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Court of Appeals

STATE OF NEW YORK

A.D. Case No.
2020-01872

In the Matter of

THE COMMITTEE FOR ENVIRONMENTALLY SOUND DEVELOPMENT and THE MUNICIPAL ART SOCIETY OF NEW YORK,

Appellants,

against

AMSTERDAM AVENUE REDEVELOPMENT ASSOCIATES LLC, NEW YORK CITY BOARD OF STANDARDS AND APPEALS, and NEW YORK CITY DEPARTMENT OF BUILDINGS,

Respondents.

MEMORANDUM OF LAW OF *AMICI CURIAE* THE CITY CLUB OF NEW YORK, ALLIANCE FOR A HUMAN-SCALE CITY, THE COALITION TO PRESERVE CHINATOWN AND THE LOWER EAST SIDE, EAST RIVER PARK ACTION, FRIENDS OF THE UPPER EAST SIDE HISTORIC DISTRICTS, THE GREENWICH VILLAGE SOCIETY FOR HISTORIC PRESERVATION, INWOOD LEGAL ACTION, NEW YORK ENVIRONMENTAL LAW AND JUSTICE PROJECT, PRESERVE OUR BROOKLYN NEIGHBORHOODS, SAVE CENTRAL PARK NYC, THE WEST 64TH THRU 67TH STREETS BLOCK ASSOCIATION, AND THE WORKING GROUP AT PARK WEST VILLAGE IN SUPPORT OF MOTION FOR LEAVE TO APPEAL

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PRELIMINARY STATEMENT

Amici are civic. environmental, and community groups with diverse substantive interests and positions, all of whom share an interest in the urban environment, including the physical environment and the diverse communities that make New York City a living place.

Amici agree with and fully support the argument of Appellants Committee for Environmentally Sound Development and The Municipal Art Society of New York ("Petitioners") that the Appellate Division's decision in this case misunderstood and misapplied the doctrines of mootness and agency deference enunciated in *Dreikausen v. Long Beach Zoning Bd. of Appeals*, 98 N.Y.2d 165 (2002), and *Peyton v. N.Y.C. Bd. of Standards and Appeals*, 2020 N.Y. LEXIS 2873, 2020 WL 7390864 (Dec. 17, 2020), *rev'g* 166 A.D.3d 120 (1st Dep't 2018), respectively.

Amici also agree with Petitioners that the Appellate Division's interpretations "create a *de facto* bar for many community groups and advocacy organizations that would challenge" agency approvals of real property developments. Pet. Br. at 3.

However, given their role in this case, Amici make a broader argument. Even if the Appellate Division's decision correctly interpreted this Court's precedents, this Court should still grant leave to appeal and should then

take this opportunity to revisit those precedents and rule for Petitioners. First, the rule of so-called "mootness" enunciated in *Dreikausen* should be overruled entirely, as it irrationally requires impecunious petitioners to make a motion for a preliminary injunction to stop construction that will inexorably and necessarily be denied, and has even been read to require them to take an appeal from its denial that is also destined to fail. Petitioners' motion must fail because a preliminary injunction requires a showing of irreparable harm. The harm in these cases is that the challenged project will be completed while the litigation wends its way through the courts. Yet *Dreikausen* states that having made their motion, petitioners have insulated themselves from that harm. After all, this Court there promised that if petitioners make this motion, "relief remains … available even after completion of the project[, because] structures changing the use of property most often can be destroyed." 98 N.Y.2d at 172. Unable to show irreparable harm, petitioners must necessarily lose their motion.

Second, contrary to the movement of both liberal and conservative justices on the United States Supreme Court toward more active judicial review of administrative agency decisions, *Peyton* inappropriately extended existing law on deference to agency decisions, curtailing the role of the judiciary in interpreting the law and ignoring the potential of agency capture.

Amici also point out that several recent cases concerning zoning violations have involved attempts to place enormous amounts of additional bulk onto towers-in-the-park superblocks. Further development on these superblocks was restricted when they were created by urban renewal, but as those restrictions expired, they became targets of developers. Amici do not ask this Court to take a position on how much and what kind of infill there should be, if any. However, if the 1961 Zoning Resolution's protections for light, air and open space are to be changed, it must be through the considerate and democratic processes provided by the Charter for amending it, and not by clever gimmicks approved by regulators in thrall to the real estate industry, in violation of existing regulations.

INTERESTS OF THE *AMICI CURIAE*

The following are the Proposed Amici Curiae and their interests:

1. **The City Club of New York** was founded in 1892 as a good-government advocate. It is now broadly concerned with the urban environment of New York City. In recent years, it has addressed major zoning, park, and landmark issues. among others, with the dual objectives of improving the urban environment and curtailing governmental abuse that threatens the contrary.

