SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DEBRA A. JAMES** **PART** **IAS MOTION 59EFM**

Justice

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EAST RIVER FIFTIES ALLIANCE, INC. and BENJAMIN KALLOS,

Petitioners,

- v -

CITY OF NEW YORK, BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK, MARGERY PERLMUTTER, and SUTTON 58 HOLDING COMPANY LLC,

Respondents.

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INDEX NO. 157917/2018

MOTION DATE 12/21/2018

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 53, 54, 55, 56, 57, 58, 59, 60, 61

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of petitioners for a preliminary injunction pending disposition of their petition, that enjoins and restrains respondent Sutton 58 Holding Company LLC, directly or indirectly, from engaging and/or causing others to engage in any construction activity related to the permissions granted by the respondent Board of Standards and Appeals, issued July 27, 2018 in favor of respondent Sutton Holding Company LLC at or about the premises located at 428-432 East 58th Street, New York, New York, is DENIED.

DECISION

In this proceeding, the petitioners seek to annul a determination by the Board of Standards and Appeals (the "BSA"), issued July 27, 2018, pursuant to which the Board granted the application of respondent Sutton 58 Holding LLC, the developer of a residential skyscraper at 428 East 58th Street in Manhattan (the developer), to construct its building in accordance with the prior applicable zoning code provisions under the common law vesting doctrine and the grandfathering provisions of New York City Zoning Resolution (ZR) 11-331.

The application before the court today, however, is of more limited degree and seeks to preliminarily enjoin the developer from carrying out any construction activities pursuant to the BSA determination pending the determination of the petition.

It is axiomatic that a "party seeking a preliminary injunction must clearly demonstrate (1) the likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the injunction is not issued; and (3) a balance of the equities in the movant's favor." Hous. Works, Inc. v City of New York, 255 AD2d 209, 213 (1st Dept 1998).

Here, petitioners seek interlocutory injunctive relief in order that construction activities undertaken during the pendency of this proceeding do not render the claims raised moot. See Dreikausen v Zoning Bd. of Appeals of City of Long Beach, 98 NY2d 165, 174 [2002] ("Petitioners failed to seek a temporary restraining order or preliminary injunctive relief at any time during which the matter was pending before Supreme Court"). As such, the court finds that irreparable injury prong of the test is satisfied.

The balancing of the equities between the parties is a more difficult call. "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." Lesron Jr., Inc. v Feinberg, 13 AD2d 90, 95 (1st Dept 1961). However, at the time of this application the construction is at a point where a determination of petitioners' application can be done in a manner where the developer, should it not prevail in upholding the BSA determination, would still be able to comply with the current zoning in its future construction activities, and the posting of an undertaking, as required by CPLR 6312(b), would mitigate any damage suffered during the court's consideration of the petition.

Thus, the issue before the court is whether petitioners have surmounted the high burden of establishing a likelihood of success on the merits of their application. With respect to the applicable principles the Court has stated

> New York City Zoning Resolution § 11-331 does not codify or abolish the common-law doctrine of vested rights. The common-law doctrine is a broader consideration than that posited in that section of the resolution, which confines itself to whether or not certain physical stages of construction relating to excavation and the foundation have been completed.
>
> While the general standard in determining vested rights is substantial construction and substantial expenditure made prior to the effective date of the zoning amendment, unlike New York City Zoning Resolution § 11-331, "[t]here is no fixed formula which measures the content of all the circumstances whereby a party is said to possess 'a vested right'". Rather, it is a term which sums up a determination that the facts of the case render it inequitable that the State impede the individual from taking certain action. Each case must be determined according to its own circumstances.

Estate of Kadin v Bennett, 163 AD2d 308, 309 (2d Dept 1990) (citations omitted). However, the Court has emphasized that "Basic to traditional vested rights jurisprudence is the tenet that there is no right to reliance upon an invalid building permit". Inc. Vil. of Asharoken v Pitassy, 119 AD2d 404, 416-17 (2d Dept 1986) (underlining supplied).

In support of their application, the petitioners assert that certain of the permits relied upon by the developer in completing the foundation and subsequently relied upon by the BSA in finding the foundation compliant with ZR 11-331 were invalid and therefore vested rights, under either common law or ZR 11-331, never ripened and cannot support the BSA's determination.

