("ZLDA") with Allied that allowed Realty's lot 37 and Allied's lot 32 to be

considered as one zoning lot. (Pet. Exh. J).[10] Then, on February 27, 2015, Realty



Original configuration of the tax lots prior to assemblage and subdivision. Lots involved in the zoning lot outlined in red (from The Manhattan Land Book of the City of New York (First Am. Real Estate Solutions & Sanborn 1999 ed.)).

recorded a Declaration of Zoning Lot Restrictions that described tax lot 32 (Allied's lot), tax lot 37, and tax lot 38 as a single zoning lot. (Pet. Exh. K). (ACRIS ID 2015022700681007). This Declaration describes lot 38 as including all of lot 140 except for a 4-foot deep strip (the micro-lot) along 88th Street.[11] In other words, the description of lot 38 falls four feet short of reaching the street line of East 88th Street.

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[10] Recorded documents can be found on the City Automated City Register Information System database, known as ACRIS, accessible on the internet at https://a836-acris.nyc.gov/DS/DocumentSearch/CityRegisterFileNumber. The ZLDA cited here can be found by entering its ACRIS ID number, which is 2013122200045008.

[11] Tax lot 140 (the panhandle lot) simply disappears. Petitioners have found no recorded document evidencing the merger of lots 38 and 140.

Also on February 27, 2015, Realty recorded a certification describing this 4 by 22 foot micro-lot – subsequently enlarged to 10 by 22 feet – that had been excluded from the newly merged zoning lot as new tax and zoning lot 138. (Pet. Exh. L) (ACRIS ID 2015022700681003).

Between July 22, 2014 and March 23, 2015, Realty alledgedly merged the three tax lots it owned – lots 37, 38, and 140 (excluding the 4-foot micro-lot) – into one tax lot that it called "lot 37." The new building was to rise on this lot. However, Petitioners can find no record of the merger of these tax lots on the ACRIS online database, which contains all recorded documents.[12]

Having now allegedly separated its building lot from 88th Street, Realty needed to ensure that its emergency exit route onto 88th Street would nevertheless remain forever clear and unobstructed. To this end, on June 4, 2015, Realty recorded a Declaration by which, in its capacity as owner of the micro-lot, lot 138 (which it referred to as Parcel A), it conveyed to itself, in its capacity as owner of lot 37 (referred to as Parcel B), an easement over "the entirety of Parcel A to afford access to the public street . . . . as may be necessary for the purpose of egress in the event of a fire or other emergency occurring on the property of Parcel B." This "Egress Restrictive Declaration" further provided that, "The Easement Area shall at all times be maintained and kept clear and unobstructed." (Pet. Exh. N) (ACRIS ID 2015052200499001). The whereas clauses of the Declaration recited that the easement was necessitated by the fact that Realty had applied for a permit to build a new building on Parcel B, and "a second means of egress from Parcel B is required pursuant to Chapter 10 of the 2008 Building Code." Lot 138 was described as a lot 4 feet deep with 22 feet of frontage on 88th Street.

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[12] These mergers are, however, reflected on the New York City Department of Finance's historical Digital Tax Maps. (Pet. Exh. M).

This was how matters stood until Petitioners challenged Realty's permit and DOB sustained Petitioners' objections in part, causing the developer to record numerous other documents in an attempt to legalize its zoning lot subdivision.

C. Realty's Building Permit and the Challenges Thereto

An applicant for a building permit in the City must obtain approval of a Zoning Diagram, or "ZD1," from DOB. The Rules of the City of New York, 1 RCNY § 101-15, set out procedures for members of the public to challenge DOB's approval of a Zoning Diagram.[13] Once a ZD1 is approved and posted, any member of the public has 45 days to bring a challenge. The challenge is reviewed by the Borough Commissioner. If it is denied, the public has 15 calendar days to file a new challenge, known as a "Community Appeal." That appeal is reviewed by the First Deputy Commissioner, and his determination is in turn appealable to the Board of Standards and Appeals.

Before filing its first ZD1, on February 25, 2014, Realty filed a Zoning Resolution Determination Form (ZRD1) with DOB. This was a request for a legal determination "to confirm that the proposed building can be provided with light and air at certain north-facing windows on the zoning lot described below and shown on the attached plans." (Pet. Exh. O). By this request, Realty sought a determination that the north-facing windows would be legal under the Zoning Resolution. However, neither at this time nor at any subsequent time did Realty seek any determination concerning the legality of its micro-lot. Nor did it bring this micro-lot to the attention of DOB.

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[13] Those procedures are also summarized on DOB's website. *See* http://www1.nyc.gov/site/buildings/homeowner/challenges.page

In fact, Realty's request to DOB for a determination of legality misrepresented the size and possible use of the new zoning lot that it intended to subdivide out. The accompanying plans showed a new zoning lot facing 88th Street, subdivided and excluded from the new building's lot, that was 30 feet deep, not the unbuildable 4-foot deep lot that appeared in Realty's subsequent application for a building permit, nor even the equally unbuildable 10-foot lot that Realty ultimately settled on. Realty stated that this 30-foot lot might be improved with a building: "The reconfigured portion of lot 140 that fronts on E. 88th Street will not be part of the zoning lot and shall be left unimproved or developed with a complying commercial or community facility building." *Id.* at 2 (underlining added). This suggests the possibility of a zoning-compliant building on that lot.

Yet contrary to its representations to DOB, Realty surely knew that the space between its proposed building and 88th Street could not be built on, but rather would have to be kept open and unbuilt upon, because it was required as the second emergency exit. Realty also wanted the newly created lot to be as small as it could get away with, so as to maximize the size, and permissible floor area, of its building's lot.

On August 1, 2014, Realty filed an application for a new building permit. And indeed, when, in support of that application, on December 19, 2014, Realty filed a Zoning Diagram Form (ZD1), it showed only a 4-foot micro-lot, not a 30-foot lot, fronting 88th Street. (Pet. Exh. P)[14]. There is no evidence, however, that either DOB or anyone else noticed this before the spring

[14] *Also available at* http://a810-bisweb.nyc.gov/bisweb/BSCANJobDocumentContentServlet?passjobnumber=121186518&scancode=ES242528606&rObjectId=null&appType=null .

of 2016. DOB granted the permit application in June 2015 for a construction start date of July 7, 2015.[15]

In the spring of 2016, prompted by questions from neighbors, CHN hired a zoning expert, George Janes & Associates, LLC, to examine Realty's plans. Mr. Janes noticed the micro-lot, and immediately brought it to the attention of Council Member Ben Kallos and Manhattan Borough President Gale Brewer. On May 16, 2016, they sent a letter to Rick Chandler, Commissioner of Buildings, asking that a Stop Work Order be issued because the building "used a questionable subdivision strategy so that it could circumvent the explicit intent of the Zoning Resolution," and "does not have the tower-on-base form intended by zoning." Exh. R. The letter continued:

> The applicant shaved off a tiny 4 foot portion of their lot that fronts on 88th Street so that they could claim that their building does not front 88th Street, despite using the address of 180 East 88th Street, so that no base would be required on that part of the building. This development must be required to build a contextual base 60 to 85 feet high that extends continuously along the street line as is required by applicable tower-on-base zoning regulations, including on East 88th Street.

Mr. Kallos and Ms. Brewer concluded: "The text of the Zoning Resolution is clear [that] the tiny 4 foot lot, Lot 138, must be considered part of the zoning lot that includes the applicant's development on lot 37." *Id.*

Even though the zoning challenge period had passed, DOB responded by placing a Stop Work Order on the project on May 25, 2016. (Pet. Exh. S). It is clear from DOB's response that DOB had not previously noted this attempt to evade the Zoning Resolution. In its Audit Comments, DOB stated:

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[15] Screenshot from N.Y.C. Dept. of Buildings, Building Information Search (BIS), New Building Permit, Document Overview, captured Jan. 13, 2018 (Pet. Exh. Q) (http://a810-bisweb.nyc.gov/bisweb/JobsQueryByNumberServlet?requestid=10&passjobnumber=121186518&passdocnumber=01).

