

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

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Queens Neighborhoods United (aka "QNU"), Desis Rising Up and Moving (aka "DRUM"), New York State Senator Jessica Ramos, Redd Sevilla, Silvia Juliana Mantilla Ortiz, Alexandra Owens, Karina Hurtado, Ro Garrido, Tania Mattos Jose, Jorge Cabanillas, Diego Palaguachi, Leticia Ochoa, Shrima Pandey, and Bani Amor Campozano,

Index No. 101700/2018

VERIFIED PETITION

Petitioners,

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

-against-

New York City Department of Buildings, AA 304 GC TIC LLC, 82 BAXTER TIC LLC, ZM 304 GC INVESTOR TIC LLC, 304 GC TIC LLC, Sun Equity Partners, Heskell Group, and Target Corporation,

Respondents.

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Petitioners, by their attorneys PAULA Z. SEGAL and JOHN R. LOW-BEER of the Community Development Project of the Urban Justice Center, for their Verified Petition pursuant to CPLR Art. 78 and CPLR § 3001, allege as follows:

1. This Petition seeks annulment of the building permit for construction at 40-31 82nd Street (aka 40-19 82nd Street; Queens Block: 1493 Lot: 15) in Elmhurst, Queens (herein the "Property") and a declaration that the use of the Property for a Target store of 23,580 square feet is in violation of Zoning Resolution §§ 31-00, 31-11 and 32-15.

Parties

2. Petitioner Queens Neighborhoods United is an unincorporated association of residents and business owners in Corona, Elmhurst, and Jackson Heights areas of Queens fighting displacement and criminalization. *See* Affidavits of Patricia Chou, Exhibit BB; Josselyn Attahulpa, Exhibit CC, and Carina Kaufman-Gutierrez, Exhibit QQ. QNU's members are already being displaced by rent increased that landlords explain by explaining that Target's arrival will transform the area into a luxury one. QNU members' businesses are closing. *See* Affidavit of Jay Koo, Exhibit SS (quoting a property owner on 82nd Street: "because Target is coming this is now a luxury block and there will be rent increases everywhere").

3. Petitioner Desis Rising Up and Moving (DRUM) is a New York State Not for Profit organization founded in 2000 to build the power of South Asian low wage immigrant workers, youth, and families in New York City to win economic and educational justice, and civil and immigrant rights. *See* Affidavit of Fahd Ahmed, Exhibit EE.

4. Petitioner Jessica Ramos is a New York State Senator representing Elmhurst and Jackson Heights. The Property is in her district. She and her constituents will be negatively impacted by the congestion Target will bring and its adverse impacts on local small businesses. *See* Affidavit of Jessica Ramos, Exhibit DD.

5. Petitioner Bani Amor Campozano, a resident of Jackson Heights, Queens, would be negatively impacted by the increased foot traffic brought on by the Target, because she is physically disabled, and her sister is developmentally disabled, and they would be unable to utilize 82nd Street and Baxter like they normally do, with so many people shopping at Target. *See* Affidavit of Bani Amor Campozano, Exhibit PP.

6. Petitioner Redd Sevilla is a resident of Elmhurst, Queens, a board member of Community Board 4 Queens, and the Executive Director of New Life CDC, an Elmhurst based non-profit that has provided the Elmhurst community with health services, educational programming and anti-poverty initiatives for the past 25 years. New Life CDC's members' potential for economic mobility would be undermined by the development, as it would prohibit growth of small businesses in the neighborhood. *See* Affidavit of Redd Sevilla, Exhibit FF.

7. Petitioner Silvia Juliana Mantilla Ortiz, a resident of Elmhurst, Queens, and volunteer leader at Immigrant Movement International would be affected by the development due to escalating rents for local organizations that threaten community networks of support. *See* Affidavit of Silvia Juliana Mantilla Ortiz, Exhibit GG.

8. Petitioner Alexandra Owens, a resident of Jackson Heights, Queens, lives across the street from the development, and would be impacted by the increased pedestrian traffic due to the development which would overwhelm the sidewalks in front of her apartment, and by the increased usage of the 82nd Street 7 train subway stop, which would make it difficult for her students to arrive to class on time. *See* Affidavit of Alexandra Owens, Exhibit HH.

9. Petitioners Karina Hurtado, a life-long resident of Jackson Heights, Queens, and Ro Garrido, a resident of Elmhurst, Queens, will be personally impacted by the associated increased rents, the displacement of existing small businesses that serve immigrant residents with limited English language proficiency, and the increased difficulty for small businesses, run by low-income immigrant communities in Jackson Heights, to open. *See* Affidavits of Karina Hurtado, Exhibit II, and Ro Garrido, Exhibit JJ.