"[A] determination of a zoning board, such as that of respondent BSA in the present case, is an administrative rather than quasi-judicial proceeding, and as such require[s] judicial review in Supreme Court." Kent Ave. Block Ass'n v New York City Bd. of Standards and Appeals, 280 AD2d 423, 424 (1st Dept 2001) (Citation omitted). "A board determination may not be set aside in the absence of illegality, arbitrariness or abuse of discretion, and will be sustained if it has a rational basis and is supported by substantial evidence." SoHo All. v New York City Bd. of Standards and Appeals, 95 NY2d 437, 440 [2000] (citation and internal quotations omitted). See also, Fort Indep. Park Neighborhood Ass'n v Srinivasan, 126 AD3d 422, 423 (1st Dept 2015).

In the context of the allegations made by the petitioners in this proceeding, "vested rights are not acquired where there is reliance upon an invalid permit." Perrotta v City of New

York, Dept. of Bldgs., 107 AD2d 320, 325 (1st Dept 1985), affd sub nom. Perrotta v City of New York, 66 NY2d 859 (1985). However, where the BSA's determination is "initially issued based on a reasonable interpretation of the Zoning Resolution, it [is] valid when issued" and gives the owner a vested right to construct the approved structure in reliance on the validity of the permit." Golia v Srinivasan, 95 AD3d 628, 629-30 (1st Dept 2012).

Petitioners assert that with respect to the "After Hours Variance Permits" granted to the developer to construct the foundation, such permits were impermissibly issued because the permits were not necessary to protect public safety. However, this court does not reach this issue because at the threshold there is no showing that the BSA's consideration and disposition of this argument is arbitrary and capricious. Indeed, the BSA's determination squarely considers the petitioners' assertions with respect to the After Hours Variance Permits and held that petitioners' challenge to the permits was untimely. The BSA declined to consider the validity of the permits within the vesting challenge proceeding, as a collateral attack, reasoning that under,

> "Section 666(6) of the New York City Charter, the Board is empowered to hear and decide appeals of 'any order, requirement, decision or determination of the commissioner

> of buildings,' including, but not limited to, the issuance of After Hours Variance Permits, and that such applications must be filed with the Board within thirty (30) days of the date of the determination—in this case, the dates on which the After Hours Permit(s) were issued—pursuant to § 1-06.3(a) of the Board's Rules of Practice and Procedure (2 R.C.N.Y. 1-06.3(a); and***
> (T)he prescribed period in which [petitioners] may have appealed the issuance of the After Hours Permits to the Board (has) lapsed".

Petitioners fail to explain why the BSA's limitations holding is contrary to law. Therefore, BSA's threshold, non-merits disposition of any issue concerning the non-validity of the permits cannot be said to be an abuse of discretion or arbitrary and capricious.

The petitioners also challenge the BSA's determination with respect to the issuance of and compliance with street closing permits in connection with the work on the foundation issued by the Department of Transportation to the developer. This court disagrees with petitioners' contention that the BSA failed to perform a de novo review of whether the developer properly complied with the street closure permits. With respect to the evidence before it, the BSA credited the photograph of the development site submitted by the developer as authenticated in the affidavit of the superintendent, present at the site, but found the undated photographs submitted by the petitioners, without any affidavit identifying the location to be without probative value. Thus, contrary to petitioners' argument, the

BSA fully considered the issue of the street closure permits, and did not simply defer to the Department of Transportation, but in its determination expressly examined petitioners' contentions and considered the evidence submitted by the petitioners and the developer as to the permits concluding that "construction at the Development Site on Saturday, November 11, 2017, from 7 a.m. to 6 p.m. [and] on Saturday, November 18, 2017, and until 4:08 p.m. on November 30, 2017, . . . was conducted lawfully pursuant to valid permits, and, thus, properly included in the applicant's submission with regards to 'substantial progress.'"[1]

It must be noted on this application that the court on this very narrow procedural application is constrained in its consideration of the claims raised and the high evidentiary and jurisprudential standard applicable to equitable applications for extraordinary preliminary equitable intervention. Thus, at this juncture, the court does not reach the merits of the

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[1]Query whether in raising the issue of whether the developer properly complied with the street closure permits, petitioners equate "review" with "enforcement." Petitioners do not assert that anyone made a complaint about the prosecution by the developer of the street closures, let alone that any violation or citation was issued. The record does not establish that petitioners attempted to access the enforcement mechanisms established to protect the public from harm, i.e. calling the police or 311 (the NYC Department of Transportation).

petition but shall deny preliminary injunctive relief for the reasons stated.

3/4/2019
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE