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NYSCEF DOC. NO. 69 RECEIVED NYSCEF: 01/23/2019

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Carol R. Edmead, *Justice* PART 35

Queens Neighborhood United et. al.

-v-

New York City Department of Buildings et. al.

INDEX NO. 101700/18
MOTION DATE 1/10/19
MOTION SEQ. NO. 001

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). ____
Answering Affidavits — Exhibits ____ No(s). ____
Replying Affidavits ____ No(s). ____

Upon the foregoing papers, it is ordered that this motion is

Based on the accompanying memorandum decision, it is

ORDERED that Petitioner's application seeking annulment under Article 78 is denied; and it is further

ORDERED that Petitioner's request for a declaratory judgment pursuant to CPLR §3001 is denied; and it is further

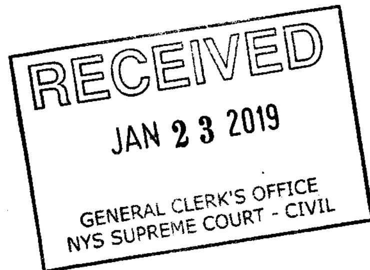
ORDERED that Petitioner's motion for injunctive relief is denied; and it is further

ORDERED that Respondents' cross-motion to dismiss the petition is granted in its entirety; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED that Respondents shall serve a copy of this order, along with notice of entry, on all parties within 15 days of entry.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ____
FOR THE FOLLOWING REASON(S): ____



Dated: 1/23/19 ____, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.

1. CHECK ONE: ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35
--x
QUEENS NEIGHBRODHOOD UNITED (AKA "QUAN"), 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, SHIRMA PANDEY, and BANI AMOR CAMPOZANO,

Petitioners,

-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.
--x

DECISION AND ORDER
Index No.: 101700/2018
Motion Sequence 001

CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION[1]

This is a hybrid Article 78/plenary action seeking declaratory and injunctive relief. Queens Neighborhood United ("QNU"), Desis Rising Up and Moving ("DRUM"), New York State Senator Jessica Ramos, and several individual residents and business owners from Jackson Heights and Elmhurst, Queens (collectively, Petitioners) filed a verified petition pursuant to CPLR Article 78 seeking annulment of a building permit for construction at 40-31 82nd Street in Elmhurt, Queens (the "Property") and a declaration pursuant to CPLR §3001 that the use of the Property for a Target store is in violation of Zoning Resolution §§31099, 31-11, and 32-15.

[1] The Court thanks Michael Cavarretta, Fordham University School of Law, Class of 2018, for his assistance with this Decision.

Petitioners also moved for a preliminary injunction to enjoin any further construction at the Property. In reply, the New York City Department of Buildings ("DOB"), AA 3043 GC TIC LLC, 82 Baxter TIC LLC, ZM 304 GC INVESTOR TIC LLC, 304 GC TIC LLC, Sun Equity Partners, and the Heskel Group (the "Developers"), and Target Corporation (collectively, Respondents) opposed the motion and filed a cross-motion to dismiss the petition pursuant to CPLR §3211, as well as an opposition to Petitioners' Order to Show Cause for a preliminary injunction.

BACKGROUND FACTS

Developers are constructing a two-story commercial building with cellar and sub cellar space in a neighborhood in Jackson Heights, Queens that is zoned R6 with a C1-3 overlay (NYSCEF doc No. 43, ¶ 17). In areas that are zoned as such, retail stores are permitted if they fall under Use Group 6, which limits the size of the stores to 10,000 square feet of "floor area" per establishment (*id.* at ¶ 19). Developers purchased the Property and have entered a lease with Target to open a store that will take up space both above ground and in the cellar space (NYSCEF doc No. 9). In August 2018, Petitioners submitted a Zoning Challenge to the DOB, arguing that the planned Target store for the Property is in violation of zoning laws (NYSCEF doc No. 43, ¶ 58). While Developers consider Target to fall under Use Group 6, when the square footage of the cellar space is incorporated, the planned Target store will take up more than 20,000 square feet (*id.* at ¶ 40). Petitioners contend it therefore falls under not Use Group 6 but rather Use Group 10, which allows for larger stores but is not a permitted use group in the area under the zoning law (*id.* at ¶ 60). Respondents argue in reply that "floor space" for the purposes of the zoning regulations specifically excludes subterranean space, so Target's Use Group 6 classification is proper (NYSCEF doc No. 42, at 6).

