STATE OF NEW YORK
SUPREME COURT :: COUNTY OF ERIE

FRANK VACANTI, CAROL VACANTI, and DOMINIC LoVALLO,	**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS AND TO LIFT TEMPORARY RESTRAINING ORDER AND IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR A PRELIMINARY INJUNCTION**
Plaintiffs,	
v.	
The ESTATE of PETER K. COUREY, and NORMAN COUREY as Administrator of the Estate of Peter K. Courey	**Index No. 2006-6955**
Defendants.	

I. Preliminary Statement

Defendants move to dismiss this action (1) for Plaintiffs' failure to state a cause of action under Section 268(2) of the Town Law; (2) for Plaintiffs' failure to exhaust their administrative remedies; and (3) for Plaintiffs' lack of standing under Section 268(2) of the Town Law. Defendants also ask this court to deny Plaintiffs' motion for a preliminary injunction, and to lift the temporary restraining order issued by order to show cause signed on August 16, 2006.

This action should be dismissed because Section 268(2) of the New York Town Law is not available where the Town, here the Grand Island Building Inspector, has taken a position contrary to that of the plaintiffs in its interpretation of the Town Code. The neighboring property owners, who the zoning ordinances are designed to protect and who are among those most interested in their proper implementation, are provided with two avenues to challenge the Town's enforcement or failure to enforce the Town Zoning Code. Where the Town fails to act, Section 268(2) of the Town Law provides an opportunity for enforcement, but where the Town

affirmatively acts, dissenting property owners and taxpayers may only pursue an appeal to the Zoning Board of Appeals within sixty (60) days of the Town's adverse decision, followed, in the event of an unsuccessful appeal, by a special proceeding under C.P.L.R. Article 78 within four (4) months of the decision of the Zoning Board of Appeals. Since the Town of Grand Island took action to enforce the Town Zoning Code by granting Defendants a building permit, Section 268(2) of the New York Town Law is not available, and the Plaintiffs have failed to state a cause of action.

The plaintiffs have failed to follow the proper procedure to challenge the Town of Grand Island Building Inspector's interpretation of the Town Zoning Code. Plaintiffs have instead waited more than a year, during which the Estate was required to make difficult decisions under the cloud of threatened litigation and actual interference from Plaintiffs. Permitting this action to go forward would allow Plaintiffs to avoid the rigorous time limits that require these types of disputes to be resolved quickly and with the benefit of the participation of the entities with the most experience and expertise in the interpretation and implementation of the Town Zoning Code; i.e., the Town of Grand Island and the Town of Grand Island Zoning Board of Appeals. Plaintiffs would also avoid the heavy burden of proof required of a plaintiff in a special proceeding under C.P.L.R. Article 78; i.e., that the administrative action of the Building Inspector was illegal, arbitrary and capricious, or an abuse of discretion. Further, this Court should afford the Town of Grand Island's Building Inspector the measure of deference warranted by the expertise developed interpreting the Town of Grand Island Zoning Code on a daily basis.

In further support of Defendants' motion to dismiss is the fact that the plaintiffs have failed to demonstrate that they are "aggrieved" by the alleged zoning violation for purposes of

establishing standing to maintain an action under Section 268(2) of the New York Town Law.

With regard to the currently pending motion for preliminary injunctive relief, equity demands that this motion be denied because the plaintiffs in this action are guilty of inexcusable and inequitable delay, and their lack of diligence has greatly prejudiced the defendants in this action. At this stage, to grant the preliminary injunction would do greater damage than denial. The construction at 3741 East River Road has progressed to a point where the cessation of work will not preserve the status quo, but disturb it, as waste is inevitable if the construction is not completed at least to a point of protection of the existing structure. The plaintiffs have not "done equity," but have caused a purchaser of the property to withdraw from a contract, and as such are not entitled to come to a court of equity and seek relief. The plaintiffs, further, have not established their right to relief or a likelihood of success on the merits.

Accordingly and for the reasons stated herein, this action should be dismissed, the motion for a preliminary injunction should be denied, and the temporary restraining order currently in place should be immediately lifted.

II. This Action Should be Dismissed

Upon the accompanying Notice of Motion to Dismiss, together with the affidavits of Norman Courey, Linda Kutzbach, and Paul Lunick, and for the reasons stated herein, this action should be dismissed.

A. Plaintiffs Have Failed to State a Cause of Action under Section 268(2) of the New York Town Law

Section 268(2) of the New York Town Law allows taxpayers in limited circumstances to step into the shoes of the Town when the Town has failed to act on a violation of the Zoning

Code. This sometimes occurs where a property owner has failed to obtain a building permit and the Town is unwilling or unable for whatever reason to address the issue. Section 268(2) states:

> In case any building or structure is . . . constructed . . . in violation of this article or of any local law, ordinance or other regulation made under authority conferred thereby, the proper local authorities of the town, in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful . . . construction . . . , to restrain, correct or abate such violation, to prevent the occupancy of said building, structure, or land or to prevent any illegal act, conduct, business or use in or about such premises; and upon the failure or refusal of the proper local officer, board or body of the town to institute any such appropriate action or proceeding for a period of ten days after written request by a resident taxpayer of the town so to proceed, any three taxpayers of the town residing in the district wherein such violation exists, who are jointly or severally aggrieved by such violation, may institute such appropriate action or proceeding in like manner as such local officer, board or body of the town is authorized to do.

N.Y. Town Law § 268(2) (Consol. 2006). Under those circumstances, the neighboring taxpayers are permitted to enforce the Code just as the Town would, were it willing and able to do so. Section 268(2) prevents the rights of the neighboring property owners to benefit from the provisions of the Zoning Code from becoming totally subordinate to the vagaries of the Town's funding priorities or other political vicissitudes.

The New York Court of Appeals is often cited for its statement that Section 268(2) was "[o]bviously intended to create an avenue for direct action by which resident taxpayers, acting in concert, may overcome official lassitude or nonfeasance in the enforcement of zoning laws." Little Joseph Realty, Inc. v. Town of Babylon, 41 N.Y.2d 738, 741, 395 N.Y.S.2d 428, 431 (1977). The Third Department recently elaborated, stating,

> in a taxpayer's action to enforce compliance with the zoning law upon failure of the town officers to do so, the taxpayer plaintiffs have no greater right to demand compliance than do the town officials. Inasmuch as the town officials could not institute legal action to enjoin the use, the plaintiffs may not do so. . . . Stated differently, where, as here, local officials find no zoning violation exists, there is no

> 'official lassitude or nonfeasance in the enforcement of zoning laws' which citizen taxpayers may overcome.

Marlowe v. Elmwood, Inc., 12 A.D.3d 742, 744, 784 N.Y.S.2d 206, 209 (3rd Dep't 2004) (internal quotations omitted); see also Forget v. Raymer, 65 A.D.2d 953, 954, 410 N.Y.S.2d 483, 484 (4th Dep't 1978) ("In this case the town could not question the validity of defendants' use of the subject property because the town building inspector and the Town Zoning Board of Appeals had declared formally that the use was a legal and nonconforming use. . . . Inasmuch as the town officials could not institute legal action to enjoin the use, the plaintiffs may not do so").

