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ZONING AND LAND USE PLANNING

Using Injunctive Relief To Stave Off the Mootness Doctrine

By **Anthony S. Guardino**
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Typically, a court will invoke the mootness doctrine when circumstances change in a way that prevents the court from rendering a decision that effectively resolves an actual controversy. In the world of zoning and land use litigation, courts will put significant weight on how far construction has progressed towards completion when determining if a challenge to a land use or zoning decision, such as a variance, is moot.

A recent decision from the Appellate Division, Second Department, *Katz v. The Town of Hempstead*, is the latest reminder from New York's appellate courts to parties in land use and zoning litigation that developers can successfully use the mootness doctrine to fend off challengers who do not request injunctive relief at both the trial and appellate levels. However, when those challengers do request such relief, they can shift significant financial risk to developers while the dispute plays out.

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A Challenge To a Two-Story Residence Comes Too Late

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Early this past February, in *Katz v. The Town of Hempstead*, 2025 N.Y. Slip Op. 00659, the Appellate Division, Second Department, held that an appeal from property owners challenging a variance for the construction of a two-story residence on neighboring property was moot. The property owners moved for a preliminary injunction enjoining construction of the residence before the Supreme Court, but did not do so before the Appellate Division.

The court rested its decision on two factors. First, the property owners failed to move for a preliminary injunction in the appellate court to preserve the status quo while their appeal was pending. Second, while the appeal was pending, the appellate court deemed that the construction of the residence was "substantially completed with the authority of the Board [of Appeals of

the Town of Hempstead]." That construction, according to the court, could not have been undone without substantially prejudicing the developer of the residence and causing it undue hardship. Thus, the court dismissed the appeal as "academic."

Precedent Supports Injunctive Relief To Avoid Mootness Doctrine

In so holding, the *Katz* court relied on two Court of Appeals cases: *Dreikausen v. Zoning Bd. of Appeals of City of Long Beach*, 746 N.Y.2d 429 (2002), and *Citineighbors Coalition of Historic Carnegie Hill v. New York City Landmarks Preserv. Commn.*, 2 N.Y.3d 727 (2004). Both emphasize the importance of challengers seeking injunctive relief throughout a zoning and land use dispute to avoid the mootness doctrine.

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In *Dreikausen,* a use variance was granted for condominium construction and the reconstruction of a marina property in a residential neighborhood in Long Beach. When challenging the grant of the variance at the Supreme Court, the neighboring owners made no request for injunctive relief. The Supreme Court dismissed their petition challenging the variance.

When appealing to the Appellate Division, the neighboring owners sought injunctive relief, having learned that the permitting for the condominiums was about to be issued. The Appellate Division denied petitioners' requests for a temporary restraining order and preliminary injunction and eventually affirmed the trial court's dismissal of the petition.

When the neighboring homeowners appealed to the Court of Appeals, they sought demolition of the condominium units and argued their appeal was justiciable because they sought preliminary relief from the Appellate Division prior to the onset of actual construction of the units.

In ruling that the homeowners' appeal was moot, the Court of Appeals explained how courts are to determine mootness in connection with a construction project. For one, a court must consider "how far the work has progressed towards completion," but must also not let a "race to completion" be determinative. A chief factor in determining mootness is "a challenger's failure to seek preliminary injunctive relief or otherwise preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation." The court also noted that factors weighing against mootness are "whether a party proceeded in bad faith and without authority" and "where a challenged modification is readily undone, without undue hardship."

The Court of Appeals found that the neighboring owners did not seek a temporary restraining order or preliminary injunctive relief at any time while the dispute was before the Supreme Court, nor did they contest the building permits being issued or of the property being used for residential purposes. Additionally, the developer demolished the marina and repaired the bulkhead, which benefitted local residents. Finally, the court deemed the owners' only request for injunctive relief, which came after the Supreme Court upheld the variance, as "half-hearted" and in the face of the project having been substantially completed. Thus, the court held the appeal was moot.

Just two years later, in *Citineighbors*, the Court of Appeals held that an appeal seeking to annul a certificate of appropriateness for a proposal to build an eight-story building atop an existing one-story building in Manhattan was moot. The petitioners did not apply for a temporary

restraining order or preliminary injunction to halt what the court deemed to be "highly visible construction work" that was already underway when they commenced their action. The Supreme Court denied the petitioners' challenge to the certificate. The Appellate Division affirmed.

Relying on the *Dreikausen* court's guidance regarding mootness, the court noted that as of approximately eight months before its decision, the project was substantially complete, including the erection of the building's steel and concrete structure, supporting columns and floors, its brick facade, and its window frames. According to the court, the property owner and developer had spent almost $26 million to that point, and the building's top several stories were unlikely to be readily demolished without undue hardship.

The court noted that the petitioners claimed they did not try to enjoin construction during the pendency of the litigation because of "monetary constraints" and the unlikelihood of success. The court explained that *Dreikausen* required them to seek an injunction in these circumstances. Their failure to do so "foisted all financial risks (other than their own legal fees and related expenses) onto the property owner and the developer" so they could not have expected the court to overlook the substantial completion of this construction project and, presumably, the financial implications of the court ordering demolition of, or significant changes to, the building.

The Importance of 'Making the Ask'

Katz, Citineighbors, and Dreikausen make clear that parties challenging administrative zoning and land use decisions in court must move for a temporary restraining order or other injunctive relief at every level. Otherwise, their adversaries have a good chance of successfully arguing mootness as grounds for dismissing the appeal if construction is relatively far along.

Some challengers may assume that construction of a project will go so slowly that, surely, a court would decide their case before any material amount of construction has begun, which would prevent the court from holding that there would be undue hardship if it found in favor of the challengers. But that's a gamble considering how clogged court dockets could be, and how quickly construction on a project could go when there are few, if any, labor, supply, or weather problems. If challengers do not seek such relief, a developer faces minimal risk in beginning to build after receiving a favorable zoning or land use decision from an administrative agency.

Even if challengers are not confident they will be able to secure a restraining order or injunctive relief—as was the case in *Citineighbors*—merely "making the ask" by requesting them shifts the financial risk to the developer. The developer will then need to decide whether they should continue building, knowing that a court could rule at any time that they must stop. Or, the developer could gamble that construction could move so quickly that by the time the dispute is to be decided by a judge, it would be too far along for the judge to not deem the challenge as moot. Either way, the developer takes on significantly greater financial risk than if the challengers did not move for the relief, and is building the project at their own risk, even if they are confident the challenge will be dismissed.

Thus, while challengers contesting an administrative zoning or land use decision need to seek a temporary restraining order or injunctive relief at the trial and appellate levels to prevent a successful mootness defense from a developer, their doing so also affects the financial risk borne by a developer while the decision is being challenged, and, likely, the litigation strategy the developer will employ because of it.