> Zoning lot was improperly formed in that the tract of land was not properly subdivided into two or more zoning lots. Zoning lot cannot be subdivided into a 4' lot for sole purpose of avoiding a zoning lot requirement, in this case, the street wall requirements of ZR 23-65 and setback requirements of ZR 23-66.

Additional Information Form (AI1) dated June 7, 2016 (Pet. Exh. T).[16]

In response, Realty argued that it was in literal compliance with the Zoning Resolution and that DOB was therefore required to approve its permit application. *Id.* Nevertheless, apparently to satisfy DOB's objections, on October 27, 2016, Realty filed an amended Zoning Diagram that showed a slightly enlarged lot 138, from a depth of 4 feet to a depth of 10 feet. (Pet. Exh. U).[17] The current, third, ZD1A, which corrected certain errors not material here, was received by DOB on December 21, 2016. (Pet. Exh. V).[18] On that same day, whether because its objection was satisfied by the enlargement of the lot from 4 feet to 10 feet or for some other reason, DOB lifted the Stop Work Order. (Exh. W)[19]

In violation of basic principles of administrative law, DOB never explained why it had changed its previous position that a lot "cannot be subdivided into a 4' lot for sole purpose of avoiding a zoning lot requirement."

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[16] DOB's objections and Realty's responses can also be found at http://a810-bisweb.nyc.gov/bisweb/BScanJobDocumentServlet?requestid=4&passjobnumber=121186518&passdocnumber=01&allbin=1048054&scancode=ES875603647 .

[17] The October 27, 2016 ZD1A can also be found at http://a810-bisweb.nyc.gov/bisweb/BScanJobDocumentServlet?requestid=3&passjobnumber=121186518&passdocnumber=01&allbin=1048054&scancode=ES998689300 .

[18] The December 21, 2016 ZD1A can also be found at http://a810-bisweb.nyc.gov/bisweb/BScanJobDocumentServlet?requestid=3&passjobnumber=121186518&passdocnumber=01&allbin=1048054&scancode=ES272111912

[19] *See* link to BIS: http://a810-bisweb.nyc.gov/bisweb/ActionsByLocationServlet?requestid=1&allbin=1048054&allinquirytype=BXS4OCV3&stypeocv3=V&restore=1

Taking further steps to attempt to legitimize its creation of the micro-lot, on January 25, 2017, the developer recorded a deed by which it transferred the micro-lot from itself to Carnegie Green, an entity created for this sole illegitimate purpose.[20] The lot was still described there as being 4 by 22 feet. (Exh. J) (ACRIS ID 2017012301681001).

Although, in response to DOB's demand, Realty filed an amended Zoning Diagram representing that it had enlarged the micro-lot from 4 feet to 10 feet, and although DOB lifted the stop-work order in apparent response to this representation, Realty did not in fact enlarge its micro-lot until fully five months later, on May 26, 2017, after CHN had filed a Zoning Challenge pointing out its failure to do so, and after DOB had issued a Notice of Intent to Revoke Approvals and Permits.

And even then, the developer did not, and still has not, recorded any restrictive declaration to extend the emergency exit easement over the additional six feet of the micro-lot, and so does not have the easement that it represented to DOB, on June 7, 2016, that it had. (Exh. T)[21] The result is that the emergency exit path from Realty's new building passes over six feet over which Realty has no easement. Therefore, the building is not in compliance with the exit discharge requirements of N.Y.C. City Building Code § 1027.6, which requires exit discharge areas to have direct access to a public way.

Before the Stop Work Order was lifted, on December 8, 2016, CHN, with support from Borough President Brewer, State Senator Liz Krueger, and Council Member Kallos, filed a

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[20] For reasons unknown, this deed us dated December 21, 2015, *i.e.*, over a year earlier.

[21] *See also* http://a810-bisweb.nyc.gov/bisweb/BScanJobDocumentServlet?requestid=4&passjobnumber=121186518&passdocnumber=01&allbin=1048054&scancode=ES875603647 .

formal Zoning Challenge with DOB. (Pet. Exh. X).[22] This Zoning Challenge was filed at the earliest opportunity after CHN had learned of the micro-lot, and within the 45-day window from Realty's October 27, 2016 filing of an amended ZD1. CHN's principal argument reiterated that made by Mr. Kallos and Ms. Brewer in their May 16, 2016 letter: "Primarily, they object[ed] to the developer's absurd efforts to gerrymander its tax and zoning lots to avoid zoning requirements for buildings facing East 88th Street." *Id.* at Pet. Exh. R. The challengers argued that lots 37 and 138 were one zoning lot, both because of the manner in which they had been created and documented and because of the fact that they were integral parts of the same development, with lot 138 providing the mandated egress route from the proposed building fronting on 88th Street. They further stated:

> The policy implications of this approach for the City are huge. Developers seeking to avoid zoning restrictions that are triggered by street frontage can merely carve off a tiny tax lot, obtain an access easement, and continue to reap all the benefits that the tax lot might offer, other than the tiny amount of floor area these micro-lots produce – a tradeoff many developers will embrace given the premium price for height and high-floor apartments.

Id. at Pet. Exh. X.

The challengers also argued that the Zoning Diagram submitted by Realty showed lot 138 as being 10 feet by 22 feet, whereas the recorded documents all showed that lot as being 4 feet by 22 feet, and stated that "DOB cannot issue a building permit based upon a zoning lot that does not exist." *Id.* at Pet. Exh. X.

Three and a half months later, on March 22, 2017, the DOB Borough Commissioner denied the substantive portions of CHN's December 8th Zoning Challenge, but issued a 15-day

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[22] The Zoning Challenge and DOB's March 22, 2017 response can also be found on DOB's Building Information Search database at http://a810-bisweb.nyc.gov/bisweb/BScanJobDocumentServlet?requestid=3&passjobnumber=121186518&passdocnumber=01&allbin=1048054&scancode=SC032300001

Notice of Intent to Revoke Realty's permit based on Realty's "failure to file the proper Zoning Lot Exhibits to match the zoning lot described in the job application." Realty had failed to conform the recorded documentation with its prior representation that it had enlarged the micro-lot. DOB gave the developer 15 days to cure this defect. (Pet. Exh. Y).

On March 29, 2017, the developer responded by terminating the zoning lot development agreement, stating that the DOB determined that it was, "improperly formed." (Pet. Exh. Z)[23] However, it was not until some two months later, on May 26, 2017, that the developer recorded a series of new deeds and declarations of zoning lot subdivision and restriction that, with one important exception, made the recorded record consistent with its permit and with its Zoning Diagram filed the previous fall. (Pet. Exh. AA, BB, CC)[24] That exception was that the developer did not, and still has not, recorded any instrument extending Realty's easement over the additional six feet of lot 138. It was not until the end of the first week of June that Realty filed these documents with DOB.

Even though the zoning lot on which the development was based had not existed for over six months, the Notice of Intent to Revoke never resulted in a revoked permit.

Based on these new documents, on June 15, 2017, DOB accepted the audit of the project and rescinded the Intent to Revoke. (Pet. Exh. DD). Almost three months had gone by

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[23] *See* ACRIS ID 2017040600965002 (Termination of Declaration of Zoning Lot Restrictions between lots 32 and 37).

