

1 COURT OF APPEALS
2 STATE OF NEW YORK

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4 MATTER OF PERLBINDER HOLDINGS, LLC,
5 Appellant-Respondent,

6 -against-

No. 39

7 SRINIVASAN,

8 Respondent-Appellant.

9 -----

20 Eagle Street
Albany, New York 12207
February 17, 2016

12 Before:

13 CHIEF JUDGE JANET DIFIORE
14 ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
15 ASSOCIATE JUDGE JENNY RIVERA
16 ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

17 Appearances:

18 HOWARD GRUN, ESQ.
19 KAUFMAN FRIEDMAN PLOTNICKI & GRUN, LLP
20 Attorneys for Appellant
300 East 42nd Street
New York, NY 10017

21 JANE L. GORDON, ESQ.
22 NEW YORK CITY LAW DEPARTMENT
23 Attorneys for Respondent
100 Church Street
New York, NY 10007

24 Meir Sabbah
25 Official Court Transcriber

1 CHIEF JUDGE DIFIORE: First matter on our
2 calendar today is Matter of Perlbinder v. Srinivasan.
3 Counsel.

4 MR. GRUN: Good afternoon, Your Honors.
5 May it please the court. My name is Howard Grun, I
6 represent Perlbinder Holdings on this appeal. With
7 the court's permission, I'd like to reserve three
8 minutes for rebuttal.

9 CHIEF JUDGE DIFIORE: You have your three
10 minutes, sir.

11 MR. GRUN: Thank you, Your Honor.

12 The issue before this court today is - - - is
13 fairly straightforward and sounds simple, but it really is
14 not. And that is, when is a permit considered valid for
15 purposes of the vested interest doctrine - - - vested
16 rights doctrine.

17 This court has not issued a direct ruling on
18 that particular issue; other courts in New York have
19 issued rulings, and sister states have issued rulings on
20 that issue. And the - - - the definition that has been
21 given by other courts in other jurisdictions is fairly
22 straightforward; it simply says that when a permit is
23 issued within the authority, within the scope of authority
24 of the person issuing it, the permit is valid for purposes
25 of the vested rights doctrine.

1 JUDGE PIGOTT: Is there any limits on that?

2 MR. GRUN: There would have to be the
3 limits that the courts have talked about, and that
4 is, if it's an ultra vires action, if it's totally
5 rational, beyond the municipality's jurisdiction,
6 things of that nature, then the permit could not
7 stand. But where a permit goes through the process
8 that is set up for it, like at the Department of
9 Buildings, where a - - - in this case, the
10 commissioner of the borough actually met with the
11 architect, met with engineer, the Building
12 Department, went through the process of listing
13 seventeen objections, and went through the plans and
14 specifications that were provided to it; that's the
15 process that has been set forth for deciding whether
16 the plans are - - - should be approved, and whether
17 the replacement sign in this case was legitimate.

18 There has to come a point, as a matter of
19 policy, where a property owner can rely on that and
20 invest the kind of money they're going to invest in
21 order to create whatever it is that they want to
22 create. And this - - -

23 JUDGE STEIN: So how - - - how is this case
24 different from the Parkview case?

25 MR. GRUN: Well, Parkview talked about

1 collateral estoppel and said that, generally
2 speaking, there would not be collateral estoppel
3 against the city. But in Parkview, the - - - the
4 issue there was not that you could not have
5 collateral estoppel against the city; it was simply,
6 in that case, the facts didn't warrant collateral
7 estoppel against the city.

8 We're talking about, in this case, a
9 situation where the - - - the facts and the
10 circumstances that were given to the Building
11 Department, dealing with the sign, were exactly what
12 should have been given to it at all times; it is
13 exactly the kind of facts that the Building
14 Department deals with every day. There are hundreds
15 of people at the Building Department on a daily
16 basis.

17 JUDGE STEIN: Well, isn't there some
18 question about whether what the commissioner did was
19 - - - was maybe based on erroneous information?

20 MR. GRUN: Well, if - - - the standard that
21 we're advocating that the court adopt is that the
22 Building Department is in charge of knowing what
23 information needs to be given to it and what
24 information is relevant. So - - -

25 JUDGE ~~PIGOTT~~STEIN: So if they make an

1 erroneous determination, but it's their fault, that -
2 - - that doesn't impede the acquisition of vested
3 rights by the landowner; that's your position?

