

STATE OF NEW YORK
SUPREME COURT - PART 24 : COUNTY OF ERIE

THE TAP ROOM AT THE LAFAYETTE, INC.; KATHLEEN AMBROSE; CLASSIC
EVENT AT THE LAFAYETTE, LLC; ABL LEASING, LLC; THE BUFFALO
LAFAYETTE LEASING, LLC; HAT LOFTS, LLC; SIGNATURE DEVELOPMENT
BUFFALO, LLC; EDWARD FIBITCH,

Petitioners,

-against-

DOCKET NO. 807404/2019

BYRON BROWN; THE CITY OF BUFFALO, NY; THE CITY OF BUFFALO
PLANNING BOARD; THE CITY OF BUFFALO ZONING BOARD OF APPEALS;
BRAYMILLER MARKET, INC.; CIMINELLI REALTY DEVELOPMENT CORP.; 201
ELLCOTT, LLC,

Respondents.

25 Delaware Avenue - 4th Floor
Buffalo, New York
July 3, 2019

B e f o r e:

HONORABLE EMILIO L. COLAIACOVO,
Supreme Court Judge

A p p e a r a n c e s:

RICHARD EDMOND STANTON, ESQ.
BRIAN MICHAEL MELBER, ESQ.
Appearing for the Petitioners.

JENNIFER CRISTINA PERSICO, ESQ.
SEAN W. HOPKINS, ESQ.
Appearing for the Non-Municipal Respondents.

JESSICA M. LAZARIN, ESQ.
Appearing for the Municipal Respondents.

Reported By:

LAUREN A. ADAMS, NYRCR, RMR, CRR
Official Court Reporter

1 (Proceedings commenced at 2:09 p.m.)

2 THE CLERK: In the matter of the Tap Room at
3 the Lafayette, Inc., et al. versus Byron Brown, et al.
4 Index number 870404-2019.

5 Counsel, please note your appearance for the
6 record, beginning with the Petitioner.

7 MR. STANTON: Richard Stanton on behalf of the
8 petitioners, together with --

9 MR. MELBER: Brian Melber also for all the
10 petitioners, your Honor.

11 MS. PERSICO: Jennifer Persico, here
12 representing all of the non-municipal defendants --
13 respondents, rather.

14 MS. LAZARIN: Jessica Lazarin for the City of
15 Buffalo Law Department, representing the municipal
16 respondents in the matter.

17 THE COURT: All right. Good afternoon to all
18 of you. Before we begin, we had a conference with the
19 attorneys regarding the -- an issue. I believe it's
20 been resolved, but I believe, Mr. Hopkins, you want to
21 place it on the record, so go ahead.

22 MS. PERSICO: Your Honor, actually, given the
23 nature of the issue that was raised, I think I would
24 prefer to put that on the record, just to ensure the
25 pristine nature of these proceedings.

1 THE COURT: Sure.

2 MS. PERSICO: There was an objection raised by
3 petitioners' counsel and the individual client, who is a
4 member of a number of the LLCs, that there was a
5 potential conflict with Mr. Hopkins representing the
6 respondents in this matter, inasmuch as Mr. Termini has
7 an alleged ownership interest in a number of LLCs that
8 Mr. Hopkins' firm allegedly represents, and Mr. Termini
9 will not waive whatever perceived conflict there is
10 there.

11 So, accordingly, Mr. Hopkins will not be
12 representing the respondents -- the non-municipal -- or
13 actually, the municipal respondents, either, in this
14 matter. His affidavit, which was submitted with the
15 papers, is not at issue here because it is simply a fact
16 affidavit, because Mr. Hopkins was at each of the
17 meetings and involved in all of the proceedings involved
18 in his -- set forth in his affidavit. And so we just
19 wanted to put that on the record, and also note that we
20 were only advised of this approximately three minutes
21 before our court appearance today.

22 And Mr. Hopkins' involvement has been a matter
23 of public record on NYSCEF, and to petitioners' counsel
24 since the commencement of this action. Thank you.

25 THE COURT: Mr. Stanton or Mr. Melber, do you

1 wish to be heard on that?

2 MR. STANTON: Your Honor, with regards to the
3 remedy to the situation, Ms. Persico speaks absolutely
4 accurately, and we're fine with that.

5 THE COURT: That's satisfactory to you, then?

6 MR. STANTON: Yes.

7 THE COURT: All right. Just by way of
8 background, so that we can properly tee up what we're
9 here to discuss today, and that is that this Court
10 granted an Order to Show Cause on, I believe, June 24th,
11 and granted a preliminary injunction, and I scheduled
12 the matter for argument with respect to the continuation
13 of the preliminary injunction for today. The Court has
14 received your papers.

15 So, Mr. Stanton, I'm going to allow you to
16 proceed with your argument on that.

17 MR. STANTON: Okay. Your Honor, Mr. Melber
18 and I may split the argument if that's okay with you. I
19 will address --

20 THE COURT: Well, I mean, you can try, but I
21 might have questions. I don't know how we're going to
22 deal with that. I don't know how you're going to
23 approach it, but let's just start there.

24 MR. STANTON: I will start, your Honor. As a
25 first matter, there was an objection that the statute of

1 limitations was missed with regards to the challenges to
2 the Zoning Board of Appeals action. We all agree that
3 the date for the filing of the petitioners' -- the date
4 for the filing of the petition is 30 days. The 30 days
5 would have expired on a Sunday and extends to the
6 Monday. This action was commenced on Monday, the 17th
7 of June. The first items -- 12 items in the docket
8 corroborate that.

9 What happens when you electronically file now,
10 is you file your petition, that's the only document they
11 take initially, then you wait for an index number. CPLR
12 Section 304, subsection A of the second sentence says a
13 special proceeding is commenced by filing a petition in
14 accordance with rule twenty-one hundred two of this
15 chapter. That's exactly what was done on June 17th when
16 items number 1 through 12 of the docket were filed at
17 2:45 on that day.

18 THE COURT: Okay.

19 MR. STANTON: So, I just wanted to cover that
20 first. I know you --

21 THE COURT: I would prefer to address, I
22 guess, more of the issues that I have questions on.
23 With respect to standing, one of the issues that was
24 raised in the respondents' papers was that your clients
25 don't have standing. They allege that Mr. Koessler,

1 perhaps, missed standing, that the counselor may have
2 standing, but the remainder of the petitioners don't
3 have standing to commence this proceeding. So, I would
4 like to know --

5 MR. STANTON: I will go through that.

6 THE COURT: -- if there's any belief they were
7 existing.

8 MR. STANTON: Absolutely, your Honor. And
9 standing is a threshold issue on all of the causes of
10 action brought. There's three areas of causes of action
11 that are brought, and standing always is going to boil
12 down to one issue: Are the individuals or the entities
13 within the zone of interest of the statute at issue?

14 One of the lead cases on this, is *The Matter*
15 *of Gernatt Asphalt Products v. Town of Sardinia*, as well
16 as *The Society of Plastics Industry v. County of Suffolk*
17 case cited by the petitioners. It always comes down to,
18 what are the zones of interest?

19 The Court of Appeals has been very, very
20 active over the past maybe 15 years on clarifying what
21 is standing and have different standards for different
22 cases. They started out the first case in the Court of
23 Appeals line of cases was *Saratoga Chamber of Commerce*
24 *v. Pataki*, 100 N.Y.2d 801-203.

25 And in that case, that was a challenge to

1 Governor Pataki signing of a compact with an Indian
2 nation. In that case, it was -- the party who got the
3 benefit of the agreement would not be one likely to
4 complain on whether or not they were going to allow the
5 IDA standing. They determine when you're protecting the
6 public interest, it was a broader standard to allow a
7 standing for it.

8 That's adopted since then with some major
9 cases by the Court of Appeals. There's the Pine Barrens
10 case -- or *Pine Bush case v. The Common Council of the*
11 *City of Albany*, 13 N.Y.3d 297 (2009). That was private
12 land that was -- it was a resource in the Pine Barrens
13 outside of Albany, and there was a couple species -- a
14 couple sensitive species of concerns -- what was the
15 Karner blue butterfly, of all things.

16 THE COURT: Although, in this particular case
17 we have a falcon that perhaps is affected by this
18 project.

19 MR. STANTON: Yeah, we haven't raised that --

20 THE COURT: Well, this case is everything but
21 wetlands, so --

22 MR. STANTON: Yeah. And it really is the
23 noise and displacement of persons in our businesses is
24 our primary concern, and reaching the public trust, and
25 who can enforce those in the variance issue.

1 So there, they allowed standing to another
2 group of unincorporated persons who had an interest in
3 the matter and were losing the loss and use of enjoyment
4 of a species. Then, there was another big case which --

5 THE COURT: Your argument essentially is that
6 because they derive a benefit from these parking spots
7 and would be affected by the noise, regardless of what
8 they did previously, they have standing because of how
9 this anticipated and contemplated project would
10 adversely affect them?