10. Petitioners Tania Mattos Jose, Jorge Cabanillas, Ro Garrido, Diego Palaguachi, Leticia Ochoa and Shrima Pandey are all residents of the surrounding neighborhood that concerned that the increased automobile and pedestrian traffic due to the project will increase their commuting times, lead to an increase in accidents, and delay access to Elmhurst Hospital, located just one block away. *See See* Affidavits of Tania Mattos Jose, Exhibit KK, Jorge Cabanillas, Exhibit LL, Diego Palaguachi, Exhibit MM, Leticia Ochoa, Exhibit NN, and Shrima Pandey Exhibit OO.

11. Respondent New York City Department of Buildings is an agency of the City of New York. The New York City Charter articulates the Functions of the Department of Buildings as follows: “The department shall enforce, with respect to buildings and structures, such provisions of the [...] zoning resolution [...] as may govern the [...] use [...] of buildings or structures in the city.” N.Y.C. Charter § 643.

12. Respondent Sun Equity Partners, a Delaware limited liability company, is part of the Property development team. Avy Azeroual, Mendel Tress and Zev Schick are its founders and managing partners. Its address is 31 West 34th Street, Suite 1012, New York, NY 11101.

13. Four Respondent entities managed by Sun Equities co-own the Property: AA 304 GC TIC LLC, a Delaware limited liability company, % Sun Equity Partners, 31 West 34th Street, Suite 1012, New York, NY 11101 Avy Azeroual, Manager; 82 Baxter TIC LLC, a Delaware limited liability company, % Sun Equity Partners, 31 West 34th Street, Suite 1012, New York, NY 11101; Avy Azeroual, Manager; ZM 304 GC Investor TIC LLC, a Delaware limited liability company, % Sun Equity Partners, 31 West 34th Street, Suite 1012, New York,

New York 11101, Zev Schick, Manager; 304 GC TIC LLC, a Delaware limited liability company, % Sun Equity Partners, 31 West 34th Street, Suite 1012, New York, New York 11101, Zev Schick, Manager.

14. Respondent Heskell Group is a Delaware corporation, is part of the development team. Its address is 545 Fifth Avenue, Suite 822, New York, New York 10017. Yeheskell Elias is its Chief Executive Officer and Founder.

15. Collectively, the above six Respondents are referred to here as the “Developers.”

16. Respondent Target Corporation is a Minnesota corporation that has entered into a Memorandum of Lease to rent space for a store on the Property. Its address is Target Properties, 1000 Nicollet Mall, TPN 12H, Minneapolis, Minnesota 55403.

The Property and Its Proposed Development

17. The Property is zoned R6 with a C1-3 overlay. This designation was assigned at the time of the 1961 Zoning Resolution and has not been changed, despite efforts to do so that failed to be approved by the New York City Council, as required by the City’s Uniform Land Use Review Procedure (ULURP).

18. Commercial uses on such properties are restricted to those in Use Group 6.

19. Use Group 6 is reserved for stores that serve “local consumer needs” and have a “small service area” (ZR 32-15); it allows variety stores, but limits the size of such stores to 10,000 square feet per establishment.

20. Target stores are large department stores that sell a dizzying variety of consumer goods. They are typically large stores - 135,000 square feet of retail space - found in

suburban areas and in malls. In 2016, Target launched a new national strategy to open urban locations with smaller retail floors and smaller selection: the Express stores, each about 22,500 square feet.

21. The Target Express location in Forest Hills at 69-40 Austin Street, Queens (Block 3234 Lot 150, BIN 4077469), which opened in July 2016, is one such properly located Target store. 69-40 Austin Street is within the Forest Hills Special District, which allows for “large retail establishments (such as department stores) that serve a wide area, ranging from a community to the whole metropolitan area, and are, therefore, appropriate in secondary, major or central shopping areas; and are not appropriate in local shopping or local service areas because of the generation of considerable pedestrian, automobile or truck traffic,” ZR § 32-19 (Use Group 10), on lots fronting Austin Street, ZR § 86-12.

22. The underlying commercial designation of that Austin Street property is C2, which limits commercial uses to Local Service Districts. Local Service Districts are preserved for a “wide range of essential local services not involving regular local shopping [which are]... are less frequently visited by customers... permitted services create relatively few objectionable influences for nearby residential areas.” Without the Forest Hills Special District designation, no store like Target would be allowed there.

