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

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, the Heskel Group and Target Corporation,

Respondents.

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

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Preliminary Statement

This case is brought by residents, elected representatives and organizations working together (collectively "Petitioners") to protect their closely knit Jackson Heights/Elmhurst community from being disrupted by the introduction of a large retail establishment in violation of zoning. The property is in a residential district which allows only small-scale retail stores that provide for the needs of local consumers. The Developer Respondents purchased the property and subsequently attempted to change the zoning so that more intensive retail could be located in a new building they planned to build. Their attempt to make this change via the legislative process failed. Simultaneous with that effort, Respondents initiated an application for a building to house a "commercial destination" - a mall anchored by a large 23,580 square foot Target department store. The proposed store is more than twice the size conceivably allowable under the applicable C1 zoning.

Such destination retail would have been permitted if the attempted rezoning had been approved. Yet even though it was not, the New York City Department of Buildings ("DOB") granted the Developers' a permit to build for a non-conforming use. DOB did so based on the Developers' argument that cellar space was not to be counted toward the limit of 10,000 square feet per establishment applicable to Variety Stores in this location -- an argument based on zoning text dealing with density, bulk and parking requirements, not with uses and the allowable size of individual "establishments." The Developers' interpretation of the zoning text would provide a loophole through which the store would fit, leading to an absurd result that contradicts both the language and the intent of the statute.

This Court should grant a TRO and a preliminary injunction because Petitioners are not only likely to succeed on the merits, but also will suffer irreparable harm if construction is allowed to proceed. The times involved in obtaining rulings from the Board of Standards and Appeals ("BSA") are measured in months, even years, not in days. Meanwhile, the Developers are engaged in a "race to completion." *Dreikausen v. Zoning Bd. of Appeals of the City of Long Beach*, 98 N.Y.2d 165, 172 (2002). Case law cited below demonstrates that Petitioners' case is very likely to be held moot, and Petitioners to be deprived of a remedy, if construction continues unabated. Moreover, the Developers are proceeding in full knowledge that their building violates the Zoning Resolution. The balance of the equities lies in favor of preserving the status quo.

This court has the power to rule on this matter without waiting for the BSA to make a decision. The central question - whether DOB erroneously granted a building permit for this specific and known use - is a question of law that can be decided by this Court without deferring to the BSA. Nor is it appropriate or necessary for this Court to defer where the administrative agency cannot grant the immediate relief that Petitioners are seeking, and where deferring would, as noted above, deprive them of a remedy.

Petitioners now request that the court enjoin all construction activity at the Property and annul the permit that was granted in error.

FACTS

The Parties

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. 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. Remaining Petitioners are individuals who live, work and/or have businesses near the proposed development. All actively and successfully protested the Respondent's application to change the zoning of the Property because they anticipate that the change in permitted uses of buildings in the area will lead to rents going up for small businesses that serve the community now. All will be harmed by such a change because they will lose access to jobs, healthy food, community cohesion and affordable life staples.

Respondent DOB is an agency of the City of New York charged with enforcing "such provisions of the ... zoning resolution ... as may govern the ... use ... of buildings or structures in the city." N.Y.C. Charter § 643.

Respondents Sun Equity Partners, AA 304 GC TIC LLC, 82 Baxter TIC LLC, ZM 304 GC Investor TIC LLC, and 304 GC TIC LLC, are Delaware limited liability companies that share the same office address, have overlapping officers and members, and all have ownership interests in the Property. Respondent Heskel Group is a Delaware corporation that also has an

ownership interest in the Property. These respondents are referred to collectively hereinafter as the "Developers."

The Developers' website proclaims that they are "committed to an investment strategy that pinpoints underperforming assets," and projects that "attract leaseholders, yield high returns, and increase property value."[1]

Respondent Target Corporation is a Minnesota corporation that operates retail department stores nationwide. Target Corporation signed a 15-year lease to operate a Target "Express" store at 40-31 82nd Street Queens Block: 1493 Lot: 15, in 2017.

Development History

Petitioners challenge DOB's unlawful issuance of a permit for the development of a large-scale destination retail mall at 40-31 82nd Street (aka 40-19 82nd Street; Queens Block: 1493 Lot: 15) in Elmhurst, Queens (the "Property"). The Property is located in a thriving residential area with many small shops that are run by residents and serve neighborhood needs. Since the enactment of the 1961 Zoning Resolution, the Property has been zoned R6 with a C1-3 overlay. Retail uses on such properties are restricted to those in Use Group 6, which only allows stores that serve "local consumer needs" and have a "small service area." ZR § 32-15.

The 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, Heskel 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) (Pet. Exh. B); Deed, Sept. 29, 2016

[1] *See* http://www.suneqp.com/sun-equity-partners-about.

(Pet. Exh. C). As reported by *The Real Deal* and in the Developers' website,[2] the plans were for a 10-story building with commercial space on the ground floor, a community facility on the second floor, and residential space above.

On March 31, 2017, Target recorded a Memorandum of Lease in the New York City Automated City Register Information System (Pet. Exh. D). The Memorandum of Lease provided for a 15-year lease of "approximately 23,580 square feet of space" in the Property. It prohibited many of the normal neighborhood uses, such as laundry services, smaller clothing retail, drug stores, variety stores and grocery stores, all of which are permitted in Use Group 6, from sharing space in the Property.

Eight months after announcing their plan to build a 10-story residential building building with commercial and community space on the lower floors, and two months after signing the lease with Target, on May 24, 2017, the Developers abandoned the residential tower portion of the project and applied for a permit to build a 2-story commercial building. *See Job Overview* (Pet. Exh. E). New renderings were released to the press showing this building. *See Target to Open at Former Jackson Heights Cinema Site*, K. Honan, DNAInfo (May 1, 2017) (Pet. Exh. F). The entire building was proposed to be dedicated to retail. There was no mention of the 10-story, mostly residential, building that the Developers had publicized the previous September.

Some time before January 25, 2018, the Developers initiated a Uniform Land Use Review Procedure ("ULURP") to change the zoning of the Property from R6/C1-3, **a residential designation with an overlay for local commercial uses,** to C4-5X, a commercial designation that

[2] This proposal was subsequently removed from the Developers' website.

would have allowed the Property to be developed as a regional destination for shoppers from outside the neighborhood.[3]

The City Planning Commission Report on the rezoning characterized the existing zoning as follows: "The C1-3 commercial overlay district is mapped in conjunction with residential zones along neighborhood shopping streets to support local retail and service needs." *Calendar No. 1,* (Pet. Exh. I at 4). Yet the documents the Developers submitted in support of their ULURP application admitted that the current zoning only allows "local retail," and would not allow the Target store for which they had signed a Memorandum of Lease. *See, e.g., 82nd Street Rezoning, Environmental Assessment Statement* (Jan. 25, 2018) (Pet. Exh. G at 10).

Nora Martins of Akerman LLP, representing the Developers at the CPC hearing, stated publicly that the Developers intended to create a commercial "destination" that attracts shoppers from the "region" and outside the immediate neighborhood. *See* City Planning Commission Hearing Video (May 23, 2018).[4]

Petitioners have been opposing the Developers' plan from the outset. The Developers presented their rezoning plan 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 change in the commercial designation that would allow the property to be used for a regional shopping area with big box stores and national chains. (*See* Chu Aff.) At that hearing,

[3] ULURP requires presentations to the local community board and the borough president, who can provide advice to to the City Planning Commission (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 he does not, the change becomes a binding part of the Zoning Resolution. The process requires a series of pre-application meetings with the Department of City Planning, which are followed by an environmental review pursuant to CEQR.

[4] *Available at* https://youtu.be/bi1papxTU2s.

twenty-four members of Community Board 4 voted to oppose the application; none voted to support; four abstained. On May 9, 2018, Borough President Melinda Katz recommended that the project be approved, with conditions meant to mitigate the impact of the large commercial development on the neighborhood.

Thereafter, the CPC held a hearing about the project on May 23, 2018. Developers' counsel acknowledged during the presentation that the change her clients sought would be to a "regional commercial center designation," but sought to justify the appropriateness of changing the zoning designation by arguing that "this 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." 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] Describing the need for additional parking, Ms. Martins confirmed that the new building, with its commercial uses including a Target "Express" location, was intended to be a "regional retail" draw. *Id.* at 1:03. The Developers' website similarly describes this development, a.k.a. "The Shoppes," as "A rare outdoor mall experience in the outer boroughs," (Pet. Exh. Z).

At the CPC hearing, residents and business owners particularly objected to the Target lease. *See* CPC Report, Cal. No. 1 C 180098 ZMQ, July 9, 2018, at 10-11 (Pet. Exh. I). At the Review session held by the CPC on June 11, 2018, Commissioner Anna Levin characterized the proposal 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.*

[5] *See* https://www.youtube.com/watch?v=bi1papxTU2s, at 54:00 et seq.
[6] *See* https://www.youtube.com/watch?v=84f-TDJ-bd0 at 3:03.

Subsequently, on July 9, 2018, the CPC voted to approve the rezoning. *See* CPC Report, Cal. No. 1, C 180098 ZMQ (July 9, 2018) (Pet. Exh. I); CPC Report, Cal. No. 2, C 180099 ZRQ (July 9, 2018) (Pet. Exh. J).

Meanwhile, on June 15, 2018, DOB approved the application filed a year earlier by the Developers for a permit to build a 2-story retail-only building under the current zoning (Pet. Exh. K).

Thereafter, in or about July 2018, Council Member Francisco Moya, who represents this area, indicated that he planned to vote against the rezoning proposal in the City Council. A local blog called 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." *Controversial 82nd Street rezoning halted after local lawmakers voice opposition to developers,* J. Bagcal, QNS (July 16, 2018) (Pet. Exh. L). Renderings shared with the press showed that the Developers would go forward with the two-story commercial building that they had applied to build a year earlier, and that they did not intend to build even the smaller residential tower that would have included market rate housing. *Id.*

In addition to the commercial upzoning, the Developers' application would also have permitted a larger residential tower than the one proposed after they first purchased the Property in September 2016. However, the history of this project suggests that the commercial rezoning was the primary, and perhaps the only, reason for this ULURP application, and that the proposals for a residential tower were window dressing from the start. After initially proposing a residential tower

in September 2016, in May 2017 the Developers submitted an application for a commercial building without the residential tower. Then, in January 2018, they commenced the ULURP proceeding for a proposal that included a larger version of the residential tower. After withdrawing their rezoning application, the Developers returned to the two-story building design that is now under construction.

That larger tower was to be developed under Mayor de Blasio's Mandatory Inclusionary Housing ("MIH") Program. Although the rezoning would have allowed a slightly taller residential tower than the one proposed in September 2016, that taller tower would have netted the Developers little additional profit, because under the MIH program 36 of the 43 additional apartments would have been income- and rent-restricted. *See generally 40-31 82nd Street Rezoning, Environmental Assessment Statement* (Pet. Exh. G); CPC Report, Cal. No. 1, C 180098 ZMQ (July 9, 2018) (Pet. Exh. I); CPC Report, Cal. No. 2, C 180099 ZRQ (July 9, 2018) (Pet. Exh. J). The MIH program is designed so that developers neither make or lose money on those restricted units. The application was a successful strategy to get the Mayor to champion the rezoning, which he did at the Queens Town Hall. *See Video of Queens Town Hall* (March 30, 2018).[7]

[7] *See* https://www.youtube.com/watch?time_continue=7036&v=6IL2jYZi_n0, at 1:56:55. In response to a question about the proposed rezoning of the Property at the Town Hall, Mayor Bill de Blasio 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."

Petitioners have opposed the proposed Target store vigorously from the outset. While the ULURP process unfolded, Developers continued to work with DOB on the applications they filed in May 2017 for a 2-story commercial building. On June 28, 2018, DOB approved their Zoning Diagram, triggering the start of the 30-day Public Challenge Period. *See* 1 RCNY § 101-15. On or about August 11, 2018, some of the present Petitioners timely filed zoning challenges arguing that the proposed use of the building for a large store such as Target was not allowed in the zoning district. ZRD Zoning Challenge with response (submitted in relevant part as Pet. Exh. M). On August 29, DOB accepted our Zoning Challenges, stating "Zoning Challenge regarding Use Group 6 Accepted." *Id.* Initial Challenge review by DOB resulted in a Stop Work Order ("SWO") (Pet. Exh. N). A Notice of Objections, dated August 29, 2018 explained that the violation was 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," (Pet. Exh. O). On September 5, DOB issued a Notice of Violation for work ongoing at the Property despite the SWO (Pet. Exh. P).