[24] *See* ACRIS ID 2017052500881001 (transferring 6 additional feet from lot 37, owned by Realty, to lot 138, owned by Carnegie Green); ACRIS ID 2017052500881003 (new Declaration of Zoning Lot Subdivision and Restrictions subdividing lot 138, as 10 by 22 foot lot, from lot 37); ACRIS ID 2017052500881006 (new Declaration of Zoning Lot Restrictions between lot 32 and redefined lot 37).

since DOB denied the substance of CHN's Zoning Challenge while issuing the Notice of Intent to Revoke.[25]

CHN, however had not waited for Realty to satisfy DOB's objections about the manner in which Realty's zoning was formed and documented. On April 11, 2017, following the Borough Commissioner's March 22, 2017 denial of the substance of its Challenge, CHN had promptly proceeded to the next step: filing a Community Appeal. (Pet. Exh. EE). DOB accepted this filing. Not until three months later, on June 29th, in response to an email inquiry from CHN, did DOB inform CHN that it had deemed the filing premature because the Notice of Intent to Revoke was still extant at the time the Appeal was filed. By that same email, DOB informed CHN that it had only two days to renew its Community Appeal. (Pet. Exh. FF).

The next day, on June 30, 2017, CHN filed a second Community Appeal substantially similar to its April Community Appeal. (Pet. Exh. GG). DOB sat on this Appeal for another three months. Not until after CHN raised the issue directly with the Mayor did DOB respond, on September 28, 2017, by denying the Appeal. (Pet. Exhs. GG, B, HH).[26] During this entire time, construction work continued.

On October 30, 2017, Petitioners CHN and FRIENDS appealed this denial to the BSA. On December 26, 2017, the BSA issued a Notice of Comments on this appeal. (Pet. Exh. II). The BSA appeal has not yet been calendared.

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[25] Even then, as noted above, Realty did not cure all the defects identified by DOB, because it failed to extend the easement of the Egress Restrictive Declaration to cover the additional six feet of the micro-lot.

[26] *See also* http://a810-bisweb.nyc.gov/bisweb/BScanJobDocumentServlet?requestid=3&passjobnumber=121186518&passdocnumber=01&allbin=1048054&scancode=SC111111111

D. The Process of Construction

With the exception of the period from May 26, 2016 until December 21, 2016, 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.

From the beginning, Realty has asked for and received from DOB authorizations, called After Hours Variances, to allow construction work on nights and weekends. Such authorizations are not supposed to be handed out routinely. The N.Y.C. Administrative Code states that they may only be granted for periods of two weeks at a time, and only for one of five reasons: (1) emergency work, (2) public safety, (3) city construction projects, (4) construction activities with minimal noise impact, and (5) undue hardship.

In response to complaints from constituents, on April 19, 2017, Petitioner Council Member Kallos wrote to DOB Borough Commissioner Martin Rebholz to object to the routine issuance of these authorizations to Realty. (Pet. Exhs. A & JJ). DOB ignored Council Member Kallos' objection, and has continued to issue new After Hours Variances every two weeks. These have allowed Realty to accelerate in its race to complete the building before construction could be enjoined.

As of January 19, 2018, Petitioners' expert consultant, George Janes, estimated that approximately 150 feet of the 523-foot structure had been built. (Pet. Exh. E).

ARGUMENT

THIS COURT SHOULD ISSUE A PRELIMINARY INJUNCTION ENJOINING REALTY'S BUILDING AS VIOLATIVE OF ZONING

"It is settled beyond doubt that an action for injunctive relief is the appropriate remedy of an aggrieved property owner who seeks to bar the erection of a structure on adjoining

or nearby premises in violation of express zoning regulations." *Lesron Junior, Inc. v. Feinberg*, 13 A.D.2d 90, 95 (1st Dept. 1961) (holding that plaintiffs were not required to exhaust administrative remedies at BSA before seeking to enjoin construction violative of setback and rear yard requirements of zoning); *Haddad v. Salzman*, 188 A.D.2d 515 (2d Dept. 1992) (same); *Kverel v. Town of Southampton*, 2015 N.Y. Misc. LEXIS 3186, 2015 N.Y. Slip Op. 31656(U) (S. Ct. Suffolk Co. Aug. 25, 2015) (granting preliminary injunction enjoining further construction of house allegedly being built in violation of zoning).

A preliminary injunction should be granted when three elements are shown: a likelihood of success on the merits; irreparable injury to the movant unless the provisional relief is granted; and a balance of the equities in the movant's favor. *See, .e.g., Doe v. Axelrod*, 73 N.Y.2d 748 (1988); *Kverel*, 2015 N.Y. Misc. LEXIS 3186, at *12 (granting preliminary injunction halting construction of building allegedly violative of zoning); *Capruso v. Village of Kings Point*, 34 Misc. 3d 1240(A) (S. Ct. Nassau Co. 2009), *aff'd* 78 A.D.3d 877 (2d Dept. 2010) (granting preliminary injunction halting construction on parkland); *Chelsea Business & Property Owners' Ass'n, LLC v. City of New York*, 30 Misc. 3d 1213(A) (S. Ct. N.Y. Co. 2011) (distinguishing *Lesron* and denying preliminary injunction for alleged zoning violations).[27]

As demonstrated herein and in the accompanying affirmation, affidavits, and exhibits, Petitioners amply satisfy all three elements.

[27] Some courts have held that a plaintiff – including even a private plaintiff – seeking a preliminary injunction in a zoning case does not need to allege irreparable harm. For example, in *Thilberg v Mohr*, 74 A.D.3d 1055 (2d Dept. 2010), the Second Department, affirming an order granting neighbors a preliminary injunction against certain uses, stated, "To obtain preliminary injunctive relief based on a violation of a zoning ordinance, a movant is not required to show irreparable harm." *Id.* (citing cases).

A. Petitioners Will Succeed On The Merits.

"To establish a likelihood of success on the merits, '[a] prima facie showing of a reasonable probability of success is sufficient; actual proof of the Plaintiffs' claims should be left to a full hearing on the merits.'" *Barbes Restaurant, Inc. v. ASSR Suzer 218, LLC*, 140 A.D.3d 430, 431 (1st Dept. 2016) (quoting *Weissman v Kubasek*, 112 AD2d 1086, 1086 (2d Dept. 1985)). Where, as here, the case raises only a question of law, and there are no facts in dispute, preliminary relief is more likely to be granted. Weinstein, Korn & Miller, *N.Y. Civ. Practice* ¶ 6301.05[2] (citing *Ulster Home Care Inc. v. Vacco*, 255 A.D.2d 73 (3d Dep't 1999), and other cases).

Moreover, because Petitioners will be denied effectual relief if construction is allowed to continue to completion, this Court should apply a relaxed standard of proof with regard to this issue. *State v. City of New York*, 275 A.D.2d 740, 741 (2d Dept. 2000) (enjoining City's sale of community gardens and noting that "[w]here, as here, the denial of injunctive relief would render the final judgment ineffectual, the degree of proof required to establish the element of likelihood of success on the merits should be reduced"); *Gramercy Co. v. Benenson*, 223 A.D.2d 497, 498 (1st Dept. 1996) (same, affirming grant of injunction to stop work in Gramercy Park); *Masjid Usman, Inc. v. Beech 140, LLC*, 68 A.D.3d 942, 942 (2d Dept. 2009) ("plaintiff was entitled to a reduced degree of proof with respect to this issue, since the denial of a preliminary injunction in this case would disturb the status quo and likely render the final judgment ineffectual").

These cases are fully applicable here. If Realty is allowed to complete the building, Petitioners will face a very high hurdle to effectual relief. This is because, "as a general rule, a mandatory injunction to remove or destroy a building is a drastic remedy which will only be granted if the benefit to the movant if the injunction were granted and the irreparable harm to the movant if the injunction were not granted substantially outweighs the injury to the party against whom the injunction is sought." *Angiolillo v Town of Greenburgh*, 21 AD3d 1101, 1104 (2d Dept

2005), *quoted in Diamond v. Nestor*, 29 Misc. 3d 1214(A) (S. Ct. N.Y. Co. 2010) (declining to order demolition of rooftop structure where, despite conceded zoning violation, plaintiff had not demonstrated "the type or the extent of the harm allegedly resulting from the claimed zoning violation").

