SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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Queens Neighborhoods United, New York City Council Member Francisco Moya, New York State Senator Jessica Ramos, Desis Rising Up and Moving, Alexandra Owens, Tania Mattos Jose and Jorge Cabanillas,

Petitioners,

Index No. _____
VERIFIED PETITION

For a Judgment Pursuant to CPLR Art. 78 and a Declaration Pursuant to CPLR 3001

-against-

New York City Board of Standards and Appeals, New York City Department of Buildings, AA 304 GC TIC LLC, 82 BAXTER TIC LLC, ZM 304 GC INVESTOR TIC LLC, 304 GC TIC LLC, Sun Equity Partners, the Heskel Group and Target Corporation,

Respondents.

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Petitioners, by their attorney PAULA Z. SEGAL of TakeRoot Justice, for their Verified Petition pursuant to CPLR Art. 78 and CPLR § 3001, state:

Preliminary Statement

1. Petitioners seek to protect their neighborhood from the illegal construction of a mall with Target as an anchor tenant in a residential zoning district. Construction of an oversized cellar specifically designed to be rented to the Target Corporation has been ongoing since September 2018. But the property where the mall is to be located is in a zoning district that permits only Local Retail and expressly forbids Retail Destinations such as Target stores.

2. Destination Retail, such as this Target store, is permitted in C4 Destination Retail districts, but not in C1 Local Retail districts, the type of district in which the subject property is located. *See* Exh. A, N.Y.C. City Planning Commission, Zoning Map 9d. But Developers[1] signed a lease agreement with Target to place a Target store on the property.

3. To build their desired Target store in a zoning district that did not permit it, Developers pursued two strategies: (1) pursuing rezoning of the property that would have aligned the planned use with the uses that are permitted there and (2) constructing a cellar space in an attempt to evade the existing zoning district's use restrictions entirely.

4. In pursuit of a rezoning, they applied to have City Council change the zoning of the subject property from C1 Local Retail to C4 Destination Retail. City Council did not make the change and Developers withdrew their application. At that point, Developers should have

[1]Collectively, Respondents Sun Equity Partners, AA 304 GC TIC LLC, 82 Baxter TIC LLC, ZM 304 GC Investor TIC LLC, 304 GC TIC LLC, and Heskel Group are referred to herein as "Developers."

respected City Council's control of New York City zoning per the N.Y.C. Charter and changed their leasing plan for the property.

5. Instead, Developers moved forward with their fallback plan: building a 22,000+ square foot cellar that, when completed, will be accessed by a set of escalators at grade for Target. This complex design is a subterfuge that Developers are attempting to use to circumvent the restrictions imposed by Local Retail zoning district of the property. This subterfuge works in two steps.

6. The statute prohibits a siting department store in a Local Retail district. Thus, as a threshold matter, Developers submit documents to DOB that assert that its tenant, a Target store which will have departments, is not in fact a "department store" but rather a "variety store." Even though the Department has a Charter-mandated obligation to enforce the use retrictions of the New York City Zoning Resolution ("ZR"), New York City Charter § 643, when Developers submitted these documents, DOB did not verify the "variety store" claim at all.

7. Second, Developers assert that the Target, which is over 22,580 square feet in size, is actually smaller than 10,000 square feet. They do so to avoid C1 Local Retail retrictions on large "variety stores," specifically those over 10,000 square feet. To make this claim, they say that the part of the store which is below ground cannot be counted as part of the store area. This, too, is incorrect: it conflates regulations of the *bulk* of a building–the building's size and location–and the *use* to which the spaces inside the building may be put. The ZR does exclude cellar space from the calculation of the "floor area of a building," used to calculate building bulk. ZR § 12-10. But the ZR distinguishes between that calculation and "floor area per establishment," which is used to determine whether a variety store is so large that it must be

disallowed in a Local Retail zoning district. ZR § 32-15. Crucially, cellar space is excluded only from the "floor area of a building," not from "floor area per establishment." ZR § 12-10. While a DOB employee did raise the objection that the planned variety store was too large for the C1 Local Retail district, Developers were able to provide their nonsensical explanation without any investigation into its propriety or applicability because DOB allowed Developers to self-certify that the objection was adequately addressed, again undermining DOB's obligation to enforce zoning.

8. The property that is the subject of this proceeding is located at 40-31 82nd Street (aka 40-19 82nd Street; Queens Block: 1493 Lot: 15) in Elmhurst, Queens ("Property"). The neighborhood in which the Property is located is a thriving residential area with many small shops that are run by residents and serve neighborhood needs.

9. Petitioner Queens Neighborhoods United ("QNU") is an association of Elmhurst and Jackson Heights residents, including Petitioners Alexandra Owens, Tania Mattos and Jorge Cabanillas. Desis Rising Up and Moving ("DRUM") is a New York State Not-for-Profit organization founded in 2000 to build the power of South Asian low wage immigrant workers, youth, and families in New York City to win economic and educational justice, and civil and immigrant rights. Council Member Francisco Moya represents the district in the New York City Council and chairs the Council's Subcommittee on Zoning and Franchises. *See* Moya Aff. Petitioners Jose, Owens and Cabanillas (collectively "Individual Petitioners") are residents of the surrounding neighborhood concerned that the increased automobile and pedestrian traffic due to the project will increase their commuting times, lead to an increase in accidents, and delay access to Elmhurst Hospital, located just one block away.

10. QNU and Individual Petitioners exhausted their administrative remedies for seeking annulment of the Permit via Zoning Challenges, Community Appeal, and an appeal to the BSA. Petitioners Council Member Moya and Senator Jessica Ramos submitted letters to the BSA in support of the appeal.

11. Developers continue to build on the basis of an illegally granted New York City Department of Buildings ("DOB") permit that was improperly and capriciously upheld by the Board of Standards and Appeals ("BSA"). BSA 2018-166A (filed Sept. 3, 2019) (herein "BSA Decision"),[2] Exh. B; DOB Permit 421485805-01-NB (Sept. 20, 2018), Exh. C.

12. QNU, DRUM, Senator Ramos and Individual Petitioners filed a previous Article 78 petition seeking a preliminary injunction to halt the illegal construction while BSA hearings and written Decision were pending; this court denied this earlier petition because administrative remedies had not been exhausted yet at the time of filing. *Queens Neighborhood United v. NYC Dept. of Bldgs.*, 62 Misc. 3d 1210[A] (Sup. Ct. N.Y. Co. 2019), Exh. D. The court directed, "If the BSA rules in Respondents' favor, Petitioners will be able to file another Article 78 petition which will then be timely and not premature." *Id.* at *6. The BSA did rule in Respondents' favor and the present petition is now timely.

13. Upon denial, the BSA made the following irrational findings:

a. that Target "is properly categorized as a variety store and not a department store," BSA Decision, p. 11;

b. that the planned 23,580 square foot store "contains less than 10,000 square feet of 'floor area,'" and thus that the planned Target retail destination is "a Use Group 6

[2]In an unusual deviation from the rest of the Commission, one member voted to grant the appeal at the BSA, but vote did not control the BSA Decision.

variety store [] consistent with ZR § 32-15," *id.* (a conclusin drawn by improperly excluding cellar space from the calculation of floor area of the establishment);

c. and that the drafters of the ZR considered the traffic impacts of Use Group 6 variety stores, Use Group 10 variety stores and Use Group 10 department stores to be the same, *see id*. at 13, a direct contradition of the stated intent of the ZR to "regulat[e] the intensity of local retail development, by restricting those types of establishments which generate heavy traffic" from some districts. ZR § 31-00(d).

14. This BSA's erosion of the ZR's distinction between Local Retail and Destination Retail districts has citywide implications. Large swaths of New York City are zoned for Local Retail only. Should the court affirm, New York City will see a proliferation of underground malls of unlimited size in every residential district designed to allow retail at all. *See* BSA Decision, p. 7 (describing two other underground Target stores for which DOB has granted permits in C1 districts, 17,000 and 12,477 square feet respectively); Daniel Geiger, *Landlords strike gold by turning basements into destinations*, Crains, Sept. 9, 2015 (describing that there is a market appetite and technology for "five basement floors as deep as 70 feet below ground level" and other similar retail architecture developments, in 2015 only being built in commercial districts where retail destinations are permitted by zoning), Exh. E; BSA Decision, p. 13 (the 2019 determination could lead to DOB permitting "stores of virtually unlimited size in a cellar" in all districts where retail is otherwise limited to Use Group 6 Local Retail).