On September 10, 2018, developers filed new plans for the Property that were substantially the same as the initial May 2017 plans and did not cure the central defect: the planned use of the building violates the underlying zoning by including a 23,580 square-foot destination store (Pet. Exh. Q).

On September 13, DOB updated its Building Information system to indicate say,

> BORO COMMISSIONER HAS ISSUED SWO FOR ALL WORK UNDER # 421485805 DUE TO INTENT TO REVOKE APPROVAL AND PERMIT. (Pet. Exh. S)

It also mailed another Notice of Violation to the Developers (Pet. Exh. R). Confusingly also on September 13th, DOB wrote a letter to the Developers stating that their "response sufficiently demonstrates that the approval and permit should not be revoked," (Pet. Exh. T). On September 17, 2018, DOB rescinded the SWO (Pet. Exh. U). On September 20, 2018, the DOB issued a new permit for construction that is the subject of this Article 78 petition (Pet. Exh.V).

Interpreting the rescinding of the SWO as denial of their zoning challenges, Petitioners submitted an Appeal of Challenge Denial on October 2, within 15 calendar days of the denial as required by City Rules (Pet. Exh. X). The DOB has not yet responded to this Appeal.

To protect their rights, on October 18, 2018, Petitioners timely appealed to the BSA from the September 20, 2018, permit for construction of the new building by the DOB (*BSA 2018-166A*, Pet. Exh. Y). The BSA has not yet responded to our appeal and no hearing has been scheduled. This same permit is the subject of the present action.

Construction restarted at the Property on or about September 21, 2018, and continues apace. 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.

RELEVANT ZONING PROVISIONS

(Emphases added)

Article I -- General Provisions
Chapter 1 -- Title, Establishment of Controls and Interpretation of Regulations

11-22 Application of Overlapping Regulations

Whenever any provision of this Resolution and any other provisions of law, whether set forth in this Resolution or in any other law, ordinance or resolution of any kind, [...] contain any restrictions covering any of the same subject matter, that provision which is more restrictive or imposes higher standards or requirements shall govern.

* * * *

Chapter 2 -- Construction of Language and Definitions

12-10
DEFINITIONS

"Floor area" is the sum of the gross areas of the several floors of a #building# or #buildings#, measured from the exterior faces of exterior walls or from the center lines of walls separating two #buildings#. In particular, #floor area# includes:

* * * *

(o) any other floor space not specifically excluded.

However, the #floor area# of a #building# shall not include:

(1) #cellar# space, except where such space is used for dwelling purposes. #Cellar# space used for retailing shall be included for the purpose of calculating requirements for #accessory# off-street parking spaces, #accessory# bicycle parking spaces and #accessory# off-street loading berths; ...

* * * *

Article III -- Commercial District Regulations
Chapter 1 -- Statement of Legislative Intent
31-00 -- GENERAL PURPOSES OF COMMERCIAL DISTRICTS

The Commercial Districts established in this Resolution are designed to promote and protect public health, safety and general welfare. These general goals include, among others, the following specific purposes:

(a) to provide sufficient space, in appropriate locations in proximity to residential areas, for **local retail** development **catering to the regular shopping needs of the occupants of nearby residences**, with due allowance for the need for a choice of sites;

* * * *

(d) to protect both local retail development and nearby residences against congestion, **particularly in areas where the established pattern is predominantly residential but includes local retail uses on the lower floors, by regulating the intensity of local retail development, by restricting those types of establishments which generate heavy traffic**, and by providing for off-street parking and loading facilities;

* * * *

31-10 -- PURPOSES OF SPECIFIC COMMERCIAL DISTRICTS

31-11 – C1 Local Retail Districts

These districts 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. Since these establishments are required in convenient locations near all residential areas, and since they are relatively unobjectionable to nearby residences, these districts are widely mapped. The district regulations are designed to promote convenient shopping and the stability of retail development by encouraging continuous retail frontage and by prohibiting local service and manufacturing establishments which tend to break such continuity.

31-12 – C2 Local Service Districts

These districts are designed to provide for a wide range of essential local services not involving regular local shopping. Since these establishments are less frequently visited by customers, they tend to break the continuity of prime retail frontage and, therefore, hamper the development of convenient shopping. The permitted services create relatively few objectionable influences for nearby residential areas.

* * * *

31-14 – C4 General Commercial Districts

These 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. The district regulations are designed to promote convenient shopping and the stability of retail development by encouraging continuous retail frontage and by prohibiting service and manufacturing establishments which tend to break up such continuity.

31-15 – C5 Restricted Central Commercial Districts

These districts are designed to provide for office buildings and 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. The district regulations also permit a few high-value custom manufacturing establishments which are generally associated with the predominant retail activities, and which depend on personal contacts with persons living all over the region. The district regulations are also designed to provide for continuous retail frontage.

* * * *

Chapter 2 -- Use Regulations

32-00 – GENERAL PROVISIONS

In order to carry out the purposes and provisions of this Resolution, the #uses# of #buildings or other structures# and the open #uses# of #zoning lots#, or portions thereof, have been classified and combined into Use Groups. A brief statement is inserted at the start of each Use Group to describe and clarify the basic characteristics of that Use Group.

* * * *

32-10 – USES PERMITTED AS-OF-RIGHT

* * * *

32-15 – Use Group 6

C1 C2 C4 C5 C6 C8

Use Group 6 consists primarily of retail stores and personal service establishments which:

(1) provide for a wide variety of local consumer needs; and

(2) have a small service area and are, therefore, distributed widely throughout the City.

Public service establishments serving small areas are also included. Retail and service establishments are listed in two subgroups, both of which are permitted in all C1 Districts.

The #uses# listed in subgroup A are also permitted within a #large-scale residential development# to provide daily convenience shopping for its residents.