But whether the standard is relaxed or not, Petitioners can readily show a likelihood of success on the merits.

1. Realty's Building Violates ZR § 23-692, the Sliver Building Regulations

When interpreting a statute, the "'primary consideration is to discern and give effect to the Legislature's intention.' The text of a statute is the 'clearest indicator' of such legislative intent and 'courts should construe unambiguous language to give effect to its plain meaning.'" *Avella v. City of New York*, 29 N.Y.3d 425, 434 (2017) (citations omitted). As Chief Judge Lippman wrote in *Schoenfeld v. State of NY,* 25 N.Y. 3d 22, 25-27 (2015), "It is well settled that, where the language of the statute is clear, it should be construed according to its plain terms . . . . '[N]o rule of construction gives the court discretion to declare the intent of the law when the words are unequivocal.'" Additionally, this Court's reading of the Zoning Resolution here need not wait upon the interpretation of the BSA, because where "'the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency,'" and if the agency's interpretation "'runs counter to the clear wording of a statutory provision, it should not be accorded any weight.'" *Roberts v. Tishman Speyer Props., L.P.*, 13 N.Y.3d 270, 285 (2009) (quoting *Kurcsics v. Merchanges Mutual Ins. Co.*, 49 N.Y.2d 451, 459 (1980)).

The sliver regulations, ZR § 23-692, titled "Height limitations for narrow buildings or enlargements," set stringent height limits on "portions of buildings with street walls less than

45 feet in width."[28] Those height limits extend back 100 feet from the street line. ZR § 23-692 is made applicable to mixed residential/commercial buildings in a C1-9 district, such as this, by ZR § 35-23.

The applicable provisions of ZR § 23-692 are as follows:[29]

> In the districts indicated, portions of #buildings# with #street walls# less than 45 feet in width shall not be permitted above the following heights:
>
> * * * *
>
> (c) For #corner lots# bounded by at least one #wide street#, a height equal to the width of the #widest street# on which it fronts, or 100 feet, whichever is less.
>
> * * * *
>
> (e) (2) The provisions of this section shall not apply to #street walls# of permitted obstructions or #street wall s# located beyond 100 feet of a #street line#.

ZR § 23-692.

The plain language of the sliver regulations makes them applicable to the building at issue here. These regulations apply to "portions of buildings with street walls less than 45 feet in width." ZR § 23-692.

The portion of Realty's proposed building that faces 88th Street is only 22 feet wide. A "street wall" is defined as a "wall or portion of a wall of a building facing a street." ZR § 12-10 (underlining added). A "street line" is defined as "a lot line separating a street from other land." A street wall is not necessarily along the street line, but only facing that line. Indeed, as ZR § 23-692(e)(2) states, the street wall can be more than 100 feet from the street line.

The Zoning Resolution does not define the term "facing." However, in plain language, Realty's building has a wall that "faces" 88th Street and is 22 feet wide, *i.e.*, "less than

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[28] ZR § 23-692 is made applicable to mixed residential/commercial buildings in a C1-9 district, such as this, by ZR § 35-23.

[29] Hashtags in the Zoning Resolution indicate defined terms.

45 feet in width." "In construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning." *Samuelsen v. New York City Transit Auth.*, 101 A.D.3d 537, 540 (1st Dep't 2012) (internal quotation marks omitted).

The sliver regulations explicitly do not apply to any street wall "located beyond 100 feet of a street line," ZR § 23-692(e)(2), which, on most Manhattan blocks, is the midline of the short dimension of the block. They therefore do apply to a street wall that is less than 100 feet away from the street line. This is the case for that portion of Realty's building that is on former tax lot 140. The building therefore meets all the criteria for application of ZR § 23-692, the sliver regulations.

The zoning lot at issue here is a corner lot, because it includes tax lot 32, the lot on the corner of Third Avenue and 87th Street. For a building on a corner lot, the maximum height of the portion of the building with street walls less than 45 feet wide is "the width of the widest street on which it fronts, or 100 feet, whichever is less." *Id.* The widest street on which Realty's building fronts is Third Avenue, which is more than 100 feet wide. Therefore, the height of the portion of Realty's building governed by the sliver regulations, *i.e.*, the portion facing, and within 100 feet of, 88th Street cannot exceed 100 feet. As currently designed, that portion of the building, like the rest, rises 32 stories and 523 feet, far exceeding the 100-foot limit.

Realty's ruse is not only contrary to the plain language of the Zoning Resolution, but also leads to a result that negates the intent of the legislature, and on that ground too, it cannot be sanctioned. Where the result even of seemingly unambiguous language is unreasonable, absurd, or in direct contradiction to the intention of the statute, the Court must "look to the act as a whole,

to the subject with which it deals, to the reason and spirit of the enactment, and thereby determine the true legislative intention and purpose; and if such purpose is reasonably within the scope of the language used, it must be taken to be a part of the statute the same as if it were plainly expressed." *In re Meyer*, 209 N.Y. 386, 389 (1913). As the *Meyer* court put it:

> There must be some uncertainty of sense, else the natural and ordinary meaning of its words must prevail. Uncertainty of sense, however, does not spring alone from uncertainty of expression. The legislative intention, if expressed, is the law itself. It is always presumed, in regard to a statute, that no unjust or unreasonable result was intended by the legislature. Hence, if viewing a statute from the standpoint of the literal sense of its language, it works such a result, an obscurity of meaning exists, calling for judicial construction.

Id.

These principles of statutory construction have been reaffirmed repeatedly. *See, e.g.*, *People v. Santi*, 3 N.Y.3 234, 243-44 (2014) ("While we acknowledge that defendant's interpretation of the statute represents a fair and literal reading of the text, such an interpretation ignores the legislative intent underlying the statute's enactment. . . . We cannot accept that the Legislature intended to enable such conduct . . . . Insofar as we must interpret a statute so as to avoid an 'unreasonable or absurd' application of the law, we reject defendant's interpretation."); *Long v. Adirondack Park Agency*, 76 N.Y.2d 416, 420-422 (1990) ("legislative intent is the great and controlling principle," so that the statute will not be read literally where such a reading would lead to "an absurd result that would frustrate the statutory purpose"); *id.*, 151 A.D.2d 189 (3d Dept 1989) ("'Adherence to the letter will not be suffered to defeat the general purpose and manifest policy intended to be promoted.'") (quoting *Surace v Danna*, 248 N.Y. 18, 21 (1928) (Cardozo, Ch. J.)); *Zappone v. Home Insurance Co.*, 55 N.Y.2d 131,137 (1982) ("In the interpretation of statutes the '[absence] of facial ambiguity is * * * rarely, if ever, conclusive.' . . . Literal interpretation of the words used will not be accorded when to do so will . . . produce . . . absurdity.") (citations omitted); *New York State Bankers Assn. v Albright*, 38 N.Y.2d 430, 437

(1975) ("'When [the plain] meaning has led to absurd or futile results, . . . this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words.'") (quoting *United States v American Trucking Assns.*, 310 U.S. 534, 543-544 (1940)); *Abood v. Hospital Ambulance Service Inc.*, 30 N.Y.2d 295, 298 (1972) (While it is true that, whenever the language of a statute is clear and unambiguous, we are required under ordinary rules of construction to give effect to its plain meaning . . . , the literal language of the statute, where it does not express the statute's manifest intent and purpose, need not be adhered to. Rather, '[to] effect the intention of the legislature the words of a single provision may be enlarged or restrained in their meaning and operation, and language general in expression may be subjected to exceptions through implication.'"); *People ex rel. McGoldrick v. Sterling*, 283 A.D. 88, 90 (1st Dept. 1953) (to the extent that a literal reading of rent regulations would allow defendants to circumvent the statute and the regulations, those regulations are invalid, null and void).