15. Petitioners seek annulment of BSA 2018-166A; an injunction of any action by Respondents in pursuit of building a space to lease to Target at the subject property; declarations per CPLR § 3001 that Target stores are department stores for the purposes of interpreting the ZR,

that DOB must include cellar space when calculating the floor area of an establishment in order to determine whether an estalishment complies with a size limit ZR § 32-15, and that DOB's practice of allowing applications to be submitted under the self-certification of objections procedures is contrary to its obligations under the Charter; and an injunction of any DOB Permits, Certificates of Occupancy or other approvals for Target stores in any C1 Local Retail districts in the City.

PARTIES

16. Petitioner QNU is an unincorporated association of residents and business owners in Corona, Elmhurst, and Jackson Heights areas of Queens fighting displacement and criminalization. *See* Jose Aff., Cabanillas Aff., Aviles Aff.

17. Petitioner DRUM is a N.Y.S. Not for Profit Corporation founded in 2000 to build the power of South Asian low wage immigrant workers, youth, and families in New York City to win economic and educational justice, and civil and immigrant rights. This court has found that DRUM has standing to challenge government action in connection with development at the subject property. *Queens Neighborhoods United*, 62 Misc. 3d 1210[A] at *2 ("Petitioner DRUM has standing, as it is a Not For Profit organization made up of residents who live in the immediate vicinity of the Property. The members of DRUM will therefore be affected by the use of the Property in a manner differently from the community at large.").

18. Petitioner Council Member Francisco Moya is the representative for the subject property and the surrounding area to the New York City Council, New York City's legislative body responsible for adoption and modification of the New York City Zoning Resolution.

19. Petitioner Senator Jessica Ramos represents the subject property and the surrounding area in the New York State Senate.

20. Petitioners Alexandra Owens is a member of QNU who lives within 250 feet of the subject property. *See* Owens Aff.

21. Petitioner Jorge Cabanillas is a member of QNU who lives within 1,600 feet of the subject property. *See* Cabanillas Aff.

22. Petitioner Tania Mattos Jose lives approximately 1,000 feet away from the subject property. *See* Jose Aff.

23. BSA is an agency of the City of New York. BSA has jurisdiction,

> To hear and decide appeals from and review, […] any order, requirement, decision or determination of the commissioner of buildings or of a deputy commissioner of buildings or any borough superintendent of buildings acting under a written delegation of power from the commissioner of buildings […].

N.Y.C. Charter § 666 ("Jurisdiction").

24. Respondent DOB is an agency of the City of New York with a mandate to enforce the Zoning Resolution, including provisions governing construction and use, with respect to buildings and structures in the city. N.Y.C. Charter § 643; *9th and 10th Street L.L.C. v. BSA of Cty. of NY*, 10 N.Y.3d 264 (2008) (DOB responsible for evaluating proposed buildings for planned use and design).

25. Respondent Sun Equity Partners, a Delaware limited liability company, is part of the Property development team. Avy Azeroual, Mendel Tress and Zev Schick are its founders and managing partners. Its address is 31 West 34th Street, Suite 1012, New York, NY 11101.

26. Four Respondent entities managed by Sun Equities co-own the Property: AA 304 GC TIC LLC, a Delaware limited liability company, c/o Sun Equity Partners, 31 West 34th Street, Suite 1012, New York, NY 11101 Avy Azeroual, Manager; 82 Baxter TIC LLC, a Delaware limited liability company, c/o Sun Equity Partners, 31 West 34th Street, Suite 1012, New York, NY 11101; Avy Azeroual, Manager; ZM 304 GC Investor TIC LLC, a Delaware limited liability company, c/o Sun Equity Partners, 31 West 34th Street, Suite 1012, New York, New York 11101, Zev Schick, Manager; 304 GC TIC LLC, a Delaware limited liability company, c/o Sun Equity Partners, 31 West 34th Street, Suite 1012, New York, New York 11101, Zev Schick, Manager.

27. Respondent Heskel Group is a Delaware corporation, is part of the development team. Its address is 545 Fifth Avenue, Suite 822, New York, New York 10017. Yeheskel Elias is its Chief Executive Officer and Founder.

28. Collectively, Sun Equity Partners, AA 304 GC TIC LLC, 82 Baxter TIC LLC, ZM 304 GC Investor TIC LLC, 304 GC TIC LLC, and Heskel Group are referred to herein as "Developers."

29. Respondent Target Corporation is a Minnesota corporation that has entered into a Lease to rent space for a store on the Property. See Memo of Lease, Exh. F. Its address is Target Properties, 1000 Nicollet Mall, TPN 12H, Minneapolis, Minnesota 55403.

BACKGROUND

1. Zoning

A. The Zoning Resolution's Regulation of Commercial Uses Distinguishes Between Local and Destination Retail

30. The New York City Zoning Resolution ("ZR") is written to prevent certain districts from the impacts that Destination Retail is known to bring with it, while simultaneously directing those impacts to specific areas where the infrastructure can sustain them. All ZR commercial district regulations "are designed to promote and protect public health, safety and general welfare" and serve specific purposes:

> (a) to provide sufficient space in appropriate locations in proximity to residential areas, for local retail development catering to the regular shopping needs of the occupants of nearby residences [...]
>
> (b) to provide appropriate space and, in particular, sufficient depth from a street, to satisfy the needs of modern local retail development, including the need for off-street parking spaces in areas to which a large proportion of shoppers come by automobile [...]
>
> (d) to protect both local retail development and nearby residences against congestion, particularly in areas where the established pattern is predominantly residential [...] by regulating the intensity of local retail development, by restricting those types of establishments which generate heavy traffic [...]
>
> (k) to promote the most desirable use of land and direction of building development in accord with a well-considered plan,[...] to protect the character of the district and its peculiar suitability for particular uses [...]

ZR § 31-00. To those ends, the ZR makes a sharp distinction between C1 Local Retail districts and C4 Destination Retail Districts.

31. C1 Local Retail zoning districts are located "in convenient locations near all residential areas," ZR § 31-11, and designed to provide for local shopping and include a wide range of retail stores and personal service establishments which cater to frequently recurring needs, *id.*, and are designed to be protected from the harms that large retail establishments are known to bring, specifically increased congestion and traffic, ZR § 31-00(d).

32. Retail establishments permitted in Local Retail districts serve "local consumer needs" and have a "small service area." ZR § 32-15. These general characteristics, presented as prefaratory statements in the ZR sections that describe each Use Group, provide guidance to agencies interpreting the ZR. *See Appelbaum v. Deutsch,* 66 N.Y.2d 975 (1985) (BSA properly considered preferatory Use Group text and "the stated purposes of the resolution to protect residential areas from traffic and noise associated with commercial uses")*; Coalition for Community Preservation & Stabilization, Inc. v. Board of Standards & Appeals* Index No. 14997/94 (Sup. Ct, Queens County Jun. 6, 1995) (BSA properly considered prefaratory statements as the "express language" of the ZR, as well as its "underlying logic").

33. Specific types of retail permitted are also listed in ZR § 32-15 divided into those classes of retailer that can properly included in Use Group 6 regardless of size[3] and those that can

[3] Barber shops, beauty parlors, drug stores, eating or drinking establishments, food stores, including supermarkets, grocery stores, meat markets, or delicatessen stores, hardware stores, laundry establishments, liquor stores, post offices, shoe or hat repair shops, stationery stores, tailor or dressmaking shops, offices, veterinary medicine for small animals, antique stores, commercial art galleries, artists' supply stores, automobile supply stores with no installation or repair services, banks, bicycle sales, book stores, candy or ice cream stores, cigar or tobacco stores, docks for ferries or water taxis, docks or mooring facilities for non-commercial pleasure boats, electrolysis studios, fishing tackle or equipment shops, florist shops, frozen food lockers, furriers, gift shops, jewelry or art metal craft shops, leather goods or luggage stores, loan offices, locksmith shops, medical or orthopedic appliance stores, meeting halls, millinery shops, music stores, newsstands, optician or optometrist establishments, paint stores, pet shops, photographic equipment or supply stores, photographic studios, picture framing shops, record stores, seed or

only be pemitted as a Use Group 6 establishment if the partocualr store is smaller than a specific size "per establishment:"

> **variety stores** over 10,000 square feet of "*floor area*" per establishment**,** ZR § 32-15(A);
> **bakeries** in which more than 750 square feet of "*floor area*" per establishment is used for production, *id.*;
> **carpet, rug, linoleum or other floor covering** stores over 10,000 square feet of "*floor area*" per establishment, *id.*;
> **clothing or clothing accessory stores** over 10,000 square feet, *id.*;
> **clothing rental establishments** over 10,000 square feet, *id.*;
> **dry cleaning or clothes pressing establishments** over 2,000 square feet, *id.*;
> **dry goods or fabrics stores** over 10,000 square feet, ZR § 32-15(C);
> **furniture stores** over 10,000 square feet, *id.*;
> **interior decorating** establishments in which more than 750 square feet is used for processing, servicing or repairs, *id.*; and
> **television, radio, phonograph or household appliance stores** over 10,000 square feet, *id*.