A. Convenience Retail or Service Establishments

Bakeries, provided that **#floor area# used for production shall be limited to 750 square feet per establishment**
Barber shops
Beauty parlors
Drug stores
Dry cleaning or clothes pressing establishments or receiving stations dealing directly with ultimate consumers, **limited to 2,000 square feet of #floor area# per establishment,** ...
Eating or drinking establishments
Food stores, including supermarkets, grocery stores, meat markets, or delicatessen stores
Hardware stores
Laundry establishments, hand or automatic self-service
Liquor stores, package
Post offices
Shoe or hat repair shops
Stationery stores
Tailor or dressmaking shops, custom
Variety stores, **limited to 10,000 square feet of #floor area# per establishment**

B. Offices

Offices, business, professional including ambulatory diagnostic or treatment health care, or governmental
Veterinary medicine for small animals

C. Retail or Service Establishments

Antique stores

Art galleries, commercial
Artists' supply stores
Automobile supply stores, with no installation or repair services
Banks, including drive-in banks
Bicycle sales
Book stores
Candy or ice cream stores
Carpet, rug, linoleum or other floor covering stores, **limited to 10,000 square feet of #floor area# per establishment**
Cigar or tobacco stores
Clothing or clothing accessory stores, **limited to 10,000 square feet of #floor area# per establishment**
Clothing rental establishments, **limited to 10,000 square feet of #floor area# per establishment**
Docks for ferries ...
Docks for water taxis ...
Docks or mooring facilities for non-commercial pleasure boats
Dry goods or fabrics stores, **limited to 10,000 square feet of #floor area# per establishment**
Eating or drinking establishments with entertainment, but not dancing, with a capacity of 200 persons or fewer
Eating or drinking establishments with musical entertainment but not dancing, with a capacity of 200 persons or fewer
Electrolysis studios
Fishing tackle or equipment, rental or sales
Florist shops
Frozen food lockers
Furniture stores, **limited to 10,000 square feet of #floor area# per establishment**
Furrier shops, custom
Gift shops
Interior decorating establishments, provided that #floor area# used for processing, servicing or repairs shall be limited to **750 square feet per establishment**
Jewelry or art metal craft shops
Leather goods or luggage stores
Loan offices
Locksmith shops
Medical or orthopedic appliance stores
Meeting halls
Millinery shops
Music stores
Newsstands, open or enclosed
Optician or optometrist establishments
Paint stores
Pet shops
Photographic equipment or supply stores

Photographic studios
Picture framing shops
Record stores
Seed or garden supply stores
Sewing machine stores, selling household machines only
Shoe stores
Sporting or athletic stores
Stamp or coin stores
Telegraph offices
Television, radio, phonograph or household appliance stores, **limited to 10,000 square feet of #floor area# per establishment**
Toy stores
Travel bureaus
Typewriter stores
Wallpaper stores
Watch or clock stores or repair shops

* * * *

32-19 – Use Group 10

C4 C5 C6 C8

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.

A. Retail or Service Establishments

Carpet, rug, linoleum or other floor covering stores, with **no limitation on #floor area# per establishment**
Clothing or clothing accessory stores, **with no limitation on #floor area# per establishment**
Department stores
Depositories for storage of office records, microfilm or computer tapes, or for data processing
Docks for ferries . . .
Dry goods or fabric stores, with no limitation on #floor area# per establishment
Eating or drinking places, without restrictions on entertainment or dancing, but limited to location in hotels
Furniture stores, with no limitation on #floor area# per establishment
Office or business machine stores, sales or rental
Photographic or motion picture production studios

Radio or television studios
Television, radio, phonograph or household appliance stores, **with no limitation on #floor area# per establishment**
Variety stores, **with no limitation on #floor area# per establishment**

B. Wholesale Establishments

Wholesale offices or showrooms, with storage restricted to samples

ARGUMENT

I. THIS COURT SHOULD ENJOIN THE DEVELOPERS' PROJECT BECAUSE IT VIOLATES ZONING

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

A preliminary injunction must be granted when three elements are met:

(A) a likelihood of success on the merits;

(B) irreparable injury to the movant unless the provisional relief is granted;[8] and

(C) a balance of the equities in the movant's favor.

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

See, .e.g., Doe v. Axelrod, 73 N.Y.2d 748 (1988); *Capruso v. Village of Kings Point*, 34 Misc. 3d 1240(A) (S. Ct. Nassau Co. 2009), *aff'd* 78 A.D.3d 877 (2d Dept. 2010) (granting preliminary injunction halting construction on parkland).

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

A. Petitioners Will Succeed On The Merits

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

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

degree of proof with respect to this issue, since the denial of a preliminary injunction in this case would disturb the status quo and likely render the final judgment ineffectual").

These cases are fully applicable here. If the Developer is allowed to complete the building, Petitioners will face a very high hurdle to effectual relief. This is because, "as a general rule, a mandatory injunction to remove or destroy a building is a drastic remedy which will only be granted if the benefit to the movant if the injunction were granted and the irreparable harm to the movant if the injunction were not granted substantially outweighs the injury to the party against whom the injunction is sought." *Angiolillo v. Town of Greenburgh*, 21 AD3d 1101, 1104 (2d Dept 2005), *quoted in Diamond v. Nestor*, 29 Misc. 3d 1214(A) (S. Ct. N.Y. Co. 2010) (declining to order demolition of rooftop structure where, despite conceded zoning violation, plaintiff had not demonstrated "the type or the extent of the harm allegedly resulting from the claimed zoning violation").

But whether the standard is relaxed or not, Petitioners have a likelihood of success on the merits because allowing a building to contain a large retail store in a C1 Zoning District is a facial violation of the Zoning Resolution. Respondents cannot avoid controlling law by hiding the non-conforming use in the cellar.

1. DOB's Issuance of a Permit for a Building To Contain a Large Retail Store in a C1 Zoning District Violates ZR §§ 31-00, 31-11 and 32-15

"When interpreting a statute, 'our primary consideration is to discern and give effect to the Legislature's intention.' . . . The text of a statute is the 'clearest indicator' of such legislative intent and 'courts should construe unambiguous language to give effect to its plain meaning.' . . . We have also previously instructed that '[i]t is an accepted rule that all parts of a statute are intended to be given effect and that a statutory construction which renders one part meaningless

should be avoided.'. . . Furthermore, 'a statute . . . must be construed as a whole and . . . its various sections must be considered together and with reference to each other.'" *Avella v. City of New York*, 29 N.Y.3d 425, 434 (2017) (citations omitted). It should be noted, too, that even unambiguous statutory language "will not be read literally where such a reading would lead to "an absurd result that would frustrate the statutory purpose." *Long v. Adirondack Park Agency*, 76 N.Y.2d 416, 420-422 (1990); *see also Matter of Jamie J.*, 30 N.Y.3d 275, 283-84 (2017) (citations omitted) (rejecting a "hyperliteral reading of [the statute], divorced from all context," and stating that "courts should not adopt 'vacuum-like' readings of statutes in 'isolation with absolute literalness' if such interpretation is 'contrary to the purpose and intent of the underlying statutory scheme and would conflict with other operative features of the statute's core overview procedures'").