As their name suggests, the sliver regulations were adopted to prevent the ill that would be consummated here if Realty's project were allowed to be completed: construction of very tall, narrow buildings that are inconsistent with the scale and character of existing neighborhoods, such as this one. The problem was well-described by Halina Rosenthal, who shortly thereafter founded FRIENDS, in a January 1982 letter to then-City Planning Commissioner Herbert Sturz: "The present R8 Zoning allows the proliferation of assorted needles, slivers, splinters and other such skyward oriented structures which – if unchecked – will totally destroy New York City's mid-block residential streetscape, creating sort of a pin-cushion aerial view of the city, and an out of control hodge-podge at eye level." (Pet. Exh. KK).

The City Planning Commission's Report on the sliver regulation explained:

> Spiraling real estate values, continued demand for luxury housing and lack of opportunity to assemble large construction sites in high density R7-2, R8, R9, and R10 Districts and in Cl and C2 Districts with equivalent residential floor area ratio have led to the construction of high rise residential buildings on small lots. Where linear lot street frontage opportunities are less than 45 feet, the resulting tall and narrow "sliver" buildings are sometimes four to five times the height of their surrounding low-rise brownstone neighbors. Because of their narrowness and exceptional height, these buildings are inconsistent with the scale and character of the existing neighborhoods.
>
> The Commission feels it is important to regulate the construction of "Sliver" buildings in the aforementioned districts which are predominantly residential in character in order to ensure a harmonious relationship between these buildings and the existing buildings in the neighborhood.

City Planning Commission Report N830112 ZRY (Feb. 2, 1983) (Exh. LL).

In this instance, the 100-foot height limit applies from the 88th Street street line southward 100 feet. This affects that portion of the building facing 88th Street and within 100 feet of that street – approximately 1,200 square feet per floor. As currently designed, that portion of the building rises 523 feet, far exceeding the 100-foot limit.

2. Realty's Building Violates the Tower-On-A-Base Regulations

The tower-on-a-base regulations are contained in ZR §§ 23-65 and 23-651. They are made applicable to mixed residential/commercial buildings in a C1-9 district, such as this, by ZR § 35-64. They generally require a building base to be built at or near the street line and to extend upward at least 60 feet and typically no more than 85 feet. Such buildings must have at least 55 percent of their floor area in their lower floors, below 150 feet, presumptively thereby reducing their overall height. ZR § 23-651. The tower is placed on top of the base, set back from the base by at least ten feet on wide streets and 15 feet on narrow streets. This form creates a building base that, from the pedestrian's point of view, resembles the scale of traditional New York

City row houses and tenements so that the pedestrian's relationship with both new and existing buildings is consistent.

The applicable provisions are as follows.

> (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.
>
> However, no such recesses shall be permitted within 20 feet of an adjacent #building# fronting on the same #street line# or within 30 feet of the intersection of two #street lines#.

ZR § 23-651(b)(1)(i) (underline added).

These regulations apply to "[a]ny #development# or #enlargement# that meets the location and #floor area# criteria of paragraph (a) of section 23-65 and includes a tower." ZR § 23-651. In turn, ZR § 23-65(a) states: "#Buildings developed# or #enlarged# with towers shall comply with either tower-on-a-base regulations or standard tower regulations," and continues:

> The tower-on-a-base regulations of section 23-651 shall apply to any such #building# that:
>
> (1) contains more than 25 percent of its total #floor area# in #residential use#; and
>
> (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#.

ZR § 23-65.

Realty's building meets all of these criteria. The 88th Street street wall of its base is within 125 feet of the intersection of Third Avenue and 88th Street. Yet it is not "located within eight feet of the street line" as the law requires. To the contrary, it is set back 34 feet and 2 inches from the street line.

The fact that the zoning lot on which Realty's building is being built allegedly does not itself abut 88th street is irrelevant. The Zoning Resolution does not define the words "facing the street," "on a narrow street," and "street frontage." Therefore, these words must be read according to their commonly accepted meanings. *Samuelsen v. NYCTA*, 101 A.D.3d at 540. Realty's insertion of a micro-lot between its building's street wall and the street line does not change the fact that the tower-on-a-base rule applies to the building.

Realty claims that it can evade these regulations by calling the patch of empty space it created in front of its building – the very space that makes its building illegal – a separate lot. However, the plain language of the sliver building and tower-on-a-base regulations makes them applicable to Realty's building regardless of Realty's creation of the separate micro-lot.

Here too, Realty's ruse leads to a result that negates the intent of the legislature. The tower-on-a-base regulations were enacted in 1994 as a reaction to the "tower-in-the-plaza" buildings that had been encouraged by the 1961 Zoning Resolution. The tower-in-the-plaza buildings, exemplified by the Seagram Building on Park Avenue between 52nd and 53rd Streets, designed by famed architect Ludwig Mies Van der Rohe in 1957, had "a dramatic [negative] effect on the quality of life in the Upper East Side community." CPC Report N 940013, attached submission of Manhattan Borough President Ruth W. Messinger, Nov. 24, 1993 ("Messinger Report"), at 7 (Pet. Exh. MM). "Residential buildings towered over the surrounding neighborhood

and offered no relationship to the existing urban fabric. Building setbacks and plazas began to erode the unique neighborhood character that had existed on the Upper East Side." *Id.*

These concerns led to the enactment of a series of regulations intended to limit building height and encourage or mandate contextual buildings, including the sliver regulations[30] and the rezoning of Lexington Avenue to decrease the allowable density and mandate that buildings be built to the street line, without plazas.[31] In further response to these concerns, the tower-on-a-base provisions were enacted in 1994. The City Planning Commission Report on these amendments found that "[t]he plaza erodes the streetwall character of the neighborhoods," and that:

> many blocks in neighborhoods with an established streetwall character have had this context eroded by towers that are set back from the streetline in plazas and rise without setback.
>
> * * * *
>
> Recent high density residential development, particularly on the east side of Manhattan, has all too frequently been out of scale with its context. The streetwall scale and neighborhood context have been eroded as towers have become increasingly taller and thinner. This [tower-on-a-base] text change would create a new building form that would reinforce the established neighborhood character.

CPC Report N 940013 ZRM, at 2, 11 & 12.

The tower-on-a-base regulations were intended to ameliorate these problems. The CPC Report concluded that "[t]he proposed combination of streetwall controls, floor area distribution, tower coverage and articulation credits work together to ensure a flexible building design which will enhance streetscapes, reinforce neighborhood character, and still allow for reasonable tower development." CPC Report, at 7.

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[30] *See* Regulating Residential Towers and Plazas, at 4 (DCP Discussion Document, 1989) (Pet. Exh. NN).

[31] Messinger Report, at 2.

DOB's intepretation of the statute could be used to negate the tower-on-base regulations entirely. It is not correct.

3. Realty's Zoning Lot Subdivision Creates a Noncomplying Building in Violation of ZR § 12-10

Realty's attempt to insulate itself from otherwise applicable zoning provisions additionally fails because it violates both the plain language and the clear and obvious intent of the Zoning Resolution's prohibition of zoning lot subdivisions that result in noncomplying buildings.

The definition of "Zoning Lot" includes the following:

> 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. If such #zoning lot#, however, is occupied by a #non-complying building#, such #zoning lot# may be subdivided provided such subdivision does not create a new #non-compliance# or increase the degree of #non-compliance# of such #building#.

ZR § 12-10.[32]

The clear import of this provision is that a zoning lot subdivision cannot be used to enable construction of an otherwise noncompliant building. "Shall" in the first sentence of the quoted provision includes both the present and the future, ZR § 12-01(d), and "[t]he word 'shall' is always mandatory and not discretionary," ZR § 12-01(c). The first sentence covers the situation where at present there is no noncompliance. The second sentence covers the situation where there is at present a noncompliance and the subdivision would result in additional noncompliance. All bases are covered.