27. Variety stores are also included in Use Group 10 in the ZR. ZR § 32-19. The business practices and retail mix of Use Group 6 and Use Group 10 variety stores are identical. The ZR draws a distinction based on the size of the store alone. Store size dictates how much parking an establishment is required to provide, *see* ZR § 36-21, BSA Decision p. 11 n. 4, and likewise is the controlling factor for how much truck, car, and pedestrian traffic the establishment will generate. Limiting the size of variety stores to 10,000 square feet limits those impacts.

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garden supply stores, household sewing machine stores, shoe stores, sporting or athletic stores, stamp or coin stores, telegraph offices, toy stores, travel bureaus, typewriter stores, wallpaper stores, eating or drinking establishments with entertainment but not dancing, and watch or clock stores or repair shops. *See* ZR § 32-15. Developers can rent to a tenant who will operate any establishment on this list in the 23,580 square foot space that is the subject of this dispute without violating the rules of the C1 Local Retail Zoning District.

28. The drafters of the 1961 ZR chose which establishments would be limited thus in Local Retail districts with great care. Prior to the 1961 adoption of the present Zoning Resolution, the City commissioned two studies, each of which included proposed zoning resolution text: *Plan for Rezoning the City of New York* by Harrison Ballard & Allen (1950) ("the 1950 Proposal"), *see* Exh. QQ (key pages), and *Zoning New York City: A Proposal for a Zoning Resolution for the City of New York*, by Voorhees Walker Smith & Smith (1958) ("the 1958 Proposal"), *see* Exh. RR (key pages). Both of these foundations of the current ZR highlight the distinction between the kinds of districts where "destination retail" is permitted and those where only small-scale local retail is permitted. The 1950 Proposal sharply distinguished between "RESIDENCE RETAIL DISTRICTS" and "COMMERCIAL DISTRICTS:" each was described in an individual article. Residence Retail Districts were explicitly designed

> to protect residences, so far as possible in areas where the established pattern is predominantly residential, but includes retail development on the ground floor,...to protect both residential and retail development against congestion...by regulating the intensity of retail development...[and] to provide sufficient space, in appropriate locations in close proximity to residences, for retail development catering to most of the regular shopping needs of the occupants of such residences.

1950 Proposal at 146 (emphasis in original). In contrast, Commercial Districts were designed to

> provide sufficient space in appropriate locations for transaction of all types of commercial and miscellaneous service activities in beneficial relation to one another, and thus strengthen the economic base of the community and to protect public convenience, prosperity and welfare.

Id. at 161. Per the 1950 Proposal, at 243, some variety stores are part of Use Group 6 which

> consists primarily of those uses which are needed for more or less daily shopping by persons residing nearby, and therefore serve an area with a smaller population than [other retail and commercial use groups],

Id. at 174, and are allowed in "Residence Retail Districts" as well as all "Commercial Districts." Other variety stores, and similarly department stores, were to be included in a separate Use Group which

> consists primarily of those retail uses which… are used for occasional shopping by persons residing at a considerable distance, and therefore serve an area ranging from several square miles to the whole metropolitan area,

1950 Proposal at 175, 242, and was to be prohibited from Residence Retail Districts. The distinct regulation of the two categories of variety store, conceived by the drafters as having impacts on their surrounding areas based on different store size, is the subject of this Petition and before the courts for the first time. The 1958 Proposal likewise distinguished between districts "designed to serve local area needs - C1 and C2" and districts either "designed for the primary and secondary outlying shopping centers serving extensive service areas - C4" or "catering to the retail and commercial needs of the entire City and metropolitan region - C5 and C6." 1958 Proposal at 108. The 1958 Proposal clearly spells out the reasoning behind the limits on the size establishments in C1 areas:

> Because [C1] districts are closely related to the residential areas they serve, particularly in medium- and high-density areas, it is important to limit the intensity of commercial development to levels which are consistent with the adjoining residential areas. Department stores and other large establishments are therefore not permitted, *because they generate excessive pedestrian and vehicular traffic originating outside the immediate residential neighborhood*.

1958 Proposal at 108-9 (emphasis added).

B. Retail Impacts on Traffic

33. In contrast with the uses permitted in Destination Retail districts and included in Use Group 10, commercial uses allowed in C1 Local Retail Districts are intended to be "relatively unobjectionable to nearby residences." ZR § 31-11. ZR Commercial District Use regulations are specifically geared towards protecting "both local retail development and nearby residences against congestion...by regulating the intensity of local retail development, by restricting those types of establishments which generate heavy traffic...." ZR § 31-00(d).

34. Traffic is a distinct concern for City agencies engaged in planning activities. *See, e.g.*, NYC Department of Transportation ("NYC DOT"), Downtown Jamaica Transportation Study Public Meeting #3, (March 28, 2018), Exh. G (slides on pages 10, 17-24 and 27-36 specifically address traffic conditions; slides on pages 25-26 address parking). Studying traffic impacts involves studying the capacity of a roadway, which is "the maximum rate of flow which can pass through a section of roadway under prevailing traffic, roadway and signalization conditions." NYC DOT, Far Rockaway Central Business District Study (Jan. 2014), Exh. H, at 4-11.[4]

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[4]A street's automobile and truck carrying

> capacity is determined by analyzing the interaction of several factors, including turning movements, signal timing, geometric design of the intersection, pedestrian movements, type of vehicle, illegal and/or double parking, grade, roadway conditions, and weather.

NYC DOT Far Rockaway Study, p. 4-11. Pedestrian use

> is measured as the pedestrian flow rate per minute per foot of width (p/min/ft). This indicates the quality of pedestrian movement and comfort, and is defined in a density-comfort relationship.

Id. at 7-16.

35. "There are numerous quality of life issues associated with truck traffic[,] such as noise, air pollution, and safety." NYC DOT Far Rockaway Study, p. 4-19. Truck "presence in the traffic network impacts traffic conditions and contributes to congestion, thereby affecting traffic flow." *Id.*

36. Destination Retailers, including Target, bring truck traffic to an area. *See, e.g.*, NYC DOT, College Point Transportation Study (2006) (conducted to understand the relationship between the presence of commercial retail permitted by new zoning and traffic in College Point, which was rezoned to permit Destination Retail in areas where it had previously been prohibited, and where Target was one of the establishments opened in the area after the rezoning), Exh. I . New retail as a result of that rezoning "resulted in the generation of increased traffic on the local street network as a result of the intense commercial / manufacturing / commercial uses in the area." *Id*. at 1. The study attributes "higher trip generation rates which in turn translates into higher traffic volumes on the street network" to the "type (i.e., more commercial retail)" of new development. *Id.* at 18.

C. Key Terms

41. The ZR contains extensive definitions but is not exhaustive. Specifically, the terms "establishment,"[5] "department store," and "variety store" are not defined in the text of the statute. On the other hand, some terms in the ZR are so widely used that a single definition is

[5]The Oxford English Dictionary defines an "establishment" as, inter alia, "A business organization, public institution, or household." *See* https://en.oxforddictionaries.com/definition/establishment. Merriam-Webster similarly defines "establishment" as "a permanent civil or military organization; a place of business or residence with its furnishings and staff; [or] a public or private institution." *See* https://www.merriam-webster.com/dictionary/establishment. An "establishment" is not a part of a building; rather, it is a *use* for a building or a part of a building.

defined extremely broadly, in an attempt to plan for all possible uses. "Floor area" is such a term.

42. The primary function of the concept of "floor area" in the Zoning Resolution is in the calculation of the allowable bulk and density in the various districts. Consistent with this function, the ZR § 12-10 definition states that cellar space other than habitable cellar space does not count towards "the #floor area#[6] of a #building#" (emphasis added), *i.e.*, that it does not count towards the total square footage available for development within the FAR limit of the district.