2. **Alliance for a Human-Scale City, a/k/a Human-Scale NYC Human-Scale NYC, Inc.** is a non-profit organization with a mission to promote

human-scale urbanism, neighborhood livability, anti-displacement policies and democratic control over the built environment through research, education, and advocacy. It operates on a five-borough basis educating the public about policies that affect the character of neighborhoods regarding zoning, transportation, urban planning, housing, public space management, campaign finance, community planning, and historic preservation.

3. **The Coalition to Protect Chinatown and the Lower East Side** is an association of community groups, senior centers, small businesses, students, workers and families. Among its members are Chinese Staff & Workers Association, National Mobilization Against Sweatshops, Lower East Side Organized Neighbors, Democratic Socialists of America, Art Against Displacement, 318 Restaurant Workers Union, Youth Against Displacement, citygroup (architecture collective), East River Park Action, and Sixth Street Community Center. We organize with our community members to fight predatory land use decisions and the displacement they cause, and to take control of our community.

4. **East River Park ACTION (ERPA)** is a grassroots nonprofit community organization of largely middle to low-income residents fighting the current East Side Coastal Resiliency (ESCR) project at East River Park in Lower Manhattan, where it is faced with the imminent threat of bulldozers that would destroy the Park in its entirety in the name of an environmentally disastrous flood

resiliency plan that had no community input. ERPA believes that the judicial system must be balanced so that small community groups with lack of resources can have an equal chance at justice against overdevelopment promoted by much larger and well-funded entities.

5. **Friends of the Upper East Side Historic Districts ("FRIENDS")**, founded in 1982, is a non-profit membership organization dedicated to the preservation of the architectural legacy, livability, and sense of place of the Upper East Side. FRIENDS is also the leading voice for common sense development in its neighborhood. It has recognized the importance of smart planning and transparent regulation of the urban realm for almost 40 years, and has led battles against outsized developments before City agencies and in the courts. FRIENDS' research and educational campaign against zoning loopholes contributing to supertall buildings spurred New York City to adopt legislation to regulate mechanical voids in 2019.

6. **The Greenwich Village Society for Historic Preservation**, founded in 1980, is a membership-based 501(c)(3) whose mission is to document, celebrate, and protect the special architectural and cultural heritage of Greenwich Village, the East Village, and NoHo. We work to prevent inappropriate development and for the fair and equitable enforcement of landmark and zoning regulations, and to promote sound and healthy development in our neighborhoods.

7. **Inwood Legal Action (ILA)** first formed in August 2018 to prepare a court challenge to the rezoning of Inwood, a neighborhood in Northern Manhattan. A collection of activists, organizers, professionals, and engaged Inwood residents, ILA welcomes a just rezoning of Inwood driven by the community, not by the real estate industry. The ongoing goals of ILA are to promote community-driven, racially just, environmentally responsible, and contextual development in Inwood and throughout New York City; to promote affordable housing and prevent the residential displacement of Latinx, Black, Asian, and indigenous people, and working-class and low-income individuals and families; to preserve the character of Inwood as a neighborhood, including by preventing the displacement of the small businesses, particularly the immigrant-, minority- and women-owned small businesses, that serve the neighborhood; and to protect and preserve the environmental resources of Inwood, including its air and water resources, its parks, its gardens, and its waterfront.

8. **New York Environmental Law and Justice Project/ Environmental Justice Initiative** is a non-profit public interest organization based in Manhattan, affiliated with the National Lawyers Guild. It counsels and represents groups and individuals of all races, ages and genders concerned with the preservation and improvement of community environmental conditions. We believe it is possible for people to protect themselves and their communities from dangerous and

burdensome environmental hazards through knowledge and effective and affordable legal avenues.

9. **Preserve Our Brooklyn Neighborhoods** is a non-profit whose purpose is to protect the Fort Greene/Clinton Hill neighborhood character in accordance with the Contextual Zoning Resolution enacted by the City of New York in 2007 and to support other communities in New York City besieged by onerous rezonings and flagrant intrusions into livable neighborhoods.

10. **Save Central Park NYC** has the mission of mobilizing the public to share their concern with elected officials about the impact of the proliferation of megatowers on all sides (south, north, east and west) of Central Park. We need to halt the frenzied pace of new construction around the park pending adoption of zoning modifications and/or legislation that will benefit the city for generations to come. This battle to save our parks and neighborhoods from overdevelopment must be fought at the State and City levels and in the courts.