4 MR. GRUN: The position - - - yes, because
5 there is a question of - - -

6 JUDGE STEIN: Wouldn't that change our law
7 pretty significantly?

8 MR. GRUN: No, no, in fact, the - - - the
9 courts in this state, both at the Appellate Division
10 and the trial level, have issued decisions and - - -
11 and I cite in my brief to Incorporated Village v.
12 Cornwall, the Second Department case in 1974, that
13 said, as long as the commissioner's predecessor - - -
14 very similar to this case, the commission's
15 predecessor was acting within his authority when he
16 granted the original permit, the city is estopped
17 from withdrawing that approval, even if it turns out
18 to be erroneous.

19 The First Department said the same thing in
20 Brennan v. the New York City Housing Authority; a
21 mistake of law estops the government when the
22 government itself reviewed everything about it, had
23 all of the information, and is presumed to know the
24 law that it should be applying.

25 JUDGE ABDUS-SALAAM: Counsel, this - - -

1 this mistake, if you will, was discovered on an
2 audit, so if we adopt your rule, what would be the
3 point of the Buildings Department auditing any of the
4 permits that they issue?

5 MR. GRUN: Remember that we're talking
6 about a situation where vested rights means that not
7 only there was a permit issued that later on the
8 Building Department found out was, in their view,
9 erroneous, but now there was action taken afterwards
10 by an owner, by a property developer, in reliance on
11 that. Which means that a - - - what presumes to be a
12 valid permit is issued, to no one's understanding at
13 the time, there's any reason to suspect that there is
14 a problem, because - - -

15 JUDGE STEIN: But wasn't there a reason to
16 suspect that here?

17 MR. GRUN: No, because the - - - the - - -
18 all of the plans and specifications laid out exactly
19 what it was that the sign was going to be. Were it
20 would - - -

21 JUDGE STEIN: Right, but he was told that
22 there were all these problems, and then all of a
23 sudden they go away?

24 MR. GRUN: But - - - yes, because if you
25 look at the record, the objections were all written

1 as okayed, and passed, and cleared by the Department
2 of Buildings. And Commissioner Santulli himself
3 dealt with the same three issues that Commissioner
4 Colgate later dealt with twenty-five months later,
5 when he said it was unclear - - - and those are his
6 words - - - it was unclear whether in fact there had
7 been a proper analysis performed by Commissioner
8 Santulli.

9 And that's really at the heart of the issue
10 here; when Commissioner 1 goes through the process,
11 uses the expertise he's given, or he has and that's
12 presumed to exist under the charter which grants his
13 right to deal with Building Department issues, when
14 he goes through it, and he deals with the issues, and
15 analyzes them, and has his department list seventeen
16 objections, and they're all cleared, my client had
17 the right to, at that point, presume that everything
18 that was provided to the Buildings Department was - -
19 - had passed inspection, and that he could now go
20 ahead and invest the money he was going to invest.
21 And he spent 188,000 dollars replacing this sign and
22 putting it up where it now stands.

23 Had there not been that investment, and had
24 there not been the expanse of time that was two years
25 - - - twenty-five months, actually - - - that went

1 by, perhaps, Your Honor, there would be a different
2 issue because a permit that was issued, that the city
3 - - - Building Department then says, okay, we made a
4 mistake, it's a month later, we had an audit, we
5 realize we made a mistake, okay, no harm no foul, the
6 owner hasn't done anything wrong, he hasn't done
7 anything to violate the law because the sign hasn't
8 gone up, and he hasn't spent the money in reliance.

9 Vested rights doctrine says, I've now spent
10 the money in reliance, a time has gone by, I presumed
11 that the Department of Buildings knows the law and
12 had its experts review everything, I gave them all my
13 information, and now I'm told twenty-five months
14 later, we made a mistake, oops. Well, that's not
15 fair. That is a - - - that really renders
16 Commissioner Santulli's authority to be null.

17 JUDGE STEIN: So - - - so the New York City
18 code that says that they have the right to vacate
19 orders that they deemed to have been made in error,
20 would be of no practical value.

21 MR. GRUN: Not when it's up against the
22 vested rights doctrine. The vested rights doctrine
23 is an equitable doctrine, so what it's saying is, if
24 the City's department wants to go ahead and revoke a
25 permit, it can do so, unless - - -

1 JUDGE STEIN: But then wouldn't that be
2 true any time anybody started to take any action
3 based on being granted a permit; and so if you get
4 your permit and say, ha, I'm going to go out there
5 and I'm going to go do this really quickly before
6 they can take it back.