11 MR. STANTON: The public trust -- that's my
12 argument of the public trust, because they utilize and
13 rely on the parking spaces for their own maintenance of
14 their own property and enjoyment of their own property
15 interest --

16 THE COURT: So that, in and of itself, confers
17 standing to bring the Petition.

18 MR. STANTON: On the public trust. Only on
19 the public trust, not under SEQRA. SEQRA is a different
20 standard, your Honor, because it's a different zone of
21 interest. SEQRA is an environmental harm statute.
22 Environmental harm under SEQRA is defined under 8-105 of
23 the Environmental Conservation Law. Unlike the federal
24 law, we consider the quality of the human environment
25 character -- impact on character effect of the

1 neighborhood and displacement of businesses as small
2 persons --

3 THE COURT: So anyone can bring that?

4 MR. STANTON: No, no. You got to be harmed.

5 THE COURT: I mean, anyone that alleges a
6 harm?

7 MR. STANTON: Anybody to bring the petition.

8 THE COURT: Yeah, yeah.

9 MR. STANTON: Because standing -- you don't
10 have to win to have standing.

11 THE COURT: No, no. I understand.

12 MR. STANTON: Standing -- you have got to
13 have it. So, anyone impacted on their use and enjoyment
14 of their own property, their own interest that is
15 different than the public at large gain standing, and
16 here we're saying there's people that own about 150
17 apartments, some people live inside those apartments.

18 One of the main petitioners, the apartment
19 owners, which would be AM&A's Lofts on some of them, and
20 ABL Leasing, the hotel room with the windows facing the
21 Ellicott Street area, which is about -- under the
22 construction, they would have standing.

23 The businesses threatened with displacement
24 because of a four-and-a-half-year waiting list for
25 parking downtown in conditions where they need it would

1 have standing based on threat of displacement.

2 THE COURT: But I mean, I guess, with respect
3 to the parking issue, is displacement of a parking space
4 sufficient enough to give somebody one standing? And
5 number two, sufficient enough to thwart in proceeding
6 with this project?

7 MR. STANTON: One parking space we're not
8 saying would be enough, your Honor. Displacement of
9 small businesses is the standard under the SEQRA,
10 upon -- for displacement of persons.

11 There's four cases on that. There's the
12 one -- the Concerned Citizens of Wellsville Case v.
13 Walmart. The Walmart case before that -- there's the
14 major case, which is the Court of Appeals case, which
15 that is the Chinese Staff case. They all cited on that,
16 which was displacement of -- well, there was persons.
17 Here, we have a community of people that have come and
18 built in reliance on the public holding the asset they
19 took for public benefit.

20 THE COURT: But the community that you allege
21 is rather small.

22 MR. STANTON: It is, it is. I'm not going
23 around the blocky (phonetic). I'm going by the actual
24 impacted persons, and that's what I have to show, is
25 only -- there's a case that's a little broader. It says

1 the fact it impacts a lot of people, but --

2 THE COURT: Just -- I wonder about the
3 slippery slope that any court would create if every time
4 that a project is anticipated that would involve the
5 displacement of a parking lot, that that would give rise
6 to concerned citizens to say, no, we need that parking
7 lot, you can't build X, Y, Z there.

8 MR. STANTON: Yeah. And you really have to
9 show it affects you different than the public, as a
10 whole, and you have some legitimate interests in it, and
11 it impacts you for this SEQRA aspect of the parking lot
12 displacement.

13 THE COURT: Right. Well, let's focus now on
14 the parking lot itself. One of the things that you
15 allege is that this -- the transfer violates the public
16 trust doctrine. And is a parking lot, as -- we're
17 switching over to Mr. Melber.

18 MR. STANTON: We can, yeah.

19 MR. MELBER: I think we might be, Judge, but
20 we will do our best to respond to your questions.

21 THE COURT: But, I guess my question is, is a
22 parking lot a public use? In looking at some of the
23 cases on this, I have seen, like, city docks --

24 MR. MELBER: Docks city case?

25 THE COURT: That has been construed as a

1 public trust -- or a public use. Is a parking lot, in
2 and of itself, qualified to that?

3 MR. MELBER: It is, Judge. And you don't
4 really have to go any further than the 10 E. Realty case
5 from 2008. This is the Appellate Division -- there are
6 a lot of 10 E. Realty cases -- this is -- the Appellate
7 Division case from 2008 is cited in the Respondent's
8 memorandum. And in that case, the Court recognized that
9 a parking lot can be held for public use for a public
10 purpose.

11 And here, if you look at the factual record
12 that we've been able to present the Court with on a very
13 short amount of time, what we know is that this parking
14 lot -- first of all, it's been a parking lot for 55
15 years. It was acquired by the City of Buffalo to be a
16 parking lot.

17 We went back to the Common Council's records
18 from 1961 and 1963, and there we learned that the Common
19 Council first issued a -- they did a bond issue to raise
20 over \$1 million to buy this land and make it a parking
21 lot, and it's been another bond issue for \$150,000 to
22 construct it into a parking lot. And those Common
23 Council records make reference to the fact that the City
24 also commenced a condemnation proceeding in Supreme
25 Court in Erie County to take possession of this land by

1 eminent domain.

2 And, as your Honor, I'm sure, knows that the
3 basis for any taking by eminent domain is -- the essence
4 of that is a public use -- a public purpose. It
5 wouldn't have been -- wouldn't be allowed. You couldn't
6 accomplish that through eminent domain and through a
7 condemnation unless you were creating it by -- for a
8 public purpose.

9 Beyond that, we know in more recent years
10 that -- this is in the record, Judge -- we know that
11 this parking lot is operated -- the City has chosen --
12 it owns the parking lot, and the City has chosen to
13 operate it through BCAR, which is a not-for-profit
14 entity, you can look at their website and find out that
15 they indicate that their mission is to serve the public,
16 and that's what -- that's what this parking lot does.

17 THE COURT: What about the matter of *10*
18 *E. Realty, LLC v. Inc. Village of Valley Stream*? In
19 that particular case, it's a Second Department case
20 where it deals with a municipal parking lot. The
21 parking lot had been a parking lot for 50 years, and it
22 was alleged that the public trust doctrine applied, that
23 you couldn't alienate this property because it had been
24 used for so long as a parking lot.

25 And in this particular case, the Second

1 Department says that a parking lot -- the petitioners
2 have cited no authority for the proposition of a parking
3 lot may achieve public trust status through such means,
4 that there was no evidence.

5 Is the evidence that you're referencing to
6 what was just recently received by the Court this
7 morning that demonstrates the -- the history
8 establishing this as a public use?

9 MR. MELBER: That's exactly it, Judge. The 10
10 E. Realty case that you're referring to is the same one
11 that I was referring to a minute ago, and that case says
12 that municipal parking -- and I'm reading from it now,
13 Judge -- municipal parking may constitute a public use
14 of property, but in that case, the Court did not find it
15 to be a public use because the petitioners failed to
16 come forward with evidence of that.

17 We've got the evidence here, Judge. And in
18 addition to everything else that I just mentioned -- I
19 think I told you that we -- there's an indication of the
20 Common Council records that -- that there was a
21 condemnation proceeding. There is a file of that
22 proceeding with the Erie County Clerk's Office.

23 We've ordered that file, and we haven't
24 received it yet, but in the records that we have been
25 able to provide the Court with already, we can see that,

1 from the indexing, that that file includes a petition,
2 and also, then, a stipulation of discontinuance that
3 coincides in time with the Common Council's resolution
4 authorizing and directing the Corporation Counsel to
5 obtain title to the property.

6 THE COURT: But isn't it -- isn't the virtue
7 of the fact that they're leasing this property -- I
8 mean, the City of Buffalo leased, I believe, the parking
9 lot to BCAR, right?

10 MR. MELBER: I believe that's right, Judge.

11 THE COURT: So, isn't, by leasing it, doesn't
12 that demonstrate that it's not a public use? I mean, if
13 it's a public use, it's there, it's a park, you can't
14 lease a park.

15 MR. MELBER: No.

16 THE COURT: So, how would you then lease --

17 MR. MELBER: No, Judge.

18 THE COURT: By virtue of leasing it to BCAR,
19 how does that not vitiate the entire concept of the
20 public trust?

21 MR. MELBER: Sure. It doesn't, Judge, because
22 BCAR is being used by the City. The City is retaining
23 ownership of it, and they're leasing it to BCAR to
24 operate it on a not-for-profit basis. In other words,
25 to have it be there as parking for the use of the public

1 and not to make money on it, not at profit, not to be
2 put in the hands of any private entity.