After Petitioners filed their initial challenge, the DOB revoked the original permit for the Property, but later issued a new permit after the Developers submitted a revised design (NYSCEF doc No. 43 at ¶ 62-66). Under the revised plan, each commercial space on the main two floors of the building is less than 10,000 square feet, but with the basement space incorporated, the Target store still totals over 20,000 square feet. *Id.* Petitioners then filed an appeal of the new permit to the NYC Board of Standards and Appeals ("BSA"), which reviews DOB decisions (*id.* at ¶ 69). While a hearing has been scheduled for March 2019, Petitioners argue that judicial intervention is necessary despite the pending BSA hearing. On November 21, 2018, Petitioners filed a petition under Article 78 seeking an annulment of the permit, as well as a declaratory judgment pursuant to CPLR §3001 that the project is in violation of applicable zoning laws. Petitioners also moved for a preliminary injunction to enjoin construction on the Property while litigation is ongoing (NYSCEF doc No. 47). They argue that since the matter of whether the plans for the Property violate applicable zoning laws is a pure question of law, the Court should issue a declaratory judgment without deferring the matter to the BSA. (NYSCEF doc No. 45 at 4). In reply, Respondents have each filed a cross-motion to seeking to dismiss the petition and allow the BSA to make a final determination.

The Court held oral argument on Petitioners' application for a preliminary injunction seeking an order on January 10, 2019.

DISCUSSION

STANDING

As a preliminary matter, standing for Petitioners must be established. To have standing, at least one of the Petitioners must demonstrate that they will suffer a direct injury-in-fact

separate from a general sense of harm to the broader public (*see Citizens Emergency Comm. to Pres. Pres. v Tierney*, 70 AD3d 576, 576-77 [1st Dept 2010] ["[P]etitioner must show that one or more of its members-as distinct from the general public-has suffered an injury in fact, and must demonstrate that the injury falls within the zone of interests protected by the legal authority being invoked"]). Here, Petitioner DRUM has standing, as it is a Not For Profit organization made up of residents who live in the immediate vicinity of the Property (NYSCEF doc No. 43, ¶ 3). The members of DRUM will therefore be affected by the use of the Property in a manner differently from the community at large. Petitioner QNU does not have standing, at it is an unincorporated association and thus can only bring a lawsuit in the name of its president, not on behalf of individual members. As QNU has no named president or other executive board members, it lacks capacity to sue in the first place (*see Ayew v Willard Hawes & Co.*, 250 AD 597 [1st Dept 1937]). Senator Ramos, who represents Elmhurst and Jackson Heights, also does not have standing. While it is laudable that she wishes to represent her constituents' interests in this matter, elected officials do not have standing to sue on behalf of constituents (*Matter of Montgomery v Metro. Transp. Auth.*, 25 Misc. 3d 1241[A] [Sup. Ct. 2009]). However, as only one petitioner needs to have standing, Petitioners have demonstrated standing for the purposes of their petition, and Respondents concede that standing is satisfied (NYSCEF doc No. 64 at 40).

ARTICLE 78

Petitioners urge the Court, pursuant to Article 78, to annul any and all permits issued by DOB for construction of retail stores larger than 10,000 square feet at the Property. Petitioners claim this measure is necessary to prevent any further development at the Property that violates the Zoning Resolution. On an Article 78 motion, the Court evaluates whether the determination of an agency was made in violation of lawful procedure, was affected by an error of law, or was

arbitrary and capricious or an abuse of discretion (CPLR § 7803). Here, Petitioners' failure to exhaust their administrative remedies means that any judicial review of their Article 78 claim is premature (*see Wilkins v Babbar*, 294 AD2d 186, 187 [1st Dept 2002] [affirming the dismissal of the proceeding as petitioners had not yet exhausted administrative remedies, including appeal of the DOB's determination to the BSA]). It is hornbook law that "a proceeding under [Article 78] shall not be used to challenge a determination: (1) which is not final or can be adequately reviewed by appeal to a court or to some other body or officer or where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application" (CPLR § 7801[1]).