11. **The West 64th thru 67th Streets Block Association**'s mission is to create a sense of community for our streets. We promote neighborhood harmony, quality of life and safety through collaborative planning, community action, and policy advocacy. Our objectives include reaching out to our government with one strong and effective voice. As such, we are proud to join members of our broader community in supporting this amicus brief.

12. **The Working Group at Park West Village a/k/a Park West Justice Project** is composed of a diverse group of dedicated individuals from the Upper West Side of Manhattan who are committed to saving our Park West neighborhood from over-development, to preserving precious and dwindling open space, and to protecting the health and safety of our residents from construction hazards, toxins in the air or ground, hazardous waste and materials, traffic congestion, noise and pollution.

ARGUMENT

I. *DREIKAUSEN* MANDATES MOTION PRACTICE THAT IS FRIVOLOUS, WASTEFUL AND HIGHLY PREJUDICIAL TO CHALLENGERS[1]

In *Dreikausen v. Zoning Board of Appeals*, 98 N.Y.2d 165 (2002), the Court of Appeals held that petitioners challenging a construction project for violations of zoning or similar must move for a preliminary injunction as soon as permits are issued, even before exhausting their administrative remedies, lest their case be held moot by the time it reaches the appellate courts. Only by pressing for injunctive relief, the Court held, can petitioners prove their seriousness, and thereby put the developer on notice that it proceeds with construction at its own risk.

[1] For a more comprehensive discussion of this issue, *see* J. Low-Beer, ""Why Community Groups Can Never Win Against Developers," NYLJ, Sept. 18, 2019 (https://www.law.com/newyorklawjournal/2019/09/18/why-community-groups-can-never-win-against-developers-the-dreikausen-paradox-and-other-hurdles-and-suggestions-for-change/).

Dreikausen should be overruled because it imposes on petitioners the severe punishment of dismissal of their claims, no matter how meritorious, for their failure to do something that is wholly futile and often beyond their resources: immediately make a motion that will necessarily fail, as a matter of law, and then take an appeal that will also necessarily fail. This Alice-in-Wonderland motion and appeal are an utter waste of time and resources for respondents and for the courts, and impose insuperable barriers to impecunious challengers. They would ordinarily be considered frivolous, and therefore sanctionable; but in the upside-down world of *Dreikausen* and its progeny, they are actually required.

Challengers can never win the motion or the appeal because a preliminary injunction requires a showing of irreparable harm, which in these cases means a showing that without the injunction the building will be completed and the challengers' claim will be rendered moot. But *Dreikausen* says that the challengers need only seek a preliminary injunction to preserve their right to obtain demolition of the building and avoid dismissal on mootness grounds. So by the very act of applying for the injunction, petitioners have presumptively avoided the harm that they need to show in order to win the motion.

Since *Dreikausen*, the rule there enunciated has become ever more draconian as it has been applied in the more than twenty appellate decisions that have found challenges to construction projects to be moot where (1) the petitioners

failed to apply for a preliminary injunction at the earliest possible moment, immediately upon the granting of a building permit and commencement of construction, and/or failed to appeal from denial of their preliminary injunction motion; and (2) the building in question was substantially completed while the case was pending.[2]

In denying preliminary injunctions, courts regularly cite the absence of irreparable harm. In this case, Owners' counsel stated in court that, "As long as you timely sought injunctive relief, no one will ever say that you waived your right," SR.36-37, and Justice Perry, in denying Petitioners' motion, stated, "Yes, the owners are building at their own risk." In *City Club of N.Y. v Extell Dev. Co.*, 2019 N.Y. Misc. LEXIS 3111, at *16, 2019 NY Slip Op 31645(U), 12, *app. dism'd*, 177 A.D.3d 422 (1st Dep't 2019), the Supreme Court denied injunctive relief, stating:

> [H]aving sought an injunction, plaintiffs preserved their right to seek demolition of the building should the BSA uphold their challenge to the plan.

[2] *See, e.g., Weeks Woodlands Assn., Inc. v. Dormitory Auth. of the State of New York*, 95 A.D.3d 747 (1st Dept. 2012), *aff'd on op. below*, 20 N.Y.23d 919 (2012) (petitioners' claims held moot even though meritorious where they moved twice in the lower court for injunctive relief and sought a calendar preference in the Appellate Division, but did not renew request for preliminary injunctive relief in the Appellate Division); *Citineighbors Coalition v. Landmarks Preservation Commission*, 2 N.Y.3d 727 (2004) (brushing aside petitioners' assertion that they had not sought preliminary injunctive relief because of inability to provide bond); *Sierra Club v. N.Y.S. Dept. of Envtl. Conservation*, 169 A.D.3d 1485 (4th Dept. 2019), *lv. den.*, 2019 NY Slip Op 03256 (Apr. 26, 2019) (action to enjoin pipeline construction and power plant renovation dismissed as moot where petitioners waited seven weeks to bring suit and failed to seek TRO).