23. The Temporary Certificate of Occupancy, attached as Exhibit A, for 7000 Austin Street correctly states that the Target VARIETY STORE is in Use Group 10A.

24. The Property that is the subject of this Verified Petition is located in a thriving residential area with many shops and street vendors operated by residents to serve

neighborhood needs. See Affidavits of Carina Kaufman, Exhibit QQ, and Lucy Block Exhibit RR,

25. Sun Equity Partners and Heskell Group (herein “Developers”) purchased the Property, a former movie theater, in September 2016. with the intention of “transforming the area to bring in more well-known tenants.” *Sun Equity, Heskell Group pay \$27M for Jackson Heights site; Buyers plan 160K sf commercial building in place of ex-cinema*, M. Hall, *The Real Deal*, Sept. 21, 2016, Exhibit B; Deed, Sept. 29, 2016, Exhibit C.

26. The Developers’ website proclaims that it is committed to an investment strategy that pinpoints underperforming assets,” and projects that, “attract leaseholders, yield high returns, and increase property value.”¹

27. Plans initially reported by the press, on the Developers’ own website² and the rendering in Exhibit B, were for a ten-story residential building with commercial space on the ground floor and community facility on the second floor. Those 2016 announcements did not include any mention of “affordable” income- or rent-restricted units.

28. The Developers acknowledged that as of right they could only build commercial space for “local retail.” See *40-31 82nd Street Rezoning, Environmental Assessment Statement, CEQR No. 18DCP045Q* (Jan. 25, 2018) at 10, Exhibit G.

29. On March 31, 2017, international chain Target recorded a 15-year Memorandum of Lease with the Developers in the New York City Automated City Register Information System. Exhibit D.

¹ See <http://www.suneqp.com/sun-equity-partners-about>.

² Removed since.

30. The Memorandum states that Target's lease for the 82nd Street Property prohibits the Developers from renting to other tenants who intend to use retail establishments to be constructed on the ground floor for many of the uses that are permitted in Use Group 6. Laundry services, smaller clothing retail, drug stores, variety stores and grocery stores would be prohibited from renting retail space within 40-31 82nd Street as long as Target is renting there.

31. The Developers initiated an application to build a new two-story commercial building at the Property on May 24, 2017. See Exhibit E. These applications included no reference at all to the ten-story residential building that the Developers had publicized that they planned to build when they acquired the Property in 2016. The building for which Developers now sought permits would be two stories tall. Cellar, first and second floors would be used only for retail. Renderings were released to the press showing this building. See e.g., *Target to Open at Former Jackson Heights Cinema Site*, DNAInfo, Katie Honan (May 1, 2017), Exhibit F.

32. The Developers submitted additional documents to the DOB in pursuit of the new building permit for a two-story commercial complex in January 2018.

33. At the same time, in or about January 2018, Developers initiated a process to try to change the zoning of the Property from R6/C1-3 to C4-5x, a commercial designation that would allow the Property to be developed as a regional destination for shoppers from outside the neighborhood.

34. Zoning designations for properties in New York City can be changed via the Uniform Land Use Review Procedure (ULURP) only.

35. ULURP requires a series of pre-application meetings with the Department of City Planning (“DCP”), which are followed by an Environmental Assessment (“EAS”), before the proposal is certified for public review. *See* 62 RCNY § 10-01 et seq. The Developers’ EAS was finalized on January 25, 2018, Exhibit G.

36. The EAS shows that the Developers’ proposed zoning change would have allowed a slightly taller residential tower than is permitted under the current zoning, and would have brought the proposed building within the Mandatory Inclusionary Housing (MIH) Program, a program that is central to Mayor Bill de Blasio’s housing plans. Inclusion in the MIH Program would not have netted the Developers much, if any, additional profit, but was a successful strategy to get the Mayor to champion the rezoning that would have allowed larger retail stores such as Target on the Property.

37. DCP’s evaluation of the EAS resulted in a negative declaration on January 29, 2018 (*Negative Declaration*, Exhibit H), and the two zoning changes were certified by the City Planning Commission (“CPC”) as complete to enter ULURP as Nos. 1 80098ZMQ (the map amendment to change R6/C1-3 to C4-5X) and N 180099ZRQ (the MIH text amendment) on the very same day.

38. The proposed rezoning would have allowed the Developers to build about 43 more apartments than without the rezoning, but 36 of them would be income- and rent-restricted under the program; the MIH program is designed so that Developers neither make or lose money on those restricted units.

39. The commercial component of the project would increase space on the floors of the building above the cellar permitted to be used for retail by 24,500 gross square feet

to 76,375 gross square feet. Id. at 16. Critically, commercial space in any new building on the Property would no longer be restricted to “local retail” as it is under the current zoning.