Currently, Petitioners have an appeal pending with the BSA, which per local law has the explicit authority to review DOB decisions (*see* N.Y.C. Charter, Chapter 27, § 666). Specifically, the City Charter grants the BSA authority to review DOB interpretations of zoning resolutions and permit decisions, including "any order, requirement, decision or determination of the commissioner of buildings" (*id*). The Zoning Resolution also explicitly holds that the BSA has the jurisdiction to review any DOB decision "over the *use*...of buildings or other structures." New York City Zoning Resolution § 7-11. If, as here, there is a designated administrative body that has authority to review the matter and take steps to ameliorate future harm, commencement of an Article 78 proceeding is premature (*Church of St. Paul & St. Andrew v Barwick,* 67 NY2d 510, 520, *cert denied* 479 U.S. 985 [1986]).

Petitioners contend that they should be exempt from the requirement to exhaust administrative remedies before bringing this petition, as their case will likely be rendered moot if construction on the building is completed (NYSCEF doc No. 45 at 32). However, courts have not necessarily always held that completion of a building renders the matter completely moot or

academic in the name of preserving the status quo (*see Parkview Assocs. v City of New York*, 71 NY2d 274 (1988) (the court ordered the modification of a completed building after it was determined that the building's height exceeded applicable zoning regulations). Petitioners argue that *Parkview* is a rare example of a building being taken down after completion, and that most appeals are deemed moot (NYSCEF doc No. 66 at 12). However, a court evaluating a future appeal by Petitioners will be unlikely to dismiss their claims for mootness, as the record will show they sought injunctive relief prior to completion (*see Dreikausen v Zoning Bd. of Appeals of City of Long Beach,* 98 N.Y.2d 165, 172–73 [2002] [dismissing Petitioners' appeal as moot in large part because they failed to seek a temporary restraining order or preliminary injunction at any point during construction]).

It is highly unlikely that Petitioners would see a similar outcome to *Dreikhausen*, as they have demonstratively sought injunctive relief at all stages. Additionally, Respondents, who have contended in their opposing papers and at oral argument that completion does not equal mootness (NYSCEF doc No. 66 at 29), cannot later argue mootness once the building is finished, as that would be a disingenuous tactic amounting to a dishonest abuse of the court system. Yet another reason mootness is inapplicable to Petitioners is that even if a court did refuse to tear down the building, Petitioners' claim would still not be rendered moot as their complaint is about the use of the building for a large variety store, not the structure itself (NYSCEF doc No. 64 at 33). Petitioners will still have a claim ripe for adjudication even if the building is fully standing. Therefore, Petitioners cannot assert the doctrine of mootness as justification for why they do not need to exhaust administrative resources, and the petition remains premature.

Although Petitioners do not state as such in their papers, their application for an annulling of the permit amounts to a *de facto* request for a writ of mandamus. Under New York law, a writ

of mandamus may be issued when an administrative agency, public body, or officer failed to perform a duty enjoined upon it by law (CPLR § 7803 [1]). While mandamus is a drastic remedy that should only be employed in certain emergency circumstances, it has been held that since the failure of a government agency to perform a legal duty is reviewable under Article 78, mandamus may be an appropriate remedy in an Article 78 proceeding. See *Matter of Albany Med. Ctr. Hosp. v Breslin*, 47 Misc 2d 208, 210 (Sup Ct, Albany Ct 1965). However, it is settled law that "a mandamus to compel may not force the performance of a discretionary act, but rather only purely ministerial acts to which a clear legal right exists" (*Matter of Anonymous v Commissioner of Health*, 21 AD3d 841 [1st Dept 2005]). The agency or official that the writ seeks to compel must be under some sort of clear nondiscretionary duty to perform the action specified in the order (*see Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 757 [1991]). Here, Petitioners are all but asking the court to issue a writ of mandamus against the DOB and compel them to revoke the permit issued to Respondents. However, the decision of whether to issue a permit is not a nondiscretionary matter, but rather one that the DOB made within its discretion based on its interpretation of the zoning regulations. While it may be the case that the DOB's interpretation was incorrect, nothing suggests that Petitioners have established a legal right that would compel this Court to force a revocation of DOB permits. The administrative agency whose decision making would be ripe for judicial review here is the BSA, not the DOB, and as the BSA has not yet issued their ruling, the Article 78 petition is premature and thus dismissed.

DECLARATORY JUDGMENT

In addition to their Article 78 petition for an annulment of the building permit, Petitioners urge the Court to issue a declaratory judgment holding that the Respondents' planned use of the

Property violates the relevant zoning laws. As with the Article 78 motion, the declaratory judgment must be denied because it is premature. Additionally, the Court finds that a declaratory judgment would be inappropriate as there are multiple questions of fact involved in Petitioners' claim. Petitioners maintain that the Court should issue its own judgment without deferring to the BSA regardless of the fact-based elements of the case, as the essence of their application turns on a pure question of law. Thus, Petitioners argue that they need not exhaust their administrative remedies before seeking judicial relief (*see Matter of Sievers v City of New York, Dept. of Bldgs.*, 146 AD2d 473 [1st Dept 1989]).

It is true that the mere presence of factual disputes in a complaint does not preclude a court from entertaining a motion for a declaratory judgment (*Dun & Bradstreet v City of New York*, 168 Misc. 215, 217 [Sup. Ct. 1938]). However, where the entire complaint hinges on questions of fact, declaratory judgment is not appropriate. A court may address questions of fact that come up within the broader context of a declaratory judgment action, but "the point and purpose of the relief is to declare the respective legal rights of the parties based on a given set of facts, not to declare findings of fact" (*Thome v Alexander & Louisa Calder Found*, 80 AD 3d 88, 100 [1st Dept 2009]). Given that here there are several issues of fact that must be addressed to determine Respondents' compliance with zoning laws, the Court would essentially be taking on the role of factfinder were it to declare as a matter of law that Respondents' planned use of the Property violates the applicable zoning statutes.

In its review process, the BSA will determine whether the planned Target store should be classified under Use Group 6 or Use Group 10, and whether an establishment's "floor area" for the purposes of determining its classification should include subterranean space. These are not, contrary to Petitioners' assertion, questions of law, but rather fact-specific inquiries that the BSA

is best situated to address. Courts have been clear that the BSA may only be bypassed for judicial review when "the expertise of (the BSA) is not involved and has no relevancy to the case at bar" (*Sievers v New York Dep't of Bldgs.*, 146 AD2d 473 [1st Dept 1989], quoting *Rosenberg v 135 Willow Co.*, 130 AD2d 566, 567 [1st Dept 1989]). Here, the BSA has the proper expertise and knowledge, more so than the Court. This is not a question of statutory interpretation but rather a fact-based application of the zoning regulations. The language of the zoning resolution is unambiguous and clear on its face, and it therefore requires not judicial review but rather an assessment of an expert in the subject field.

INJUNCTIVE RELIEF

As part of their petition, Petitioners have moved for a preliminary injunction. While much of the reasoning discussed above, namely prematurity, the failure to exhaust administrative remedies, and the presence of issues of fact, also apply to this branch of the Petition, the Court writes separately to further clarify why a preliminary injunction is improper. The decision whether to grant a motion for preliminary injunctive relief is a matter of discretion for the trial court (*see Doe v Axelrod*, 73 NY2d 748, 750 (1988); *Jiggetts v Perales*, 202 AD2d 341, 342, [1st Dept 1994]). The primary test is whether a movant has shown: "(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of the equities tipping in the moving party's favor" (*Doe,* 73 NY2d at 750; *Housing Works, Inc. v City of New York*, 255 AD2d 209, 213 [1st Dept 1998]). Preliminary injunctive relief is a drastic remedy, which will only be granted if it is established that there is a clear right to the relief under the law and the facts (*Koultukis v Phillips*, 285 AD2d 433 [1st Dept 2001]). As preliminary injunctions are granted in advance of adjudication on the merits, they should be issued cautiously and only in rare circumstances (*Uniformed Firefighters Assoc. v. New York*, 79 NY2d 236 [1992]).

Likelihood of Success on the Merits

The first element of the test, that the movant must establish a likelihood of success on the merits, does not favor Petitioners as there is a fairly significant question of their likelihood of success on the merits. As discussed above, Petitioners face an uphill battle in essentially every argument they put forth in their petition, as they have failed to exhaust administrative remedies. The caselaw is clear that parties may only bypass administrative remedies in extreme circumstances, such as where an agency acts outside the scope of its power or otherwise unconstitutionally (*Watergate II Apts v Buffalo Sewer Auth.,* 46 NY2d 52, 57 [1978]). Petitioners' arguments for why exhaustion is not necessary, such as the notion that their claim will be rendered moot upon completion of the building, are not sufficient to excuse the prematurity of their petition. Furthermore, as discussed, there are several issues of fact to be determined regarding the Target store's proper classification under the zoning laws. While Petitioners may very well prevail, it is unclear if they will succeed on the merits of their claim and adjudication ahead of a hearing on the merits is improper.

Irreparable Harm

Petitioners have also not established that they will suffer any sort of irreparable harm if construction proceeds. Typically, a party moving to enjoin construction work must have some sort of right or property interest that will be adversely affected unless the construction immediately ceases (*Lesron Junior, Inc. v Feinberg*, 13 AD2d 90, 92 [1961]). Petitioners have no right or property interest that is in danger of being harmed by the construction process. As Petitioners have repeatedly conceded, the future use of the building is the issue here, not the construction of the building itself. The building itself, dimensionally, comports with all applicable zoning regulations. Since it is the use that is in issue, Petitioners cannot point to irreparable harm that would necessitate

injunctive relief to prevent further construction. As part of their mootness argument, Petitioners contend there is no possible use for the building other than to house a variety store such as Target (NYSCEF doc No. 64 at 33). This, at best, is a factually dubious assertion, but even if true, it has no harmful implications for Petitioners. If the BSA finds that the proposed Target store indeed violates the zoning regulations and Developers are unable to find a suitable replacement tenant, that is purely their loss and of no consequence to Petitioners. Thus, the denial of a preliminary injunction to enjoin construction raises no threat of irreparable harm to Petitioners.

Balancing of the Equities

The third factor of the preliminary injunction analysis, the balancing of the equities, also does not tip in favor of Petitioners. As discussed above, Petitioners will not suffer irreparable harm even if construction on the building is completed. Respondents, however, would undoubtedly suffer if the preliminary injunction were granted. Construction on the Property is underway, with a targeted completion date of December 2019 (NYSCEF doc No. 42 at 34). An injunction puts the Developers' financing at risk, and they have indeed already failed to obtain a loan from one lender because of the ongoing litigation (*id.*). Developers also currently employ approximately 70 construction workers who will be laid off if construction stops (*id.*). Additionally, Developers contend that they will be subject to a variety of costs and fees if construction cannot proceed, including the expenses of backfilling the existing foundation that has been excavated for the building (*id*). Given that Petitioners have not established a concrete harm they will suffer if the injunction is not granted, the balancing of equities clearly tips toward Respondents.

It is also important to note that although the BSA is best suited to resolve this dispute, Petitioners will have opportunities to appeal their ruling. Decisions of the BSA are reviewable by *certiorari* to this Court by "any person or persons, jointly or severally aggrieved by any decision

of the board…" (N.Y.C. Admin. Code, Title 25, Ch. 2, § 25-207). If the BSA rules in Respondents' favor, Petitioners will be able to file another Article 78 petition which will then be timely and not premature. Should the Court find no reason to overturn the BSA's decision, Petitioners may of course then appeal the Court's hypothetical future decision to the First Department. Given that Petitioners will have several more bites at the apple as they seek to prevent the alleged improper use of this Property, the Court finds no compelling reason to grant injunctive relief at this juncture.

The application of petitioners for injunctive relief is therefore denied, as petitioners have failed to establish irreparable harm, and there is a significant question of likelihood of success on the merits.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that Petitioner's application seeking annulment under Article 78 is denied; and it is further

ORDERED that Petitioner's request for a declaratory judgment pursuant to CPLR §3001 is denied; and it is further

ORDERED that Petitioner's motion for injunctive relief is denied; and it is further

ORDERED that Respondents' cross-motion to dismiss the petition is granted in its entirety; and it is further

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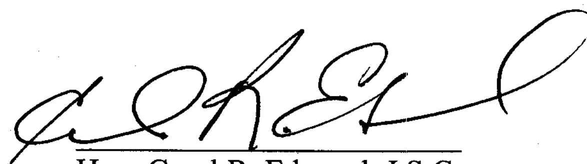
Dated: January 23, 2019



Hon. Carol R. Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.