43. However, in the context of use restrictions, the relevant concept is not the bulk of the building–which may contain many uses–but the size of the individual establishment whose use type is being determined, measured in terms of the floor area of an establishment. Consistent with this different context and different function, the size limit in Use Group 6 is phrased in terms of "square feet of #floor area# per establishment." ZR § 32-15(A) (emphasis added).[7]

44. The drafters of the ZR were careful to refer to "#floor area# of a #building#" where it was their intent to bring in the exclusions listed in the definition and to otherwise refer simply to "#floor area#." In doing so, they mirrored the convention of the 1916 Zoning Resolution (as amended) that was in effect at the time they were drafting the 1961 ZR. The language of the ZR that it replaced that year is illuminating. The earlier Resolution also treated

[6]# indicates a term that is defined in the ZR; this is ZR convention.
[7]The term #floor area# appears in other locations in the ZR without the "of a #building#" modifier. *See e.g.* ZR § 36-21 (Off-Street Parking Requirements; #floor area# includes cellar), ZR § 36-62 (Loading Berth Requirements, #floor area# includes cellar), ZR § 36-711 (Enclosed Bicycle Parking Requirements, #floor area# includes cellar). All these sections use the term #floor area#, not "#floor area of a #building#," when setting out calculation methods which are consistent with the inclusion of cellar floor area in the sum.

"floor area of a building" and "floor area" in the context of the size of an establishment distinctly. Floor area of a building had a specific purpose in the 1916 ZR:

> For the purpose of determining the ratio of the floor area of a building to the area of the lot, the "floor area" of a building is the sum of the gross horizontal areas of the several floors of a building, including interior balconies and mezzanines but excluding garage areas and basement and cellar floor areas not devoted to residence use. All horizontal dimensions are to be made between the exterior faces of walls, including the walls of roofed porches. The floor area of a building shall include the floor area of accessory buildings, except garages, on the same lot, which shall be measured in the same way." 1916 ZR Art I Sec 1(u) (as amended to December 3, 1959).

The 1916 Resolution also contained a single Use restriction on the basis of establishment size:

> The gross floor area of the dry cleaning establishment, including space used for dry cleaning, pressing and incidental operations, and space used for storage, service of customers and convenience of employees, shall not exceed 2,000 square feet. However, additional space may be used on a lower floor which is either a basement or a cellar, provided that on such floor there shall be no dry cleaning and no storage of recently cleaned articles. 1916 Art II Sec 4(53)(b) (as amended to December 3, 1959).

As in the 1961 resolution, the calculation of the size of the establishment for this restriction on a particular use was not done using the same rules as the calculation of the "floor area of a building" per 1916 ZR Art I Sec 1(u). With the 1959 text as their guide, if the drafters of the 1961 Resolution intended for space in the cellar to be excluded from the per establishment limit and treated as a bonus, they would surely have mimicked the form of this regulation. "We must assume that the Legislature in enacting the section intended that it should affect some change in the existing law and accomplish some useful purpose." *Mabie v. Fuller*, 255 N.Y. 194, 201 (1931). The drafters of the 1961 resolution did not mean to allow unlimited cellar space for

establishments they crafted strict size limits, leaving the size of establishments to be determined by how deep a hole developer can dig.

2. DOB's Enforcement of the Zoning Resolution

A. Plan Examination

45. When a property owner or tenant seeks a Permit for a construction project, they must file an application with DOB. *See* Nagan Aff. The application can be submitted to DOB for review in one of three ways: (1) Standard Examination; (2) Self Certification of Objections; or (3) Professional Certification.[8] *Id.* ¶ 6 et seq. DOB has left it up to the applicant to select how their own application will be reviewed. A 1975 Directive governs this process. *See* Nagan Aff. Exh. 1, DOB Directive 2 of 1975: *Plan Examinations and Building Laws Interpretations Section C26-108.6 Admin Code* (Feb. 21, 1975) . It explains to Department staff that review is not needed where the applicant has hired professional architects or engineers based on the fact that those architects and engineers spend a lot of time developing the plans. The Directive allows DOB staff to assume that architects and engineers are "sufficiently familiar with the building laws of this City." *Id.* The Directive articulates the Department's goal as being "to minimize

[8]If Professional Certification is selected, professionals hired by the applicant are permitted to certify that the application and plans are complete and in compliance with all applicable laws themselves. *See* Nagan Aff. The clerk who accepts that application for filing only needs to verify that all required items are in the file. *Id.* Upon filing, no examination is performed by a DOB examiner at all, though in some cases a review for compliance with zoning may be done, and the application may be audited at some later date. *Id.* Although the application which resulted in the granting of the permit at issue here was not processed via Professional Certification, the fact that such illusory review is available as an option at all demonstrates that DOB relies heavily on professionals in the employ of developers to ensure compliance with laws designed to restrict development. Notably, the Target establishments described by the BSA that are over 10,000 square feet approved in C1 districts where the square footage exceeded the permissible Use Group 6 establishment size for a variety store, BSA Decision, p. 7, were Professionally Certified and therefore never reviewed by DOB for compliance with the ZR.

delays in approval of applications for building permits." *Id.* at 1. The role of Department personnel in relation to professionals employed by applicants who are seeking permits is explained to be "to provide information," not to enforce the zoning laws. *Id.*

46. A DOB examiner will review the application and plans for compliance with zoning and building laws, and issue a Notice of Objections if they identify any compliance issues. Nagan Aff. ¶ 7.

47. Where an applicant thinks that an Objection is the result of misinterpretation of the ZR, they can request a reconsideration per DOB Directive 1 of 1985: *Requests for New York City Building Code Information Interpretations, Consultations and Reconsiderations* (March 4, 1985), Exh. J. A reconsideration request will lead to the Objection being reviewed by senior DON employee: an Assistant Chief Plan Examiner or the Chief Plan Examiner. *Id.*

48. The method of an applicant's response to an Objection that is sustained is determined by whether they self-selected the Standard Examination or Self Certification of Objections review procedure when first filing the application. *Id.* If Standard Examination is selected, the applicant or a filing representative must bring a revised application and plans to a plan examination appointment. *Id.* ¶ 10(a). At the appointment, with the applicant or filing representative present, a DOB examiner will mark the objections that are satisfactorily resolved. *Id.* If all objections listed in the Notice of Objections are resolved and the application is complete with all required items submitted, the examiner will approve. *Id.* If all objections listed are not resolved, and/or if the revisions plans raise other objections, the examiner will disapprove the application again and give the applicant a new completed Notice of Objections. *Id.* The applicant can again request a plan examination when revisions are ready. *Id.*

49. If the applicant selects Self Certification of Objections, DOB allows professionals employed by the applicant to certify that all objections have been resolved themselves. *Technical Policy and Procedure Notice #01/01: Removal of Objections Issued at Plan Examination: Optional Self-Certification of Compliance by Registered Architects and Professional Engineers*, (Sept. 24, 2001), Nagan Aff. Exh. 3. A DOB plan examiner then reviews to verify that all objections that were on the Notice of Objections are listed on the certification form, verifies the required items are submitted, and approves the application. Nagan Aff. ¶ 10(b). The examiner is not required to evaluate whether the resolution of objections was done according to applicable law. *Id.* The extent of the scrutiny given to certification form is variable; no DOB procedure instructs examiners to evaluate statements made on this form for their content. *See* Nagan Aff. Training materials DOB provides to filing representatives list the following steps as the complete process that follows an applicant submitting a form with their purported resolutions of each objection:

> "1. Applicant brings the package along with the AI1 form to the designated plan examiner who stamps the drawings with a Self-Cert of Objections stamp
> 2. Job is ready for permit."

NYC DOB, *COURSE 101: Filing Representative Training for Class 1 Representatives and Class 2 Code and Zoning Representatives* (2015) at 115, Exh. K.

50. Even if an examiner does look at the substance of a Self Certified response to an Objection and determines that the response is not actually a response but a disagreement about the Objection itself, there is no DOB procedure for a plan examiner to require an applicant to seek reconsideration when the applicant has disagreed with an Objection but not filed a reconsideration request.

B. Use Group Classification

51. When faced with uses that do not fit clearly into listed use groups in the Zoning Resolution, DOB regularly issues policy memos interpreting the Zoning Resolution and, in some cases, requiring applicants to prove with supporting documentation that their proposed use is allowed. For example, Technical Buildings Bulletin 2010-015,

> clarifies when a fresh fruits and vegetables, and pushcart storage facility for Green Cart vendors may be considered a Zoning Use Group 4 community facility and establishes administrative requirements and technical criteria for such a facility.

Exh. L. Similarly, Zoning Buildings Bulletin 2011-003 "clarifies that a facility verified by a governmental agency as permanent supportive housing may be classified as a Use Group 3 under the New York City Zoning Resolution." Exh. M. This Bulletin includes specific application requirements:

> the applicant shall provide the department (plan examiner) with a letter from the sponsoring governmental agency (HPD, OMH, DHS, etc.) attesting to the fact that the proposed development qualifies as a supportive housing facility.

Id. No DOB Bulletin addresses when retail establishments may be considered in a Zoning Use Group 6 Local Retail establishment or clarifies the application process for seeking to have an establishment in a proposed development classified as such.