7 MR. GRUN: If you're going to spend
8 substantial sums of money investing in the property,
9 and in - - - in conjunction with that, enough time
10 has gone by that the City should have known it made a
11 mistake - - - in its view, we're not saying that they
12 made a mistake, but in their view they're saying they
13 made a mistake - - -

14 JUDGE RIVERA: Then can you just go back
15 and finish the rule statement; you said, City can
16 revoke a permit unless; what's the rest of the
17 sentence?

18 MR. GRUN: Unless there's been vested
19 rights that has - - - that has gone ahead and vested
20 - - - I hate to use the same word twice.

21 CHIEF JUDGE DIFIORE: Counsel, if we
22 weren't talking about the sign and we were talking
23 about matters that affect health and safety of a
24 community or a surrounding area, would your argument
25 be the same?

1 MR. GRUN: It has to be the same for all
2 issues, and - - - and this - - - the Department of
3 Buildings is there to make sure that whatever is
4 being built in Manhattan, in New York City, is safe,
5 is secure, is protecting the community and the
6 environment; and remember, here, there were no
7 objections by anybody in the community to the sign;
8 there were letters in the record that indicate the
9 community supported the deal.

10 And - - - and Commissioner Santulli
11 actually reviewed the very three issues that
12 Commissioner Colgate later on found to be
13 problematic, and that had to do with the - - - the
14 double-sided nature of the sign, the fact that it was
15 twenty-seven feet further south on the lot, that it
16 was lower. And Commissioner Santulli, when he went
17 through that, used the discretion afforded him by law
18 to see that substantial justice was done, to make
19 sure that it complied, in his view, with the law as
20 he read it, and we've gone through our brief, and I
21 don't want to belabor the point, but there are
22 certainly rational reasons for having Commissioner
23 Santulli conclude, as he did, that the sign did not
24 pose a - - - a further degree of nonconformity, which
25 is the standard.

1 JUDGE ABDUS-SALAAM: If we disagree with
2 you, counsel, that the vested rights doctrine allows
3 you to keep your building - - - your sign without
4 having to get a variance, what do we do about the
5 procedure used to allow you to keep the sign? There
6 - - - the building - - - where the Appellate Division
7 says that you don't need to get a variance, that your
8 application should be treated as a variance.

9 MR. GRUN: To tell you the truth, I'm not
10 quite sure I understood that part of the Appellate
11 Division decision, and I - - - I would agree with
12 counsel for the City that the decision does not
13 appropriately deal with the variance issue there. We
14 were not looking for variance; our application was
15 never one for a variance,

16 JUDGE FAHEY: Well, was - - - was there
17 ever a good faith determination on your application
18 by the BSA?

19 MR. GRUN: There was a determination made
20 on appeal of the - - - of the revocation of the
21 permit. The variance issue had never come up in the
22 context of this particular application. So - - -

23 JUDGE FAHEY: No, I want to separate out
24 the good faith determination from the variance issue,
25 all right.

1 MR. GRUN: The - - -

2 JUDGE FAHEY: So was there a variance - - -
3 I'm assuming there wasn't a variance application; was
4 there a good faith determination at all made?

5 MR. GRUN: Well, the Appellate Division
6 certainly said there was good faith on the law and
7 the facts, which we believe constitutes the law of
8 the case and is a finding that sticks.

9 JUDGE FAHEY: Uh-huh.

10 MR. GRUN: There was no indication below
11 that there had ever been a disagreement that there
12 had been a reliance in good faith, because the BSA
13 simply said, good faith doesn't rule the day here
14 because the permit was invalid; there was something
15 wrong with it.

16 JUDGE STEIN: Didn't they go further and
17 say that if there was a variance application, we
18 would look at that - - - that issue?

19 MR. GRUN: Yeah, the BSA actually said, the
20 only time good faith will be relevant is on a
21 variance application. We take issue with that, and
22 we think the Appellate Division's decision on that
23 issue was perfectly correct.

24 Good faith should be something that is
25 considered across the board, whether it's an

1 application as a matter of law and, as a matter of
2 fact, on a permit application, or whether there's a
3 variance application.