Realty's zoning lot subdivision has no legitimate land use purpose, and indeed no purpose at all other than to enable construction of a building that would be noncomplying were it not for the subdivision. On May 26, 2016, DOB issued a Notice of Objection, objecting to the

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[32] *See also* ZR Art. V, "Non-conforming uses and non-complying buildings."

proposed building on these very grounds. DOB stated: "Zoning lot cannot be subdivided into a 4' lot for sole purpose of avoiding a zoning lot requirement, in this case, the street wall requirements of ZR 23-65 . . . ."

In response, Realty argued that this zoning lot subdivision avoided, rather than created, a noncompliance. (Pet. Exh.T). According to Realty, the above provision in the definition of "zoning lot" allows a zoning lot subdivision whose only purpose is to attempt to make a noncomplying building into a complying one, and thereby to nullify the Zoning Resolution.

DOB's Objection was well-taken, and Realty's response to it ill-founded.[33] Even if Realty were correct that its zoning lot subdivision brings its building into literal compliance with zoning – which it does not – Realty's interpretation of this provision would sanction an absurd result that is the very opposite of what the legislature so clearly intended: a building that does not follow the street line and does not observe the height limit applicable to the area fronting on 88th Street (the area of former tax lot 140). Indeed, it appears that without the unlawful abrogation of these regulations enabled by Realty's fictitious micro-lot, Realty's building would be untenable.

Moreover, Realty's gimmick, if sanctioned, could be extended to any other site where the developer wished to avoid the tower-on-a-base zoning regulations, the sliver building zoning regulations, or any other requirement based on street or avenue frontage.

The Zoning Resolution's prohibition on zoning lot subdivisions that enable noncomplying buildings is applicable here. As the Court of Appeals said in *Long v. Adirondack*

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[33] Although DOB subsequently withdrew its Objection and reinstated Realty's permit, it never offered any explanation for this change. Such unexplained shifts are the hallmark of an arbitrary and capricious decision. "'Absent . . . an explanation, failure to conform to agency precedent will . . . require reversal on the law as arbitrary.'" *Richardson v. Comm'r of N.Y.C. Dep't of Soc. Servs.*, 88 N.Y.2d 35, 40 (1996) (quoting *Charles A. Field Delivery Serv. v Roberts,* 66 NY2d 516, 520 (1985)

Park Agency, 76 N.Y.2d at 420-422, "legislative intent is the great and controlling principle," and this provision was clearly intended to, and does, encompass situations such as this.

4. In Fact and In Law, Under the Zoning Resolution, Realty's "Development" Is On a Single Zoning Lot

Both in fact and in law, lot 138 is an integral and inseparable part of Realty's development. Physically, the empty space in facing 88th Street forms an entryway to the building.

Legally, lot 138 could never, so long as this building stands, be used for any other purpose, because it is required by the Building Code as an emergency exit, and must be kept unobstructed. The easement that Realty has over the property, which precludes it being used for any purpose other than as an entranceway to the building, means that all the sticks in the bundle of ownership rights are owned by Realty, and Carnegie Green holds only a bare legal title. It is entirely under the control of Realty, and the notion that it is under separate ownership is a fiction.

Moreover, even if lot 138 is a separate tax lot, the definition of "development" in the Zoning Resolution requires that it be considered part of the same zoning lot as lots 32 and 37 because it is an integral part of Realty's development. "Development" is a defined term in the zoning resolution:

> A 'development,' on a #zoning lot# or a portion thereof includes:
>
> (a) the construction of a new #building or other structure#;
>
> (b) the relocation of an existing #building or other structure# to another #zoning lot#; or
>
> (c) the establishment of a new open #use#, other than an #accessory use#."

ZR § 12-10 (underlining added). The key phrase is that a development is "on a zoning lot or portion thereof." A development is not on two or more zoning lots. In light of this definition, Realty's claim that tax lot 138 is not a part of the zoning lot on which it is building is wrong.

5. A Zoning Lot Subdivision That Has No Lawful Purpose Is a Nullity

Transactions that have no legitimate purpose, including real property transactions such as the one at issue here, are nullities without legal effect. In *For the People Theatres of N.Y. Inc. v. City of New York*, 29 N.Y.3d 340 (2017), the Court of Appeals upheld the validity of zoning regulations for so-called "adult" bookstores and chided the Appellate Division for "los[ing] sight of the fact that the issue was whether there was sham compliance. A bookstore could very well engage in such a sham by removing large signs, allowing minors to enter, and ensuring that non-adult materials are accessible, and yet retain a focus on sexual materials." *Id.* at 361.

Sham transactions have been held to be nullities under both tax and zoning law. For example, in *United States v. Tax Comm'n of New York*, 22 A.D.2d 290 (1st Dept. 1964), the court held that a lease assignment that purported to assign ownership of improvements to a tax-exempt tenant while in fact retaining all the rights of ownership would be disregarded. The First Department stated:

> If the agreement conferred no incidents of ownership whatsoever upon the tenant then the provision might well be held meaningless.
>
> * * * *
>
> [W]hile legal rules need not reflect prescisely the order of nature, they may not be so divorced from reality or legal theory, that their consistency or nexus with external facts and larger legal doctrine is utterly absent.
>
> * * * *
>
> The crucial question was who had the beneficial ownership, not who had the legal title. 'We believe that the appropriate test would turn on practical ownership of the property rather than the naked legal title'

Id. at 294-96. Just as in that case, so here the transfer of a bare legal title to a purportedly new zoning lot is meaningless, as a practical matter, and should be disregarded or annulled.

Similarly, in *595 Investors Ltd. Partnership v. Biderman*, 140 Misc. 2d 441 (S. Ct. N.Y. Co. 1988), Justice Lehner construed a local law that imposed a real property transfer tax on

any transaction "whereby any economic interest in real property is transferred." *Id.* at 442. The plaintiff, an entity that sold its interest in another entity that, in turn, owned a property, sought to avoid payment of the transfer tax on the grounds that it did not, itself, own the property.

> The city [took] the position that, although the transaction does not fall within the literal wording of the statute in that plaintiff does not hold title to any real property, the court should look behind the transaction and give effect to the economic realities and not permit the use of a dummy or shell entity to avoid payment of the tax.

Id. at 444. While acknowledging that, "'[a]s a general rule, a statute which levies a tax is to be construed most strongly against the taxing authority and in favor of the taxpayer,'" the court nevertheless held that the tax would apply. *Id.* "To accept plaintiff's argument," the court wrote, "would ascribe to the Legislature an intent to permit the creation of shell entities to avoid taxation when the whole purpose of the legislation, as stated by the Governor and the Senate sponsor, is to tax transactions which effectively, but indirectly, convey real property." *Id.* at 445; *see also, e.g., Sherwin-Williams Co. v. Tax Appeals Tribunal*, 12 A.D.3d 112 (3d Dept. 2004) (in determining the validity of a transaction, "consideration is given to whether petitioner established a 'transaction with economic substance which is compelled or encouraged by business or regulatory realities, is imbued with tax-independent considerations, and is not shaped solely by tax-avoidance features that have meaningless labels attached'") (quoting *Frank Lyon Co. v. United States*, 435 U.S. 561, 583-84 (1978)). As in these cases, so here too, acceptance of Realty's zoning lot subdivision would enable Realty to avoid "the whole purpose of the legislation."

