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

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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 NUMBER:
100125/2018

- against -

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

- - - - - X

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

BEFORE:
HONORABLE SHLOMO S. HAGLER, Justice.

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(Continued on next page.)

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APPEARANCES: (Continued)

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MARGARET BAUMANN
OFFICIAL COURT REPORTER

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

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

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

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

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

Deal with the cross-motions first.

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

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

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

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

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

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

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

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MR. MOSS: Fair enough, Your Honor.

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

MR. MOSS: I understand, Your Honor.

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

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

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

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

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

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

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

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Proceedings

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

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

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

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

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

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

Proceedings

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

7 MR. MOLLEN: Your Honor, on July 28, 2014, the
8 Developer filed the plans with the Department of Buildings,
9 and those plans contemplated a combination of Lots 37 and
10 32, and it contemplated the development of a 32 story
11 building.

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

14 MR. MOLLEN: The new lot is 138.

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

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

19 THE COURT: And 32?

20 MR. MOLLEN: And 32. The development rights.

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

23 MR. MOLLEN: Lot 138 was going to be approximately
24 4 feet in depth by 22 feet.

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

Proceedings

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2 March 13, 2015.

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

5 THE COURT: When was the --

6 MR. MOLLEN: On June 9th.

7 THE COURT: You said construction began or
8 construction complete?

9 MR. MOLLEN: The foundation was complete.

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

12 MR. MOLLEN: In April 2015.

13 THE COURT: I meant April of 2015.

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

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

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

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

23 THE COURT: Okay, fine.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. MOLLEN: December 21, 2016.

THE COURT: Thank you.

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

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

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

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

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

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

THE COURT: When did you first bring the action?

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

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

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correct?

MR. LOW-BEER: Yes.

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

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

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

THE COURT: December 8th, 2016.

MR. MOLLEN: Yes.

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

THE COURT: March 22nd, what year?

MR. MOLLEN: 2017.

THE COURT: A year later.

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

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

MR. MOLLEN: Construction was proceeding.

THE COURT: It did not affect construction.

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

THE COURT: So, let me understand carefully, to

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

7 MR. MOLLEN: The direct answer to your question is,
8 yes, that's correct, and that's why the building today is up
9 to the 16th floor. The concrete has been poured up to the
10 16th floor. It has been continuous since December 20, 2016.

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

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

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

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

Proceedings

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

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

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

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

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

Proceedings

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

4 THE COURT: I saw the box.

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

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

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

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

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

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

Proceedings

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

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

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

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

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

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2 pursued the appeal and prosecuted the appeal.

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

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

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

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

15 "Unfortunately, administratively it takes time."

16 And, you went onto say:

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

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

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

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

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relief."

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

THE COURT: I remember.

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

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

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

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

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

And you cited sound accepted principles of administrative law.

Those were the words of the Court.

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

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

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

Proceedings

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

4 THE COURT: That's even older.

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

6 THE COURT: I remember that one too.

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

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

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

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

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

7 That is cited at their brief at 12.

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

10 MR. MOLLEN: Yes.

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

15 THE COURT: Allegations of what?

16 MR. MOLLEN: Intent.

17 THE COURT: Intent.

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

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

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

Proceedings

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

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

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

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

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

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

Proceedings

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

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

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

11 We were before Justice Friedman on a Friday.

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

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

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

Proceedings

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

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

12 We have contracts out with subcontractors.

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

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

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

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

Proceedings

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

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

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

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

17 Stairs have been poured through the fourteenth
18 floor.

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

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

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

Proceedings

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2 through the seventh floor.

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

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

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

10 The interior framing is in progress through the
11 seventh floor.

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

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

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

19 The total amount of awarded scope packages is about
20 94 percent.

21 Now, in addition to having approximately 115
22 workers on the site now and having so many subcontracts out,
23 the costs now are approximately \$1.1 million per month, per
24 month, and that includes construction loan costs on a
25 \$153 million construction loan, includes storage rental
26 cost, the site team, safety costs, insurance.

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

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

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

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

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

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

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

Proceedings

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

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

10 This is a site that was generating about \$128,000
11 in tax revenue. It is going to go to approximately
12 \$2,045,000 annually. The mortgage recording revenue alone
13 is \$4 million, and projected residential closing tax revenue
14 is \$8.694 million. Approximately \$14 million of benefits to
15 the City.

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

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

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

Proceedings

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

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

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

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

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

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

Proceedings

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

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

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

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

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

Proceedings

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2 get appropriate legal advice.