4 JUDGE PIGOTT: If you went back like the
5 City wants you to, wouldn't the - - - wouldn't the
6 Department of Buildings then determine that, or the
7 BSA, and say it is good faith - - -

8 MR. GRUN: Well, they - - - they might,
9 they might, and frankly, the problem we has - - - we
10 have is that there is no guarantee that a variance
11 will - - - will be issued, there are lots of vagaries
12 involved in the variance application, and not only
13 that, if the variance is granted, what that does for
14 us is allows us to keep the sign in place going
15 forward from the date of the variance, but for the
16 years that have gone by, we have an illegal sign, and
17 we're facing 112 different violations issued by the
18 Department of Buildings on the presumption that a
19 sign, once considered legal, is now no longer
20 considered legal, and the fines aggregate over a
21 million dollars, and with interest and penalties,
22 probably - - -

23 JUDGE STEIN: Well, that's something that
24 they might say that was - - - you know, that was an
25 undue burden on you.

1 MR. GRUN: I would hope they would, but
2 there's no guarantee, and frankly, that I envision
3 that might be another litigation that has to be
4 brought, if there's a variance rather than an as-of-
5 right-permit ruling. My time is up so I'll stop.

6 CHIEF JUDGE DIFIORE: Thank you, counsel.

7 JUDGE FAHEY: Can I just, Judge - - -

8 CHIEF JUDGE DIFIORE: Yes, of course.

9 JUDGE FAHEY: Just got to get it straight
10 in my own head. The good faith determination, the
11 BSA made a determination and denied your application.
12 There was no good faith determination, and the AD, in
13 their second, in their re-argument, as I understood
14 it, sent it back for a determination to the BSA for
15 further proceedings on good faith, and not on - - -
16 on a variance application.

17 It would seem, if your good faith
18 application was turned down, then you could then
19 apply for a variance all over again, and start the
20 process, the way I read the decision. I just want to
21 know, do you read it that way?

22 MR. GRUN: No, I - - - I read the decision

23 - - -

24 JUDGE FAHEY: Tell me how you do it.

25 MR. GRUN: I read the decision both, at the

1 - - - the first decision by the Appellate Division
2 and the second one,

3 JUDGE FAHEY: I'm talking about the second
4 one now.

5 MR. GRUN: By the second one, I read as,
6 good faith is found as a matter of law; that the
7 decision was that the BSA should consider a variance
8 application in light of the fact that there was good
9 faith reliance.

10 JUDGE FAHEY: I see.

11 MR. GRUN: And that's why good faith is not
12 an issue.

13 JUDGE FAHEY: So the good faith just - - -
14 let me stop you, so they're not saying that the good
15 - - - that the BSA has to make a determination on
16 good faith, the AD says, we find good faith, go back
17 and make a determination on a variance, but there's
18 been no application for a variance.

19 MR. GRUN: Correct.

20 JUDGE FAHEY: Thank you.

21 MR. GRUN: Thank you, Your Honor.

22 CHIEF JUDGE DIFIORE: Thank you.

23 Counsel.

24 MS. GORDON: Good afternoon, Your Honors.

25 On behalf of cross appellants, my name is Jane

1 Gordon. May I please reserve three minutes?

2 CHIEF JUDGE DIFIORE: Counsel, you have
3 your time.

4 MS. GORDON: Thank you.

5 I want to begin by addressing Parkview, and what
6 this court said in Parkview, which is that "Estoppel is
7 not available to preclude a government entity from
8 discharging its statutory duties, or to compel
9 ratification of prior erroneous implementation in the
10 issuance of an invalid permit."

11 Here, we have an erroneously issued permit.
12 When it was approved, and I'm referring to page 135 of the
13 record, Commissioner Santulli said, "It's okay to accept
14 prior sign as grandfathered of existing nonconforming
15 sign, and to accept lower sign as no increase in the
16 degree of noncompliance."

17 There's no indication that the relocation of the
18 sign from one zoning lot to another was considered. There
19 is no indication of the increased illumination being
20 considered. There was no indication that, in fact, the
21 commissioner overruled the many objections that the
22 Department of Buildings had - - - only two weeks prior, by
23 the way; the Department of Buildings' list of objections
24 was issued two weeks before this permit approval.

25 That is important because when this court in

1 Parkview talked about vested rights, it noted, in
2 particular, that reasonable - - - good faith was relevant
3 to whether or not reasonable diligence could have
4 uncovered the error. Here, reasonable diligence could
5 certainly have uncovered the error, just as it was found
6 in Parkview.