40. This package of zoning changes was designed to facilitate the change in commercial use restrictions that the Developers needed in order to be able to lease any part of a new building at this location to Target. The Developers had promised Target a 23,000 square foot establishment for use as a Department or Variety Store. This use was prohibited without a change in zoning.

41. ULURP requires presentations to the local community board and the borough president, who can provide advice to the CPC and Council Member about whether or not to approve a particular zoning change. The CPC and the City Council must then each vote to approve before the change becomes law. The Mayor has the opportunity to veto a change after the CPC and Council approve. If s/he does not, the change becomes a binding part of the City Zoning Resolution and controls all future development at the Property.

42. ULURP requires an applicant, such as the Developer, to show what project the proposed rezoning is meant to facilitate, but it does not bind the applicants to actually constructing that project. Once the zoning of a property is changed, its owner can build anything on it that conforms to the new zoning. There is no need for the built project to reflect the project that was presented as part of ULURP.

43. While preparing ULURP presentations that showed a possible residential building at the Property, the Developers submitted additional documents to the DOB in pursuit of the new building permit for the two-story commercial complex in February 2018. Materials

were produced at expense to the Developers and showed a commitment to building a two-story commercial center, not a residential building.

44. Developers presented the plan for a residential building with commercial uses on the lower floors to a public meeting of Queens Community Board 4 on March 13, 2018. At that public hearing, more than 100 local residents offered testimony against the proposed rezoning, which would have allowed the Property to be used for a regional shopping area with big box stores and national chains. Residents and business-owners objected, particularly, to Target's lease.

45. Presenting the project that could be built as result of the requested zoning change as primarily residential and proposing to include it in the MIH program was a successful strategy by the Developers to get the Mayor de Blasio to champion the change. At a Queens Town Hall held on March 30, 2018, in response to a question about the proposed rezoning, the Mayor said,

If you've got a site where there's no affordable housing, that's as I understand it the current rule would be that there would be no affordability whatsoever, our plan allows for affordability on the site. We are interested in creating affordable housing anywhere we can get it so that one's still being talked through, but I have to be very clear, when we have a chance to build affordable housing - which means that community members will be there longterm, that's very very important, as opposed to a place, again, talk to the 20 families who will have those units and that means they will have affordable housing for a decade, which is a very very big deal for them - and I think it's going to be more than 20, but that's something that still going through a community process.

*Video of Queens Town Hall (March 30, 2018).*³

³ https://www.youtube.com/watch?time_continue=7036&v=6IL2jYZi_n0, at 1:56:55 *et seq.*

46. At the May 23, 2018, CPC hearing on the proposed zoning changes, representatives of the developer explained that they intended to create a commercial “destination” that attracts shoppers from the “region” and outside the immediate neighborhood. *CPC Meeting Video* (May 23, 2018).⁴ Specifically, Nora Martins of Akerman LLP, representing AA 304 GC TIC LLC, acknowledged that the change her clients sought would be to a “regional commercial center designation.” She explained that in her opinion this new designation would be appropriate because at present the neighborhood “is not *just* a local shopping area serving local retail needs, *though it is very much that*; it also draws customers from a larger area.”

47. Ms. Martins cited the mission of the local business improvement district of marketing the area as a “destination” as a further justification. *CPC Hearing Video* (May 23, 2018).⁵ Ms. Martins confirmed the intended “regional retail” draw of the commercial use that would be allowed if the application was approved in the context of describing the added need for parking. *Id.* at 1:03.

48. The Developers’ website similarly describes this development, a.k.a “The Shoppes,” as “[a] rare outdoor mall experience in the outer boroughs.” Exhibit Z.

49. At the May 23 CPC hearing, residents and business owners particularly objected to the Target lease. *See CPC Report July 9, 2018 / Cal. No. 1 C 180098 ZMQ (C4-5X)*, Exhibit I. Opposition expressed at the hearing is described in the July 9, CPC Report as follows:

Representatives from Queens Neighborhoods United (QNU), a community organizing group, testified in opposition. Several speakers stated that the proposed development is in contrast with the existing character of the neighborhood. Representatives from QNU also stated that the proposed development would exacerbate the area’s already strained infrastructure and services, including

⁴ See <https://youtu.be/bi1papxTU2s>.