As the First Department wrote in *City v. Stringfellow's of New York*, 253 A.D.2d 110, 115-116 (1999), *aff'd,* 96 N.Y.2d 51 (2001), "While zoning ordinances must be narrowly interpreted and ambiguities are to be construed against the zoning authority, . . . the fundamental rule in construing any statute, or in this case an amendment to the City's Zoning Resolution, is to ascertain and give effect to the intention of the legislative body, here the New York City Council." The standard for interpreting the zoning resolution was recently reaffirmed by the First Department Appellate Division in *Matter of Peyton v. New York City Bd. of Stds. & Appeals*, 2018 NY Slip Op 06870 (1st Dept. Oct. 16, 2018). The court there relied on the "clear and unambiguous language" of the Resolution, as opposed to how the language of the Zoning Resolution "could be read,'' *id.* at 5-6, to overturn a decision of the BSA that misinterpreted the Resolution's definition of "open space" in permitting construction of a building despite a lack of required open space.

The Zoning Resolution itself provides further guidance about how it is to be read where we find multiple "restrictions covering any of the same subject matter[:]" "the provision which is more restrictive or imposes higher standards or requirements shall govern." ZR § 11-22.

It is the responsibility of the Department to evaluate not only the design of a proposed building, but also its use. *9th & 10th Street L.L.C. v. Board of Standards and Appeals of City of New York*, 10 N.Y. 3d 264 (2008). 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.

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 those. ZR § 32-15.

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.

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.

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.

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.

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.

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 that [other retail and commercial use groups," 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, 242. Use Group 9 was proposed to be prohibited in all Residence Retail Districts but permitted in all Commercial Districts.

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.

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. To add insult to injury, Target's lease rider for the Property prohibits many of the uses that are permitted in Use Group 6 from sharing space in the development as proposed, explicitly not permitting laundry services, smaller clothing retail, drug stores, variety stores and grocery stores from opening within the "destination it plans to build at 40-19 82nd Street.

2. Respondents Cannot Avoid Controlling Law by Hiding Their Nonconforming Use in a Cellar

Even though the proposed store will have 23,580 square feet, the Developers and Target argue that it does not violate zoning because it is a Variety Store with under 10,000 square feet, and therefore falls within Use Group 6. This sleight of hand relies on an erroneous interpretation of the definition of "Floor Area." That definition states:

> [T]the #floor area# of a #building# shall not include: (1) #cellar# space, except where such space is used for dwelling purposes.

ZR § 12-10.

The Developers and Target would read this definition as providing that their store can exceed Use Group 6's limit of 10,000 square feet per establishment, because, according to them, the retail square footage in the cellar does not count as "floor area." This is a misreading that disregards the plain language of the statute.

The primary function of the concept of "floor area" in the Zoning Resolution is in the calculation of the allowable bulk and density in the various districts. Consistent with this function, the ZR § 12-10 definition states that cellar space other than habitable cellar space does not count towards "the floor area of a building," *i.e.*, that it does not count towards the total square footage available for development within the FAR limit of the district.

However, in the context of use restrictions, the relevant concept is not bulk, but size, measured in terms of the floor area of an establishment. Consistent with this different context and different function, the size limit in Use Group 6 is phrased in terms of "square feet of floor area per establishment," without reference to its location in the building. ZR § 32-15. This difference in language between the two provisions is not accidental, and must be given meaning. *Avella v. City*, 29 N.Y.3d at 434 (citations omitted) ("'[I]t is an accepted rule that all parts of a statute are intended to be given effect and that a statutory construction which renders one part meaningless should be avoided.'").

Bulk regulations and use regulations for Commercial Districts are even controlled by different chapters of the Zoning Resolution. Bulk is addressed in chapters 3 through 5 of the Commercial District Regulations (Article III), whereas use is addressed in chapter 2. "'[A] statute . . . must be construed as a whole and . . . its various sections must be considered together and with reference to each other.'" *Id.* When this is done, it is plain that "floor area per establishment" as used in chapter 2 is calculated differently from "floor area of a building," as used in chapters 3 through 5 and in the many other places in the Zoning Resolution that deal with bulk.[9]

[9] A separate chapter of the Commercial District Regulations, Chapter 6, addresses accessory off-street parking. This subject, too, is addressed in the definition of "floor area of a building" in ZR § 12-10. It states: "#Cellar# space used for retailing shall be included [*i.e.*, counted as floor area of a building] for the purpose of calculating requirements for #accessory# off-street parking spaces, #accessory# bicycle parking spaces and #accessory# off-street loading berths." Chapter 6 of Article III of the Zoning Resolution requires developers to provide parking space in proportion to the square footage of commercial space they build. ZR § 36-21. The explicit statement that retail space, whether located in the cellar or elsewhere, shall be counted in calculating the amount of required parking is intended to ensure that the requisite number of parking spaces are provided regardless of the location of retail space within a building. The provision on the calculation of floor area in relation to parking has nothing to do with the Use Group 6 limitations on the size of establishments, which are regulated by a different chapter of the Commercial District Regulations.

The Developers' interpretation of the size restriction of ZR § 32-15 would lead to "an absurd result that would frustrate the statutory purpose," *Long,* 76 N.Y.2d at 420-422, of having a specific district reserved for local retail only. Under their interpretation, retail stores of any size would be permitted in a local retail district as long as they were below ground. It is absurd to suggest that these clear distinctions pertaining to use can be vitiated simply by putting a business in the cellar. The 10,000 square foot floor area restriction on stores in C1 applies whether or not the area is in the cellar because it is intended to regulate the size of the store, not the extent of the building's imposition on the neighborhood's residential density, light and air.

That cellar retail space is to be included in calculating the square footage per establishment is confirmed by two Special Permit applications for premises at 462 Broadway in SoHo. One was to allow retail in a district where ground-floor retail is not permitted. A second accompanying application was 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. *CPC Reports C170192 and C170193 ZSM* (July 12, 2017) (Pet. Exh. AA, Recommendation of the Manhattan Borough President, 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.* (Pet. Exh. AA, 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 this case, the second

application, which was to allow a retail store in excess of 10,000 square feet, was withdrawn by the applicant before it could be voted on by the City Council.[10]

3. The Attempt by Target and Developers to Circumvent Zoning at the Property Reflects a Citywide Pattern and Practice

A typical Target Department Store is approximately 135,000 square feet. In 2016, Target announced a national strategy to access urban markets via Target Express Stores, each of which is approximately 22,500 square feet. The fact that there are even larger stores elsewhere in Target's portfolio does not excuse this store's violation of zoning. Target cannot hide behind its "Express" label to avoid the restriction on the Property.