Although Appellants have not found a New York zoning case in which the courts confronted such a brazen attempt to nullify a zoning provision through a privately executed zoning transaction that has no legitimate land-use or other purpose, the courts of other states have held that land transactions that served no purpose other than to avoid zoning were invalid and must be disregarded. In *Sorenti v. Bd. Of Appeals*, 345 Mass. 348 (Mass. S. Jud. Ct. 1963), the zoning

ordinance was amended to require that a zoning lot have 40 feet of street frontage in order to be buildable. However, lots that had less frontage were grandfathered if on the effective date of the amendment they did not adjoin other lots owned by the same owner that together would provide the required 40 feet of frontage. Sorenti owned three adjacent lots, two of which had less than 40 feet of frontage. To avoid the amended zoning on these now noncomplying lots, Sorenti transferred the middle one to a straw owner on the day before the effective date of the amendment, and had it conveyed back to him the day after. The Supreme Judicial Court affirmed the trial court's holding that notwithstanding the transfer to a straw owner, the lots were in reality owned by the same owner on the effective date, and therefore were not grandfathered. *See also Hansbury v. Hughes*, 11 Mass. L. Rep. 329 (Mass. Super. Ct. 2000) (plaintiff's nonconforming lots were not grandfathered, because transfer of ownership of adjacent lot to straw owner was a sham transaction); *Campbell v. Kildew*, 141 Idaho 640 (Idaho S. Ct. 2005) (invalidating sham arbitration to subdivide property in circumvention of zoning law).

The creation of the micro-lot by Realty should be deemed a nullity, and Realty's building should be required to comply with the requirements attendant on its fronting on 88th Street.

For all of the above reasons, and in light of the relaxed standard that should apply in considering whether Petitioners are likely to succeed on the merits, Petitioners have met their burden of showing that they have "a reasonable probability of success" on the merits. *Barbes Restaurant. v. ASSR*, 140 A.D.3d at 431.

B. Petitioners Will Suffer Irreparable Harm If Construction Is Permitted to Continue

Courts routinely find injury to be irreparable unless the plaintiff's harm can be redressed through a legal damages remedy that is "as complete, practicable and efficient as the

equitable one." *Poling Transp. Corp. v. A & P Tanker Corp.*, 84 A.D.2d 796, 797 (2d Dept. 1981); *Lesron Junior*, 13 A.D.2d at 93 (injunctive relief should be available unless it appears "that the remedy at law is plain and adequate; in other words, that it is as practical and efficient to secure the ends of justice and its proper and prompt administration as is the remedy in equity").

An injunction is appropriate to prevent actions that would, for all practical purposes, be irreversible, rendering future relief moot and the final judgment ineffectual. *State v. City of New York*, 275 A.D.2d 740, 741 (2d Dept. 2000) (enjoining City from selling community gardens pending decision on the merits); *see also Citineighbors Coalition of Historic Carnegie Hill v. New York City Landmarks Preservation Comm'n*, 2 N.Y.3d 727, 728-29 (2004) ("'Typically, the doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy.'") (quoting *Matter of Dreikausen v Zoning Bd. of Appeals of the City of Long Beach*, 98 N.Y.2d 165, 172 (2002)). That is the case here: courts have frequently held that a case is moot or academic once the structure at issue is completed. *Dreikausen*, 98 N.Y.2d 165; *Weeks Woodlands Ass'n v. Dormitory Authority of the State of New York*, 95 A.D.3d 747 (1st Dept. 2012), *aff'd on op. below*, 20 N.Y.3d 919 (2012) (holding that even though respondents' construction violated the Zoning Resolution, the case was moot because construction was almost completed and petitioners had not, at all stages of the litigation, preserved their rights by seeking a preliminary injunction); *see also Angiolillo v. Town of Greenburgh*, 21 AD3d at 1104 (2d Dept 2005) (taking down completed structure is "drastic remedy"); *Sunrise Plaza Assoc., L.P. v Intl. Summit Equities Corp.*, 288 AD2d 300, 301 (2nd Dept 2001) ("[w]here the removal or destruction of a building is the object of an injunction, the courts will generally exercise caution in granting such relief").

In the absence of a preliminary injunction, Realty's building will likely be completed during the course of this litigation. For this reason, denial of a preliminary injunction here will render a final judgment in Petitioners' favor ineffectual, and result in a permanent, continuing, and irreparable zoning violation. *Gramercy Co. v. Benenson*, 223 A.D.2d at 498 (granting preliminary injunction to preserve the status quo and avoid irreparable harm).

C. The Balance of the Equities Lies in Favor of Preserving the Status Quo

In balancing the equities, the Court should analyze the parties' status and gauge the effect of an injunction on them. If the injury to the plaintiffs is irreparable, and therefore more harmful to them than the harm to defendants from an injunction that will preserve the status quo until the legal issues can be decided, the injunction should be granted. *Poling Transp. Corp. v. A & P Tanker Corp.*, 84 A.D.2d 796, 797 (2d Dept. 1981). That is the case here, where Realty could incur money damages from delay, but no irreparable harm, whereas the violations of the Zoning Resolution will become permanent if construction is allowed to proceed to completion.

The balance of the equities favors Petitioners because, in addition to the zoning violations alleged here, Realty has from the start proceeded with construction willy-nilly, at breakneck speed, under a constant shadow of illegality. The speed with which Realty has proceeded was enabled by its applications for, and DOB's consistent and routine granting of, After Hours Variances. DOB granted these variances over the objection of Petitioner Council Member Kallos, and even though there is no evidence that Realty met any of the legislated conditions that justify such Variances.

Realty's actions to circumvent the Zoning Resolution have been brazen and deliberate. At the very beginning, on February 25, 2014, Realty filed a Zoning Resolution Determination Form in which it specifically asked DOB a legal opinion regarding certain windows on its proposed building. At that time, it represented that its new zoning lot would be 30 feet deep,

and possibly be used for a community facility or a commercial building. The Proposed Plat Plan that Realty submitted to DOB showed a small but still buildable 30 by 22 foot lot. However, when Realty filed for its new building permit, the 30-foot lot had become an unbuildable 4-foot lot. In its permit application, Realty did not draw attention to the micro-lot, did not note that it was a new lot, and did not seek an opinion as to the applicability of the sliver or tower-on-a-base rules.

DOB's subsequent actions show that it would not have issued this permit had it been aware of the micro-lot. Certainly, Petitioners were not aware of it, and when CHN did become aware of it, the 45-day window for bringing a Zoning Challenge had passed. CHN brought the matter to the attention of Borough President Brewer and Council Member Kallos, who in turn wrote to DOB on May 16, 2016. Only nine days later, DOB issued a Notice of Objections and a stop-work order based on its ruling that "[z]oning lot was improperly formed in that the tract of land was not properly subdivided into two or more zoning lots. Zoning lot cannot be subdivided into a 4' lot for sole purpose of avoiding a zoning lot requirement." DOB also objected that the easement for an emergency exit from the proposed building through the micro-lot did not comply with DOB standards. (Pet. Exh. T).

In an unexplained reversal, on December 21, 2016, DOB lifted the stop-work order, even though Realty had done nothing to meet this objection. DOB's reversal violated a basic principle of administrative law that an agency's unexplained shift from its prior interpretation of a statute is arbitrary and capricious. *Richardson v. Comm'r*, 88 N.Y.2d at 40 ("when an agency determines to alter its prior stated course it must set forth its reasons for doing so"); *Lyublinskiy v. Srinivasan*, 65 A.D.3d 1237, 1239 (2d Dept. 2009) (reversing as arbitrary and capricious a BSA determination that "neither adheres to its own prior precedent nor indicates its reasons for reaching a different result on essentially the same facts").