In *Queens Neighborhood United v. N.Y.C. Dept. of Buildings*, 2019 N.Y. Misc. LEXIS 268, *8-*9, 62 Misc. 3d 1210(A) (S. Ct. N.Y. Co. Jan. 23, 2019), the court denied injunctive relief, stating:

> [A] court evaluating a future appeal by Petitioners will be unlikely to dismiss their claims for mootness, as the record will show that they sought injunctive relief prior to completion. . . . . Additionally, Respondents, who have contended ... that completion does not equal mootness, cannot later argue mootness ... as that would be a disingenuous tactic amounting to a dishonest abuse of the court system.[3]

In this case, the First Department has lifted the bar to insurmountable heights. Appellants here engaged in extensive litigation and made herculean efforts to block construction, bringing a plenary action and two Article 78 proceedings and thrice seeking preliminary relief. These efforts should be more than enough to demonstrate seriousness.

Neither this Court nor any other has provided any reason why engaging in frivolous motion practice should be a requirement for obtaining a remedy for a zoning violation.

The futility of *Dreikausen*'s requirement is aggravated by the fact that challengers such as Petitioners do not have the resources to litigate <u>first</u>, a plenary action and a preliminary injunction motion, which must be brought at the earliest

[3] These two cases are known to counsel because he represented the challengers in both. Presumably, there are others.

possible time, and in any event prior to exhausting administrative remedies, in addition to an appeal from its denial and second, an Article 78 proceeding (or two, as in this case), a new motion for preliminary relief and another appeal from the inevitable denial thereof.

As this Court recognized, the *Dreikausen* rule is not really a rule of mootness:

> 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. ... In a challenge such as this, however, relief remains at least theoretically available even after completion of the project. Simply put, structures changing the use of property most often can be destroyed.

Dreikausen, 98 N.Y.2d at 172. Nor does it involve laches, which "is defined as such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity." *Capruso v Village of Kings Point*, 23 N.Y.3d 631, 641 (2014). In this case and others like it, there is no prejudice to the adverse party, because it has ample notice, even without a frivolous motion, of the claims against it. The *Dreikausen* requirement is simply a cudgel to be wielded against petitioners, who already face serious hurdles.

Petitioners here did everything and more, within reason, to assert their claims. In light of the economic realities of most not-for-profits and community organizations, including Petitioners, the dicta accusing them of "nonfeasance that

they chalk up to 'monetary constraints,'" *Citineighbors Coalition of Historic Carnegie Hill*, 2 N.Y.3d at 727, or "half-hearted request[s] for injunctive relief," *Dreikausen*, 98 N.Y.2d at 174, are unfortunate. Their failure to take a useless appeal from denial of a motion they could never have won should not be held against them.

II. THIS COURT SHOULD NOT DEFER TO ADMINISTRATIVE AGENCY DECISIONS ON QUESTIONS OF LAW, NO MATTER HOW COMPLEX

This Court should use this case to reassert the principle that it is courts, and not administrative agencies, that have the ultimate responsibility to interpret statutes, no matter how complex. The decision of the Appellate Division relies heavily on the December 17, 2020, 4-3 decision of this Court in *Peyton* for the proposition that the courts must defer to the Board of Standards and Appeals ("BSA") in matters "relating to its expertise." *Id.* at *4. *Peyton* states that "'[w]here the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute.'" *Id.* (quoting *Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 459 (1980). This proposition is neither new nor controversial.

Peyton also gave lip service to the other side of the coin: the equally well-established proposition that "when 'the question is one of pure statutory reading

and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency.'" *Id.* (quoting *Kurcsics*, 49 N.Y.2d at 459, and citing *Raritan Dev. Corp. v. Silva*, 91 N.Y.2d 98, 106 (1997), and *Toys "R" Us v. Silva*, 89 N.Y.2d 411, 418 (1996)).

However, as the *Peyton* dissent correctly pointed out, in fact the *Peyton* majority extended deference beyond previous precedent to questions of pure statutory interpretation merely because they involve a "complex set of cross-references and interlocking provisions." *Id.* at *5. The idea that the Court must defer "because the Zoning Resolution uses words that refer to other words and because land use law is complicated ... contravenes basic principles of statutory interpretation." *Id*. at *8 (Wilson, Rivera, & Fahey, JJ., dissenting).

Deference on questions of law such as those raised by the instant case is an abdication of the courts' proper role of deciding questions of law *de novo*. Mere legal complexity should not deter judges from interpreting the law. Nor has it done so in the past. For example, in *Kurcsics*, 49 N.Y.2d 451, 459 (1980), which the *Peyton* majority relied on, the Court did not defer even though the case involved "highly complex, interrelated provisions," 49 N.Y.2d at 461 (Gabrielli, J., dissenting). Similarly, it did not defer in *Royal Bank & Tr. Co. v. Superintendent of Ins.*, 92 N.Y.2d 107, 124 (1998), even though the case involved a "unique,

complicated set of circumstances" and "require[d the Court] to grapple with the intricate interplay" among provisions of the insurance law.

Peyton's expansion of the sphere of deference to questions of law goes in the opposite direction from what has been happening at the federal level. Thirty-seven years ago, in the watershed decision of *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), the United States Supreme Court adopted a highly deferential standard of judicial review of agency actions: unless the governing statute provided an unambiguous answer to the question before the agency, "a reviewing court ... is obliged to accept the agency's position if ... the agency's interpretation is reasonable." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (citing *Chevron*, 467 U.S. at 842-845). In recent years, however, the Supreme Court has limited or even ignored *Chevron*, to the point where many commentators have anticipated its demise.[4] It has distinguished between legislative rules, which are entitled to *Chevron* deference, and decisions in individual cases, such as the BSA's decision here, to which the courts will defer "only to the extent [they] have the power to persuade." *Gonzalez v. Oregon*, 546 U.S. 243, 256 (2006) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Most recently, the Court has gone further

[4] *See, e.g.*, M. Herz, "*Chevron* is Dead; Long Live *Chevron*," 115 Colum. L. Rev. 1867, 1868 (2015) ("reports of *Chevron*'s death seemed to get significant confirmation at the end of the Supreme Court's 2014-2015 Term"); G.E. Metzger, "The Roberts Court and Administrative Law," 2019 Sup. Ct. Rev. 1, 3 (2019) ("*Chevron* has been under full-blown assault at the Supreme Court since 2015").

still. Justice Kagan, writing for the Court in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), limited deference to situations in which the provision at issue is "genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation," *id.* at 2414, and in which "the agency's reading [is] reasonable," *id.* at 2415, and finally, in which the reviewing court concludes, after "an independent inquiry," that "the character and context of the agency interpretation entitles it to controlling weight," *id.* at 2416.[5]

As the Supreme Court now recognizes, whatever deference may be appropriate when the question before an agency involves issues of policy and/or expertise is inappropriate with respect to questions of law, as it "wrests from courts the ultimate interpretative authority to 'say what the law is,'" *Michigan v. EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)), and "creates a 'systematic judicial bias in favor of the ... government, the most powerful of parties, and against everyone else,'" *Kisor*, 139 S. Ct. at 2425 (Gorsuch, J., concurring in an opinion in which Thomas, Kavanaugh and Alito, JJ. join) (citation omitted).

[5] The Supreme Court's retreat from deference comes from both liberal and conservative justices. *See, e.g., Kisor*, 139 S. Ct. 2400 (maj. op. of Kagan, J., joined by Ginsburg, Breyer, and Sotomayor, JJ.); *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring) ("deference ... exhibited in some of these cases is troubling ... [a]nd when applied to other questions of statutory interpretation ... it is more troubling still"). Justices Scalia and Thomas were the staunchest defenders of *Chevron* deference before they came to oppose it. *See* Herz, *supra*, at 1869; Metzger, *supra*, at 9; *Baldwin v. United States*, 140 S.Ct. 690 (2020) (Thomas, J., dissenting from denial of cert.).

The expertise of the BSA is in disciplines related to land use, not law. Charter § 659 requires that it comprise five members, of whom one must be a professional planner, another a registered architect, and another a licensed professional engineer, each with at least ten years' experience in their profession. None is required to be a lawyer. Nor is the City Planning Commission required to have an attorney among its thirteen commissioners. It is the courts that have expertise in statutory interpretation. Unless an interpretive question involves "operational practices or ... an evaluation of factual data," judges are better equipped than land-use experts to answer them.

Deference is particularly unwarranted where an agency may be captive to the industry it is supposed to regulate. The theory of capture, developed by economists Mancur Olson[6] and Nobelist George Stigler,[7] holds that agencies are captured when industry players with enormous interests in the outcome of regulatory decisions focus large resources on influencing the agencies that are supposed to regulate them, while members of the public, who have few resources and are usually not repeat players, cannot exert equivalent countervailing pressure. In many cases, too, the professional staff of an agency come from, and will return to, the industries

[6] THE LOGIC OF COLLECTIVE ACTION (1965).

[7] "The Theory of Economic Regulation," 2 Bell J. Econ. & Mgmt. Sci. 3 (1971).

that they regulate.[8] Consciously or unconsciously, their outlooks are shaped by those industries' perspectives. Very few engineers, architects, and planners work for community groups or civic organizations.

Before according full-throated deference to an administrative agency, courts should at least consider the possibility of agency capture. In December 2016, at a City Council hearing concerning the BSA, Council Member Ben Kallos, Chair of the Committee on Governmental Operations, stated:

> For decades, the BSA has been subject to criticism that it favors developers over the community and that high levels of variances granted, 97%, despite community boards' only supporting 79% have altered the character of neighborhoods and resulted in de facto rezoning. ... The concern here is that BSA is allowing developers to circumvent City zoning laws which restrict building forms, use, height, density, and more. We will also ensure that the BSA is the "relief valve" it was intended to be and not a rubber stamp for real estate.

City Council Hearing Tr. at 5-6 (Dec. 14, 2016).[9] At that same hearing, Council Member and Majority Leader Jimmy Van Bramer stated:

> We in Queens, ... just like all over the city, have been really plagued by BSA rulings that have gone against the wishes of the civic organizations in the neighborhood, the community boards; all the elected officials. And just as you were inspired, Mr. Chair, by a situation, I was inspired by a building on Woodside Avenue in Woodside, Queens where we knew that the project was out of scale, out of character, inappropriate for Woodside; every single elected official wrote the BSA, every single elected official attended a press conference, every civic leader, the community board, unanimous, all of us saying in one voice this would

[8] The current BSA Chair, who actually is an attorney, recused herself from this case because she was a member of the law firm that had created the gerrymandered zoning lot.

[9] (https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2898994&GUID=94A9AF7E-B705-495C-9E61-CE265EE24124&Options=Advanced&Search=).

> be wrong for our community and yet the BSA ruled that that would be appropriate and that building moved forward and was built.

Id. at 9-10.[10]

Recent decisions of the BSA in interpretive appeals from DOB grants of building permits also raise questions regarding capture. Amici know of no recent decisions in which the BSA decided against the developer. On the other hand, there have been a number of decisions in favor of developers that have been directly contrary to the text and/or the intent of the Zoning Resolution, or relied on strained interpretations. Where those have been affirmed by the courts, this may be more indicative of excessive deference than of even-handedness on the part of the BSA.

In this case, the BSA was so determined to side with the developer that it contradicted DOB's conclusion that the gerrymandered lot was illegal. It also "wholly ignored" the directive of the Supreme Court in its first Decision and Order, which annulled the BSA's first Resolution and remanded the matter, "and instead wrongly claimed that it had been directed to consider 'ways in which the Resolution could be amended to more specifically describe [BSA's] determination.'" *The Committee for Environmentally Sound Development v. Amsterdam Ave. Redevelopment Assocs. LLC*, 2020 N.Y. Misc. LEXIS 12708, *12, 2020 NY Slip Op

[10] The legislation enacted by the Council in 2017 addressed some issues of transparency and accountability, but did nothing to change the fundamental bias of the BSA. *See https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2898994&GUID=94A9AF7E-B705-495C-9E61-CE265EE24124&Options=Advanced&Search=*.

34453(U) (S. Ct. N.Y. Co. Feb. 27, 2020). For this reason, and because "the question is one of pure legal interpretation of statutory terms," the Supreme Court held that BSA's second Resolution was "not entitled to substantial deference." *Id.*

In another recent decision, the Supreme Court, New York County, compared the BSA's actions to those of the F.A.A. in approving Boeing's 737 Max. The court wrote that with the BSA, as with the F.A.A., "a business has gotten an administrative agency to approve a faulty, flawed plan, constituting a 'severe lack of oversight' (albeit, nobody has or will die)." *City Club of N.Y. v. N.Y.C. Bd. of Stds. & Appeals*, 2020 NY Slip Op 33139(U), at **8 (S. Ct. N.Y. Co., Sept. 25, 2019) (quoting N. Chokshi, "House Report Condemns Boeing and F.A.A. in 737 Max Disasters," N.Y. Times, Sept. 16, 2020).

In justification of its ruling in that case, the BSA cited ZR § 72-11 as requiring it to "strictly apply[ ] and interpret[ ] the provisions of this Resolution." BSA Resolution 2019-89-A, 36 West 66th Street, Manhattan (Sept. 17, 2019).[11] However, in this case the BSA rejected the plain meaning of the applicable provision of the Zoning Resolution. In *Peyton*, too, a strictly literal reading of the Zoning Resolution would concededly have required annulling the permit, but the BSA

[11] *See also, e.g.*, BSA Resolution 2017-290-A, 1558 Third Avenue, Manhattan (Dec. 11, 2018) (relying on ZR § 72-11 and a literal reading of the Zoning Resolution in holding that developer could create a new zoning lot consisting of a 10-foot-deep strip along the side street for the sole purpose of avoiding having to comply with zoning rules for buildings facing the side street).

declined to read it literally, instead advancing a "practical" reading, *Peyton*, 2020 WL 7390864 at *3, which the *Peyton* dissent correctly described as "wholly absent from the language of the Zoning Resolution," *id.* at *8.

For all the above reasons, Amici submit that the decisions of the BSA, particularly on questions of law, even complex ones, should be reviewed under the standard articulated by Justice Kagan in *Kisor* rather than under the more deferential standard of *Peyton* and *Chevron*.[12]

III. RECENT CITY AGENCY APPROVALS SANCTIONING MASSIVE INFILL DEVELOPMENT IN VIOLATION OF THE 1961 ZONING RESOLUTION'S PROTECTIONS OF LIGHT, AIR, AND OPEN SPACE SHOULD NOT BE RUBBER-STAMPED BY THE COURTS

This case, as well as *Peyton* and two zoning cases challenging four proposed towers on the Lower East Side, *Tenants United Fighting for the Lower East Side v. City of N.Y. Dep't of City Planning*, 191 A.D.3d 548 (1st Dep't 2021) (decided together with *Lower East Side Organized Neighbors v. New York City Planning Comm'n*), have revolved around efforts by developers, supported by the City, to insert massive amounts of infill housing into existing towers-in-the-park developments in ways that violate the Zoning Resolution and obliterate, the light, air and open space that these developments were designed to provide.

[12] *See also* J. Low-Beer, "Comment on Peyton v. NYC BSA," CityLand, Jan. 11, 2021 (https://www.citylandnyc.org/comment-on-peyton-v-nyc-bsa/).

In each of these cases, petitioners' concerns were given short shrift by the relevant City agencies—the BSA here and in *Peyton*, the Department of City Planning ("DCP") in the Two Bridges cases—and by the appellate courts, which in each case reversed the decisions of the Supreme Court, New York County.

Perhaps the rejection of petitioners' claims in these cases was out of some sense that the development process is too often obstructed by litigation and that opposition to the proposed projects is mere NIMBYism, motivated by attachment to the status quo and fears of change. This is the view of proponents of hyperdensity, who see increased density as necessary if New York City is to keep up with other global cities as a hub of innovation and prosperity or to maintain some semblance of affordability. *See, e.g.*, E. Glaeser, TRIUMPH OF THE CITY, at 260-261 (2011) ("The Curse of NIMBYism") (attacking neighborhood preservation as contrary to "the public interest"); V. Chakrabarti, A COUNTRY OF CITIES at loc. 583 (2014) (arguing that "[e]ven dense places need the growth required to ensure affordability and keep pace with cities worldwide").

Others, however, contend that while some density is necessary for a successful city, ever greater density is not healthy for cities or communities, which must maintain a human scale in order to be successful. J. Gehl, CITIES FOR PEOPLE 127 (2010) ("[W]hat the lively city really needs is a combination of good inviting city space and a certain critical mass of people who want to use it. There are

countless examples of places with high building density and poor city spaces that do not work at all."). The idea that allowing construction of supertall luxury buildings will lead to more affordable housing has also been questioned.

> The relatively high rate of vacancies in luxury buildings belies the notion that the surplus will trickle down to poor people …[T]he lack of affordable housing for low- and moderate-income households remains constant because "the market" does not build for them, and government subsidies are simply not sufficient to fill the gap. … [T]he new luxury housing produced by the market forces more people into the existing housing stock, which … means that the rents there will actually go up and not down!

T. Angotti, ZONED OUT 36-37 (2017). Also to be considered are the social costs of the displacement and destruction of existing communities that results from gentrification—costs that, now as during the era of urban renewal, are borne disproportionately by people of color. *Id.*

Amici do not ask that the courts resolve the debate over density, building heights, and gentrification. That is not their role. However, it is the courts' role to enforce the Zoning Resolution as written and intended, and to require that any changes in it be approved by the elected representatives of the people as prescribed by the City Charter.