3 It's just like -- Judge, I'm sure you're
4 familiar with it -- the City of Buffalo has its parks
5 operated and managed by the Olmstead Parks Conservancy.
6 That doesn't mean they're not a public use or for a
7 public benefit. That's a not-for-profit group that
8 manages and operates those parks for the use and benefit
9 of the public, and that's what we've got here with this
10 parking lot.

11 THE COURT: But are you asking this Court to
12 say that every time a parking lot is sold that the state
13 legislature has to act?

14 MR. MELBER: Not every time, Judge, and it
15 wouldn't have been the case here. There are some
16 other --

17 THE COURT: It wouldn't move very fast.

18 MR. MELBER: -- there are other alternatives
19 that the City could do if they really want to sell this
20 parking lot, recognizing that it is being held for the
21 public use, they could do it under an urban renewal
22 plan. There doesn't happen to be one that covers this
23 area right now. That would be an alternative. They
24 could also do it just by having a public bidding process
25 and putting it out for public bids so that there was

1 competitive bidding to -- to establish the price of
2 this.

3 And here, Judge, it's really interesting in
4 this record that we know that when this land was
5 acquired in 1963, the City paid over a million dollars
6 for it. In 1963 dollars 55 years later, it's being sold
7 under an appraisal. We don't have that appraisal yet,
8 and I had to --

9 THE COURT: Well, hold on. There was one
10 issue I wanted to raise, because the City of Buffalo, in
11 their responding papers, said that on the agenda there
12 was a link to this appraiser. You said that this
13 appraisal was missing --

14 MR. MELBER: I was just about to address that.

15 THE COURT: They take issue with that.

16 MR. MELBER: I was just about to address that,
17 Judge. So -- and I had to read that section very
18 carefully, because I said, did we miss something? Did
19 we fail to follow this link and read the appraisal? If
20 you read that carefully, they're not -- I don't take it
21 to be saying that there's a link to the appraisal.

22 What they're saying is, we have told you in
23 the materials -- and this is -- the reference is to the
24 Common Council agenda item which is available online,
25 and what they're saying is, as I understand it, we've

1 told you what the result of that appraisal was -- you
2 know, that -- what the figure was. The appraisal
3 itself, as far as I know, Judge, is not available -- is
4 not reachable by a link, and I have not seen it, and I
5 also don't see it in any of the responding papers from
6 the petitioner.

7 So we don't know what that appraisal was based
8 on. And because of that, we're not in a position -- and
9 neither -- I think more importantly, we're not in the
10 position to know the quality of that appraisal. But
11 more importantly, neither was the Common Council or any
12 of the city bodies who act on this; presumably, some of
13 them have seen it. We don't have it. We don't have
14 that appraisal. And without knowing what that appraisal
15 was, it bumps right up against this alternative where
16 there are provisions under the law for the City to
17 alienate a property held for public use, and that would
18 be to do it by a public bid so that you're getting a
19 full value for it.

20 THE COURT: Okay. Turning to the SEQRA
21 issue -- okay --

22 MR. MELBER: And that will be Mr. Stanton,
23 Judge.

24 THE COURT: We will come back to you,
25 Mr. Melber.

1 MR. MELBER: Happy to.

2 THE COURT: You allege a number of failures of
3 agencies who have failed to comply with the provisions
4 of SEQRA. My question is: What agencies are those?
5 Because the only ones that I could figure out that had
6 the lead agency role were the City of Buffalo and the
7 planning board. Was there anybody else that --

8 MR. STANTON: The planning board acted as the
9 lead agency, your Honor. They notified who they
10 notified. They're the ones that took on the
11 responsibility to do the hard look. We're coming back
12 to the planning board with regard to any procedural
13 objections. With regards to reliance on those mistakes
14 and failure for anybody to take this substantive hard
15 look as required under the HOMES cases -- it's an
16 acronym, H.O.M.E.S. --

17 THE COURT: Okay.

18 MR. STANTON: -- that there was then carried
19 out and nobody took the requisite --

20 THE COURT: So, who didn't -- who was supposed
21 to be involved in that that didn't? Because, in reading
22 the Neg Dec, I noticed that the Sewer Authority was
23 involved, the Water Authority was involved, because they
24 dealt with consumption levels, and so I'm just wondering
25 who was not involved.

1 MR. STANTON: I'm not moving forward in the
2 coordination at this time for this purpose, your Honor.
3 I'm looking at the substantive issue under the SEQRA and
4 everybody relying on it. There was also some statements
5 that we did not make inside of our petition attributing
6 to the City's papers. We are relying on the failure for
7 anybody to take the hard look, your Honor, but the lead
8 agency --

9 THE COURT: But that's what I'm getting at.

10 MR. STANTON: The --

11 THE COURT: Hold on, hold on. This works
12 better if I get to ask my question. But, so who didn't
13 take the hard look?

14 MR. STANTON: The planning board.

15 THE COURT: Okay. And how?

16 MR. STANTON: The EAF is the starting process.
17 The EAF, page 8, was supposed to identify any potential
18 significant adverse impact on noise, in particular, and
19 if there was potential adverse impact, they're supposed
20 to speak -- identify. This was the project sponsor.

21 THE COURT: But they went through that.

22 MR. STANTON: No, they didn't. They did not.
23 There's no -- there's no -- I'm sorry for using the word
24 "no" as a transition, but in this particular case, there
25 is no operation -- there's no look at any kind of

1 operational noise and there's a failure to disclose it.

2 With regard to the required identification of
3 duration and intensity of the noise, which I believe,
4 again, is on page 8 of the EAF, that is left blank.
5 With regard to, then, the hard look which follows the
6 identifications of things in the EAF, there's no
7 analysis of operational noise at all.

8 I have a professional affidavit from a
9 professional engineer, John Schenne, who then says, "I'm
10 familiar with construction projects"; I think he was
11 working with the Army --

12 THE COURT: Isn't there a construction project
13 working on right now in front of your client's building?

14 MR. STANTON: On and off. It's on the side
15 and there are complaints about that as noise, but that's
16 a short term -- that's -- that should be a short term or
17 have an end to it.

18 THE COURT: Well, here -- I drive past it
19 every day and that's not very short term if that's your
20 definition of short term. This has been going on for
21 quite some time.

22 MR. STANTON: And short term, if you look at
23 Cortlandt Park, can be a temporary thing that lasts
24 years, obviously, and becomes permanent. That's the Van
25 Cortlandt Park case.

1 THE COURT: Right.

2 MR. STANTON: But what I'm getting at is,
3 short term can be insufficient in and of itself.

4 THE COURT: But I mean, I believe that what
5 you alleged as being part of the noise component to this
6 for the beeping noises that when they back up, the HVAC
7 work and the -- I forget what the third one was -- but
8 I'm just wondering how -- well, you go ahead.

9 MR. STANTON: That's yes. I'm going to use
10 "yes" as a transitional word this time, your Honor.
11 When I get to operational noise, there's two components
12 of this project. There's a supposed two-year
13 construction phase of this project, and then there's the
14 forever noise.

15 So the significant noise would be in the
16 two-year construction where it's 110, 120 decibels next
17 to residential property or across from residential
18 property, unbuffered in the sound walls -- no buffers,
19 no specific limitations. Operational noise, which lasts
20 forever, is a crazy site plan here. There's a site plan
21 where cars -- where trucks -- 53-foot trucks have to
22 back up along the Oak Street Arterial and back up into a
23 parking space.

24 Trucks themselves, by definition -- by beeping
25 noise, are designed to get attention. There's standards

1 for assessing noise. New York State DEC has guidance
2 standards for assessing noise which is references in the
3 Schenne Affidavit. Those things are at 90 decibels,
4 they're intermittent noise, they're high-pitched noise.
5 That's why they get your attention, that's why they
6 annoy people, that's why they wake people up. There's
7 no hours of operation time limitation on that. There's
8 also compressor noise. If you don't do a controlled
9 site -- if you don't take things into consideration, you
10 don't control things on the front end, that's where you
11 get noise that becomes a nuisance.

12 THE COURT: But doesn't that just block any
13 type of development whatsoever?

14 MR. STANTON: Not at all. You can -- there's
15 engineering, your Honor.

16 THE COURT: I'm sorry?

17 MR. STANTON: There's engineering, and SEQRA,
18 at the very end, if you identify a potential significant
19 adverse input -- in fact, you got to mitigate it on the
20 full extent possible. That's the substantive duty at
21 the end. It's the failure to take the hard look which
22 renders the Negative Declaration null and void.

23 THE COURT: Well, if you look at the Negative
24 Declaration and -- I mean, they do go through in
25 painstaking detail -- and I have questions about it for

1 them, which I will get to, but, I mean, couldn't an
2 argument be made that you just simply take issue with
3 the conclusions that they reach? And that, in and of
4 itself, isn't a basis to disturb the Negative
5 Declaration finding?