THE PROPERTY AND ITS PROPOSED DEVELOPMENT

52. The Property is in a R6 residential zoning district with a C1-3 Local Retail commercial overlay. *See* Exh. A, Zoning Map 9d. The assignment of the Local Retail district to this was done in 1961 according to a well-considered plan, ZR § 31-00(k), and has not been altered since, *see* Moya Aff. The retail uses permitted on the property are governed by ZR §§ 32-11 (C1 Local Retail), 32-15 (Use Group 6).

53. Sun Equity Partners and Heskel Group purchased the Property, a former movie theater, in September 2016, with the intention of "transforming the area to bring in more well-known tenants." *Sun Equity, Heskel Group pay $27M for Jackson Heights site; Buyers plan 160K sf commercial building in place of ex-cinema*, M. Hall, The Real Deal, Sept. 21, 2016, Exh. N; Deed, Sept. 29, 2016, Exh. O.

54. Developers' website proclaims that it is committed to an investment strategy that "pinpoints underperforming assets," and projects that, "attract leaseholders, yield high returns, and increase property value."[9] Plans initially reported by the press, on Developers' own website [10] and in the rendering in Exh. N, were for a ten-story residential building with commercial space on the ground floor and community facility on the second floor.

55. In what appeared to be an interim use plan for the subject property, on March 8, 2017 Developers filed an application with DOB to "convert existing two story movie theater and office to one story retail stores with removal of upper floor," with the upper floor removed and an open fruit market on the ground floor. Exh. P. On the Schedule A form filed with the

[9] *See* http://www.suneqp.com/sun-equity-partners-about.
[10] Removed since.

application in or about March 2017, Developer listed a proposed retail store use in Use Group 10. See Exh. Q.

56. A DOB plan examiner reviewed and disapproved the application on March 17, 2017. DOB issued objections, informing Developer that Use Group 10 Destination Retail establishments were prohibited in the district. Thereafter, Developer acknowledged this and removed the "10" from the Schedule A form. See Exh. R. A DOB plan examiner reviewed the revised application again on April 4, 2017 and approved the application.

57. Meanwhile, on March 31, 2017, international chain Target recorded a 15-year Memorandum of Lease with Developers in the New York City Automated City Register Information System. Exh. F. The exclusivity agreement in Target's lease prohibits Developers from renting the retail establishments under construction on the ground floor to other tenants that have planned uses that are permitted in a Local Retail district (laundry services, smaller clothing retail, drug stores, variety stores and grocery stores).

58. A Permit was subsequently issued for the open air market on April 7, 2017, yet Developers did not pursue the project, having signed a lease with Target and changed their plans for the property from the interim market use and a long term plan for residential, to a plan to build a mall with Target as an anchor tenant.

59. Target stores are department stores. They sell a dizzying variety of consumer goods, and those goods are divided into "departments," as described by Target itself. *See* Carpenter-Gold Aff.; Nagan Aff ¶ 4, 5. The store Target intends to open at the subject property will full a wide selection of goods across many consumer categories, with options presented for each class of good. *See* Exh. S (photos of Lower East Side Target location, which is the same

size as the establishment proposed for the subject property, showing departments including "Market," "Pharmacy," "Electronics," "Home" and "Beauty," displays of categories of items such as "Air Beds," "Digital Storage," "First Aid," "Bulletin Boards," etc., and self-checkout typical of department stores) (also submitted to BSA); Nagan Aff. ¶ 1, 2.

60. DOB regularly classifies Target stores as Use Group 10 Destination Retail, as described in ZR § 32-19, the Use Group that includes both department stores and variety stores with no limitation on establishment size. It has done so for at least fourteen (14) Target locations in New York City.[11]

61. Shortly after recording the Target Memorandum of Lease, Developers initiated a new DOB application to build a two-story commercial building at the Property on May 24, 2017. *See* Exh. T. On this application, Developer did not attempt again to propose Use Group 10 retail; a DOB plan examiner had just in March explained that no Destination Retail uses would be permitted at the property because zoning prohibits them. Instead, the application described a 23,580+ square foot Target store as Use Group 6 Local Retail. Developers already knew that if they proposed a Use Group 10 retail establishment on their application for the subject property, DOB would have denied it. Yet if they proposed the "same exact" planned use as a Use Group 6, DOB would accept. *See also* DOB counsel's testimony before the BSA, May 21, 2019 BSA

[11] *See* Forest Hills Target Certificate of Occupancy ("CO"); Midwood Target CO ("6, 10" as Use Group for all retail spaces occupied by Target); Queens Place Target CO (same); Tribeca Target CO at p. 2 (Target is Use Group 10 ["UG10"] variety store on Floor 001); City Point Target CO; Atlantic Terminal Target CO at p. 3 (Target is UG10 on 002 and 0003); Harlem Target CO; Bronx Terminal 1 and Bronx Terminal 2 Target COs (Target is UG10 on 003); Flushing Target CO at p. 2; College Point Target CO; Manhattan Columbus Circle Target, *see* Temporary CO and Aug. 16, 2018 Schedule A; Brooklyn Kings Highway Target, *see* March 11, 2019 Schedule A (Target planned in cellar, UG10); Forest Avenue Target in Staten Island, *see* CO (Target taking over existing retail space used by another UG10 retailer, Staples); Astoria Target, *see* Dec. 6, 2018 Schedule A (Target is UG10 planned on 002 and 003). Exh. U.

Hearing Video, 1:17:02 *et seq*. (DOB counsel explaining that an applicant has the discretion to choose the Use Group themselves, and that in this case only Use Group 6 was allowed in the district and so making any other choice would lead to a denial).[12]

62. In May, renderings were released to the press showing this new building configuration, a stark contrast with the pre-Target Memo renderings: the new pictures did not show any residential use, only a mall with Target as an anchor tenant. *See, e.g.*, *Target to Open at Former Jackson Heights Cinema Site*, DNAInfo, Katie Honan (May 1, 2017), Exh. V. Developers' website described it as "The Shoppes," a "rare outdoor mall experience in the outer boroughs." Exh. W.

63. This application was submitted under the Self Certification of Objections process.

64. On June 2, 2017, a DOB plan examiner reviewed the application and sent a Notice of Objections to Developers. *See* Exh. X (Self Cert Notice of Objections, June 7, 2017). In the Notice, the examiner specifically objected to Developer's proposal to locate the planned Target in the cellar, citing ZR § 32-15 and stating as the reason: "Variety stores, limited to 10,000 square feet of #floor area# per establishment." *Id*.[13] By June 2017, DOB had made it clear to Developers' professionals that Use Group 10 establishments are prohibited on the property.

[12] *Available at* https://www.youtube.com/watch?v=H5Ihjph0j6s&feature=youtu.be.

[13] DOB seems to have been relying on the professionals to pay attention to details throughout the entirely of the application process. This particular DOB document lists the wrong zoning district for the subject property (R4A instead of R6/C1-3) and the wrong Borough/Block/Lot designation (for a completely different address--apparently 42-16 159th St. in Flushing/Auburndale). It also lists only the street number, not the street name, in the address. These errors were never corrected.

65. To avoid a discussion of whether the ZR provides a loophole through which variety stores of any size can be located in Local Retail districts by placing them below grade, Developers did not request a Reconsideration of the Objection. Instead, sometime in December 2017, Developers' professional team submitted a legal argument that should properly have been made via a Reconsideration request as though it was a resolution, while actually making no changes to the application or plans:

> Does not apply to cellar. As defined by NYC ZR 12-10, 'Floor area of a building shall not include cellar space, except where such space is used for dwelling purposes.'

See Exh. Y. A reconsideration of the Objection would have led to a review of the applicable law by a senior DOB employee. Instead, Developers chose to hide behind the shield of Self Certification, which allowed them to claim that the unlawfully large retail destination was permitted by zoning without ever discussing the matter with anyone in DOB. DOB enabled them doing so by accepting the Developers' re-interpretation of the law as though it was an actual resolution to the Objection its examiner had raised, approving the application and issuing the Permit that is the subject of the BSA appeal and this Petition.[14]

66. In order to try to change this inconvenient obstacle to developing a mall with Target as an anchor tenant, prior to January 2018, Developers had already initiated a Uniform Land Use Review Procedure (ULURP) to try to change the zoning of the Property from R6/C1-3

[14]Developers are keenly aware that reconsideration is possible, and that it will lead to scrutiny of the requirements under all applicable laws: between December 2017 and May 31, 2018, when the application was approved, Developers did request reconsideration of objections related to the need for loading reservoirs for the car and truck elevators that Developers imagine will serve the subterranean levels of the mall, including its 124-space public parking garage. In at least one case, the applicant made a reconsideration request that was reviewed by the Borough Commissioner. *See* Exh. Z.

to C4-5X, a commercial district where the ZR permits Use Group 10 Destination Retail. Developments like the Queens Center Mall are permitted in C4-5X zoning districts. *See* Moya Aff.; N.Y.C. City Planning Commission, Zoning Map 13c.