7 This sign was relocated to a new lot, and in
8 fact, there were so many different lots mentioned in
9 connection with this sign that the application before
10 Commissioner Santulli had lot number 25; the sign was on
11 lot 26/27; the original sign was on lot 28. All of those
12 lots - - - put into play, by the way, by Perl binder, not
13 the Department of Buildings. This - - -

14 JUDGE STEIN: Is there anything under the
15 rules and regulations that would ~~not~~ have allowed the
16 Department of Buildings, or the commissioner, or
17 anybody, to grant a permit - - - a building permit
18 under those circumstances?

19 MS. GORDON: No, Your Honor, because it's
20 in violation of the zoning resolution and - - - and
21 Perl binder's only option here is to ask for a
22 variance of the zoning resolution under the proper
23 procedure set out in the charter. And here is, of
24 course, where our cross appeal lies, in how the
25 Appellate Division confused two very distinct

1 procedures, and created a new end-run around the
2 variance process.

3 JUDGE STEIN: Well, did you agree that - -
4 - that the - - - the procedures are somewhat
5 overlapping, in terms of appealing from a Buildings
6 Department determination and seeking a zoning
7 variance?

8 MS. GORDON: I think that they are not
9 overlapping, Your Honor, and here's why. Section
10 666(5), creates the time tested procedure for a
11 zoning variance, which this court is well familiar
12 with, because zoning variances come up here all the
13 time. That is a very particular procedure under the
14 zoning resolution and under the charter.

15 JUDGE STEIN: Yes, but this is a building
16 permit that was granted and then revoked, so why
17 doesn't that fit in with the other section?

18 MS. GORDON: With 666(6), which I'll call
19 for distinction, the interpretive appeal process. In
20 fact, the BSA here did perform a 666(5) function in
21 that, it took a look at - - - it took a look at the
22 relevant zoning provision to see what is meant by the
23 - - - the terms of the provision when the sign has to
24 be in the same location and - - - and direction. And
25 in that way, the BSA was performing its interpretive

1 powers under 666(6).

2 However, it could not grant a zoning
3 variance under 666(6), and it said that in its
4 decision. Perlbinder had to go under the separate
5 provision created in the charter to obtain a zoning
6 variance.

7 JUDGE STEIN: But what - - - how could it
8 exercise its powers under subdivision 5 to look at
9 undue hardship and - - - and that sort of thing? How
10 to we give meaning, I guess that's what I'm saying;
11 they have those interpretive powers, and subdivision
12 5 says what it says, and subdivision 6 says what it
13 says, and how do we know which one applies; that's my
14 question.

15 MS. GORDON: Well, if - - - if an applicant
16 needs a zoning variance, they have to go under the
17 provision that's the more specific provision, Your
18 Honor. They have to go under - - - they have to go
19 get a zoning variance under subsection 5.

20 JUDGE STEIN: You're saying we apply the
21 specific over the general.

22 MS. GORDON: Absolutely.

23 JUDGE STEIN: That's how we decide which
24 one to use.

25 MS. GORDON: Absolutely.

1 JUDGE STEIN: Can you give me an example of
2 when a subdivision 5 would apply and subdivision 6
3 wouldn't?

4 MS. GORDON: Okay. In the record, we
5 actually have two interpretive appeals. And they're
6 at about - - - well I'm reading from 337, and in that
7 case, it was - - - the question was whether not to
8 rescind a stop work order, and - - - and appellant's
9 supposed it own failure to conform with the law, but
10 it was the rescission of a stop work order, not a
11 variance.

12 In the second interpretive appeal that is in the
13 record, it had to do with an ambiguous provision, where it
14 was difficult to promulgate a definitive or - - - the
15 applicant was stuck between two provisions that were
16 somewhat ambiguous, and the BSA had to decide under 666(6)
17 which provision would apply; that's at page 343 of the
18 record.

19 So the court has before it two examples of the
20 court - - - of the BSA using its subsection 5 powers. But
21 I would also say that in our brief, there is a Supreme
22 Court - - - a lower court decision that actually got it
23 exactly right on when 666(5) applies and 666(6) applies,
24 and understood it very lucidly and clearly, which the
25 Appellate Division was unable to do here.

1 I'd like also to address the issue of good
2 faith. In this matter, the Appellate Division decided the
3 issue of good faith as a matter of law. And that is
4 contrary to the doctrine of primary administrative review.
5 That is a question for the BSA to decide in the first
6 instance. It is a fact-intensive question, we have
7 highlighted for the court the numerous factual questions
8 we believe need to be resolved in order to determine
9 Perlbinder's good faith, and it was error, as a matter of
10 law, for the Appellate Division to decide that as a matter
11 of law.