6 MR. STANTON: If they would have a noise
7 impact assessment, they would have identified the
8 daytime -- or construction noise and post-construction
9 operational noise, and if that would have determined
10 there was no potential significant adverse impact, they
11 could have terminated the environmental review process
12 with Negative Declaration. They did not.

13 If the answer is ECL 8-109 Sub 2 -- if there
14 was any potential significant adverse impact, then they
15 have to proceed to an environmental impact statement.
16 That does add time to a project, your Honor. It's not
17 an endless project, but it does add time.

18 And under the environmental impact statement,
19 they could say, okay, this is the consequences on the
20 quality of the human environment around it, but the
21 economic benefit outweighs it.

22 THE COURT: So, you take issue with the
23 thoroughness of the SEQRA process that the City of
24 Buffalo perhaps didn't exhaustedly input?

25 MR. STANTON: Absolutely. And I also think

1 they didn't meet the threshold -- the mandatory
2 threshold of 8-109-2, which is a substantive --

3 THE COURT: I'm sorry; what? You're talking
4 real fast.

5 MR. STANTON: I know. I'm sorry. There's two
6 issues. I'm saying they didn't take the hard look
7 because there's potential significant adverse impacts
8 they didn't address.

9 This Neg Dec, there's no showing of how it
10 emerged inside of the records that we have thus far,
11 that's just a piece of paper produced. I don't have any
12 discussion to put on the record, but there's no showing
13 of looking at two issues inside the Negative
14 Declaration, which is displacement of the small
15 businesses, and there's no showing of operational noise.

16 They did say, because there will be
17 construction noise and it will be short term, that's the
18 only of the three most significant potential adverse
19 impacts that are identified and addressed in there.

20 And then, secondly, there's only one way if
21 you got potential significant adverse impacts to finish
22 the process, that's to do the environmental impact
23 statement, and then say, is this project worth it?

24 There's an absolute balancing test they can do
25 at the end. They just can't skip the process, that's

1 what all the SEQRA cases, like EFS Ventures, Chinese
2 Staff, all the granddaddies out there, they cover.

3 THE COURT: Okay. One of the other things
4 that respondents raise, is that you have to post the
5 bond if you want a continuation of the preliminary
6 injunction. And they calculate it to be \$1.6 million,
7 and they support it by the affidavit of Ms. Borgese.

8 Are your clients prepared to post a bond?

9 MR. STANTON: A bond, yes, your Honor, but
10 \$1.64 billion, that would be a stifling bond, and not
11 reasonable and not supported by the record.

12 There's a division of cases out there, your
13 Honor, which I cited at the end of my brief which has to
14 do with bonds when cases are in the public interest.
15 When you're protecting against the violation of the
16 public trust, many of those cases they say a nominal
17 amount. So, I -- if I could grab the brief real
18 quickly --

19 THE COURT: That's all right. Believe me, I
20 read it.

21 MR. STANTON: Okay. And then I have some
22 notes, though. I was doing some more poking around on
23 that issue today there. There was a recent parkland
24 case, I just want to pull my notes on it.

25 There's a recent case, and it was reversed on

1 other grounds, but not on this ground, your Honor. It's
2 called *Union Square Park Community Coalition v. New York*
3 *City Department of Parks and Recreation*, 38 Misc 3d
4 1215. And there, there was a \$1,000 bond where they're
5 protecting the public interest.

6 If you got businesses being threatened with
7 displacement, if you've got a threatened breach of the
8 public trust, your Honor, and you're not following the
9 process on how to abandon the public trust, that's where
10 the bond should be weighed. If you make the bond so
11 that no one can protect the public interest, then you
12 defeat regress.

13 THE COURT: The TRO that the Court signed was
14 narrowly tailored -- drawn by you, I presume, to prevent
15 the City and the non-municipal respondents from entering
16 into any type of contracts, transferring deeds, et
17 cetera. I just -- I'm wondering how your clients are
18 irreparably harmed by the commencement of the
19 transaction, which is separate and apart from the actual
20 construction, which goes to the merits of your petition.

21 MR. STANTON: The abandonment of the resource
22 that they rely upon, your Honor. I mean, that's really
23 why -- there was another case which is deja vu all over
24 again, that's a little more clear than this one, which
25 is the casino case. That was an abandonment of the

1 street, pursuant to a specific provision, which allows
2 you to abandon the streets. They used to have their own
3 law, General State Law Section 29, but there, it's
4 taking the asset beyond the public's use and control,
5 which is the issue here --

6 THE COURT: But that only -- but that argument
7 only applies if I accept the public trust doctrine
8 argument.

9 MR. STANTON: Yes.

10 THE COURT: And if I don't, then I think
11 you're kind of out of luck on that.

12 MR. STANTON: I -- the public trust record is
13 un-Godly important to us, your Honor. It is. And
14 there's one -- one of the businesses who put in an
15 affidavit -- each one verified the affidavit -- but one
16 talks about being booked through 2020 and relying on
17 these parking spots for their valet spaces. That's a
18 group of 45 people who will be displaced from employment
19 on that.

20 There's three banquet halls in total inside
21 that facility. So each one of those, all the employees,
22 all the bookings, that's the irreparable harm, the loss
23 of business -- the loss of public businesses, the loss
24 of employment to all the people, that is the threatened
25 harm.

1 THE COURT: All right. I have nothing
2 further. Do you have anything else?

3 MR. STANTON: I appreciate the questions.

4 MR. MELBER: Judge, can I just mention one
5 thing that I wanted to make sure we discussed, and that
6 has to do with the factual record again.

7 The respondents argue repeatedly in their
8 papers that our factual record is limited to two
9 affidavits of petitioners. I want to make sure that
10 everybody's mindful of the fact that we have a very
11 detailed factual petition. The petition was verified by
12 all eight of the petitioners, and it -- we know from
13 CPLR 105 Sub U that a verified pleading, by statute,
14 under the CPLR -- a verified pleading can be used in a
15 same form as an affidavit. It's evidentiary proof in
16 admissible form. It can be used just like an affidavit
17 for any purpose. It's right in the CPLR.

18 So our factual record includes all of the
19 factual allegations in the verified petition, verified
20 by every single petitioner. It includes Mr. Schenne's
21 affidavit, Mr. Siegel's affidavit, who are subject
22 experts, and it includes three additional factual
23 affidavits that we submitted, with the Order to Show
24 Cause. That's our factual record, and -- actually, I'm
25 omitting one more thing, Judge. Mr. Stanton's

1 affirmations, one from the other day, the other one that
2 was filed last night, those are affirmations of counsel.
3 Generally, the affirmation itself is not evidentiary
4 proof. The attachments -- every single attachment to
5 those two affirmations is a public document, public
6 record and is admissible in evidentiary proof that the
7 Court can take notice of, so it's a very much more
8 robust factual record than the respondents seem willing
9 to acknowledge.

10 THE COURT: All right. Thank you. Okay.
11 Go ahead.

12 MR. STANTON: There's a point -- you mentioned
13 two questions on the bond, and I sat down just a little
14 too quickly, also submitting -- it's not a project
15 that's ready to go forward right now. There's no curb
16 cut approval from New York State DOT --

17 THE COURT: Although, I thought that
18 Ms. Borgese's affidavit painstakingly details their
19 anticipated schedule, that -- that starts, I think, as
20 soon as August?

21 MR. STANTON: She would start as soon as she
22 could, your Honor. They would hear of the public
23 parking -- but they do not have a proper approval for
24 this project to go forward because it requires at least
25 two more governmental approvals. It requires New York

1 State DOT approval to use Oak Street in the matter of
2 which they intend to have curb cuts on, to wit, the
3 State controls that. It's the 20,000 cars per day using
4 it, and that seems like maybe an approval that never
5 comes under this site plan and makes that unworkable.

6 There's also NEPA. It's alleged there's been
7 no commencement of the NEPA, which is the second
8 environmental review. They were not done in tandem
9 here. At least there's no evidence that they're done in
10 tandem. We don't have the record yet. We don't have
11 any conclusion of the NEPA process.

12 So, as we sit here today, these are not
13 projects that are ready to go forward. I think they
14 want to get started with tearing up the parking lot,
15 starting with Brownfield Tax Credit Program. They want
16 to get started like everybody wants to get started, but
17 it doesn't have final approvals yet.