67. ULURP requires a series of pre-application meetings with the Department of City Planning ("DCP"), which are followed by the production of an Environmental Assessment Statement ("EAS"), before the proposal is certified for public review. *See* 62 RCNY § 10-01 et seq. Developers' EAS was finalized on January 25, 2018; it included rendering and a written plan for a residential building with ground floor commercial space entirely unlike the partially-underground mall that their DOB application described.[15]

68. At the May 23, 2018, City Planning Commission ("CPC") public hearing on the proposed zoning changes, about a week before the subject application for a commercial-only building was approved, a representative of Developer explained that they intended to create a commercial "destination" that attracts shoppers from the "region" and outside the immediate neighborhood. *CPC Meeting Video* (May 23, 2018).[16] Specifically, counsel for Developers acknowledged that the change her clients sought would be to a "regional commercial center

[15]The residential component of the proposed rezoning would have allowed Developers to build approximately 43 more apartments than current zoning allows, but 36 of them would be income- and rent-restricted under the city's Mandatory Inclusionary Housing (MIH) program, which they offered to voluntarily apply to the property to make the rezoning more enticing and to make it appear to align with mayoral priorities. The increase in residential capacity that Developers would have gotten had the zoning application been approved would not have had a significant impact on their bottom line: since the MIH program is designed so that Developers neither make or lose money on the MIH program units, the additional residential allowance would have only netted them seven (7!) apartments from which they could profit. This narrow margin would be supplemented by the range of Retail establishments that Developers could then attract to the site, as they would newly be permitted to lease to retail destinations like Target.

[16]*See* CPC May 23rd, 2018 Public Hearing Video*, available at* https://youtu.be/bi1papxTU2s.

designation" that would include "regional retail" and "draw[] customers from a larger area." *Id.* at 1:03.

69. DOB approved the application for building "the Shoppes" with Target as anchor tenant on May 31, 2018. The approval did not address the June 2017 objection to the use being a violation of ZR § 32-15 on the basis of store size; this objection was simply signed off by a second plan examiner. *See* Exh. AA. There are other irregularities in the record of the DOB approval: it shows seven plan examinations on the same day, the first six of which were disapprovals, though the final submission was approved. *See* Exh. BB. Based on that approval, DOB issued a building permit on June 15, 2018. *See* Exh. CC.

70. Having successfully gotten a building permit without addressing the fact that the anchor tenant they planned to install in the new mall is not permitted by the zoning, and facing opposition from community members and the key elected official whose support they needed to have the rezoning pass the City Council, Council Member Francisco Moya, Developers withdrew the ULURP application in July 2018. *See Controversial 82nd Street rezoning halted after local lawmakers voice opposition to Developers,* QNS, Jenna Bagcal (July 16, 2018) ("'After conversations with Council member Moya and Assembly member Espinal, and taking the borough president's recommendations into consideration, we have decided to no longer pursue this rezoning application. We are continuing with construction as permitted under the current zoning,' said Hank Sheinkopf, a spokesman for Developers of the project, known as the Shoppes at 82nd Street."), Exh.DD.

PROCEDURAL HISTORY

1. DOB Zoning Challenges and Community Appeal

70. Via present counsel and individually, Individual Petitioners and QNU filed timely zoning challenges to the Zoning Diagram, dated May 31, 2018, but made public on June 28, 2018. The basis of the challenges was that the proposed use of the new building that DOB had approved is not allowed in the zoning district, due to the size and nature of the anchor retail establishment: a 23,580+ square foot Target. Exh. EE. The challenges pointed out that department stores are prohibited in Local Retail districts, and that even if Target could be described as a variety store, variety stores over 10,000 square feet are likewise prohibited.

71. On September 5, 2018 DOB accepted these zoning challenges and issued a Stop Work Order (SWO). Exh. FF. The accompanying Notice of Objections, stated,

> ...the pure Zoning Floor Area of the first floor even after taken (sic) all area deduction, it (sic) is already up to 18,706 sf. which is way over the maximum permitted in the C1-3 District of allowed 10,000 square feet, and by which of such first floor commercial retail under use group 6 is contrary to Section 32-15 ZR,...

Exh. GG. This is a misstatement of the Use Group 6 regulations under the ZR. There is no maximum total retail square footage that a building in a Local Retail district can contain; whatever limits the zoning sets on bulk or "pure Zoning Floor Area" are set from the bulk restrictions in the district, which are governed by the underlying R6 zoning, not the use group or the C1-3 overlay.[17] There are only restrictions on the size of each establishment in the building, which were not addressed in the Notice at all.

[17]When a C1-3 district is overlaid on an R6 districts, the maximum commercial Floor Area Ratio is 2.0. ZR § 33-121 Petitioners do not contend that Developers have violated this bulk restriction.

72. On September 5, 2018, DOB issued a Notice of Violation related to work ongoing at the Property despite the SWO. Exh. HH.

73. On September 10, 2018, Developers filed new plans for the Property that are substantially the same as the initial plans and do not cure the central defect: that the planned use of the building under construction violates the underlying zoning by including a Use Group 10 establishment as the anchor tenant, a 23,580+ square foot department store planned for a subterranean space that could only be accessed via an escalator from street level. Exh. II. These new plans clarified that each of the retail spaces on the first floor would not be bigger than 10,000 square feet, a size limit that is relevant for uses permitted in a Local Retail District, but certainly not all, *see supra* ¶ 32; ZR § 32-15.

74. On September 13, 2018, DOB announced its Intent To Revoke Approval and Permit online via the Building Information System, Exh. JJ, and issued a second Notice of Violation related to work at the Property going on despite the SWO, Exh. KK.

75. Also on September 13, DOB wrote a letter to the Developers stating that their "response sufficiently demonstrates that the approval and permit should not be revoked." Exh. LL. The letter did not clarify what response it refers to.

76. On September 17, 2018, DOB issued a Stop Work Rescind Order. Exh. MM.[18]

77. On September 20, 2018, DOB issued a new permit for construction of the new building. Exh. OO.

[18] On October 2, 2018, seeking to employ all administrative avenues to prompt DOB review of the strict Local Retail regulations in light of the planned tenant of the mall, Petitioners and allies also filed a Community Appeal of this Order. Exh. NN. The Community Appeal was closed by DOB, without being addressed, after petitioners initiated appeal of the September 20 Building Permit at the BSA.

2. BSA Appeal

78. On October 18, 2018, QNU and its members, including Individual Petitioners, filed a timely appeal of the September 20 permit to the BSA. BSA scheduled the first hearing on March 7, 2019 and a continued hearing on May 21, 2019.

A. Suppression of Public Testimony

79. "Testimony by representatives of any neighborhood, civic, business, or industry association whose members have an expertise *or interest* in the land use aspects of the application" may be submitted at BSA hearings per BSA Rules of Practice and Procedures § 1-11.8 (July 2019) (emphasis added).

80. BSA staff called the police at the May 21 hearing in response to the content of statements made by members of civic organizations with an interest in the appeal. *See* Jose Aff.; Aviles Aff.; Cabanillas Aff.

81. Police were also present in the hearing room at the start of the session at the June 4 public hearing at which decision was scheduled and effectively intimidated members of the Petitioner QNU and other individuals in attendance to witness the vote.

82. As a result of this intimidation, some testimony from people who had a right to testify was suppressed, and the BSA rendered its decision without the benefit of that testimony.

B. The BSA's Written Resolution

83. The BSA voted on the appeal at their June 4, 2019 session but did not file a decision until September 3, 2019. This prevented Petitioners from filing this case for three months,[19] allowing work to continue on the property in violation of zoning and towards

[19] Per the BSA rules, a determination is not final until a written resolution is filed. BSA Rules § 1-12.1 ("A final determination of the Board will be in the form of a written resolution.").

irreversible neighborhood change. Developers are racing to complete the building and benefited from the delay. *See* Owens Aff. They have also been seeking and obtaining permits to work almost every Saturday since the September 20, 2018 permit was granted, claiming "Public Safety" as the reason that Saturday work is needed. *See* Owens Aff. Ex. 1.

84. The Decision misstates that the BSA "received two letters in support and more than 150 additional letters in opposition to this appeal," Decision p. 11. In reality, it received over 150 letters *in support* of the appeal, many from members of the Petitioner organizations and from the individual petitioners themselves, *see* Jose Aff. Ex. 2, in addition to the letters from elected officials described in the decision.