⁵ See <https://www.youtube.com/watch?v=bi1papxTU2s> at 54:00 et seq.

subways, schools, and roads. Several speakers stated that the 128 proposed parking spaces are excessive compared to what would be required under the proposed zoning, and contradict the proposal's description of this development as transit-oriented. Some speakers stated that parking and commercial delivery activities at the proposed curb cut on Baxter Avenue could conflict with existing activities on Baxter Avenue, including emergency vehicles traveling to and from Elmhurst Hospital, commercial deliveries from surrounding retail establishments, and the Q29 bus route.

Representatives from QNU also expressed concerns that Target, the retail tenant confirmed to occupy approximately 23,000 square feet within the proposed development, could threaten the livelihood of surrounding small businesses by selling products at lower prices that directly compete with neighborhood businesses. Speakers also expressed concerns about the lease that Target has established with the applicant, which includes clauses prohibiting certain businesses from occupying the same building.

Representatives of QNU and other local residents expressed concerns about residential displacement as a result of the proposed development, stating that the number of permanently affordable units proposed pursuant to the Deep Affordability Option would not adequately address affordability issues for neighborhood residents, and that market-rate units would further increase upward pressure on residential rents in the surrounding area, potentially displacing some of the area's low-and-moderate income residents. Several speakers stated that the applicant should consult the community to envision a development that provides more public benefit, such as increased community facility space. *Id.*, at 10-11.

50. At the subsequent Review session held by the CPC on June 11, 2018, Commissioner Anna Levin characterized the proposed rezoning as a “doubling of the commercial density.” *See CPC Review Session Video* (June 11, 2018).⁶ She followed by saying, “This seems a steep price to pay for 24 affordable units.” *Id.*

⁶ *See* <https://www.youtube.com/watch?v=84f-TDJ-bd0> at 3:03

51. On July 9, 2018, the CPC voted to approve the zoning changes. *See* CPC Report, Cal. No. 1, C 180098 ZMQ (July 9, 2018) (Pet. Exh. J); CPC Report, Cal. No. 2, C 180099 ZRQ (July 9, 2018) (Pet. Exh. K).

52. Six weeks earlier, the Developers submitted additional documents to the DOB in pursuit of the new building permit for a two-story commercial complex – not the mixed-use building presented at public hearings on the rezoning – on May 24, 2018.

53. A building permit for a new commercial only building was approved by the DOB on June 15, 2018. *See Exhibit K*. At that time, the rezoning application had not yet been before the City Council. Although no changes had been made to the original zoning of the site to allow retail uses beyond “local serving retail” with a “small service area,” the Developers, their representatives, and the press all continued to present the proposed use of the site as a residential tower with some “affordable” units, drawing attention away from the commercial retail component.

54. Subsequent to the CPC hearing and the building permit approval by DOB, the local Council Member indicated that he planned to vote against the proposal.

55. Developers submitted additional documents to the DOB in pursuit of the new building permit for a two story commercial complex on June 28, 2018, including a Zoning Diagram.

56. The Developers withdrew the ULURP application in July 2018, before it reached the City Council. *See Controversial 82nd Street rezoning halted after local lawmakers voice opposition to Developers*, QNS, Jenna Bagcal (July 16, 2018), Exhibit L. QNS reported:

After conversations with Council member Moya and Assembly member Espinal, and taking the borough president’s recommendations into consideration, we have decided to no longer

pursue this rezoning application. We are continuing with construction as permitted under the current zoning,” said Hank Sheinkopf, a spokesman for the developers of the project, known as the Shoppes at 82nd Street.

Id. The Developers then announced that they would move forward with a two-story commercial building. Renderings shared with the press illustrated the building that the Developers had already applied to build a year prior, despite a public misinformation campaign that focused on the size of a residential development.

57. DOB approved the June 28 Zoning Diagram on or about July 15, 2018.

58. Petitioners were alerted to the approval because work began at the Property just after Developers withdrew their rezoning application, on or about the first week in August. Via present counsel and individually, Petitioners filed zoning challenges to the June 28 Zoning Diagram. These challenges were timely submitted before August 12, 2018. The basis of the challenges was that the proposed use of the new building that DOB had approved is not allowed in the zoning district due to size of the retail establishments. Exhibit M.

59. On August 29, the DOB accepted these zoning challenges and issued a Stop Work Order (SWO). Exhibits M, N.

60. A Notice of Objections, dated August 29, 2018 but not posted to the DOB’s website until October 24, explained the violation as being that “first floor commercial retail calculated without counting cellar commercial retail... is already up to 18,706 sf. which is way over the maximum permitted in the C1-3 District of allowed 10,000 sf, and by which of such first floor commercial retail under use group 6 is contrary to Section 32-15 ZR.” Exhibit O.