18 THE COURT: All right. Ms. Persico?

19 MS. PERSICO: Good afternoon, your Honor. If
20 you can't hear me, I will use the microphone, but I'm
21 generally pretty loud, so -- I think that we're --
22 there's kind of a lot of smoke in the ear going on on
23 the petitioners' side here. I want to talk about a
24 couple of things, but I feel like it's important to
25 point out to the Court that they're lofty cases that

1 have been cited by my esteemed opponent there. Sure,
2 yes, they apply to Pine Barrens and forests and natural
3 wonders. They do not apply to a parking lot, right?
4 We're talking about a parking lot being redeveloped
5 into --

6 THE COURT: Well, it doesn't necessarily say
7 that. I mean, if we're looking at the 10 E. Realty
8 case, it says the petitioners have cited no authority
9 for the proposition that a parking lot may achieve
10 public trust status through such means.

11 MS. PERSICO: Your Honor --

12 THE COURT: Hold on. That, I think, is an
13 evidentiary issue that a Second Department took with the
14 moving parties there.

15 Now, the most recent affidavit that was
16 submitted this morning, they argue, provides that that
17 evidence that was otherwise required. So, isn't it
18 possible, by demonstrating the historical nature of this
19 property, that it does establish a public use?

20 MS. PERSICO: I don't believe that the
21 evidence supports that and I will -- this is why. So,
22 the 10 E. Realty case does, of course, say that
23 property for a public parking lot can be shown to be
24 dedicated for public use, but it has to be through
25 express provisions in a deed or legislative enactment --

1 and I'm quoting directly from 49 A.D.3d 764 at page 766.
2 And clearly, they -- the Court there -- and I'm
3 quoting -- says they can show that the property was
4 dedicated for public use through express provisions in a
5 deed or legislative enactment.

6 So we have submitted and pointed out to the
7 Court that the deed submitted by petitioner are bereft
8 of any restrictions whatsoever. And in fact, in our
9 papers, we quote from the deeds which say that they
10 grant to the City of Buffalo all rights, title and use
11 of that property.

12 So we know that there is no way that the deed
13 restriction piece of this can apply to this situation.

14 THE COURT: So you're saying that because it
15 didn't create an in-perpetuity, that they can alter
16 their plans at any time.

17 MS. PERSICO: Yes, and in fact, the Carpenter
18 case that we cite says specifically that -- and I will
19 just draw your attention for the record -- I will cite
20 that case. It's an old case, but it's still good law,
21 *Carpenter v. City of Buffalo* 137 Misc 618.

22 THE COURT: That's the 1930 case, Niagara
23 Falls?

24 MS. PERSICO: Right. And it says
25 specifically, surely, if the City acquires land for a

1 public use and later finds that the lands are not fitted
2 for that use or such public use is abandoned, they
3 should have the right and the power to sell the lands in
4 question. But, let's go back to -- not that I'm not
5 happy to answer any questions, but I think we're also
6 here relative to the preliminary injunction.

7 We will, of course -- unless, of course, the
8 Court dismisses the petition in its entirety today,
9 which we would encourage you to do, and we believe that
10 you have grounds to do that, but for the purposes of
11 today, we're here to talk about, really, two things:
12 One, standing; and two, the preliminary injunction.

13 THE COURT: Well, let's talk about the
14 standing. In looking through some of these cases,
15 *Committee to Preserve Brighton Beach and Manhattan Beach*
16 *Incorporated v. Planning Commission*, they said close
17 proximity alone will give rise to an inference of an
18 injury.

19 And the Gernatt case that counsel cited to,
20 improper procedure, which they do here, they suggest the
21 Court of Appeals does, but that's enough to give
22 somebody standing.

23 And so haven't they alleged enough? I mean,
24 there's certainly enough allegations that were contained
25 in the affidavits and the papers that would allege that

1 they would be harmed if this sale goes forward.

2 MS. PERSICO: I understand what you're saying,
3 your Honor, and of course, those cases say that, but
4 this situation doesn't equate to those.

5 I think if you look at -- so, first of all, I
6 have to point out that they're -- although Mr. Melber
7 says that the Court can consider the whole record, I
8 don't know that that's the case in the context of a
9 preliminary injunction. You are -- you are required to
10 consider what they give you in terms of the preliminary
11 injunction. And so, I submit that there is nothing in
12 the application for the preliminary injunction that
13 addresses the transfer of the land, period, right?
14 There's nothing that says, this is why I need a
15 preliminary injunction stopping the transfer of the
16 land.

17 THE COURT: However, I mean, in looking at the
18 Order to Show Cause that I signed -- or Judge Panepinto
19 signed in my absence, I mean, I can entertain an
20 argument about whether or not they would be affected
21 irreparably from the sale to your clients; however, one
22 of the things that I signed as part of the Order to Show
23 Cause, Judge Panepinto signed in my absence, was that
24 the City was prohibited from abandoning or discontinuing
25 the public parking lot at 201 Ellicott Street.

1 They're alleging that if I vacate the TRO
2 today, that tomorrow you're going to be over there --
3 maybe not tomorrow, but soon thereafter, you'd be over
4 there tearing up the parking lot.

5 MS. PERSICO: Well --

6 THE COURT: Doesn't that give them standing
7 enough to continue or ask that we continue the temporary
8 injunction?

9 MS. PERSICO: I don't think so, because -- so,
10 I -- the proof that was in the record with regard to the
11 preliminary injunction application talks about the
12 environmental, if you will, impact of the project
13 itself, right? There's the Stanton affidavit, which is
14 of no evidentiary value, but the attachments as they are
15 in the preliminary injunction application, right?

16 I'm -- I think it's important that the Court
17 understand and recognize that injunctive relief is
18 significant. It shouldn't be granted lightly. It
19 shouldn't be granted just because somebody says this
20 might bug me again sometime in the future, right?
21 That's why there is so much case law with regard to
22 standing. In the preliminary injunction application,
23 the Koessler affidavit, the Ambrose affidavit, and the
24 non-party Siegel affidavit allege that the -- that the
25 project, when it's going and when it's over, the noise

1 and the decrease in parking are going to be adverse
2 environmental impacts to those two individuals.

3 If you look at that in the context of this
4 particular application, there just isn't the standing
5 for a SEQRA review. They're challenging the SEQRA
6 review, they're challenging the fact that the planning
7 board didn't take into account the noise during the
8 operation and during the construction.

9 THE COURT: Is it your argument that they
10 don't have -- his clients don't have standing to
11 challenge the SEQRA determination?

12 MS. PERSICO: Right. That's correct, your
13 Honor. I think the Mobil Oil case spells that out
14 pretty clearly. The affidavit -- the affidavit
15 submitted with the preliminary injunction relief from
16 Bill Koessler alleges that classic events at the
17 Lafayette will be harmed economically by those things,
18 and the Mobil Oil case is clear, when you're looking to
19 challenge a SEQRA determination, which is essentially
20 what this is, you have to allege not just an economic
21 harm but some kind of environmental injury. And in
22 addition to that, you also have to establish that you
23 are suffering an injury that is distinct from the public
24 at large.

25 And we cited a case -- I think to the Finger

1 Lakes case where the allegations that the petitioner
2 made in that case -- I'm just going to try and make sure
3 I'm accurate here -- the allegations in that case were
4 almost identical to those made by Ms. Ambrose, inasmuch
5 as she would be impacted by the project with increased
6 noise and dust.

7 And, the Court there said very clearly -- and
8 that is *Finger Lakes Zero Waste Coalition v. Martens*,
9 Third Department case from 2012, the petitioner --
10 petitioner -- "Roll's affidavit stating that she can
11 presently hear some noise from the landfill does not
12 indicate if, or to what extent, the noise level changed
13 in November of 2010 once work began."

14 "Roll's generalized assertions that the
15 project will increase her exposure to noise and dust are
16 insufficient to demonstrate that she will suffer damages
17 that are distinct from those suffered by the public."

18 I would submit to the Court, I don't see a big
19 difference between what Ms. Ambrose is alleging
20 individually, right -- so let me back up a little bit.

21 Koessler and Ambrose, as managing member of
22 Groom Services, are alleging economic harm based on the
23 decrease in parking and the increase in noise. That
24 doesn't get them in the door. It doesn't give them
25 standing. So Koessler and Classic Events doesn't even

1 make an individual harm argument. Groom Services,
2 ironically complaining about noise, because it is a
3 blow -- hair blow dry salon, so all they do is make
4 noise all day, so I find it difficult to reconcile --

5 THE COURT: Inside, though.

6 MS. PERSICO: Inside, right. So they make
7 noise inside, but they don't want anybody to make noise
8 outside. But additionally, Ms. Ambrose individually
9 makes essentially the same arguments as the petitioner
10 in the Finger Lakes case, and the Court there said that
11 you don't -- you haven't made an allegation sufficient
12 to prove that you have something different happening to
13 you than is happening to everybody. And I think that's
14 the case with regard to the two petitioners who
15 submitted affidavits in connection with the preliminary
16 injunction. And I do think that the Court is
17 restricted, because it's the petitioner's burden to look
18 at what the petitioner submits with that application.
19 There's no -- there isn't even like we incorporate by
20 reference, I don't think.