Apparently in response to DOB's objections, Realty represented to DOB that it had enlarged the micro-lot from 4 feet to 10 feet,[34] and had its permit reinstated based on that misrepresentation. However, Realty did not in fact enlarge its lot. Yet it continued to build. CHN, in its December 8, 2016 Zoning Challenge, pointed out that the zoning lot description on ACRIS showed a 4 by 22 foot lot, whereas Realty's permit was based on 10 by 22 foot lot, and that "DOB cannot issue a building permit based upon a zoning lot that does not exist." (Pet. Exh. X). DOB agreed, and issued a Notice of Intent to Revoke Realty's permit. (Pet. Exh. Y). Yet Realty did not fix this illegality until May 26, 2017, and DOB did not lift its Notice of Intent to Revoke until June 15, 2017. During this entire time, Realty continued to build.

Realty's permit was in violation of DOB's conditions in another respect as well. Realty had represented that it had a legally protected means of egress from its building to 88th Street: "The 88th Street exist provides a continuous and unobstructed means of egress to a public way (88th Street) through an at grade easement over Tax Lot 138." (Pet. Exh. T). Realty did have an easement over the first four feet of lot 138, but Realty did not have, and to this day does not have, any recorded easement to protect the six additional feet that it was required to add to lot 138.

Only after Realty had cured the defects identified by DOB and DOB had lifted its Notice of Intent to Revoke was CHN permitted to file its Community Appeal. While Realty continued to build, DOB did not even inform CHN that its Community Appeal was allegedly premature. Thereafter, DOB required an additional three months, and prodding from the Mayor, to issue its denial of the Community Appeal. In total, DOB took over nine months to consider and decide CHN's challenges to the permit.

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[34] Realty did so in two Zoning Diagrams, one filed on October 27, 2016 and another filed on December 21, 2016 (the same day the stop-work order was lifted).

Petitioners have proceeded expeditiously since they learned of Realty's attempt to circumvent the Zoning Resolution. Petitioners are aware of case law holding that they do not have to exhaust their remedies before the BSA, but believed that they did have to exhaust their remedies at DOB, because unlike BSA, DOB has the ability to issue a Stop Work Order, and therefore can grant what amounts to injunctive relief.

It should also be considered that because this case involves only pure questions of law, it can be decided promptly. Indeed, it could be decided on this motion.

"Although [Petitioners] may not ultimately prevail on the merits, the equities lie in favor of preserving the status quo while the legal issues are determined in a deliberate and judicious manner." *State v. City of New York*, 275 A.D.2d at 741.

D. The Court Has Discretion to Require Only a Nominal Undertaking

CPLR § 6312(b) authorizes the Court to fix an amount for an undertaking "that the plaintiff, if it is finally determined that he or she was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction." This Court has wide discretion in determining the amount necessary for an undertaking in a motion for a preliminary injunction. *See Livas v. Mitzner*, 303 A.D.2d 381, 383 (2d Dept. 2003) ("fixing the amount of an undertaking is a matter within the sound discretion of the court"); *Clover Street Associates v. Nilsson*, 244 A.D.2d 312, 313 (2d Dept. 1997) (same); *Lelekakis v. Kamamis*, 303 A.D.2d 380 (2d Dept. 2003) (the amount of an undertaking is within the discretion of the court and "will not be disturbed absent an improvident exercise of discretion").

Among the factors in determining an appropriate undertaking are the financial ability of the moving party to post the undertaking, the public interest nature of the action; and the damages that the defendant might incur if it is later determined that the preliminary injunction was issued in error. In *Daytop Village, Inc. v. Consolidated Edison Co. of New York, Inc.*, 61 A.D.2d

933, 935 (1st Dept. 1978), for example, the court noted the "nature of the nonprofit institution's financing" in holding that it "could not reasonably be expected to make immediately a lump sum payment of a substantial amount," and as such, a large undertaking was "hard to justify". In *Raritan Baykeeper, Inc. v. City of New York*, 42 Misc. 3d 1208(A) (S. Ct. Kings Co. 2013), too, the court observed that "Plaintiffs are a not-for-profit organization and litigating this matter at their own cost," and set the bond at "the minimal amount of $1,000." Similarly, in *Broadway Triangle Comm'y Coalition v. Bloomberg*, 35 Misc. 3d 167, 178 (S. Ct. N.Y. Co. 2011), because the movants were nonprofits and community groups, the court enjoined a proposed housing development and set the undertaking at a nominal amount of $5,000.

A plaintiff entitled to a preliminary injunction should not be left without a remedy simply because he or she cannot afford to post an undertaking. In *Modugno v. Merritt-Chapman Scott Corp.*, 17 Misc. 2d 679, 680 (S. Ct. Queens Co. 1959), the court enjoined pile driving after 6 p.m. on a construction project. It rejected the respondent's request for an undertaking of "not less than $1,000,000" as "completely out of the question, since its imposition as a condition of a temporary injunction would result in a denial of relief to which Plaintiffs show themselves entitled," and set the undertaking at $5,000 instead. Courts have also viewed citizens bringing actions on behalf of the public interest as private attorneys general, and as such have exempted them from the undertaking requirement entirely. *See McDonald v. North Yacht Sales, Inc.*, 134 Misc.2d 910, 911 (S. Ct. Nassau Co. 1987) (consumers were not required to post an undertaking because they "stand in the shoes of the Attorney General who is not required to post bond," and requiring them to do so would render the statute a nullity); *see also Modugno*, 17 Misc. 2d at 680 (recognizing that plaintiffs' nuisance suit seeks to protect "human life and comfort").

When the purpose of a federal rule matches its New York counterpart, New York Courts may consider decisions of the federal courts as "persuasive authority." *All Seasons Resorts, Inc. v. Abrams*, 68 N.Y.2d 81, 87 (1986). Like CPLR § 6312(b), Federal Rule of Civil Procedure 65(c) also mandates an undertaking that will protect the party enjoined.[35] Yet the federal courts have exercised their discretion to waive the bond requirement in appropriate cases. "Although the [federal] rule speaks in mandatory terms, an exception to the bond requirement has been crafted for, *inter alia*, cases involving the enforcement of 'public interests'" *Pharmaceutical Soc. of New York v. New York Dept. of Social Services*, 50 F.3d 1168, 1174 (2d Cir. 1995) (citations omitted); *Sierra Club v. Norton*, 207 F. Supp.2s 1342 (S.D. Ala. 2002) ($1,000 bond sufficed where enforcement of federal environmental statute was "in the public interest," and "to post bond in an amount sufficient to cover the potential losses to [developers] would effectively bar Plaintiffs – two non-profit public interest organizations – from obtaining meaningful judicial review or appropriate relief"). Federal courts also tend to set nominal bonds or waive the requirement in cases such as this, where the law explicitly contemplates citizen involvement in enforcement. *Friends of the Earth, Inc. v. Brinegar*, 518 F.2d 322, 323 (9th Cir. 1975) (overturning district court's requirement of $4.5 million bond and setting bond at $1,000 where high bond requirement would prevent citizens from obtaining "effective and meaningful judicial review").

Petitioners here are nonprofit organizations seeking to enforce the Zoning Resolution on behalf not only of their members immediately affected, but on behalf of the community as a whole, in the public interest. "Discrimination in zoning is usually thought of in

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[35] "The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c).

terms of the injustice done to the landowner. In reality, it is also a wrong done to the community's land use control scheme." *Udell v. Haas*, 21 N.Y.2d 463, 476 (1968). Zoning is "'a vital tool for maintaining a civilized form of existence' for the benefit and welfare of an entire community." *Little Joseph Realty, Inc. v. Babylon*, 41 N.Y.2d 738, 745 (1977) (quoting *Udell*, 21 N.Y.2d at 523). Because Petitioners cannot afford a substantial undertaking, and because they are acting to protect the public interest, any undertaking herein should be set at a nominal amount.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court preliminarily enjoin any further construction of Realty's building at 180 East 88th Street pending a decision on the merits, and that the Court require Defendants to respond to the Petition herein expeditiously. Petitioners further request that any undertaking be set at a nominal amount.

Dated: Brooklyn, New York
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Respectfully submitted,

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