Plaintiffs admit that, subsequent to the denial of Peter Courey's application for a zoning variance, Peter Courey was able to conform his application for a building permit to the applicable Zoning Code. He successfully received a building permit from the Town of Grand Island Building Inspector to allow construction of a structure at 3741 East River Road with a foundation that is 6.1 feet from the common side yard line with the neighboring property owned by Plaintiffs Frank and Carol Vacanti at 3751 East River Road. See Building Permit dated July 7, 2005 (attached at Tab 2 to the Affidavit of Norman Courey filed herewith) (requiring "6.1' min" side yard setback). Since the Town's approval of the building permit application and prior to the service of the complaint or the order to show cause in this action, construction began in compliance with that validly issued permit.

The Building Inspector can and does enforce the Zoning Code through the permitting process. As in Marlowe, where the Town Building Inspector made a determination that no zoning violation existed when it issued a valid certificate of occupancy, here, the Town Building Inspector made a determination that no zoning violation existed when it issued a valid building

permit. See Marlowe v. Elmwood, Inc., 12 A.D.3d 742, 744, 784 N.Y.S.2d 206, 209 (3rd Dep't 2004); In re Palm Mgmt. Corp. v. Goldstein, 29 A.D.3d 801, 815 N.Y.S.2d 670, 673 (2d Dep't 2006) ("the [Zoning Board of Appeals] determined that 'the statute of limitations has long expired' because 'the underlying determinations which aggrieve the applicants are the building permit . . . and the certificate of occupancy"). Therefore, there is now no "official lassitude or nonfeasance" on the part of the Grand Island officials which these three taxpayer plaintiffs may now seek to overcome. See Marlowe v. Elmwood, Inc., 12 A.D.3d 742, 744, 784 N.Y.S.2d 206, 209 (3rd Dep't 2004).

That is not to say that the rights of the taxpayers protected by Section 268(2) are paramount. Marlowe v. Elmwood, Inc., 12 A.D.3d 742, 744, 784 N.Y.S.2d 206, 209 (3rd Dep't 2004) ("the taxpayer plaintiffs have no greater right to demand compliance than do the town officials"). The Town has the right to enforce its Code and where it has done so, the rights of the taxpayer who is dissatisfied with that enforcement are to be determined in an appeal of that action to the Zoning Board of Appeals. See N.Y. Town Law § 267-a (Consol. 2006) (appeal from and review of "any order, requirement, decision, interpretation, or determination made by the administrative official charged with the enforcement of any ordinance or local law adopted pursuant to [Article 16 of the Town Law]" may be initiated by a person aggrieved by the determination); Town of Grand Island Zoning Code § 49-214(B) (adopted and effective July 19, 2004) ("Such appeal may be taken by any person aggrieved [by the determination]"). To the extent that the appeal is denied, the remedy for the dissatisfied taxpayer is a special proceeding under Article 78 of the C.P.L.R.

B. The Proper Procedure for Plaintiffs Under the Circumstances of this Matter

was an Appeal to the Zoning Board of Appeals, Followed by a Special Proceeding Under Article 78 of the Civil Practice Law and Rules in the Event of an Unsuccessful Appeal

The time limit on an appeal to the Zoning Board of Appeals is sixty (60) days (N.Y. Town Law § 267-a(5)(b) (Consol. 2006); Town of Grand Island Zoning Code § 49-214(A) (adopted and effective July 19, 2004)), and the time limit for commencement of an Article 78 proceeding to challenge the decision of the Zoning Board of Appeals is four months from a final and binding decision or (in a proper case) from the respondent's refusal to perform its duty upon the petitioner's demand. N.Y. C.P.L.R. § 217 (Consol. 2006); see also In re Palm Mgmt. Corp. v. Goldstein, 29 A.D.3d 801, 815 N.Y.S.2d 670, 673 (2d Dep't 2006) ("the [Zoning Board of Appeals] determined that 'the statute of limitations has long expired' because 'the underlying determinations which aggrieve the applicants are the building permit . . . and the certificate of occupancy").

C. Plaintiffs Have Failed to Exhaust Their Administrative Remedies By Failing to Challenge the Issuance of the Building Permit by the Town of Grand Island Building Inspector

Plaintiffs must exhaust their administrative remedies prior to seeking relief in the courts. The Town and the Zoning Board of Appeals must be given the opportunity to hear and redress, if appropriate, any alleged failure to properly apply or enforce the Zoning Code. The Town Building Inspector and the Zoning Board of Appeals have the obligation to fairly and consistently apply the Zoning Code. Therefore, this action should be dismissed because the plaintiffs have failed to exhaust their administrative remedies. See Sloane v. Annunziato, 234 A.D.2d 281, 281-82, 651 N.Y.S.2d 309 (2d Dep't 1996) ("The plaintiffs failed to appeal the determination of the Town of Warwick Building Inspector to the Town of Warwick Zoning Board of Appeals. . . .

Therefore, the Supreme Court properly dismissed the action [pursuant to Town Law § 268(2) to enforce a zoning ordinance] on the ground that plaintiffs failed to exhaust their administrative remedies"); In re Nautilus Landowners Corp. v. Harbor Comm'n, 232 A.D.2d 418, 419, 648 N.Y.S.2d 627, 628 (2d Dep't 1996) ("The petitioners never appealed to the Zoning Board of Appeals of the Village of Mamaroneck from the issuance of the permit. Thus, the petition should have been dismissed for failure to exhaust administrative remedies"); In re Levine v. Town of Clarkstown, 307 A.D.2d 997, 999, 763 N.Y.S.2d 661, 663 (2d Dep't 2003) ("The petitioners were required to challenge the issuance of the building permit before the Town's Zoning Board of Appeals prior to commencing this [Article 78] proceeding" to review a "determination" of the Building Inspector granting a building permit and to enjoin the respondents from continuing construction, "and thus their present claims are not properly before us").

D. Section 268(2) Does Not Permit a Plaintiff to Avoid the Heavy Burden and Short Time Limitations Encountered in an Article 78 Proceeding

Section 268(2) is not available as an alternative means of challenging the Town's interpretation of the Town Zoning Code. Beresford Apartments, Inc. v. City of N.Y., 238 A.D.2d 218, 219, 656 N.Y.S.2d 607 (1st Dep't 1997) ("a taxpayer's suit is not a vehicle for . . . reviewing determinations supposedly made in violation of law"). Section 268(2) is only available where the Town has not taken action, in spite of a request by the plaintiff directed to the Town that it take such action.