61. On September 5, 2018, the DOB issued a Notice of Violation related to work ongoing at the Property despite the SWO. Exhibit P.

62. On September 10, 2018, Developers filed new plans for the Property that are substantially the same as the initial plans and do not cure the central defect: the planned use of the building under construction violates the underlying zoning by including a variety store establishment that is larger than 10,000 square feet. Exhibit Q. Although the plans re-affirmed that each of the retail establishments on the first floor will not take up more than 10,000 square feet of the first floor, they did not resolve the issue raised in the August 29, 2018, objection: the overall square footage of commercial retail under Use Group 6 planned to be located in the Property continues to include establishments that are each far over 10,000 square feet in size. These plans did not include a new Zoning Diagram.

63. On September 13, 2018, the DOB announced its Intent To Revoke Approval And Permit via its online Building Information System, Exhibit S, and issued a second Notice of Violation related to work at the Property going on despite the SWO, Exhibit R.

64. Confusingly, also on September 13, the DOB wrote a letter to the Developers stating that their “response sufficiently demonstrates that the approval and permit should not be revoked.” Exhibit T. The letter did not clarify what response it refers to.

65. On September 17, 2018, the DOB issued a Stop Work Rescind Order. Exhibit U.

66. On September 20, 2018, the DOB issued a new permit for construction of the new building. Exhibit V. Presumably this permit was issued on the basis of the September 10th submissions, which did not include a new Zoning Diagram and therefore did not trigger a new Zoning Challenge period.

67. On or about September 20, 2018, the Developers' real estate agent published an updated brochure for the Property. Exhibit W.

68. Treating the rescinding letter dated September 17, 2018 as a denial of their August Challenges, on October 2, 2018, Petitioners filed a timely Community Appeal within 15 days of the letter. Exhibit X. DOB has not yet responded to this appeal.

69. On October 18, 2018, Petitioners filed a timely appeal of the September 20 permit to the NYC Board of Standards and Appeals ("BSA"). Exhibit Y. The BSA has not yet responded to this appeal and no hearing has been scheduled. The BSA Project Manager assigned to the case told Petitioner's counsel that a hearing is not likely to be scheduled until Summer 2019 at the earliest and that this delay was typical.

70. Sun Equity's website⁷ currently describes the project as follows:

The Shoppes on 82nd Street is located on 82nd Street, just south of Roosevelt Avenue, at the border of Jackson Heights & Elmhurst, Queens. Jackson Heights & Elmhurst are the two most densely populated neighborhoods in Queens, with 22,000 residents within a quarter of a mile and over 83,000 within a half mile radius.

Served by 5 subway lines, 4 major bus routes and easily accessible by car via the Grand Central Parkway, Brooklyn Queens Expressway and the Long Island Expressway. The 7 train subway line has 5.2 million riders annually at the 82nd Street station. Sixteen million riders pass through the 74th Street & Broadway station for the E, F, M and R trains. 4.4 million riders annually at the Elmhurst Avenue station for the M & R trains.

A rare outdoor mall experience in the outer boroughs. Primary shopping district in Jackson Heights and Elmhurst. More than 20 national and regional chain stores. Traveled by thousands of pedestrians daily. Dense foot traffic seven days a week. Active and dedicated Business Improvement District – the 82nd Street Partnership.

⁷ Available at <http://www.suneqp.com/the-shoppes-at-82nd-street>.

Local attractions include Citifield – home of the New York Mets with over 2.15 M visitors annually. USTA Billie Jean King National Tennis Center – home of the US Open and over 700,000 in attendance. Elmhurst Hospital Center affiliated with Mount Sinai Hospital serves 1 million residents in Queens. Exhibit Z.

71. Construction at the Property continues in earnest and appears to have gained speed since Petitioners filed the appeal to the BSA. A deep hole has been dug, presumably to accommodate the oversized cellar and sub-cellar levels where the Developers intend to hide uses that do not conform to the Property's zoning. *See* Atahualpa Aff. (photos taken Nov. 6); Chu Aff. (photos taken Nov. 16).

CAUSE OF ACTION

DOB'S GRANTING OF BUILDING PERMITS FOR THE PROPERTY VIOLATES ZR §§ 31-00, 31-11 AND 32-15

72. The Property at issue is located in a C1 district. C1 is titled "Local Retail Districts." ZR § 32-11. Such districts are located "in convenient locations near all residential areas," and "are designed to provide for local shopping and include a wide range of retail stores and personal service establishments which cater to frequently recurring needs." *Id.* Retail establishments in C1 districts are limited to those that serve "local consumer needs" and have a "small service area." ZR § 32-15.