12 We know of no instance and we have been able to
13 find no cases where good faith, a fact-intensive issue,
14 was determined as a matter of law. There ought to be
15 hearing and it - - - and it ought to be before the BSA.

16 We believe that the petition should be dismissed
17 and that Perlbinder ought to obtain a zoning variance,
18 which, by the way, it told the BSA it intended to do, and
19 that's the proper procedure under subsection 6, not 5.

20 JUDGE FAHEY: So - - - so the good faith
21 determination, does that - - - can they get a good
22 faith determination on the original permit that dates
23 back all the way, I guess, to before 2008, and then
24 if they lose that, apply for a variance?

25 Because it would seem to me that the good

1 faith determination goes to the actions they took in
2 reliance on the original permit; that's why I'm
3 asking the question. And if they then either were
4 successful or not in front of the BSA, if they were
5 unsuccessful, then they could apply for a normal
6 variance under the theory that the size and surface
7 area and the location of the sign had been moved, but
8 still within the parameters of the property.

9 MS. GORDON: Your Honor, their application
10 right now is under subsection 6.

11 JUDGE FAHEY: Uh-huh.

12 MS. GORDON: A zoning variance cannot be
13 granted under subsection 6. What they asked under
14 subsection 6 is that the two year - - -

15 JUDGE FAHEY: No, I understand that, so the
16 point is they'd be asking for a new variance. So can
17 you make a determination first on good faith by the
18 BSA, then, should they be unsuccessful in that
19 application, based on this original permit that's
20 before is now, can they then go forward and reapply
21 directly for a variance to satisfy the concerns,
22 should they lose on good faith.

23 MS. GORDON: I'm not sure that a finding of
24 good faith would get them what they need and what
25 they want.

1 JUDGE FAHEY: No, I'm assuming they'll lose
2 good faith. They go before the BSA now, on this
3 permit they lose on good faith, and they go back and
4 say, all right, fine, we didn't win on good faith in
5 the original permit, we're going to go back, we're
6 going to ask for a zoning variance.

7 MS. GORDON: Yes, they can go and ask for a
8 zoning variance; that's we want them to do, we want
9 them to go back to the BSA and apply for a zoning
10 variance.

11 JUDGE FAHEY: So the determination on good
12 faith is separately - - - separate and distinct from
13 the determination on the zoning variance.

14 MS. GORDON: They would raise their good
15 faith in connection with their application for a
16 zoning variance.

17 JUDGE FAHEY: It doesn't - - - so you're
18 saying that principle then does not apply to this
19 permit; because it seems to me that - - - that this
20 court - - - let's say that you're correct, that good
21 faith - - - it was error for the Appellate Division
22 to decide good faith, we go - - - say, send it back,
23 the BSA should make that determination; say we accept
24 that argument. The determination, if I'm right, you
25 could - - - if I'm wrong correct me, but I understand

1 it would be on the original permit that we're talking
2 about, right?

3 MS. GORDON: Yes.

4 JUDGE FAHEY: All right, the Santulli grant
5 - - - that they acted on the Santulli grant, and - -
6 - let's say they make a determination, they lose on
7 that; can they - - - so that's a good faith
8 determination on the original permit that was
9 approved. They lose on that determination or they
10 win on it; if they win, we're done. If they lose,
11 then they can - - - then they could conceivably go -
12 - - and go back all the way to the beginning and
13 apply for original zoning variance, couldn't they?

14 MS. GORDON: I - - - I think I understand
15 what Your Honor is asking, and I will try to answer
16 it.

17 JUDGE FAHEY: Good luck, okay.

18 MS. GORDON: The BSA does not consider good
19 faith in connection with a section 666 - - -

20 JUDGE FAHEY: Okay. I got it, okay. Yeah,
21 yeah. All right.

22 MS. GORDON: So it would necessarily mean
23 that they would go and seek a zoning variance which
24 is, in our opinion, the appropriate - - -

25 JUDGE FAHEY: You're saying that the way

1 the Appellate Division sent it back to you, they had
2 - - - they had to make a determination because you
3 could not make that determination on the application
4 you had in front of you.

5 MS. GORDON: I don't think the Appellate
6 Division had to make that determination, no, Your
7 Honor.

8 JUDGE FAHEY: All right, okay.

9 MS. GORDON: I think that it was
10 inappropriate for them to make that determination;
11 that that should have - - - should be vested in the
12 BSA when Perl binder makes an application for a zoning
13 variance.