In this case, the Town Building Inspector issued a Building Permit on July 7, 2005 based on the Town's interpretation of the Town Zoning Code. Plaintiffs believed that the foundation constituted a zoning violation and had retained an attorney to address this violation by July 20,

2005. See Letter from John J. Lavin, P.C. to Town of Grand Island Zoning Inspector dated July 20, 2005 (attached at Tab 4 to the Affidavit of Norman Courey filed herewith). Plaintiffs were not permitted to sit on their rights from July 20, 2005 until May 15, 2006 when Ralph C. Lorigo, another attorney retained to address this matter, articulated his agreement with the position taken in the July 20, 2005 letter. See Letter dated May 15, 2006 from Ralph C. Lorigo to the Town of Grand Island Building Department (attached at Tab 7 to the Affidavit of Norman Courey filed herewith). The proper procedure under these circumstances was to take an appeal to the Zoning Board of Appeals challenging the propriety of the Building Inspector's issuance of the permit, followed by a special proceeding under Article 78 in the event of an adverse decision by the Zoning Board of Appeals. Plaintiffs failed to appeal the decision to the Zoning Board of Appeals within sixty (60) days of the issuance of the permit, and instead waited more than a year to bring this proceeding.

E. The Holding in Marlowe -- Requiring Plaintiffs to Directly Attack the Issuance of the Permit -- Prevents Plaintiffs from Excluding the Town from a Proceeding Designed to Challenge the Town's Interpretation of the Town Zoning Code and Avoiding the Deference Afforded that Determination in the Context of an Article 78 Proceeding

The plaintiffs are not permitted to avoid the heavy burden associated with a proper challenge of any adverse decision of the Zoning Board of Appeals. In a special proceeding under C.P.L.R. Article 78 challenging the Town's or the Zoning Board of Appeals' interpretation of the Town's Zoning Code, the petitioner bears the burden of establishing that the Town's interpretation of the Town Code is illegal, arbitrary and capricious, or an abuse of discretion. N.Y. C.P.L.R. § 7803 (Consol. 2006) (a successful special proceeding under Article 78 requires a finding that "a determination was made in violation of lawful procedure, was affected by an error

of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed"); Kransteuber v. Scheyer, 80 N.Y.2d 783, 786, 587 N.Y.S.2d 272, 273 (1992) (affirming dismissal where "petitioner failed to establish that the [Zoning] Board [of Appeals'] determination was arbitrary and capricious" in special proceeding under Article 78).

Nor are the plaintiffs permitted to avoid the rigorous time limitations associated with a proper challenge of that decision initially within sixty (60) days before the Zoning Board of Appeals (N.Y. Town Law § 267-a(5)(b) (Consol. 2006); Town of Grand Island Zoning Code § 49-214(A) (adopted and effective July 19, 2004)), and thereafter within four (4) months in the Supreme Court. N.Y. C.P.L.R. § 217 (Consol. 2006); see also In re Palm Mgmt. Corp. v. Goldstein, 29 A.D.3d 801, 815 N.Y.S.2d 670, 673 (2d Dep't 2006) ("the [Zoning Board of Appeals] determined that 'the statute of limitations has long expired' because 'the underlying determinations which aggrieve the applicants are the building permit . . . and the certificate of occupancy")); Schultz v. Town of Red Hook Zoning Bd. of Appeals, 293 A.D.2d 621, 621-22, 740 N.Y.S.2d 235, 236 (2d Dep't 2002) ("there is no unfairness in applying Section 267-a by its express terms and in finding the petitioners' appeal untimely" where petitioners still had approximately three weeks to submit a timely appeal when they became aware of the town official's determination). Here, the plaintiffs have waited over a year since they first articulated their concern relative to an alleged "zoning violation" and the determination which aggrieved them, and this delay has caused considerable prejudice to the defendants, who have incurred great cost in reliance upon the Building Inspector's determination. See Affidavit of Norman Courey sworn to on Aug. 23, 2006 and filed herewith at ¶ 3 (foundation), ¶ 19 (framing);

Affidavit 2 of Paul Lunick sworn to on Aug. 23, 2006 and filed herewith at ¶ 3 (flooring, framing, labor).

The Building Inspector's determination was a final and binding determination which triggered the statutes of limitations found in N.Y. Town Law § 267-a(5) and N.Y. C.P.L.R. § 217. A Building Inspector's determination to issue a building permit triggers the statute of limitations under Section 267-a(5) when it is filed in his office or in the Town Clerk's office within five (5) days after it was rendered. N.Y. Town Law § 267-a(5)(a) (Consol. 2006).

In this case, the Town of Grand Island approved Peter Courey's application by issuing him a building permit on July 7, 2005 (see Building Permit (attached at Tab 2 to the Affidavit of Norman Courey filed herewith)), and that permit is filed as a public record in the Town of Grand Island Building Department office. The Town's approval became final and binding. The mere fact that the Town may not have answered Plaintiffs' request to reconsider did not render its initial determination non-final. Gilmore v. Planning Bd. of Ogden, 16 A.D.3d 1074, 1075, 791 N.Y.S.2d 804, 805 (4th Dep't 2005) ("Although the board was empowered to reconsider its decision, its refusal to do so did not render its initial decision non-final and thus did not restart the running of the statute of limitations"). Therefore, the statutes of limitations under Town Law § 267-a(5) and C.P.L.R. § 217 started to run when the Town filed the permit, and both have long since expired.

F. Decisions of Town Officials and the Zoning Board of Appeals Interpreting the Zoning Code Are Entitled to Deference Based on the Specialized Knowledge Involved in Such Interpretations

Courts routinely afford a Town and its Zoning Board of Appeals the measure of deference warranted by the expertise developed interpreting their Town Code on a daily basis. Violet

Realty, Inc. v. City of Buffalo Planning Bd., 20 A.D.3d 901, 798 N.Y.S.2d 283 (4th Dep't 2005) ("'[D]eference is generally accorded to an administrative agency's interpretation of statutes it enforces when the interpretation involves some type of specialized knowledge.' . . . The [building] permit application process in the City of Buffalo is specialized knowledge within the ambit of the Commissioner [of Permits], and thus we defer to his interpretation of the City Code"); Ass'n of Friends of Sagaponack v. Zoning Bd. of Appeals, 287 A.D.2d 620, 622, 731 N.Y.S.2d 851, 852 (2d Dep't 2001) ("the interpretation of a zoning ordinance by a zoning board of appeals must be 'given great weight and judicial deference, so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute'"); Town of Huntington v. Five Towns College Real Prop. Trust, 293 A.D.2d 467, 467-68, 740 N.Y.S.2d 107, 108-09 (2d Dep't 2002) ("A zoning board of appeals is empowered to interpret the provisions of a local zoning ordinance, and the judicial function in reviewing a board's decision is a limited one. . . . [T]he board's interpretation is entitled to deference and should not be disturbed unless it is unreasonable or irrational").

G. Plaintiffs Are Not "Aggrieved" by the Alleged Zoning Violation For Purposes of Establishing Standing to Maintain an Action Under Section 268(2) of the New York Town Law

Plaintiffs assert in conclusory fashion that they are "jointly and severally aggrieved." See Complaint at ¶ 26. However, Plaintiffs do not describe, in any way, how they are "aggrieved" by the alleged violation for purposes of establishing standing to seek relief under Town Law § 268(2), and the case law indicates that they are not.