21 So, I think you're limited to just looking at
22 what they give you on the face. So, I would submit that
23 those petitioners have not, under the Mobil Oil case,
24 been able to avail themselves of standing. So --

25 THE COURT: One of the trickier things about

1 this was, with respect to the parking lot, was the
2 abandonment argument. I believe that in order to sell
3 the property under 27-5 of the code, that the City could
4 do so if the property was either abandoned or
5 re-appropriated. And oddly enough, the definition of
6 "abandonment" and "re-appropriated" are nowhere to be
7 found in the code.

8 And you acknowledge that in your responding
9 papers, and you admit that it wasn't defined, but your
10 argument is, is that if it's left undefined, it gives
11 the Common Council the right to transfer the property.
12 And you say that a narrower definition is against New
13 York State Law, but you don't cite any case law to
14 substantiate that point, and I'm curious, you said it's
15 an important point for the Court to consider is, what is
16 that case law that says that you can't adopt a narrower
17 definition?

18 MS. PERSICO: Well, I think -- and I'm just
19 going to look at my notes here so I can answer you
20 correctly, but let me talk about that for a minute.
21 27-4 does very clearly of the charter -- I'm just
22 saying -- does very clearly say that after an appraisal,
23 which was done in this case --

24 THE COURT: Which was done.

25 MS. PERSICO: No one is --

1 THE COURT: Well, they're saying that it
2 wasn't because it's not linked on the website.

3 MS. PERSICO: Well, I think we also have
4 evidence in the record now from the people at the City
5 affirming that, in fact, it was done, and I think maybe
6 they might not have it, but they -- and they might take
7 issue with the appraisal itself, but the procedure was
8 followed, right? The proper procedure was followed, and
9 that's what this is about, right?

10 THE COURT: Well, let's presume that it was.
11 I'm not going to get hung up on the appraisal just
12 yet --

13 MS. PERSICO: So --

14 THE COURT: But it sounds to me like the City
15 of Buffalo one day said, well, we're no longer going to
16 operate with BCAR, and therefore, it's abandoned. It's
17 abandoned because we say it's abandoned.

18 MS. PERSICO: And I think that that's -- you
19 make it sound like that's an unreasonable and irrational
20 response, but I think, if you think about it in the
21 opposite, it makes more sense. So, just like this
22 project --

23 THE COURT: I mean, doesn't something have to
24 be abandoned for an extended period of time? I mean,
25 it's -- it's a timing issue, I'm wondering.

1 MS. PERSICO: So, if we took that argument a
2 little bit further, I think it would be the inept --
3 the -- I guess inefficient nature of it would become
4 apparent. So, this is a parking lot. It's being used
5 as a parking lot. It's not hurting anybody to have it
6 being used as a parking lot. People go there, they
7 pay -- another element that we seem to be missing
8 here -- but this isn't -- I think your Honor hit on it
9 precisely. This isn't a park where people can go and
10 relax, they pull their cars in, pay money to BCAR, and
11 that's how they use it.

12 So, would it make sense, then, to just say
13 arbitrarily, you have to let this parking lot sit fallow
14 for -- I don't know, you pick -- a day, ten days, ten
15 years, ten months? It doesn't make any sense. In the
16 practical context of economic development, it makes more
17 sense if the governing body determines that the next
18 use --

19 THE COURT: But I go back to my original
20 question, which is, you said that New York case law
21 suggests a broader interpretation of the term
22 "abandonment." I'm just wondering what that is.

23 MS. PERSICO: And I think we do cite it, your
24 Honor. I'm just going to -- I'm going to pull this out
25 here.

1 Okay. So, we cite to *Carpenter v. City of*
2 *Buffalo* as support saying where you're interpreting
3 similar provisions, there, Buffalo abandoned the public
4 use of property where previously it had leased the
5 property in the manner of a private land owner and then
6 they just changed their mind.

7 I think I read to the Court the quote from
8 that case, which essentially said, lookit, if they take
9 it in the beginning and think that they're going to use
10 it for X and then -- I don't know what the Common
11 Council minutes are from 1963 -- I read them past my
12 bedtime last night when they were filed.

13 So they determined however many decades later
14 that that is no longer the use that they want to have on
15 that property, should the City be prohibited from doing
16 that? I mean, that flies in the face of economic
17 development. And that case, although old, from 1930, is
18 still good law.

19 In addition, we cite *Grayson v. The Town of*
20 *Huntington* for the proposition that -- upholding the
21 proposition there where the Town discontinued the prior
22 public use as of the date the Town adopted the
23 resolution devoting the property to alternative public
24 use.

25 But, that still shows you that you can change

1 uses, and there is no definition of how long the
2 abandonment has to happen, because it wouldn't make
3 sense to say that, and it would be arbitrary.

4 You may think abandonment for ten minutes is
5 appropriate, I may think that it has to be 18 months.
6 Who's right about that? I don't know how you could ever
7 shackle the municipality that way. So it would really
8 be senseless to determine you have to abandon the
9 property for this much time; why? What would be the
10 point of that?

11 THE COURT: Is it still being used as a
12 parking lot today?

13 MS. PERSICO: Yes, it is. Based on the
14 temporary restraining order issued by the Court.

15 THE COURT: So, if I vacate that, it's no
16 longer going to be a parking lot as of Friday when
17 people come to work?

18 MS. PERSICO: Well, it will -- no, there's
19 notice provisions.

20 THE COURT: I saw. I --

21 MS. PERSICO: Yeah. So people would have
22 notice and people would have an opportunity to go to a
23 different paid parking lot and park, and I think, you
24 know, the decision made by the -- made by the agency --
25 the municipal agency, the planning board, the Common

1 Council, is entitled to great deference. People have
2 looked very long and hard at the project.

3 As the Court greatly points out, you know, the
4 petitioner just doesn't like the conclusion, and it's
5 not -- you know, we're not talking here about -- we're
6 not trying -- talking about saving an endangered
7 species, we're not talking about saving trees.

8 What we're really talking about is a developer
9 fighting with another developer over a parking lot,
10 because, developer number 1, who, by the way, is the
11 managing member of five of the nine petitioners -- the
12 remainder of the petitioners are either tenants, or
13 business partners of Mr. Termini's. So --

14 THE COURT: Okay. One is a homeowner, too,
15 isn't he?

16 MS. PERSICO: There is. I think the guy from
17 the hair salon who lives in the apartment building owned
18 by Rocco and some other people. So, everybody kind of
19 has a business nexus.

20 There is nothing altruistic about this
21 petition, and so -- not that the Court was misled into
22 thinking that, but what we're really talking about is an
23 economic injury to the petitioners who were involved in
24 the application for a preliminary injunction. That's
25 all they allege. That isn't sufficient to give them

1 standing, so I think the Court can dismiss based
2 completely on that argument alone.

3 Second of all, as I have indicated, injunctive
4 relief isn't something that should be granted lightly.
5 It has to be where somebody shows a lack of success on
6 the merits, where there is imminent and irreparable
7 harm, and where the balancing of the equities is in the
8 petitioners' favor.

9 I think we've demonstrated -- and I will run
10 through them quickly, and if you have any questions, I
11 would be happy to answer them, but you know, there's no
12 likelihood of success on the merits here that have been
13 demonstrated, even if you assume the standing, which I
14 think is a stretch, given what we have just on this
15 application, not talking about the merits of the
16 petition.

17 But I think if you look to the likelihood of
18 success on the merits -- so, we -- I think we've covered
19 the public trust 10 E. Realty almost directly on point.
20 There's no deed restrictions, there's no legislative
21 enactment, there's nothing in the compounds of minutes
22 that were submitted, I think improperly, and shouldn't
23 be considered by Court, but clearly the Court has read
24 them, and so I want to be able to address that, just
25 because there was a theoretic condemnation proceeding in

1 1960, or that there was money raised in order to
2 purchase those properties. The cases cited by the
3 petitioners in relation to those minutes -- really, I
4 was kind of surprised to read them, in fact, because I
5 thought, oh, these are great because they really help
6 me.

7 I think the Kelo Supreme Court case, let's
8 see -- at page -- that's 545 U.S.469, at page 479, I'm
9 quoting directly, "This Court long ago rejected any
10 literal requirement that condemned property be put into
11 use for the general public."

12 So, the Supreme Court has indicated -- so,
13 if -- I guess I'm jumping around a little bit. If you
14 accept as true that there was condemnation in
15 1960-something of the lands to create this public
16 parking lot, that still doesn't get you to the public
17 trust doctrine, because the Court, as case cited by the
18 petitioners, plainly says, we never meant that condemned
19 property had to be forever used for the general public.