In fact, the Temporary Certificate of Occupancy for the first Target Express location to open in New York City, which opened in July 2016 at the launch of Target's "Express" strategy, properly classifies it as a "VARIETY STORE" in Use Group 10A. (Pet. Exh. A). That store is within the Forest Hills Special District in a location where the zoning was amended through ULURP specifically to allow Use Group 10 Department Stores. ZR § 86-12. Without that legislative action to modify the underlying C2 zoning, the Target Express store there would not have been permitted.[11]

These events stand in stark contrast to what happened here: the Developers and Target sought a rezoning to accommodate their oversize store, but like at 462 Broadway and unlike in Forest Hills, here the Developers saw the handwriting on the wall and withdrew their ULURP application before the City Council could vote on it.

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[10] *See* https://zap.planning.nyc.gov/projects/P2015M0195 (NYC Dept. of City Planning ZAP Search, 462 Broadway).

[11] C2 districts allow only "essential local services not involving regular local shopping." ZR § 31-12.

It appears that Target and its landlords have plotted to circumvent the clear prohibition on Department Stores in several instances by improperly obtaining Temporary Certificates of Occupancy, which are granted with little scrutiny, for Target's "Express" establishments as Variety Stores in Group 6:

- The Target location at 400 Grand St, a.k.a. 145 Clinton St a.k.a. "Essex Crossing," Manhattan Block 346 Lot 40, opened on August 15, 2018 in a residential district where only C2 "local service" is allowed. Like in Forest Hills, properties with this Zoning Designation are not allowed to be used as locations for Use Group 10 establishments. Unlike in the Forest Hills Special District, the zoning was not modified to allow this store. The C2 district itself was only established in 2012 to allow for a limited amount of commercial use of the redeveloped Essex Crossing. *See* CPC Report, Cal. No. 7, C 120226 ZMM (August 22, 2012). Prior to 2012, this property was zoned solely for residential uses. The current Temporary Certificate of Occupancy, #121186938T007, identifies the ground-floor Target Store as Use Group 6. It is well over 10,000 square feet.

- The location on 500 E. 14th Street, Manhattan, Block 407 Lot 7503, opened in late July 2018 in a C1 "local retail" district with the same restrictions that apply to this Property. The Temporary Certificate of Occupancy, #121185519T006, identifies the Target Store as Use Group 6. Likewise, it is well over 10,000 square feet.

Each of these is approximately 22,000 square feet.

This pattern of evasion must not be allowed to overcome the generally applicable zoning law. The Developers' and Target's ruse is not only contrary to the plain language of the Zoning Resolution, but also leads to a result that negates the intent of the legislature. The Developer's wish to profit from a large-scale national retail tenant is not a reason to overcome controlling law.

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

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

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

An injunction is appropriate to prevent actions that would, for all practical purposes, be irreversible, rendering future relief moot and the final judgment ineffectual. *State v. City of New York*, 275 A.D.2d 740, 741 (2d Dept. 2000) (enjoining City from selling community gardens pending decision on the merits); *see also Citineighbors Coalition of Historic Carnegie Hill v. New York City Landmarks Preservation Comm'n*, 2 N.Y.3d 727, 728-29 (2004) ("Typically, the doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy.") (quoting *Dreikausen v. Zoning Bd. of Appeals*, 98 N.Y.2d at 172).

That is the situation here: once construction is well advanced, courts have frequently held that a case is moot or academic. *Dreikausen*, 98 N.Y.2d 165; *Weeks Woodlands Ass'n v. Dormitory Authority of the State of New York*, 95 A.D.3d 747 (1st Dept. 2012), *aff'd on op. below*, 20 N.Y.3d 919 (2012) (holding that even though respondents' construction violated the Zoning Resolution, the case was moot because construction was almost completed and petitioners had not, at all stages of the litigation, preserved their rights by seeking a preliminary injunction); *see also Angiolillo v. Town of Greenburgh*, 21 AD3d at 1104 (2d Dept 2005) (taking down completed structure is "drastic remedy"); *Sunrise Plaza Assoc., L.P. v. Intl. Summit Equities Corp.*, 288 AD2d 300, 301 (2nd Dept 2001) ("[w]here the removal or destruction of a building is the object of an

injunction, the courts will generally exercise caution in granting such relief").[12] In the absence of a preliminary injunction, the Developer's building will likely be completed during the course of this litigation. For this reason, denial of a preliminary injunction here will render a final judgment in Petitioners' favor ineffectual, and result in a permanent, continuing, and irreparable zoning violation. *See Gramercy Co. v. Benenson*, 223 A.D.2d at 498 (granting preliminary injunction to preserve the status quo and avoid irreparable harm).

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

In balancing the equities, the Court should analyze the parties' status and gauge the effect of an injunction on them. Even when Petitioners "may not ultimately prevail on the merits, the equities lie in favor of preserving the status quo while the legal issues are determined in a deliberate and judicious manner." *State v. City of New York*, 275 A.D.2d at 741. Further, if the injury to the plaintiffs is irreparable, and therefore more harmful to them than the harm to defendants from an injunction that will preserve the status quo until the legal issues can be decided, the injunction should be granted. *Poling Transp. Corp. v. A & P Tanker Corp.*, 84 A.D.2d 796, 797 (2d Dept. 1981). That is the case where, as here, the Developers could incur money damages from delay, but no irreparable harm, whereas the violations of the Zoning Resolution will become permanent if construction is allowed to proceed to completion.

The balance of the equities favors Petitioners. The Developers' actions to circumvent the Zoning Resolution have been brazen and deliberate. They applied for a rezoning

[12] Indeed, courts have faulted petitioners for not seeking an injunction at the very earliest stage of construction. For example, in *Dreikausen*, 98 N.Y.2d at 171-74, the Court of Appeals recognized "that a race to completion cannot be determinative, and cannot frustrate appropriate administrative review," but at the same time, it faulted the petitioners for waiting to seek a preliminary injunction until the foundation was being poured, and held the case to be moot.

because they knew they needed one to accommodate the Target store. They added an affordable housing component only in hopes of gaining the support of the Mayor -- which, indeed, they got. At the Queens Town Hall on March 30, 2018, Mayor de Blasio referred to the proposed rezoning as "*our* plan" and justified the action to the hundreds of Queens denizens gathered there by saying,

> We are interested in creating affordable housing anywhere we can get it… [the 82nd Street property]'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."[13]

Proof that the Developers never really cared about building any residential units is in the fact that two months after signing the lease with Target and eight months before filing their rezoning application that would have allowed both the inclusionary housing and the Target, on May 24, 2017, they applied for a permit to build a 2-story commercial building. *See Job Overview* (Pet. Exh. E). And after withdrawing their rezoning application, they reverted to that same two-story project, not to the mixed-use tower that they had ballyhooed to the public when they first bought the Property.