73. The permitted establishments are enumerated in ZR § 32-15, titled "Use Group 6." They are comprised of typical neighborhood shops that are usually quite small, such as bakeries, beauty parlors, and drug stores. As to these, the Zoning Resolution does not specify their size. In addition, Use Group 6 includes a few uses that can be developed at various scales, but with respect to those, it specifies that they must be below 10,000 square feet per

establishment. “Variety stores, limited to 10,000 square feet of #floor area# per establishment” are among these. ZR § 32-15.

74. The small size limits of the local retail stores allowed in C1 districts and listed in Use Group 6 contrast with the large-scale stores allowed in C4, “General Commercial Districts,” and C5, “Restricted Commercial Districts,” which are listed in Use Group 10. C4 districts “comprise the City's major and secondary shopping centers, which provide for occasional family shopping needs and for essential services to business establishments over a wide area, and which have a substantial number of large stores generating considerable traffic.” ZR § 31-14. C5 districts contain “the great variety of large retail stores and related activities which occupy the prime retail frontage in the central business district, and which serve the entire metropolitan region.” ZR § 31-15.

75. The Zoning Resolution describes these larger stores as follows:

Use Group 10 consists primarily of large retail establishments (such as department stores) that:

- (1) serve a wide area, ranging from a community to the whole metropolitan area, and are, therefore, appropriate in secondary, major or central shopping areas; and
- (2) are not appropriate in local shopping or local service areas because of the generation of considerable pedestrian, automobile or truck traffic.

ZR § 32-19.

76. Several types of establishments that are size limited in Use Group 6 are also found in Use Group 10 with no size restriction, including Department Stores and Variety Stores. The smaller versions of these stores serve the purposes of C1 districts, whereas the larger versions serve the purposes of C4 and C5 districts.

77. The legislative history further illuminates how the Zoning Resolution carefully guards the difference between districts zoned for large retail establishments and those restricted to only smaller stores. Prior to the 1961 adoption of the present Zoning Resolution, the City commissioned two studies, each of which included proposed zoning resolutions: *The Plan for Rezoning the City of New York* by Harrison Ballard & Allen (1950) (“the 1950 Proposal”), and *Zoning New York City*, by Voorhees Walker Smith & Smith (1958) (“the 1958 Proposal”). Both of these foundations of the current Zoning Resolution highlight the distinction between the kinds of districts where “destination retail” is permitted and those where only small-scale local retail is permitted.

78. The 1950 Proposal highlighted the pioneering of “chain store enterprises” and the trend toward the concentration of retail. 1950 Proposal at 31. Its proposed zoning resolution drew a sharp distinction between “RESIDENCE RETAIL DISTRICTS,” described as part of its “Article 2: Residence and Associated Districts,” and “COMMERCIAL DISTRICTS,” which are described in their own distinct Article 3. Residence Retail Districts were proposed to be mapped

to protect residences, so far as possible in areas where the established pattern is predominately residential, but includes retail development on the ground floor, ...to protect both residential and retail development against congestion... by regulating the intensity of retail development... [and] to provide sufficient space, in appropriate locations in close proximity to residences, for retail development catering to most of the regular shopping needs of the occupants of such residences.

Id. at 146 (emphasis in original). In contrast, Commercial Districts were proposed to “provide sufficient space in appropriate locations for transaction of all types of commercial and miscellaneous service activities in beneficial relation to one another, and thus strengthen the

economic base of the community and to protect public convenience, prosperity and welfare.” *Id.* at 161.

79. The 1950 Proposal classifies Variety Stores as part of Use Group 6, at 243, which “consists primarily of those uses which are needed for more or less daily shopping by persons residing nearby, and therefore serve an area with a smaller population than [other retail and commercial use groups.” *Id.* at 174. Use Group 6 was proposed to be allowed in “Residence Retail Districts” and all “Commercial Districts.” By contrast, department stores were part of Use Group 9, which “consists primarily of those retail uses which... are used for occasional shopping by persons residing at a considerable distance, and therefore serve an area ranging from several square miles to the whole metropolitan area.” 1950 Proposal at 175 (describing Use Group 9), 242 (assigning Variety Stores to Use Group 9). Use Group 9 was proposed to be prohibited in all Residence Retail Districts but permitted in all Commercial Districts.