20 So, there's no public trust. If you don't
21 have the public trust, as the Court has already
22 indicated, this argument really doesn't go anywhere.
23 So, I think that they don't succeed on the merits if
24 there --

25 THE COURT: If you don't mind, Ms. Persico,

1 all the questions that I've had for you I have had
2 answers to. So if you don't mind --

3 MS. PERSICO: Oh. You're telling me to sit
4 down and be quiet?

5 THE COURT: No, no.

6 MS. PERSICO: I would be happy to --

7 THE COURT: Unless there's something else that
8 you really think I need to hear, other than what I've
9 already asked you, I would like to move to the City of
10 Buffalo.

11 MS. PERSICO: Yeah, sure. No, that's -- thank
12 you, your Honor. Sorry if I was --

13 THE COURT: No, no, no, no, no.
14 Counselor --

15 MS. LAZARIN: Yes, your Honor.

16 THE COURT: One of the arguments that
17 petitioner raised in their papers were that a special
18 use permit was required, and that one was not issued
19 here mostly because of the warehouse that was
20 contemplated by the project. Was a special use permit
21 necessary here?

22 MS. LAZARIN: It is not necessary here because
23 the square footage that will be --

24 THE COURT: You can use the microphone so
25 everyone can hear you.

1 MS. LAZARIN: The square footage that will be
2 utilized by the property for warehouse or storage
3 purposes is less than 10,000 square feet, and as such,
4 pursuant to the Green Code, or the Unified Development
5 Ordinance for the City of Buffalo, a special use permit
6 is not required.

7 THE COURT: I thought it was 13,000 square
8 feet, the contemplated warehouse?

9 MS. LAZARIN: There were some division of the
10 numbers, your Honor, that I can lay out for the Court.

11 If we turn our attention to Exhibit 1 of the
12 affidavit of Mr. Sean Hopkins -- I'm sorry; of
13 Ms. Denise Juron-Borgese -- I'm sorry if I totally
14 missed that.

15 THE COURT: I thought it was Borgese,
16 but that's okay.

17 MS. LAZARIN: It is, your Honor. You're
18 correct. The breakdown of the interior of the fresh
19 food market was 9,280 square feet of real estate, 9,580
20 square feet of commercial wholesale space, and 2,780
21 square feet of office space, and that's why the special
22 use permit is not required.

23 THE COURT: Okay. With respect to the parking
24 lot issue that petitioner raises in their affidavit that
25 was filed last night, do you take issue with any of the

1 attachments that were included that, more or less, they
2 argue establishes that this was the designed benefit of
3 the parking lot or of the city when it acquired it in
4 1963, that this would be a parking lot, and therefore,
5 giving rise to the public trust doctrine?

6 MS. LAZARIN: Actually, your Honor, I do agree
7 that it was acquired in that time for a parking lot, but
8 I don't agree that it is subject to the public trust
9 doctrine. If you look at the documents for -- that are
10 dated in 1961 from the Common Council, at Exhibit A, to
11 the affirmation of counsel that was submitted yesterday
12 evening, you will see on page 1, second to last
13 photograph, it's very clear that the local finance law
14 applying to this transfer of property -- most of these
15 minutes have to do with the bonds, the percentage of
16 bonds, the pricing, but it very clearly says there that
17 the -- that it is hereby found and determined that the
18 period of probable usefulness of the object or purpose
19 thereof, which is to be a parking lot, is 30 years.

20 And so quite plainly here, the Common Council
21 was contemplating a change of use for this property.
22 And that is the position of the City, whereas, this
23 property was and has been intended for a different use.
24 If you look at the supporting affirmation of --
25 affidavit of Hope Young-Watkins submitted by the City,

1 she lays out plainly at paragraph 10 of her affidavit
2 that the property was subject to a designated developer
3 agreement since 2016.

4 So this property has been contemplated for a
5 different use for some time. The initial appraisal
6 happened in 2018. I'm taking the issue with the
7 appraisal to be a separate issue. If you want to
8 challenge the appraisal, you know, that would be an
9 entirely separate record, but an appraisal was done, and
10 this property has been contemplated for a different use.

11 And just going back to the 1961 documents,
12 your Honor, when petitioners were talking about the fact
13 that condemning a property that then makes it necessary
14 for public use, pursuant to our charter, which is the
15 way that the City does transfer property, Section 2714
16 does outline for condemnation that the council, by
17 two-thirds vote of all members, may authorize
18 condemnation of property necessary for a municipal or a
19 public purpose.

20 And here, we were looking at it for municipal
21 purpose. Here we have been looking at this property for
22 a different development. Here, we have been keeping our
23 eye on this property so that we can appraise it. We had
24 looked at surrounding market values so that we could
25 appraise it well and bring a development that could be a

1 lot more useful and not -- and a lot more beneficial for
2 the greater city than just a parking lot.

3 So I don't agree at all that it is subject to
4 the public trust doctrine. This is not a parkland of
5 recreational use property. As such, I do agree that
6 those documents say, yeah, we wanted to use it as a
7 parking lot for 30 years, and we used it for a parking
8 lot for about 20 more. That shouldn't mean that we
9 can't now sell it and have it for a different purpose.

10 THE COURT: Turning to the SEQRA Negative
11 Declaration, I think you will agree with me that this is
12 a pretty big project.

13 MS. LAZARIN: Yes, your Honor.

14 THE COURT: Yet not one problem with it -- it
15 went through air, ground field, surface water,
16 transportation, noise, flooding, flora/fauna,
17 environment, consistency with community planning,
18 community character, historic and archaeological, energy
19 and public utilities and human health, and not one issue
20 found. I'm just thinking that in terms of the massive
21 scope of this project, that there was no negative
22 impacts at all?

23 MS. LAZARIN: Your Honor, that's because the
24 standard is not whether or not there are negative
25 impacts, it's whether or not there are significant

1 adverse environmental impacts.

2 THE COURT: Right. But I mean, in reading
3 through it -- I mean, the Negative Declaration was
4 pretty thorough. I mean, it didn't identify any issues,
5 whether they're significant or not. And I just thought,
6 in reading that, that that was kind of unusual that it
7 didn't identify not one thing, not -- in fact, they even
8 go so far as to explain how this -- you know, like, for
9 example, transportation: Well, this is going to be
10 great because we won't have all these people parking
11 there and yet we don't have any more traffic congestion.

12 So it's almost like you identified what could
13 be the problem. You said, oh, that's not going to be an
14 issue. I was just taken by the fact that, in concluding
15 and in preparing the Negative Declaration, no issues
16 were found at all.

17 MS. LAZARIN: Your Honor, I would disagree
18 that no issues were found. There were plenty of adverse
19 environmental impacts. But the question is, are they
20 significant enough to require mitigation? Are they
21 significant enough to stop this project?

22 And so many adverse impacts were identified
23 throughout the Neg Dec, but whether or not -- the
24 decision is whether or not they're significant enough to
25 put a stop to that, and that's where they -- we did find

1 there weren't such that they were significant that the
2 project should be stopped. And I think that parking is
3 a really unique issue in Buffalo. It's going to be
4 impacting a development on an ongoing basis because,
5 pursuant to the Unified Development Ordinance, there is
6 no mandatory required parking lot for the City of
7 Buffalo. And so, this is an issue that I think the
8 development community is going to have a problem with
9 for a number of development projects in the future
10 that's foreseeable, but it is our position that it is
11 our property and we're able to determine --

12 THE COURT: Do with it what you want?

13 MS. LAZARIN: Yes. And you know, I just -- I
14 took a little bit of issue with the petitioner saying
15 that we could do different things with that lot. We
16 could put it out to bidding, we could make different
17 provisions. Well, your Honor, the petitioners also have
18 options, that they can move their hair salon or they
19 can, you know, move the --

20 THE COURT: They can't move the building.

21 MS. LAZARIN: You're right.

22 THE COURT: The building has been there since
23 the early 20th century.

24 MS. LAZARIN: You're right. And we're not
25 advocating that they move the building. We're ecstatic

1 that it is in the condition that it is now, and bringing
2 such attention -- positive attention to the City of
3 Buffalo and its redevelopment, but they have options,
4 too. I don't see any irreparable, immediate harm taking
5 place for them.

6 THE COURT: Let me ask you this: Mr. Stanton
7 talks about the hard look and whether or not the lead
8 agency did that hard look. And while I appreciate the
9 thoroughness of the Negative Declaration, there's no
10 backup. There are no surveys, no reports, or anything
11 like that.

12 Now, I don't know if that's part of the record
13 that ultimately would have to be provided if we proceed
14 on the petition, but while the Negative Declaration
15 could be considered a self-serving document, I guess the
16 meat in the coconut would be found in the supporting
17 documentation. Why wasn't that provided?