This includes the Zoning Resolution's multiple provisions intended to encourage tower developments surrounded by light, air, and common open space that have been misread and violated in these cases. These were the animating values of the 1961 Zoning Resolution. As noted urban planning historian Hilary Ballon

stated at DCP's 2011 conference celebrating the Zoning Resolution's 50th anniversary, the "vision of the City [underlying the 1961 Zoning Resolution] was firmly anchored in the superblock solution, with free-standing towers surrounded by light, air and open space."[13] City Planning's website, too, describes the Zoning Resolution as embodying the "towers-in-the-park" vision propounded by modern architects such as LeCorbusier: multiple buildings surrounded by common open space.[14]

This overall vision was embodied in specific provisions of the Zoning Resolution. The Zoning Resolution's definition of "Zoning Lot" explicitly contemplated zoning lot mergers so as to permit the transfer of development rights, providing that zoning lots could consist of "two or more contiguous lots of record, located within a single block." ZR § 12-10. However, this definition was not intended to allow, and does not allow, zoning lots with arbitrary boundaries such as the gerrymandered zoning lot at issue here.

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[13] N.Y.C. Dept. of City Planning, Zoning the City-2011, Conference held Nov. 15, 2011, presentation of H. Ballon, "The 1961 Zoning Resolution: Historical Context and Vision." Video available at https://www1.nyc.gov/site/planning/about/city-planning-history.page?tab=2. Prof. Ballon's presentation begins at approximately the 44th minute of the video (or, on the counter on the screen, at 1 hr.).

[14] Dept. of City Planning, City Planning History (https://www1.nyc.gov/site/planning/about/city-planning-history.page?tab=2, at 4-5); Dept. of City Planning, Residence Districts: Overview, Moderate- and Higher-Density Residence Districts (R6-R10) (http://www1.nyc.gov/site/planning/zoning/districts-tools/residence-districts-r1-r10.page).

Similarly, the Zoning Resolution's definition of "Open Space," as space "accessible to and usable by all persons occupying a dwelling unit or a rooming unit on the zoning lot" ZR § 12-10, was intended to require that open space on superblock developments be common space, not privatized as the *Peyton* decision allowed.

An entire chapter of the Zoning Resolution, ZR Art. VII, Ch. 8, titled "Special Regulations Applicable to Large-Scale Residential Developments" ("LSRDs"), exists to encourage development on superblocks. The 1950 preparatory report for the 1961 Zoning Resolution explained that such developments presented both opportunities and problems: opportunities because they allowed for flexibility and more open space; problems because the underlying zoning rules were not designed for superblocks, and could easily lead to excessive density. Harrison, Ballard & Allen, *Plan for Rezoning the City of New York*, at 71-74 (1950).[15] Those rules, "based on the assumption of single-lot development break down completely in regulating such large-scale developments," because "super-block development makes available for use large amounts of land which would remain in streets in a system of gridiron development." *Id.* at 72. "As a result, under the existing Zoning Resolution the zoning envelope for large-scale projects would permit huge

[15] (https://www1.nyc.gov/site/planning/about/city-planning-history.page?tab=2).

buildings, extending from street to street, with endlessly rising set-backs and a giant tower in the center of the super-block—a wholly fantastic conception." *Id.*

The LSRD regulations and special permits at issue in *Tenants United* were intended to prevent such excesses and to ensure that superblock developments "will not unduly increase the bulk of buildings, density of population, or intensity of use in any block, to the detriment of the occupants of buildings in the block or nearby blocks, [and] will not affect adversely any other zoning lots ... by restricting access to light and air." ZR § 78-313.[16]

Tower-in-the-park developments are criticized nowadays both from the left, by urbanists such as Jane Jacobs and Jan Gehl for their inhuman scale and for sapping vitality from the streets, and from the right, by economists such as Edward Glaeser and Vishaan Chakrabarti for their supposedly under-utilized open spaces and insufficient density. But whatever the validity of these criticisms, these developments and the regulations that produced them continue to earn them the support of the communities that live in them. If they are to be jettisoned, it should be through lawful process, and not by unelected officials bending to the pressures of

[16] In dicta in its recent decision in *Peyton*, this Court questioned petitioners' "suggest[ion] that the drafters of the 1961 Zoning Resolution embraced a 'tower-in-the-park vision' that prized large zoning lots with multiple buildings surrounded by shared open space," stating that "they do not cite any statement of intent or other language in the Zoning Resolution that favors 'towers-in-the-park projects" on large superblocks.'" *Peyton*, 2020 WL 7390864 at *7. Yet this contention was never challenged by respondents in that case, and the evidence is in any event incontrovertible.

developers or by the courts deferring excessively to the decisions of these same officials.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioners' motion for leave to appeal to this Court.

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant that this brief was prepared on a computer, using Times New Roman 14 pt. with double-spacing for the body and Times New Roman 12 pt. with single-spacing for footnotes. The brief, excluding portions that need not be included in this word count pursuant to 22 N.Y.C.R.R. § 600.10.3(a)(3), contains 6,345 words.

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John R. Low-Beer