14 JUDGE STEIN: You're saying that the - - -
15 that the interpretive power on the - - - on the
16 building permit that was revoked - - -

17 MS. GORDON: Yes.

18 JUDGE STEIN: - - - that that doesn't even
19 enter into it here; is that which is saying? That -
20 - -

21 MS. GORDON: Good faith?

22 JUDGE STEIN: No, no, that that section
23 doesn't even apply here; they have to go back under
24 the zoning variance section, and then they can argue
25 hardship there; is that - - - is that your argument?

1 Because I'm getting confused.

2 MS. GORDON: Okay. Our argument is that
3 the interpretive appeal cannot be used for a zoning
4 variance, period.

5 JUDGE STEIN: Yeah, that's what I thought
6 you said.

7 MS. GORDON: And if they want a zoning
8 variance, they have to apply for a zoning variance at
9 which point the BSA will consider its ar - - - their
10 argument of good faith reliance, hardship, all the
11 elements that go into a zoning variance application.

12 JUDGE STEIN: And that's the only way they
13 can get those determinations.

14 MS. GORDON: Yes, Your Honor.

15 JUDGE STEIN: Thank you.

16 CHIEF JUDGE DIFIORE: Thank you, counsel.

17 MR. GRUN: You see the problem here. The
18 City would like to erase two years' worth of history
19 and review everything when they decide that things
20 shouldn't be the way they were. We want to sort of
21 have some sort of a time warp, and forget what
22 happened, and let's look at it afresh now, two years
23 later, after all of the facts have already happened.

24 So my client, who is relying on
25 Commissioner Santulli's interpretive power in

1 reviewing this - - - this application, and the
2 Department of Buildings' interpretive power in
3 listing seventeen objections and okaying all of them,
4 and then relying on that, that goes by the wayside.
5 And now the City says two years later - - -

6 JUDGE ABDUS-SALAAM: Well, could I just
7 ask, the original sign was grandparented in, correct?
8 Are you saying that the new sign, because of
9 Santulli's permit, was also grandparented?

10 MR. GRUN: Yes.

11 JUDGE ABDUS-SALAAM: So it was - - -

12 MR. GRUN: And it would've stayed
13 grandfathered had the commissioner not - - - had the
14 Buildings Department not waited one more month beyond
15 the time the grandfathering rights expired, to now
16 revoke the permit. Now, I don't know if that was
17 happenstance, whether that was intentional, there's
18 nothing in the record about it, but it's - - - it's
19 interesting that it happened twenty-five months after
20 the - - - the construction started, and then - - - by
21 then, grandfathering rights had gone, so now, the
22 City says, we're not going to - - - we're going to
23 review backwards what happened, say it's not good;
24 then, by saying it's not good, hit you with a million
25 dollars' worth of fines, and not only that, you have

1 no opportunity to now cure any problem that you might
2 have had had we done are due diligence and looked at
3 our permits and maybe found out that there was a
4 problem a lot sooner.

5 And the municipality really has to get on top of
6 its - - - of the ball here, and look at its permits a lot
7 sooner, and not wait for two years and change, when other
8 rights are now lapsing. What happens if an owner, wanting
9 to - - -

10 JUDGE ABDUS-SALAAM: But your argument
11 wouldn't be different if it were, instead of twenty-
12 five months, twenty-three months. You would still be
13 saying that you spent 188 thousand dollars, so I
14 don't know if getting on top of it sooner would help
15 - - -

16 MR. GRUN: Only because the prejudice is
17 worse by having waited twenty-five months, but in - -
18 - along with that line of thinking, Your Honor, any
19 property owner who wants to develop property needs to
20 have some finality and know that when he submits a
21 Building Department application, and it's granted,
22 that he can now rely on that, and build.

23 What happens if the rule is extended the way the
24 City would like it to extend, one year, five years, ten
25 years goes by, and the City decides to review its permits

1 in a routine audit, and find that, oh, we made a mistake,
2 we don't like the way three commissioners before him
3 interpreted the law; that wreaks havoc with the whole
4 system; no one will ever develop any property, no one will
5 ever spend any money because there's no finality.