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

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

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

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

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

Proceedings

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

3 He said (reading:)

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

7 He went onto say (reading:)

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

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

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

20 And he goes on.

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

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

Proceedings

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

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

7 MR. MOLLEN: I appreciate it, Your Honor.

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

10 Thank you.

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

12 THE COURT: Where do we start?

13 MR. LOW-BEER: Where do we start?

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

16 THE COURT: You have the floor.

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

20 THE COURT: It is in their brief.

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

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just and proper.

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

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

THE COURT: And it was opposed by you.

MR. LOW-BEER: I'm sorry?

THE COURT: And it was opposed.

MR. LOW-BEER: Oh, yes.

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

MR. LOW-BEER: No, no.

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

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

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

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

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

Proceedings

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

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

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

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

15 Now, they say, well, actually you could build a
16 shed there. But, the fact is this is the main entrance to
17 the residential portion of their building. It is 180 East
18 88th Street. That is the address of it. That is where the
19 lobby is. So, there are emergency exits onto Third Avenue,
20 but the main entrance to the residential portion of the
21 building is not on Third Avenue. It is on 88th Street, and
22 that means that this micro-lot can never be built on, will
23 never be built on as a practical matter, even though the
24 Building Code might conceivably allow -- I don't know how it
25 could allow for it if that is the entrance for their
26 building.

Proceedings

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

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

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

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

16 MR. LOW-BEER: No.

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

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

24 So I would submit that this express provision in
25 the Zoning Resolution overrides it to the extent that that
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THE COURT: What express provision? I don't understand what you just said.

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

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

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

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

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

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

THE COURT: Let's go to that.

MR. LOW-BEER: Okay.

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

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

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

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

4 MR. LOW-BEER: No.

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

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

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

11 THE COURT: Tower-On-A-Base.

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

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

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

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

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

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

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

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

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

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

MR. LOW-BEER: They said (reading:)
Zoning Lot cannot be subdivided for the sole purpose of avoiding a zoning lot requirement, in this case a street law requirement.

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

MR. LOW-BEER: No.

THE COURT: No.

MR. LOW-BEER: No?

Proceedings

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

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

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

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

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

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

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

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

Proceedings

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2 required means of egress.

3 THE COURT: That is a good point.

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

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

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

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

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

26 THE COURT: So you believe they should have gone up

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to the sidewalk.

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

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

What was the second thing.

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

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

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

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

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

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

THE COURT: It is too late, no?

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

THE COURT: The building foundation is up.

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

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

MR. LOW-BEER: Yes.

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

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

THE COURT: At the very beginning?

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

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

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

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2 preliminary injunction and you get that relief.

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

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

11 MR. LOW-BEER: Right.

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

14 MR. LOW-BEER: I'm sorry.

15 THE COURT: Let me rephrase.

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

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

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

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

26 Cite me one case where the courts have given you

Proceedings

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

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

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

8 THE COURT: An Appellate Court?

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

11 THE COURT: After it was already complete?

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

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

15 MR. LOW-BEER: Were they on notice?

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

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

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

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2 100 feet pursuant to the Zoning Resolution? That's my
3 question.

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

7 THE COURT: Okay.

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

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

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

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

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

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

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

THE COURT: Let me let you finish.

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

THE COURT: You are correct.

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

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

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

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

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

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

11 THE COURT: I understand that.

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

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

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

22 THE COURT: It is more than a hundred feet.

23 MR. LOW-BEER: Sorry?

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

26 According to your analysis, since the Developer for

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

9 MR. LOW-BEER: No.

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

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

15 THE COURT: You want them to add more out?

16 MR. LOW-BEER: Yes, your Honor.

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

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

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

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

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

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

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

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

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2 It is one neighborhood with an unlimited --

3 MR. MOLLEN: Height.

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

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

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

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

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

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

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

25 MR. LOW-BEER: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 MR. LOW-BEER: Hold on one second.

11 (Pause.)

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

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

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

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

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Thank you. Thanks for your time.

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

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

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

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

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

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

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

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

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

13 In 2017, there was an appeal to the BSA.

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

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

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

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

4 The Petition -- strike that.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 Off the record.

11 (A discussion was then held off the record.)

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

13 Now let's address the cross-motion.

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

22 (Pause.)

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

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

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2 That it is a novel issue.

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

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

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

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

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

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

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

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

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

Thank you.

Order the record.

(Proceedings recessed.)

CERTIFIED TO BE A TRUE
AND CORRECT TRANSCRIPT

MARGARET BAUMANN
OFFICIAL COURT REPORTER

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