II. THIS COURT SHOULD FIX A NOMINAL AMOUNT FOR THE UNDERTAKING

CPLR § 6312(b) authorizes the Court to fix an amount for an undertaking "that the plaintiff, if it is finally determined that he or she was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction." This Court has wide discretion in determining the amount necessary for an undertaking in a motion for a preliminary injunction. *See Livas v. Mitzner*, 303 A.D.2d 381, 383 (2d Dept. 2003) ("fixing the

[13] *See* https://www.youtube.com/watch?time_continue=7036&v=6IL2jYZi_n0, at 1:56:55.

amount of an undertaking is a matter within the sound discretion of the court"); *Clover Street Associates v. Nilsson*, 244 A.D.2d 312, 313 (2d Dept. 1997) (same); *Lelekakis v. Kamamis*, 303 A.D.2d 380 (2d Dept. 2003) (the amount of an undertaking is within the discretion of the court and "will not be disturbed absent an improvident exercise of discretion").

Among the factors in determining an appropriate undertaking are the financial ability of the moving party to post the undertaking, the public interest nature of the action, and the damages that the defendant might incur if it is later determined that the preliminary injunction was issued in error. In *Daytop Village, Inc. v. Consolidated Edison Co. of New York, Inc.*, 61 A.D.2d 933, 935 (1st Dept. 1978), for example, the court noted the "nature of the nonprofit institution's financing" in holding that it "could not reasonably be expected to make immediately a lump sum payment of a substantial amount," and as such, a large undertaking was "hard to justify." In *Raritan Baykeeper, Inc. v. City of New York*, 42 Misc. 3d 1208(A) (S. Ct. Kings Co. 2013), too, the court observed that "Plaintiffs are a not-for-profit organization and litigating this matter at their own cost," and set the bond at "the minimal amount of $1,000." Similarly, in *Broadway Triangle Comm'y Coalition v. Bloomberg*, 35 Misc. 3d 167, 178 (S. Ct. N.Y. Co. 2011), because the movants were nonprofits and community groups, the court enjoined a proposed housing development and set the undertaking at a nominal amount of $5,000.

A plaintiff entitled to a preliminary injunction should not be left without a remedy simply because he or she cannot afford to post an undertaking. In *Modugno v. Merritt-Chapman Scott Corp.*, 17 Misc. 2d 679, 680 (S. Ct. Queens Co. 1959), the court enjoined pile driving after 6 p.m. on a construction project. It rejected the respondent's request for an undertaking of "not less than $1,000,000" as "completely out of the question, since its imposition as a condition of a

temporary injunction would result in a denial of relief to which Plaintiffs show themselves entitled," and set the undertaking at $5,000 instead. Courts have also viewed citizens bringing actions on behalf of the public interest as private attorneys general, and as such have exempted them from the undertaking requirement entirely. *See McDonald v. North Yacht Sales, Inc.*, 134 Misc.2d 910, 911 (S. Ct. Nassau Co. 1987) (consumers were not required to post an undertaking because they "stand in the shoes of the Attorney General who is not required to post bond," and requiring them to do so would render the statute a nullity); *see also Modugno*, 17 Misc. 2d at 680 (recognizing that plaintiffs' nuisance suit seeks to protect "human life and comfort").

When the purpose of a federal rule matches its New York counterpart, New York Courts may consider decisions of the federal courts as "persuasive authority." *All Seasons Resorts, Inc. v. Abrams*, 68 N.Y.2d 81, 87 (1986). Like CPLR § 6312(b), Federal Rule of Civil Procedure 65(c) also mandates an undertaking that will protect the party enjoined.[14] Yet the federal courts have exercised their discretion to waive the bond requirement in appropriate cases. "Although the [federal] rule speaks in mandatory terms, an exception to the bond requirement has been crafted for, *inter alia*, cases involving the enforcement of 'public interests'" *Pharmaceutical Soc. of New York v. New York Dept. of Social Services*, 50 F.3d 1168, 1174 (2d Cir. 1995) (citations omitted); *Sierra Club v. Norton*, 207 F. Supp.2s 1342 (S.D. Ala. 2002) ($1,000 bond sufficed where enforcement of federal environmental statute was "in the public interest," and "to post bond in an amount sufficient to cover the potential losses to [developers] would effectively bar Plaintiffs – two non-profit public interest organizations – from obtaining meaningful judicial review or appropriate relief"). Federal

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

courts also tend to set nominal bonds or waive the requirement in cases such as this, where the law explicitly contemplates citizen involvement in enforcement. *Friends of the Earth, Inc. v. Brinegar*, 518 F.2d 322, 323 (9th Cir. 1975) (overturning district court's requirement of $4.5 million bond and setting bond at $1,000 where high bond requirement would prevent citizens from obtaining "effective and meaningful judicial review").

Petitioners here are an unincorporated nonprofit association and private individuals seeking to enforce the Zoning Resolution on behalf not only of their members immediately affected, but on behalf of the community as a whole, in the public interest. "Discrimination in zoning is usually thought of in terms of the injustice done to the landowner. In reality, it is also a wrong done to the community's land use control scheme." *Udell v. Haas*, 21 N.Y.2d 463, 476 (1968). Zoning is "'a vital tool for maintaining a civilized form of existence' for the benefit and welfare of an entire community." *Little Joseph Realty, Inc. v. Babylon*, 41 N.Y.2d 738, 745 (1977) (quoting *Udell*, 21 N.Y.2d at 523). Because Petitioners cannot afford a substantial undertaking, and because they are acting to protect the public interest, any undertaking herein should be set at a nominal amount.