80. The 1958 Proposal also includes detailed discussion of the development of the shopping mall and the “integrated shopping center,” at 10-11, and distinguishes between districts “designed to serve local area needs - C1 and C2” and districts either “designed for the primary and secondary outlying shopping centers serving extensive service areas - C4” or “catering to the retail and commercial needs of the entire City and metropolitan region - C5 and C6.” 1958 Proposal at 108. The 1958 Proposal clearly spells out why the limits on the size of establishments in C1 areas are there:

Because [C1] districts are closely related to the residential areas they serve, particularly in medium- and high-density areas, it is important to limit the intensity of commercial development to levels which are consistent with the adjoining residential areas. Department stores and other large establishments are

therefore not permitted, because they generate excessive pedestrian and vehicular traffic originating outside the immediate residential neighborhood.

1958 Proposal at 108-9 (emphasis added). This clearly articulated rationale demonstrates that the Zoning Resolution intended to prohibit large establishments, regardless of whether they are above or below ground. This inference is particularly compelling because the 1958 Proposal already distinguished clearly between Variety Stores at differing scales in precisely the same way as 1961 Zoning Resolution, still in effect today. That Proposal, like the current Zoning Resolution, placed Variety Stores “limited as to floor area” in Use Group 6 and allowing them in C1 and other districts while placing “unlimited” size Variety Stores in Use Group 10, and prohibiting them in C1 districts. 1958 Proposal at 368.

81. As explained in the accompanying Memorandum of Law, the statutory text clearly requires that the calculation of “square feet per establishment” mandated ZR § 32-15 include all space in the establishment, including cellar space.

82. That cellar retail space is included in calculating the square footage per establishment is further demonstrated by two Special Permit applications for premises at 462 Broadway in SoHo, one to allow retail in a district where ground-floor retail is not permitted and a second accompanying application to allow retail in excess of 10,000 square feet per establishment. The large retail store would have included 16,567 square feet of cellar space. Exhibit AA, Recommendation of the Manhattan Borough President, *CPC Reports C170192 and C170193 ZSM* (July 12, 2017) at 2. The 34 Community Board members voting on this application unanimously “recommend[ed] denial unless the total area for any single retail store, including cellar space, does not exceed 10,000 square feet.” *Id.*, Resolution of CB2, at 5. Borough President Gale Brewer also recommended denial of the applications. Following

approval of both applications by the CPC, only the one to allow retail was approved by the City Council. *NYC City Council Res. 1646-2017* (approved Sept. 7, 2017). As happened in the present case, the accompanying application to allow a retail store in excess of 10,000 square feet was withdrawn by its applicant before it could be voted on by the City Council.⁸

83. The store Target plans to open at the Property is over 22,000 square feet, far above the explicit “10,000 square foot per establishment” limit for Variety Stores in C1 districts contained in ZR 32-15.

WHEREFORE, Petitioners respectfully request that this Court enter an order and judgment pursuant to CPLR 3001 and/or CPLR Art. 78:

- (1) declaring that DOB’s issuance of a building permit or permits to the Developer and constructive denial of Petitioner QNU’s Community Appeal was in violation of ZR §§ 31-00 (General Purposes of Commercial Districts), 31-11 (Purposes of Specific Commercial Districts, C1 Local Retail Districts), and 32-15 (Use Group 6), and that such permit or permits are null and void;
- (2) annulling all permits for construction of a building to be used for retail stores larger than 10,000 square feet per establishment,, including cellar space;
- (3) enjoining any further steps by any of the Respondents towards the construction of 40-31 82nd Street (aka 40-19 82nd Street; Queens Block: 1493 Lot: 15, Queens, New York) pursuant to the DOB-approved plans; and
- (4) granting such other and further relief as this Court may deem necessary.

⁸ See <https://zap.planning.nyc.gov/projects/P2015M0195> (NYC Dept. of City Planning ZAP Search, 462 Broadway).

Dated: New York, New York
November 21, 2018

Respectfully submitted,

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 Urban Justice Center
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Attorneys for Petitioners

Attorney's Verification

State of New York)
) SS:
 County of New York)

PAULA Z. SEGAL, being duly sworn, states that she is an attorney duly admitted to practice in the State of New York and an employee of the Urban Justice Center, attorneys for plaintiff in the within action; that the foregoing Verified Complaint is true to her own knowledge, except as to those matters herein stated to be alleged upon information and belief, and as to those matters she believes them to be true; that the grounds of his belief as to all matters not stated upon his knowledge are from conversations with plaintiff and/or documents furnished to him by plaintiff.

The undersigned further states that this verification is made by the undersigned and not by plaintiff because plaintiff is not in the county where affirmant has his office.

Sworn to me this day:

Notary Public

Paula Z. Segal, Esq.