85. The BSA affirmed DOB's uncritical acceptance of Developers' and Target's characterization of the planned retail destination as the only kind of general merchandise retailer permitted in the district: a "variety store." The Decision clearly explains that both Target and DOB made plain to the Board that this was the Use Group selected on the application because it was the only one allowed, not because it was the best description of the planned use. BSA Decision at 10 ("[C]ounsel for Target further states that...in zoning districts in which only one use is allowed, a permit applicant has no choice but to choose the use permitted as-of-right—in this instance, such use was Use Group 6 variety store[.]...DOB states that...it is both factually possible and lawful for a use to be classified in more than one use[.]").

86. The BSA Decision perverts the description of the *general category* of Use Group 6 retailers as "hav[ing] a small service area and are, therefore, [being] distributed widely throughout the City," ZR § 32-15, into a suggestion that any chain store with multiple locations could be properly classified in Use Group 6: "with 28 locations located throughout all five

boroughs, [Target stores] are 'distributed widely throughout the City,'" Decision, 12.[20] The relevant inquiry per ZR §32-19 is whether the planned store is large enough to "serve a wide area, ranging from a community to the whole metropolitan area," not how many other stores there may be in the City.

87. In the decision, BSA admits that the subject building permit will permit a "Target store [that] would occupy 23,392 commercial gross square feet and 0 square feet of "Zoning Floor Area" in the cellar of the Proposed Building and 745 square feet of floor area on the first floor." BSA Decision, 2. Petitioners take no issue with the characterization of the "pure" Zoning Floor Area here, and readily concede that the building complies with bulk regulations. The issue is the relevant use regulation, which limits variety stores to 10,000 square feet per establishment.

88. The decision relies on an overbroad interpretation of the holding in *Raritan Development Corp. v. Silva*, 91 N.Y.2d 98 (1997), a Court of Appeals decision that addressed the question of whether the exclusion of cellar space for the purpose of calculating the "pure" Zoning Floor Area or "#floor area# of a #building#" (used interchangeably in the decision) was properly applied when calculating the pure Zoning Floor Area of residential buildings with dwelling space in the cellar to determine their compliance with bulk restrictions. Petitioners in this case never contested the pure Zoning Floor Area of the subject building permit. The Board's

[20]Even if this was a proper factor for BSA and DOB to consider when evaluating whether zoning permits a particular use at a particular location, stores which the BSA cites as "famous department stores" such as Macy's or JC Penney, *id.* at 10, likewise have sites "throughout the City." *See* https://l.macys.com/ny.html (listing two Macy's stores in the Bronx, two in Brooklyn, one in Manhattan ("New York"), and three in Queens ("Flushing" and "Elmhurst")); https://stores.jcpenney.com/ny (listing one JC Penney store in the Bronx, two in Brooklyn, one in Manhattan ("New York"), and one in Queens ("Elmhurst")).

reliance on *Raritan* for the assertion "that meaning not be imported into clearly written text," Decision, 12, likewise does not support the Board's decision. The Board determined that the "#floor area# of a #building#" and "#floor area# per an establishment" could not be "subject to different methods of calculation," *id.*, despite being two different phrases crafted to by the drafters of the ZR to indicate that they must be calculated differently. This is not a case of "look[ing] beyond the pages of statutory text," which was the Court of Appeals' concern in *Raritan*. 91 N.Y.2d at 103. The text here is clearly written, and the Board's nonsensical determination that these distinctly drafted phrases mean the same thing flies in the face of *Raritan* and generally accepted principles of statutory interpretation.

89. The BSA Decision's finding that "cellar space used for retailing" is explicitly included in the "#floor area#" calculations of parking space requirements, BSA Decision at 10-11, is a red herring and a distraction. Parking spaces are required in proportion to the size of commercial uses, with no limit on the number of spaces that the ZR could require a builder to provide and no exceptions based on the location of a commercial space within a building; the BSA used sleight-of-hand to translate this limitless obligation to provide parking into a limitless entitlement to build commercial space.

90. The BSA Decision eliminated the distinction between carefully delineated ZR use groups. It rests on a mischaracterization of the key distinction between Use Group 6 and Use Group 10 establishments made during the course of the appeal. The BSA incorrectly stated, "Appellant conceded that the subject Target store could be characterized as either a Use Group 6 variety store or a Use Group 10 department store." BSA Decision, p. 13. This is false. Appellants explained that the 23,580+ square foot Target could be classed as either a Use Group

10 variety store or a Use Group 10 department store, but that distinction was not material to whether the establishment can be lawfully located at the subject property as Use Group 10 establishments are all prohibited in C1 Local Retail districts. *See, e.g.*, Petitioner QNU's Reply To Post-hearing Submissions By Department Of Buildings, Target And Owner, 2, Exh. PP.

91. The BSA failed in its obligation to give meaning to the text of the ZRwhen it concluded that the

> traffic impacts of [Use Group 6 variety stores, Use Group 10 variety stores and Use Group 10 department stores] were not considered by the drafters of the resolution to have been substantially different, despite Use Group 10 uses only being permitting (sic) as-of-right in C4, C5, C6 and C8 zoning districts,

BSA Decision at 13.The number of parking spaces that the BSA acknowledges must be provided for the proposed Target, BSA Decision at 13, demonstrates that the traffic impacts of the store would be far greater than envisioned by the ZR. The BSA explains that the number of parking spaces Target is required to provide, calculated based on the square footage of the establishment, including the cellar, is much higher than those required for a Use Group 6 "variety store" placed at ground level. *Id.* (Target will be "required to provide 1 parking space per 400 square feet") The maximum number of parking spaces a Use Group 6 variety store could *ever* be required to provide is 25 (10,000 square feet divided by 400), while a 23,580+ square foot variety store requires more than double this number: 59 parking spaces. The limit on parking built into the Local Retail regulations via the limit on establishment size is an important check on the traffic impacts of a new store. By allowing a Use Group 10 store in an area where it is normally prohibited, the BSA effectively guaranteed that the establishment will bring the intensity of traffic that from which the statue was specifically written to protect this district.

CAUSES OF ACTION

I. THE BSA WRONGLY AFFIRMED A DOB PERMIT WHICH UNLAWFULLY ALLOWS FOR A RETAIL DESTINATION TO BE LOCATED IN A LOCAL RETAIL DISTRICT

A. BSA Arbitrarity Affirmed DOB's Blind Acceptance of Developers' Assertion that Target Does Not Plan to Operate a Department Store

92. As the First Department wrote in *City v. Stringfellow's of New York*, 253 A.D.2d 110, 115-116 (1999), *aff'd*, 96 N.Y.2d 51 (2001), "the fundamental rule in construing any statute, or in this case…the City's Zoning Resolution, is to ascertain and give effect to the intention of the legislative body, here the New York City Council." It is clearly the intention of the legislative body to protect districts that are zoned for limited retail uses from impacts that are known to arise from destination retail.

93. Petitioner City Council Member Moya, who chairs the Council Subcommittee on Zoning and Franchises, was presented with the possibility of a change to the zoning district of the subject property by Developers, but that change has not been made. The Council continues to evince its intent to protect the neighborhood from precisely the kind of uses that Developers are pursuing.

94. DOB has an obligation to enforce zoning and determine whether a particular proposed use can be accurately described by the Use Group an applicant represents on a DOB permit application before granting it; if it is unclear from the face of the application, DOB can and must ask for supportive documentation. *See supra* ¶ 51 (DOB practices for when applicants seek to install pushcart storage facilities for Green Cart vendors or supportive housing). Yet here

DOB admits that it failed to inquire at all whether it was consistent with the Zoning Resolution's text and purpose to accept Target as a Use Group 6 variety store. At the May 21, 2019 BSA hearing, DOB counsel did not even attempt to answer a question about what investigation the Department did of applicant's statements about the proper classification of planned use of a proposed building, saying, "I am not sure of our practice." May 21, 2019 BSA Hearing Video, 1:20:53.

95. BSA's unlawful affirmation of the DOB Permit signals that DOB applications will not be denied on the basis of misrepresenting an unlawful use as a permitted one.[21] It must be annulled.

96. Target's own marketing materials consistently describe it as a "department store;" the stores themselves have separate sections for different merchandise types and workers refer to them as "departments." Neither DOB nor the BSA made any investigation of these facts about the planned use of the property. The BSA Decision upholding the Permit to build for this use must therefore be annulled.

B. Even if a Target Can be Properly Classified a Variety Store, Local Retail Districts Prohibit Variety Stores Over 10,000 Square Feet per Establishment

97. The BSA relied on an erroneous understanding of the Zoning Resolution when determining that the proposed Target site does not violate § 32-15 and ZR § 12-10.