III. THIS COURT NEED NOT DEFER TO THE BSA

The requirement that a party exhaust its administrative remedies is not absolute. Ample precedent demonstrates that in cases such as this, this Court need not defer to the BSA. The Court can decide this case without first hearing from the BSA because it presents a pure question of law. It can and should grant a TRO and a preliminary injunction, too, because the BSA is not empowered to do so, and because without this relief, Petitioners will be left without a remedy.

A. The Court has the Authority to Rule on a Pure Question of Law Without Requiring Petitioners To Go Before the BSA

"[W]here the only question raised is a question of law . . . '[the] expertise of the Board of Standards and Appeals is not involved and has no relevanc[e] to the case at bar.'" *Sievers v. New York Dept. of Bldgs.*, 146 A.D.2d 473, 473 (1st Dept. 1989); *Peyton*, 2018 NY Slip Op 06870 at 8. In *Sievers*. although the case involved interpretation of the Zoning Resolution, the First Department held that petitioner was not required to exhaust his administrative remedies by appealing to the BSA. Where,

> the question is one of pure statutory interpretation dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency… courts are free to ascertain the proper interpretation from the statutory language and legislative intent.

Peyton, 2018 NY Slip Op 06870, at 8 (internal citations omitted); *see also Matter of Raritan Dev. Corp. v. Silva*, 91 NY2d 98, 102 (1997) (deference to BSA is not required because the question is one of pure legal interpretation of statutory terms).

The First Department reached the same result in *Lesron*, 13 A.D.2d 90, even though the case turned on interpretations of provisions of the Zoning Resolution, as well as of the Multiple Dwelling Law, involving complex questions of law such as "whether the height of a tower complies with the Zoning Resolution, whether it is to be considered as part of an existing structure or a separate structure, and whether the rear yard requirements of the resolution should be applied to the proposed structure." *Id*. at 100 (Valente, J., dissenting).

In *Weeks Woodlands Assoc., Inc. v. Dormitory Auth. of the State of New York*, 2011 N.Y. Misc. LEXIS 249, at *21 (S. Ct. N.Y. Co. Jan. 5, 2011), *aff'd on other grounds*, 95 A.D.3d 747 (1st Dept. 2012), *aff'd on op. below*, 20 N.Y.3d 919 (2012), too, this Court held that "Where

the question is one of law . . . exhaustion is not necessary." *Weeks Woodlands*, like *Lesron*, involved interpretation of complex provisions of the Zoning Resolution. As evidenced by the case's subsequent history, the question of law at issue was not clear-cut: while the Supreme Court rejected petitioners' interpretation of the Zoning Resolution and dismissed the case on the merits, the Appellate Division agreed with petitioners' interpretation.[15] This case is not complex, and like those cited above, involves a pure question of law with a clear answer.

B. Where the BSA Cannot Provide Relief and Petitioners Will Therefore Be Deprived of a Remedy, Petitioners Do Not Have to Exhaust Their Administrative Remedies

The exhaustion requirement "need not be followed . . . when its pursuit would cause irreparable injury." *Watergate II Apts. v. Buffalo Sewer Auth.*, 46 N.Y.2d 52, 57 (1978); *see also Mandl v. Bd. of Educ. of the City School District of the City of New York*, 31 Misc.3d 1231(A) (S. Ct. N.Y. Co. 2011). Petitioners have demonstrated above that they will suffer irreparable injury and be deprived of a remedy unless this Court grants them a preliminary injunction. This is particularly true in light of the lengthy timeframes involved in obtaining rulings from the BSA, which frequently entails submitting written responses to the Board's written questions followed by an initial hearing and, frequently, another round of briefing and a second hearing thereafter.

Because the BSA cannot protect Petitioners, they are not required to wait until that agency has ruled before seeking injunctive and declaratory relief in this Court. The leading case on this point is *Lesron Junior, Inc. v. Feinberg*, 13 A.D.2d 90 (1st Dept. 1961). Plaintiffs there, owners of adjoining property on Madison Avenue and 55th Street, sought to enjoin construction of

[15]It nevertheless affirmed on the ground that petitioners' failure to renew their request for an injunction at the appellate level had rendered the case moot. *Id.*, 95 A.D.3d 747. The Court of Appeals affirmed on the opinion below. *Id*., 20 N.Y.3d 919.

a tower in violation of the Zoning Resolution. The decision recites that " prior to and after the issuance of the building permit, the plaintiffs . . . verbally and by letter made known to the Building Department their objections to the issuance of a permit for the proposed building, and that the Building Department disregarded them." *Id*. at 92-93. While recognizing that generally plaintiffs would be required to appeal to the BSA, the court concluded "that the action here for an injunction is not barred by the failure of the plaintiffs to take and prosecute an appeal to the Board of Standards and Appeals." *Id*. at 93. The court grounded its holding on the fact that "an administrative officer or board generally has but very limited powers," and the remedy available to plaintiffs at the BSA was not the "proper and adequate relief" that they could obtain from a court of equity. *Id.* at 94. Most importantly, the *Lesron* court held that the BSA could not provide preliminary injunctive relief, and concluded, "It is settled beyond doubt that an action for injunctive relief is the appropriate remedy of an aggrieved property owner who seeks to bar the erection of a structure on adjoining or nearby premises in violation of express zoning regulations." *Id.* at 95.

Similarly, in *Haddad v. Salzman*, 188 A.D.2d 515, 516 (2d Dept. 1992), the court reversed the lower court's dismissal for failure to exhaust, holding that "[t]he failure to pursue an appeal to the Board of Standards and Appeals is not fatal to the plaintiffs' claim in light of the inability of that body to provide 'adequate and complete relief' to the plaintiffs in the form of an injunction." (citations omitted). And in *Weeks Woodlands*, 2011 N.Y. Misc. LEXIS 249, the Supreme Court held that although "[g]enerally exhaustion of administrative remedies is necessary and the BSA is the ultimate administrative authority charged with enforcing zoning resolutions . . . where petitioners are seeking injunctive relief, the failure to exhaust is not fatal to plaintiffs' claim." *Id*. at *21 (citations omitted).

These cases recognize that the BSA cannot grant the relief sought here: an immediate preliminary injunction to prevent further construction that would moot Petitioners' case.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court issue a temporary restraining order, set an expeditious briefing schedule, and enjoin any further construction of The Developer's Project at 42-19 82nd Street pending a decision on the merits. Petitioners further request that any undertaking be set at a nominal amount. Alternatively, given that this matter involves a pure question of law, Petitioners respectfully request that this Court grant the Petition and annul the Developers' building permit.

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Respectfully submitted,

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