6 And all the people that were sitting in the pit
7 at DOB, and negotiating with plan examiners, and
8 architects, and engineers, and reviewing every speck of a
9 plan to make sure that it comports with the law, will be
10 wasting their time; because no matter how many reviews
11 they get, and how many okays they get, it means nothing.
12 A new administration will come into play and they will
13 say, we don't like what we did, and that's the rule we're
14 looking to - - - to have this court issue; it's consistent
15 with the rule - - -

16 JUDGE STEIN: That - - - that could be
17 challenged, couldn't it, if they - - - if they said,
18 arbitrarily, this was an error, and in fact, there's
19 no obvious or no apparent error; that - - - that
20 could certainly be challenged?

21 MR. GRUN: Yeah, I mean, we're looking, I
22 think to - - - to have - - - we're asking the court
23 to adopt a rule that's been adopted in the lower
24 courts and in other jurisdictions, and that is, if
25 it's out of left field, if there's no possible

1 explanation that is rooted in the jurisdiction of the
2 Buildings Department, that's one thing; if it's
3 egregious, that's one thing; but if it's rational, if
4 there is a - - - if it's within the scope of the
5 authority of the person issuing the permit, here
6 Commissioner Santulli, to review it, if he's gone
7 through the whole process, and at the same time
8 there's an explanation for what he did - - - he wrote
9 what it is that he felt was going on, he reviewed - -
10 -

11 JUDGE STEIN: What if - - - what if this
12 Commissioner - - - and believe me, I'm not saying he
13 was - - - you know, was, you know, bribed or, you
14 know, just, you know, had - - - had terrible intent;
15 would that make a difference?

16 MR. GRUN: Yeah. Fraud is never good; and
17 if there was proof of fraud, certainly that would
18 take it out of the vested rights doctrine; equity
19 requires everybody to come in with clean hands, so no
20 question; but that's not what the record here even
21 suggests, we're - - - we're not even anywhere near
22 that. What the record here suggests is that the City
23 - - - the Department of Buildings had a full-fledged
24 application in front of it, did everything it
25 normally does in a normal case by reviewing and

1 hitting - - - citing objections and so forth, and at
2 the end of the day, it passed them all.

3 And my client relied on it, and spend
4 money, and when two years goes by and he's now told
5 what he's done is illegal, that is - - - is - - - is
6 just inappropriately inequitable and very harmful,
7 and I think, if the court were to let that go and not
8 adopt the rule that we're suggesting, I think the
9 entire system breaks down.

10 CHIEF JUDGE DIFIORE: Thank you, sir.

11 MR. GRUN: Thank you.

12 MS. GORDON: We are not asking the court to
13 extend any decisional law - - -

14 CHIEF JUDGE DIFIORE: Counsel. There's no
15 rebuttal time for you.

16 MS. GORDON: Oh, I'm sorry.

17 CHIEF JUDGE DIFIORE: Thank you.

18 MS. GORDON: I thought as cross-appellants

19 - - -

20 JUDGE ABDUS-SALAAM: She has a cross-
21 appeal.

22 CHIEF JUDGE DIFIORE: Oh, excuse me. I'm
23 so sorry. Sorry; excuse me.

24 MS. GORDON: That's okay.

25 ~~CHIEF JUDGE DIFIORE:~~ We are not asking the court for

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1 any extension of case law. We are asking the court
2 to apply Parkview. I want to point out a couple of
3 important facts. Parkview - - - Perlbinder was
4 advised, before the two years expired, that the
5 Department intended to revoke the permit. At that
6 point, it was incumbent on Parkview - - - on
7 Perlbinder, excuse me, to - - - if it wanted to
8 preserve its grandfather, it could've - - - it
9 could've applied to put the permit - - - put the sign
10 back where it originally stood. It had the
11 opportunity to do that before the two years expired;
12 it did not.

13 The objections of the Department of
14 Building were not cleared by the time the
15 Commissioner signed off on the permit. In fact, when
16 the review was done, the Department of Buildings
17 noted that we didn't even know what the Commissioner
18 relied on when he signed off, but there certainly was
19 still an objection that the sign had been moved
20 substantially to another zoning lot, and that that
21 alone meant it couldn't be grandfathered. And that
22 fact was - - - may not have been evident to the
23 Commissioner because the exact zoning lots for the
24 sign were never consistently identified in any filing
25 that Perlbinder made with the Department of

1 Buildings.

2 If there are no further questions, we'll rest on
3 our brief.

4 CHIEF JUDGE DIFIORE: Thank you, counsel.

5 MS. GORDON: Thank you.

6 (Court is adjourned)

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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Perlbinder Holdings, LLC v. Srinivasan, No. 39 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: February 18, 2016