98. The store Target plans to open at the Property is over 22,000 square feet, far above the explicit "10,000 square foot per establishment" limit for variety stores in C1 districts

[21] The fact that the Target Lease's bars Developers from leasing space in The Shoppes to laundry services, smaller clothing retail, drug stores, variety stores, and grocery stores further highlights Developers' goal of impermissibly turning the commercial property as a destination for transient shoppers–in their own words, a "rare outdoor mall experience in the outer boroughs"–not a place where local consumers can fulfill daily shopping needs.

contained in ZR § 32-15. The BSA's interpretation of the establishment size restriction of ZR § 32-15 would lead to "an absurd result that would frustrate the statutory purpose," *Long v. Adirondack Park Agency*, 76 N.Y.2d 416, 420 (1990) of having a specific district reserved for local retail only. Under the BSA's interpretation, retail stores of any size would be permitted in a local retail district as long as they were below ground. It is absurd to suggest that these clear distinctions pertaining to use in the Zoning Resolution can be vitiated simply by putting a business in the cellar. The court cannot affirm this perversion of the commercial district use restrictions of the ZR; instead, the Court of Appeals has made clear that it must "give the statute a sensible and practical over-all construction, which is consistent with and furthers its scheme and purpose and which harmonizes all its interlocking provisions." *Id.*

99. The court must give meaning to the specific drafting choices made by the writers of the ZR in 1961 to limit the exceptions in the definition of "floor area" to instances where the ZR requires the calculation of the "#floor area# of a #building#" and to describe the limit on the floor area of a Use Group 6 variety store as "10,000 square feet of #floor area# per establishment." These specific word choices cannot be treated as though they were accidental. *Avella v. City of New York*, 29 N.Y.3d 425, 434 (2017) (citations omitted) ("[I]t is an accepted rule that all parts of a statute are intended to be given effect and that a statutory construction which renders one part meaningless should be avoided."); *Comm. for Environmentally Sound Dev.*, 2019 N.Y. Slip Op. 30621(U) at *18-19 (citing *Mestecky v. Cty of N.Y.*, 30 N.Y.3d 239, 243 (2017), *rearg. denied*, 30 N.Y.3d 1098 (2018); *Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 104 (2001)); *Springer v. Board of Educ. of City School Dist. of Cty of N.Y.*, 27 N.Y.3d 102, 107 (2016). The BSA Decision obliterates these careful choices.

100. Where ZR § 12-10 lists exemptions from the calculation of "#floor area# of a #building#," it is imperative that that these exemptions only be applied when the #floor area# of a #building# is being calculated. Where "#floor area#" is not accompanied by the words "of a #building#," the exemptions listed in ZR § 12-10 for "#floor area# of a #building#" do not apply. The Board cannot simply disregard the words "of a #building#" in the section of the definition of #floor area# that lists areas to exempt from certain calculations; doing so is anathema to the principles of statutory interpretation. Similarly, the Board does not have the authority to read the words "of a #building#" into ZR § 32-15A where they do not appear in the properly adopted ZR text. Per N.Y. City Charter § 666(5), it is the task of the Board to apply the ZR, not to rewrite it.

101. The Board's use of ZR § 12-01(e) to avoid the plain meaning of "establishment" contorts the ZR and the distinction between "#floor area# of an establishment" and "#floor area# of a #building#" that the text reveals was the drafter's intent. The BSA Decision further discounts evidence of intent available outside the text when it states that "reference to legislative history need not be made," at 12.

C. <u>The BSA Improperly Discounted the Import of ZR Language Regarding the Protection of Local Retail Districts from Traffic Impacts</u>

102. The BSA Decision unlawfully disregarded the considerable pedestrian, automobile and truck traffic that the Board acknowledged that Target would bring to the predominantly residential district in direct violation of the ZR, a statute crafted specifically to protect such districts from these specific impacts. *See* ZR §§ 31-00(d), 31-11.

103. The statute was written with careful consideration of quality of life issues associated with traffic including noise, air pollution, and safety; the Board disregarded both the statutory language and its intent.

104. Simply providing a place for automobiles and trucks to unload and park will do nothing to alleviate their impacts on pedestrian, car and truck traffic flow on the street and sidewalks. Destination Retail will bring truck traffic as merchandise is delivered via the already-congested residential roads in surrounding the subject property, road congestion as cars and trucks line up to enter exit loading berths the underground parking garage car elevator, and an influx of people that will disrupt the primarily residential and local retail nature of the neighborhood immediately surrounding the property.

II. THE BSA AFFIRMED A DOB DETERMINATION MADE VIA AN INTERNAL AGENCY PROCESS THAT IS ARBITRARY, CAPRICIOUS AND CONTRARY TO LAW

105. The BSA affirmed a determination made by DOB pursuant to internal policies that were themselves arbitrary, capricious and contrary to law. The Self Certification of Objections procedure DOB used to evaluate the subject application, and routinely uses for others, fails to fulfill DOB's Charter-mandated obligation to administer and enforce the use provisions of the Zoning Resolution. N.Y.C. Charter § 643; *9th and 10th Street L.L.C.*, 10 N.Y.3d 264 (Department obligated to enforce all provisions of the ZR including use; *Neighborhood in the Nineties v. Cty of NY*, 919 N.Y.S.2d 159 (1st Dept. 2011) (same). It allows applicants like the Developer to make key determinations about the lawfulness of their own plans without Department review. Professional Certification and Self Certification of Objections turn control of the approval process over to the applicant themselves.[22]

106. The inadequacy of the Department's procedures that led to approval of the September 20 Building Permit, which the BSA Decision upheld, is clear: they allowed

[22]A possible audit after permits are issued is an inadequate stand-in for substantive review and enforcement of the ZR.

Developers' self-serving and incorrect interpretation of the controlling ZR section to satisfy its examiner's Objection relating to the size of the planned Target "variety store" without verification or review.

107. The process allows any developer who can afford to hire a professional qualified to select Professional Certification or Self Certification of Objections to interpret the ZR however convenient, without meddlesome inspectors examining the merits of these for-hire interpretations.

Conclusion

108. The Zoning Resolution exists for a reason: it protects residents, local businesses, and communities from the harms that come from putting the wrong development in the wrong area. A neighborhood's zoning designation is a distinct choice made by elected officials who represent their community. Developers' attempts to change the zoning designation was rejected by those officials. But instead of respecting that choice, Developers are attempting to sidestep the zoning restrictions entirely.

109. A store with departments is a department store. A 23,580 square foot store is not smaller than 10,000 square feet. The Department of Buildings' abdication of their permit-review responsibility cannot change this reality.

WHEREFORE, Petitioners respectfully request this Court enter an order and judgment:

(1) enjoining any action by Developer Respondents taken in pursuit of building a space to lease to Target at 40-31 82nd Street (aka 40-19 82nd Street; Queens Block: 1493 Lot: 15) in Elmhurst, Queens;

(2) annulling the BSA Decision 2018-166A, pursuant to CPLR Article 78;

(3) declaring that Target stores are department stores for the purposes of interpreting the ZR, per CPLR § 3001;

(4) declaring that DOB must include cellar space when calculating the floor area of an establishment in order to determine whether a Local Retail (Use Group 6) complies with ZR § 32-15, per CPLR § 3001; and

(5) declaring that DOB's practice of allowing applications to be submitted under the self-certification of objections procedures is contrary to its obligations under the New York City Charter § 643 to enforce the Zoning Resolution, per CPLR § 3001;

(6) an injunction of any DOB Permits, Certificates of Occupancy or other approvals for Target stores in any C1 Local Retail districts in the City; and

(7) granting such other and further relief as this Court may deem necessary.

Dated: September 30, 2019
New York, New York

Respectfully submitted,

Paula Z. Segal, Esq.
Daniel Carpenter-Gold, Esq.
TakeRoot Justice
123 William Street, 16th Fl. New York NY 10038
Attorneys for Petitioners

Verification

Paula Z. Segal, being duly sworn, states that she is an attorney duly admitted to practice in the State of New York and an employee of TakeRoot Justice, attorneys for Petitioners in the within action; that the foregoing Verified Complaint is true to her own knowledge, except as to those matters herein stated to be alleged upon information and belief, and as to those matters she believes them to be true; that the grounds of his belief as to all matters not stated upon her knowledge are from conversations with plaintiff and/or documents furnished to her by plaintiff.

The undersigned further states that this verification is made by the undersigned and not by Petitioners because Petitioners are not in the county where affirmant has her office: TakeRoot Justice is located in New York county; all Petitioners are located in Queens county.

Paula Z. Segal, Esq.