It is not enough for the plaintiffs to be taxpayers residing in the Town of Grand Island and to baldly allege that they are aggrieved. Plaintiffs must prove that they are "aggrieved" by the

alleged zoning violation to establish standing under the statute. "Section 268 of the Town Law does not automatically make any taxpayer an aggrieved party nor does it create a statutory cause of action unless the parties are aggrieved by the violation." Charles J. Normand Builder, Inc. v. French Court Apts., Inc., 64 Misc. 2d 1053, 316 N.Y.S.2d 767 (Sup. Ct. Monroe County 1970).

Plaintiffs have failed to allege in their complaint how they are "aggrieved." While courts may recognize a presumption that parties are aggrieved by an alleged violation based on proximity to the violation in question, that presumption is rebuttable (see, e.g., Shepardson v. Kenville, 167 Misc. 2d 247, 251, 634 N.Y.S.2d 961, 964 (Sup. Ct. Yates County 1995) ("While [the] proposed plaintiff . . . is presumed for purposes of this motion to be only 800 feet from the property which is the subject of the litigation, a distance within the 'presumptive zone' in at least one case, this court finds under the facts of this case that the 800 feet is too far"), and several courts have stated that "the status of neighbor . . . does not automatically provide the 'admission ticket' to judicial review." Brighton Residents Against Violence to Children, Inc. v. MW Props., LLC, 304 A.D.2d 53, 58 (4th Dep't 2003) (citing In re Sun-Brite Car Wash v. Bd. of Zoning & Appeals, 69 N.Y.2d 406, 414, 515 N.Y.S.2d 418 (1987)); accord Shepardson v. Kenville, 167 Misc. 2d 247, 634 N.Y.S.2d 961 (Sup. Ct. Yates County 1995). If all the plaintiffs are not presumptively "aggrieved," then they are required to plead special injury beyond that suffered by the public at large. Shepardson v. Kenville, 167 Misc. 2d 247, 634 N.Y.S.2d 961 (Sup. Ct. Yates County 1995) (granting defendants' motion for summary judgment dismissing complaint for lack of standing under Section 268(2) because "special damages must have been pleaded"). "Our courts have repeatedly held that for a person to be 'aggrieved' . . . there must be a showing that the person has been personally and adversely affected." In re Douglaston Civic Ass'n, Inc. v.

Galvin, 36 N.Y.2d 1, 5, 364 N.Y.S.2d 830 (1974); see also Marlowe v. Elmwood, Inc., 12 A.D.3d 742, 745, 784 N.Y.S.2d 206, 209 (3rd Dep't 2004) ("In order to establish special damage it is necessary to show that there is some depreciation in the value of the premises as real property arising from . . . the forbidden use"); In re Beaudin v. Town of Alexandria Planning Bd., 233 A.D.2d 855, 649 N.Y.S.2d 278 (4th Dep't 1996) ("Petitioner has not demonstrated any diminution of the value of his property as a result of the alleged violation [as would establish special damages for standing purposes] and therefore is not entitled to injunctive relief"); Slevin v. Long Island Jewish Med. Ctr., 66 Misc. 2d 312, 315, 319 N.Y.S.2d 937, 942 (Sup. Ct. Nassau County 1971) ("In order to maintain an action for injunctive relief, a plaintiff must show that he has a special interest which will be substantially damaged by the use which he seeks to enjoin"). Conclusory allegations of such injury are insufficient (Shepardson v. Kenville, 167 Misc. 2d 247, 251, 634 N.Y.S.2d 961, 964 (Sup. Ct. Yates County 1995) ("the conclusory nature of the reputed injury is insufficient")), and here, Plaintiffs have not even made a conclusory allegation of special injury in their complaint. At the very least, Plaintiff Dominic LoVallo, residing across the street and several houses away still resides too far away under the circumstances of this case to be "aggrieved" by the alleged violation at issue (i.e., the alleged side yard encroachment) (see Shepardson v. Kenville, 167 Misc. 2d 247, 251, 634 N.Y.S.2d 961, 964 (Sup. Ct. Yates County 1995); and, further, a neighbor across the street and several houses away such as Plaintiff Dominic LoVallo is not within the "zone of interests" to be protected by a zoning ordinance regarding side yard setbacks because that property is not "subject to" any such alleged encroachment (cf. Zupa v. Paradise Point Ass'n, Inc., 22 A.D.3d 843, 844, 803 N.Y.S.2d 179, 181-82 (2d Dep't 2005) ("a close neighbor must also demonstrate that his or her interest is within

the 'zone of interest' protected by the zoning laws to establish standing to enjoin a zoning ordinance violation [in the absence of establishing special damages]. . . . Since the [plaintiffs'] properties are subject to such excessive light, noise, pollution, and smoke, their interests are within the zone of interest to be protected by the ordinances")). Therefore, the complaint should be dismissed based on the plaintiffs' failure to properly plead facts which, if proved, would establish their standing to sue.

III. The Motion for a Preliminary Injunction Should be Denied

"The grant of a preliminary injunction is a drastic remedy to be sparingly used." Porter v. Chem-Trol Pollution Servs., Inc., 60 A.D.2d 987, 988, 401 N.Y.S.2d 646, 647 (4th Dep't 1978). Due to its drastic nature, preliminary injunctive relief is not to be granted "unless a clear right thereto is established under the law and the undisputed facts upon the moving papers," and "the burden of showing an undisputed right rests upon the movant." Nalitt v. City of New York, 138 A.D.2d 580, 581, 526 N.Y.S.2d 162, 163 (2d Dep't 1988).

In general, an "application for injunctive relief requires much closer scrutiny, and requires a much weightier evidentiary showing than mere conclusory allegations. Thus, . . . before a preliminary injunction is granted, it must be demonstrated that the plaintiff has a clear likelihood of success on the merits; that unless the injunction is issued the plaintiff will be irreparably injured, and that an award of money damages will not adequately compensate him; that plaintiff has no adequate remedy at law; and that the grant of the injunction will not do greater damage than the denial. Tanzer Economic Associates, Inc. Profit Sharing Plan v. Universal Food Specialties, Inc., 87 Misc. 2d 167, 176, 383 N.Y.S.2d 472, 479 (Sup. Ct. N.Y. County 1976) (internal citations omitted). In an action under Section 268(2) of the New York Town Law, a

municipality (and therefore a taxpayer proceeding in its stead) may not be required to show irreparable harm; however, the municipality or taxpayer proceeding under Section 268(2) still bears the burden of proving both a balancing of the equities in its favor and a likelihood of success on the merits. Town of Thompson v. Braunstein, 247 A.D.2d 753, 754-55, 669 N.Y.S.2d 387, 388-89 (3d Dep't 1998). The plaintiffs in this case can meet neither burden, and therefore the plaintiffs' motion for a preliminary injunction should be denied.

A. The Court Must Balance the Equities, and the Equities Favor the Defendants

Two of the most important factors to be considered by a court in balancing the equities are whether the plaintiffs are guilty of unreasonable delay and/or unclean hands. See United for Peace & Justice v. Bloomberg, 5 Misc. 3d 845, 849, 783 N.Y.S.2d 255, 259 (Sup. Ct. N.Y. County 2004). Also to be considered are whether and to what degree the equitable relief sought would result in waste (see Town of Esopus v. Fausto Simoes & Assocs., 145 A.D.2d 840, 535 N.Y.S.2d 827 (3rd Dep't 1988)), and whether the defendants complied with the law and authorities in their conduct which is the subject of the action (see Town of Thompson v. Braunstein, 247 A.D.2d 753, 754-55, 669 N.Y.S.2d 387, 388-89 (3d Dep't 1998); East Hampton v. Buffa, 157 A.D.2d 714, 716, 549 N.Y.S.2d 813, 815 (2d Dep't 1990)). Guided by consideration of these factors, it is clear that the balance of equities tips in favor of the defendants.

i. Plaintiffs' Unreasonable Delay (Laches)

The plaintiffs were well aware of the construction at 3741 East River Road for over a year before bringing this action. The Town Building Inspector issued a Building Permit on July 7, 2005, and immediately thereafter, the foundation and in-ground pool were removed from the

property and a new foundation was poured, all in plain view of the neighboring property owners. Affidavit 1 of Paul Lunick sworn to on Aug. 22, 2006 and filed herewith at ¶¶ 4-5. Plaintiffs hired an attorney to address their belief that the foundation constituted a zoning violation within two weeks of the issuance of the building permit and the commencement of the work at 3741 East River Road. See Letter from John J. Lavin, P.C. to Town of Grand Island Zoning Inspector dated July 20, 2005 (attached at Tab 4 to the Affidavit of Norman Courey filed herewith). Plaintiffs did not take an appeal from the issuance of the building permit to the Zoning Board of Appeals as would have been the proper procedure under the circumstances. Instead, Plaintiffs sat on their rights from July 20, 2005 until May 15, 2006 when Ralph C. Lorigo, another attorney retained to address this matter, articulated his agreement with the position taken in the July 20, 2005 letter. See Letter dated May 15, 2006 from Ralph C. Lorigo to the Town of Grand Island Building Department (attached at Tab 7 to the Affidavit of Norman Courey filed herewith).

"To prove laches, a party asserting the defense must show (1) lack of diligence by the party against whom the defense is asserted and (2) prejudice." Southside Fair Housing Comm. v. City of New York, 928 F.2d 1336, 1354 (2d Cir. 1991) (citing Costello v. United States, 365 U.S. 265, 282, 5 L. Ed. 2d 551, 81 S. Ct. 534 (1961)). The plaintiffs waited over a year to finally bring this proceeding (see Summons and Complaint filed on July 25, 2006), a delay which has resulted in considerable prejudice to the defendants who, in the meantime, have incurred great cost in reliance upon the validity of the building permit. Specifically, Peter K. Courey and/or his Estate have not only contracted for and completed the removal of the foundation of the former structure, the removal of the in-ground pool, and the construction of a new foundation (Affidavit 1 of Paul Lunick sworn to on Aug. 22, 2006 and filed herewith at ¶¶ 4-5), but have also more

recently contracted for and completed the construction of new framing, and have contracted for and partially completed the installation of a plywood roof over the completed frame. Affidavit of Norman Courey filed herewith at ¶ 3 (foundation) & ¶ 19 (framing); Affidavit 2 of Paul Lunick sworn to on Aug. 23, 2006 and filed herewith at ¶¶ 2-3 (work progress, costs). As is customary in the trade, the roof installation project was approached working inward from the perimeter of the house, and prior to the date of the Temporary Restraining Order, all framing of that portion of the structure which is the subject of this matter had been completed. Affidavit 2 of Paul Lunick sworn to on Aug. 23, 2006 and filed herewith at ¶¶ 2, 5; see also Photographs of Construction Progress attached to Affidavit 2 of Paul Lunick sworn to on Aug. 23, 2006 and filed herewith. As such, any preliminary injunctive relief granted so late would not serve to protect any equitable rights of the plaintiffs with regard to the subject of the action, but would only serve to irreparably harm the equitable rights of the defendants with regard to protection of the lumber, especially that at the center of the structure, currently unprotected from the elements and subject to weathering and rot, especially as the end of the building season quickly approaches. Affidavit 2 of Paul Lunick sworn to on Aug. 23, 2006 and filed herewith at ¶ 4. The substantial amount of lumber used for the flooring of the foundation and the completed framing, currently unprotected by a roof and therefore at risk of destruction by the elements, is valued at over $35,000. Affidavit 2 of Paul Lunick sworn to on Aug. 23, 2006 and filed herewith at ¶ 3. This figure does not include the considerable cost of labor also incurred by the Estate of Peter K. Courey in construction on the property.

Because the plaintiffs are guilty of this inexcusable and inequitable delay which has so prejudiced the defendants, any equitable rights to preliminary injunctive relief which they may

once have asserted must now be barred, as they are at this stage far outweighed by the defendants' equitable rights in completing the construction, at least to a point where the work already begun is protected, to avoid waste. The plaintiffs' lack of diligence along with the prejudice to the defendants caused by the plaintiffs' delays (specifically, the detrimental effect which a preliminary injunction would now have upon the near-completed construction) demands that preliminary injunctive relief be denied and the action be dismissed. See Simon Says Enters., Inc. v. Milton Bradley Co., 522 F. Supp. 986, 988 (S.D.N.Y. 1981) ("this action is also dismissed on grounds of laches. Plaintiffs waited over two years from the date they learned of defendant's game and the marketing plans for it before bringing this suit. If the plaintiffs were really interested in protecting their service mark, this action would have been instituted long ago"); Little India Stores, Inc. v. Singh, 101 A.D.2d 727, 729, 475 N.Y.S.2d 38, 41 (1st Dep't 1984) ("plaintiff's delay in seeking enforcement of the injunctive relief, obtained almost two years ago, demonstrates the absence of equities in its favor, and serves as a bar to enforcement of the right now"); De Candido v. Young Stars, Inc., 10 A.D.2d 922, 200 N.Y.S.2d 695, 696 (1st Dep't 1960) ("it appears that the defendant, to the knowledge of the plaintiff, had been selling merchandise below fair-trade prices openly for more than two years before this action was commenced. In such circumstances the plaintiff should not be granted an injunction before the issues are tried"); Porter v. Chem-Trol Pollution Services, Inc., 60 A.D.2d 987, 988, 401 N.Y.S.2d 646, 647 (4th Dep't 1978) ("in light of the alleged detrimental effect a delay in the excavation will have upon Chem-Trol's business operations, customers, employees and the general public and, inasmuch as plaintiff never required that Chem-Trol obtain a permit for excavation of its six previous landfills, the equities balance in Chem-Trol's favor"); Town of

Hempstead v. State, 9 Misc. 3d 1040, 1045, 805 N.Y.S.2d 231, 235 (Sup. Ct. Nassau County 2005) (a balance of the equities favors the defendants, as it is clear that all parties wanted a tower built, there is likely shared benefits from its construction and there was a delay in opposing that siting of the tower despite notice"); Phoenix Tenants Ass'n. v. 6465 Realty Co., 119 A.D.2d 427, 431, 500 N.Y.S.2d 657, 661 (1st Dep't 1986) ("Special Term properly balanced the equities in denying temporary injunctive relief to the plaintiffs, one of whom is a lawyer, who waited until one day before the scheduled closing date to seek such relief. . . . Such delay was particularly inexcusable in this case where plaintiffs' counsel had been aware of the statute, and had even written articles about it, for some time prior to the commencement of the action"); Mercury Service Systems, Inc. v. Schmidt, 50 A.D.2d 533, 375 N.Y.S.2d 12 (1st Dep't 1975) ("Denial of an injunction *pendente lite* against solicitation of plaintiff-appellant's customers is amply justified by delay of three and one-half months in seeking this relief. In the interval, had plaintiff moved with dispatch consonant with a threat of truly irreparable harm, all issues could well have been resolved at a plenary trial. Further, there is no clear showing of a right to the relief sought").

ii. Plaintiffs' Unclean Hands

Similarly, the plaintiffs in this case may not be rewarded with preliminary injunctive relief because they are guilty of "inexcusable and inequitable delay" and therefore come to court seeking equity with "unclean hands." Before a plaintiff will be permitted to invoke the aid of a court of equity, he must himself do equity. As one court recently stated, where a plaintiff moved for a preliminary injunction compelling the issuance of a permit only nineteen days before the scheduled event at issue,

> the plaintiff did "not come to court with 'clean hands,' because plaintiff is guilty of inexcusable and inequitable delay. Plaintiff was on notice . . . a full three months ago. Indeed, . . . if plaintiff had filed the instant application in a timely fashion, operational plans could have been implemented to accommodate plaintiff's desire. . . . Indeed, even after plaintiff reneged on that agreement on August 10, 2004, it waited an additional week to bring suit, unnecessarily prejudicing defendants. . . . Here, plaintiff's delay in coming to court, and its decision to renege on its July 21st commitment, demonstrate that it lacks the clean hands that are a prerequisite for the grant of equitable relief - regardless of any alleged or even actual wrong attributable to defendants. As the United States Supreme Court stated:
>
> > The guiding doctrine in this case is the equitable maxim that 'he who comes into equity must come with clean hands.' This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of a court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith.

United for Peace & Justice v. Bloomberg, 5 Misc. 3d 845, 849-50, 783 N.Y.S.2d 255, 259-60 (Sup. Ct. N.Y. County 2004) (internal citations omitted); Amarant ex rel. Mercury Beach-Maid v. D'Antonio, 197 A.D.2d 432, 434, 602 N.Y.S.2d 837, 838 (1st Dep't 1993) ("It is an ancient maxim that he who comes to equity must come with clean hands. . . . Injunctive relief should have been denied on this ground alone"). Here, the plaintiffs purposefully waited to bring this action even after the construction at 3741 East River Road had already begun. Plaintiffs' inequitable delay in bringing this action and seeking equitable relief, despite their ongoing knowledge of and activity in response to the plaintiffs' conduct, greatly prejudiced the defendants.

Plaintiffs are also guilty of unclean hands for having contacted Dr. Saran, a party with whom the Estate of Peter K. Courey had a contract to sell the property at issue, via a letter from

their attorney Ralph C. Lorigo on May 15, 2006. See Letter from Ralph C. Lorigo to the Town of Grand Island Building Department, copy to Dr. Saran, dated May 15, 2006 (attached at Tab 7 to the Affidavit of Norman Courey sworn to Aug. 23, 2006 and filed herewith). The $289,000 contract with Dr. Saran was cancelled as a result of the threatened litigation. Affidavit of Norman Courey sworn to on Aug. 23, 2006 and filed herewith at ¶ 12. Mr. Vacanti has also expressed interest in purchasing the property for himself, but at a significantly discounted price. Affidavit of Norman Courey sworn to on Aug. 23, 2006 and filed herewith at ¶¶ 12-13. Mr. Vacanti offered to purchase the property for approximately $175,000, the amount Peter Courey paid for it. Affidavit of Linda Kutzbach sworn to on Aug. 23, 2006 and filed herewith at ¶ 3.

iii. Waste/Obstruction

"[B]efore a preliminary injunction is granted, it must be demonstrated that . . . the grant of the injunction will not do greater damage than the denial." Tanzer Economic Associates, Inc. Profit Sharing Plan v. Universal Food Specialties, Inc., 87 Misc. 2d 167, 176, 383 N.Y.S.2d 472, 479 (Sup. Ct. N.Y. County 1976). It is clear in this case that the grant of the preliminary injunction requested will do just that. As stated earlier and in the accompanying affidavits, the structure erected on the property since the issuance of the building permit is at great risk of waste if the preliminary injunction should issue, as the lumber used in the flooring and framing, valued at over $35,000, is as yet unprotected from the elements and subject to waste by rot in the coming months. Affidavit 2 of Paul Lunick sworn to on Aug. 23, 2006 and filed herewith at ¶¶ 3-4. The cost which the preliminary injunction would impose upon the Estate of Peter Courey far outweighs the cost to the allegedly aggrieved taxpayer plaintiffs of completing the construction, at least to a point where the work already begun is protected from weathering and harm. The

Third Department recognized this risk when it affirmed the denial of a preliminary injunction in Town of Esopus, where it stated,

> Although it appears that plaintiff is likely to succeed on the merits, a balancing of the equities discloses no prejudice to plaintiff if it is left to await an adjudication on the merits. . . . To require defendant to dismantle its structure now would be a wasteful incursion into the status quo should defendant prove successful on the merits; furthermore, it would remove any incentive for plaintiff to vigorously prosecute this action.

Town of Esopus v. Fausto Simoes & Assocs., 145 A.D.2d 840, 535 N.Y.S.2d 827 (3rd Dep't 1988). To grant the plaintiffs in this case preliminary injunctive relief would be such a "wasteful incursion into the status quo." See also Tanzer Economic Associates, Inc. Profit Sharing Plan v. Universal Food Specialties, Inc., 87 Misc. 2d 167, 183-84, 383 N.Y.S.2d 472, 484 (Sup. Ct. N.Y. County 1976) ("The balance of equities would certainly indicate that less damage would follow from the denial of the injunction than from calling the merger process to a halt. To do otherwise would permit a tiny minority, without an adequate factual showing, to delay matters involving millions of dollars until they have been satisfied. Without ample justification and a clear showing of necessity, equity will not be the handmaiden of obstruction").

iv. Defendants' Compliance with the Requirements of the Town of Grand Island

Another factor which the Court may consider in deciding whether to grant a preliminary injunction is the degree of defendants' compliance with the Town Code. Defendants obtained a valid building permit from the Town of Grand Island. That building permit was not timely appealed, and Defendants commenced building as required by that permit, always in compliance with that permit. This situation is in stark contrast to cases where the equities are found to weigh in favor of the plaintiffs for the defendants' failure to obtain the proper permits or the defendants'

blatant disrespect of the authority of the Town. See, e.g., Town of Thompson v. Braunstein, 247 A.D.2d 753, 754-55, 669 N.Y.S.2d 387, 388-89 (3d Dep't 1998) ("defendants never applied for or received a permit for the alterations they made to the site despite the requirement of [the] Town of Thompson Town Code . . . that a permit be obtained. . . . In our view, the building inspector's observations at the site [of various acts of noncompliance] satisfied plaintiffs' burden of showing a likelihood of success on the merits. Further, in view of the fact that defendants made no effort to comply with the Town Code, refusing to even apply for a building permit and at all times challenging plaintiffs' authority, we conclude that a balancing of the equities weighed in plaintiffs' favor"); East Hampton v. Buffa, 157 A.D.2d 714, 716, 549 N.Y.S.2d 813, 815 (2d Dep't 1990) ("We note that the equities are balanced in favor of the town because the defendants proceeded with the work even though a stop-work order had been issued"). Where, as here, defendants have obtained the proper permits and have at all times respected the authority of the Town and its Code, these facts demonstrating such cooperation serve to further tip the balance of equities in favor of the defendants.

B. The Preliminary Injunction Will Not Protect Plaintiffs' Rights Regarding the Subject of the Action

In order to secure a preliminary injunction it must appear

> that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

N.Y. C.P.L.R. § 6301 (Consol. 2006). The plaintiffs' rights which are the subject of this action are the rights to keep their properties free of side yard encroachments beyond that permitted by

the applicable provisions of the Grand Island Zoning Code. As the construction at 3741 East River Road has already been completed with respect to that portion of the structure running along the side yard line, the preliminary injunction, if granted, would be totally ineffective with respect to the protection of those rights, and would only serve to harm the defendants' interests, by preventing the protection of the $50,000 worth of lumber and labor used in the flooring and framing of the existing structure. Affidavit 2 of Paul Lunick sworn to on Aug. 23, 2006 and filed herewith at ¶¶ 3-4.

C. Plaintiffs Cannot Demonstrate and Have Not Demonstrated a Likelihood of Success on the Merits

"[T]he party seeking the drastic remedy of a preliminary injunction must demonstrate, among other things, a likelihood of success on the merits. . . . While mere issues of fact will not preclude a preliminary injunction . . . , sharp factual disputes obscuring the likelihood of success will bar the remedy." Eklund v. Pinkey, 2006 N.Y. Slip Op. 5692, 2 (3rd Dep't July 13, 2006); Sutton, DeLeeuw, Clark & Darcy v. Beck, 155 A.D.2d 962, 547 N.Y.S.2d 773, 774 (4th Dep't 1989) ("A party moving for a preliminary injunction need not establish a certainty of success on the merits, but when the facts necessary to establish the cause of action are, as here, in sharp dispute, a preliminary injunction should not issue") (internal citations omitted). The plaintiffs in this case are unable to show a likelihood of success on the merits, for reasons presented in great detail in the Defendants' Motion to Dismiss filed herewith.

Stated briefly, "plaintiffs have failed to demonstrate that they are likely ultimately to prevail on the merits as they have not shown that they possess an enforceable . . . right." Yan's Video, Inc. v. Hong Kong TV Video Programs, Inc., 133 A.D.2d 575, 578, 520 N.Y.S.2d 143,

145 (1st Dep't 1987). To satisfy the burden of demonstrating that he or she is likely to succeed on the merits of an action in order to secure a preliminary injunction, the moving party is required to demonstrate a clear right to relief which is plain from the undisputed facts. Mosseri v. Fried, 289 A.D.2d 545, 546, 735 N.Y.S.2d 794, 795 (2d Dep't 2001) ("To satisfy this burden, the plaintiffs were required to demonstrate a clear right to relief which is plain from the undisputed facts. . . . Since the facts of this case are sharply disputed, the plaintiffs failed to demonstrate a clear right to injunctive relief. Thus, the Supreme Court properly denied the plaintiffs' motion for a preliminary injunction enjoining the defendants from doing construction work on certain premises") (internal quotations omitted). Until the plaintiffs have established this right, they have "no right to interfere" with the construction, as the preliminary injunctive relief requested "would lead to an unnecessary, and, perhaps, a fruitless and oppressive interruption of the exercise of the [defendants'] rights." Credit Agricole Indosuez v. Rossiyskiy Kredit Bank, 94 N.Y.2d 541, 547, 708 N.Y.S.2d 26, 30 (2000).

D. Status Quo

The very purpose of a preliminary injunction is to maintain the status quo during the pendency of the action. Heisler v. Gingras, 238 A.D.2d 702, 703, 656 N.Y.S.2d 70, 71 (3rd Dep't 1997) ("The fundamental purpose of a preliminary injunction is to preserve the status quo in an action, or in this case a proceeding . . . , until a decision is reached on the merits. . . . Once that decision is made, the need for provisional relief ends and any order granting a preliminary injunction expires"). Here, the motion for preliminary injunctive relief was brought only after construction began and was partially completed. Accordingly, the status quo to be preserved is not the property as undeveloped, but rather the property as partially improved by framing,

windows, and siding. The preliminary injunction would only disturb that status quo by destroying the $50,000 worth of work that has been performed to date, and "since the purpose of a preliminary injunction is to maintain the status quo pending the litigation . . ., absent extraordinary circumstances, the injunction should be denied where . . . the status quo would be disturbed." United for Peace & Justice v. Bloomberg, 5 Misc. 3d 845, 849, 783 N.Y.S.2d 255, 259 (Sup. Ct. N.Y. County 2004); see also Bronx Household of Faith v. Bd. of Educ., 331 F.3d 342, 349 (2d Cir. 2003) ("an even higher standard of proof comes into play when the injunction sought will alter rather than maintain the status quo. In such case, the movant must show a 'clear' or 'substantial' likelihood of success").

E. If This Court Should Grant the Motion for a Preliminary Injunction, the Court Must Require that Plaintiffs Post a Significant Undertaking

"For cases involving preliminary injunctions to be issued pursuant to CPLR 6301, the Legislature has provided for a number of specific safeguards." Uniformed Firefighters Ass'n v. City of New York, 79 N.Y.2d 236, 241, 581 N.Y.S.2d 734, 737 (1992) (citing N.Y. C.P.L.R. §§ 6312(b) (requiring the posting of an undertaking), 6315 (establishing a procedure for assessment of damages sustained by reason of the preliminary injunction). C.P.L.R. 6312(b) requires that the Plaintiffs must give an undertaking in an amount fixed by the court before a preliminary injunction can be granted, to protect the defendant from harm upon an erroneously granted preliminary injunction. That section states, in relevant part,

> (b) Undertaking. Except as provided in section 2512, prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he or she was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction[.]

N.Y. C.P.L.R. § 6312(b) (Consol. 2006).

This court may not dispense with the requirement of an undertaking. Where the relief requested is a preliminary injunction, an undertaking (usually in the form of a surety bond) is mandatory; i.e., a prerequisite, or condition precedent. Hightower v. Reid, 5 A.D.3d 440, 441, 772 N.Y.S.2d 575, 576 (2d Dep't 2004) ("While fixing the amount of an undertaking when granting a motion for a preliminary injunction is a matter within the sound discretion of the court, N.Y. C.P.L.R. 6312(b) clearly and unequivocally requires the party seeking an injunction to give an undertaking"); Rourke Developers Inc. v. Cottrell-Hajeck Inc., 285 A.D.2d 805, 805-806, 727 N.Y.S.2d 667 (3rd Dep't 2001) ("when moving for a preliminary injunction, a plaintiff is required to post an undertaking in an amount fixed by the court . . . and this requirement may not be waived"); Family Affair Haircutters, Inc. v. Detling, 110 A.D.2d 745, 748-49, 488 N.Y.S.2d 204, 207 (2d Dep't 1985) ("Special Term erred in failing to require that plaintiff post an undertaking as a prerequisite to the granting of the preliminary injunction as mandated by CPLR 6312(b)"); Honeywell, Inc. v. Technical Bldg. Services, Inc., 103 A.D.2d 433, 434-435, 480 N.Y.S.2d 627, 629 n.1 (3rd Dep't 1984) ("An undertaking is mandatory where a preliminary injunction is granted"); Quandt's Wholesale Distributors, Inc. v. Giardino, 89 A.D.2d 669, 452 N.Y.S.2d 329 (3rd Dep't 1982) ("the posting of an undertaking is a condition for the granting of a preliminary injunction"); Kurland, Harold A., "An Undertaking Is Required," Practice Insights, N.Y. C.P.L.R. § 6312(b) (Consol. 2006) ("the parties have the incentive to argue the size of the undertaking, which typically is covered by a surety bond. Because such bonds are expensive, in some cases the moving party will be unable to afford a bond, or it will not be in that party's interest to obtain a bond. In that case, without an undertaking, the motion should be dismissed

because the court is without discretion to grant the preliminary injunction without the undertaking"). Should the plaintiffs fail to post the undertaking, Defendants may move to vacate any order granting the preliminary injunction. See Cade v. N.Y. Community Bank, 18 A.D.3d 489, 491, 795 N.Y.S.2d 270, 271 (2d Dep't 2005) ("Upon the motion of a party, a court has the power to vacate an order which granted a preliminary injunction for failure to post an undertaking within a reasonable period of time").

The calculation of the amount of potential damages for purposes of the undertaking is within the discretion of the Supreme Court. Pouncy v. Dudley, 2006 N.Y. Slip Op. 2181, 2 (2d Dep't Mar. 21, 2006) ("Both the determination of whether to grant the plaintiff's motion for a preliminary injunction and, if granted, the amount of an appropriate undertaking to be posted, are matters within the sound discretion of the Supreme Court"). "Absent a stipulation, the Supreme Court should determine its amount after a hearing." Solomon v. RYTY Inc., 302 A.D.2d 275, 276, 755 N.Y.S.2d 387, 388 (1st Dep't 2003). The Court should consider all foreseeable damages and costs which the Defendants may sustain by reason of, or as a result of, the injunctive relief. Marietta Corp. v. Pac. Direct, Inc., 9 A.D.3d 815, 817-18, 781 N.Y.S.2d 387, 388-89 (3rd Dep't 2004) ("Pursuant to CPLR 6312(b), 'all damages and costs which may be sustained by reason of the injunction' should be considered") (citing N.Y. C.P.L.R. § 6312(b)); see also Honeywell Int'l v. R. Freedman & Son, Inc., 307 A.D.2d 518, 519, 761 N.Y.S.2d 745, 747 (3rd Dep't 2003) ("Accordingly, the original $25,000 undertaking posted in connection with the initial preliminary injunction is patently inadequate to cover defendants' foreseeable damages as the result of the expanded terms of that injunction. Accordingly, a larger undertaking is warranted").

The potential damages in this case are upward of $650,000, based on the price of the completed home, plus counsel fees. The issuance of a preliminary injunction will lead inevitably to a loss of $50,000 plus counsel fees, but the cost of the delay is enormous under the circumstances, where the property is owned by the Estate. Accordingly, if the Court should decide to grant the plaintiffs' motion for a preliminary injunction, the plaintiffs must first be required to post a sufficient undertaking.

IV. The Temporary Restraining Order (TRO) Should be Lifted, and If This Court Refuses to Lift the Temporary Restraining Order (TRO), the Court Should Require that Plaintiffs Post a Significant Undertaking

"A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had." N.Y. C.P.L.R. § 6301 (Consol. 2006). As stated in detail above, there is absolutely no immediate or irreparable injury, loss, or damage which could possibly result from continuing construction at 3741 East River Road, because all construction at issue is already complete, and the only construction remaining is irrelevant to this action. The temporary restraining order, therefore, serves only to harm the defendants, and does not protect the plaintiffs' interests in any way. For these reasons, the temporary restraining order should be lifted immediately.

Should this court choose not to lift the temporary restraining order, it would be appropriate and within the court's discretion to require that plaintiffs post a significant undertaking, as would be mandatorily required for the preliminary injunction. Honeywell, Inc. v. Technical Bldg. Services, Inc., 103 A.D.2d 433, 434-435, 480 N.Y.S.2d 627, 629 n.1 (3rd Dep't 1984). The undertaking creates a contractual right to recover damages sustained as a result of an

improperly issued preliminary injunction, and without it, Defendants will likely be precluded from seeking damages in the event that the issuance of temporary restraining order should prove erroneous. See Gardino v. Rescignano, 152 A.D.2d 911, 544 N.Y.S.2d 392 (4th Dep't 1989) ("Since the temporary restraining order was not conditioned on the posting of an undertaking, defendants cannot seek damages. 'Where, for whatever reason, an undertaking is not posted as a condition for a preliminary injunction or a temporary restraining order, the enjoined party is without a remedy unless he can prove malice'") (citing Honeywell, Inc. v. Technical Bldg. Services, Inc., 103 A.D.2d 433, 434-435, 480 N.Y.S.2d 627, 629 n.1 (3rd Dep't 1984)); Thompson v. Topsoe, 237 A.D.2d 113, 113-14, 654 N.Y.S.2d 363, 364 (1st Dep't 1997) ("Absent proof of malice, . . . there is no common-law or statutory right to recover damages sustained as a result of an improperly issued preliminary injunction; the right, rather, is contractual in nature, based on the undertaking").

In any event, an undertaking must be required if the temporary restraining order is eventually converted to a preliminary injunction. Honeywell, Inc. v. Technical Bldg. Services, Inc., 103 A.D.2d 433, 434-435, 480 N.Y.S.2d 627, 629 n.1 (3rd Dep't 1984).

V. Conclusion

For the reasons described in this memorandum of law and the affidavits submitted herewith, as well as the notice of motion and all of the pleadings filed in this matter, the Court should deny the preliminary injunction, lift the temporary restraining order, and dismiss the case.

Dated: August 24, 2006
Buffalo, New York

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