18 MS. LAZARIN: Well, ultimately, your Honor, a
19 record would be compiled if we were to proceed on the
20 merits of a case where you would have supporting
21 affidavits from the expert in-house staff from the
22 office of strategic planning. At this juncture, we are
23 hearing information on the temporary restraining order,
24 but there is much more that goes into the review. This
25 is just the -- the end result, which is the final

1 determination, and that's what's subject to the Article
2 78 proceeding.

3 Do you want to add --

4 THE COURT: Hold on. I'll get to you, I'll
5 get to you.

6 MS. PERSICO: Okay.

7 THE COURT: With respect to the abandonment
8 issue -- and I asked Ms. Persico some of these
9 questions -- will you also concede, as Ms. Persico did,
10 that the term "abandoned" is not defined?

11 MS. LAZARIN: Yes, your Honor.

12 THE COURT: So, again, how does this become an
13 abandoned property? It's still being used. I know it's
14 still being used because of the TRO, but up until the
15 TRO, it's still being used as a parking lot, so I don't
16 think that any definition would consider it to be
17 abandoned.

18 MS. LAZARIN: Well, your Honor --

19 THE COURT: And I still don't know what the
20 definition -- I'll give you a minute to respond -- I
21 still don't know what re-appropriate means or is defined
22 as.

23 MS. LAZARIN: Well, your Honor, pursuant to
24 our charter, the Common Council does have the authority,
25 by resolution, under 27-5 to provide that the interest

1 is abandoned, to provide that it may be sold. And so it
2 is our position that at that juncture, when there is a
3 new use --

4 THE COURT: So, again, if the City says it's
5 abandoned, it's abandoned.

6 MS. LAZARIN: Yes, your Honor.

7 THE COURT: So even if it was being used as,
8 let's say, for example, more than a parking lot, the
9 City, if it owns the property, could say, no, it's
10 abandoned, and we're going to raze it and put something
11 else on it.

12 MS. LAZARIN: That is our position, your
13 Honor. In fact, it's subject to the land disposition
14 agreement which has already been approved by the
15 Council, the property is, in the view of the Council,
16 already abandoned. The notice provisions do go out
17 subject to those individuals that have a contract for
18 parking, one, BCAR. But, at this juncture, that
19 decision and the determination has been made.

20 THE COURT: If the Court, though, finds it's
21 not abandoned, what is the proper way to transfer the
22 property? If 27-5 doesn't apply, because I -- let's say
23 I found it, no, it wasn't abandoned, then what's the --

24 MS. LAZARIN: Then, your Honor, procedurally,
25 would be remanded to the Council, and they would seek

1 advice for a determination on the distribution of the
2 property at that time.

3 THE COURT: Okay. Anything else?

4 MS. LAZARIN: No, your Honor.

5 THE COURT: All right. Very briefly, I will
6 let everyone take one more go at it, but we've been at
7 this for over an hour, and I think I get most of your
8 arguments and you've done a wonderful job giving me
9 answers to my subsequent questions, but I'll give you
10 one last kick at the --

11 MR. MELBER: So, Judge, I will be brief, but
12 there are a few things I want to make sure I address.
13 One is the special use permit, which we haven't talked
14 about yet, which I think I can help you with. The other
15 is this question of abandonment and how we interpret
16 that. As a matter of statutory interpretation, I think
17 there are tools we can bring to that. I would like to
18 discuss those. But maybe I want to start, Judge, with
19 talking about a representation that was made by counsel
20 for the City just now about the project being designated
21 for development and contemplated for some other use
22 going back to 2016.

23 Well, in 2016, Judge, when the City first put
24 this out for proposals under an RFQ -- and Judge, you
25 can find this RFQ at Exhibit H, 2R for the Notice of

1 Petition, which is part of the record for this
2 application. I want to come back to that, as well. The
3 RFQ made it clear that there would have to be a
4 preservation of parking as a part of this reuse of the
5 property, and that's critical here.

6 THE COURT: There is going to be some parking,
7 though?

8 MR. MELBER: There's going to be 30 spaces
9 for -- where there are now close to 400 spaces, and
10 we're going to replace those 400 spaces with 30 spaces,
11 a market, a warehouse, and a 7-story 200-unit apartment
12 building, which will have no parking for it. So we're
13 obliterating all the parking and adding parking by
14 demand, when we also know it's undisputed --

15 THE COURT: But is parking a guarantee? Is
16 this something that -- I mean, one of the things that I
17 was looking at in one of the cases -- of course, I don't
18 know if I'm going to be able to find it so quickly, but
19 when we talked about the public use doctrine, there's
20 this case that I read, the 4th Department case,
21 regarding *The Town of Riga v. The County of Monroe*, a
22 1991 case, where Judge Callahan, in his opinion, said --
23 I think it's Judge Callahan -- said, even if the Town
24 could invoke prior public use doctrine, such invocation
25 should yield to the greater public meeting. If the

1 argument is that the surrounding Buffalo area would
2 benefit more from a mixed-use project, including a
3 grocery store, then -- I kind of lost my train of
4 thought there, but --

5 MR. MELBER: I think I know where you're
6 going, Judge.

7 THE COURT: I guess the point that I'm making
8 is, is that can't the Court yield to the greater public
9 need?

10 MR. MELBER: If all of the processes and the
11 requirements of the law were followed, and the
12 determinations of the decision-makers were --

13 THE COURT: But Mr. Stanton said that it was
14 un-Godly important for your case to proceed, that
15 this -- that this property be considered protected under
16 the public use doctrines.

17 If the 4th Department, in 1991, said that the
18 Court can yield to the greater public good inarguably
19 here -- I'm not saying it's my argument, but their
20 argument is that the public -- the greater public of the
21 great people of the City of Buffalo would benefit more
22 from a grocery store than a parking lot, adapting Judge
23 Callahan's reasoning, this Court can simply overlook the
24 public use doctrine.

25 MR. MELBER: So, we don't think you can

1 overlook the public use doctrine, we think you have to
2 apply it, but we're not saying --

3 THE COURT: You can't overlook --

4 MR. MELBER: And the law doesn't -- the law
5 doesn't say, and we're not saying that there's no way,
6 given the public use doctrine, that this property could
7 ever be put into some other use other than parking, but
8 there has to be a process, and that process is about
9 abandonment, which we have talked a lot about.

10 Under the respondent's theory, abandonment
11 doesn't mean anything. Under their interpretation of
12 this statute and the way they want your Honor to
13 interpret it, they want the word "abandonment" to do no
14 work in Section 27-4.

15 Judge, let's look at the language of this
16 statute and use the regular roles of statutory
17 interpretation to figure out what abandonment might mean
18 here. I think that's what we have to do.

19 And the language is this, Judge, that this
20 provision says that by two-thirds vote of the council,
21 that the sale of the property that's in the public use
22 can be authorized, and I'm going to start quoting now,
23 "of real property acquired by the City for public
24 use" -- I think we have established that, Judge --
25 continuing the quote, "which has not been appropriated

1 thereto" -- so if it were acquired for a public use, but
2 it wasn't put into that public use, okay, that's some of
3 the surrounding language, we think that's significant --
4 continuing with the quote, "or the use of which for such
5 purpose has been abandoned."

6 So, the first thing is, Judge, let's look at
7 our rules of statutory interpretation. Context, right?
8 The phrase, "or the use of which for such purpose has
9 been abandoned" comes immediately after "which has not
10 been appropriated thereto."

11 So, if it's acquired for public use and either
12 you never put it into that use or you stopped using it
13 for that use, then two-thirds vote of the council can do
14 it. That's what the context tells us we should see --
15 we should interpret abandonment to mean.

16 Another common tool of statutory
17 interpretation, Judge -- the plain language. So, let's
18 just look at the phrase, "or the use of which for such
19 purpose has been abandoned," past tense. That is
20 abandoned, or which the council decides to abandon, has
21 been abandoned.

22 You asked about timing, there's your clue, and
23 there's your rule of statutory interpretation. There
24 has to be a time element, and it has to, at a minimum,
25 be in the past tense. Now, we can talk about how high

1 is high or how long ago is past, but it has to be in the
2 past tense.

3 And then, lastly, Judge, and maybe most
4 important, and I've already alluded to this, statutory
5 interpretation rules tell us that every part of the
6 statute has to mean something. It has to do some work.
7 Under their interpretation that they're offering to the
8 Court, this statute would mean the same thing if you
9 just deleted the words "or the use of which for such
10 purpose has been abandoned." It would operate the same
11 way, you just have a two-thirds vote, and you can sell
12 the property when it's in the public use.

13 We heard, Judge, that -- that our argument is
14 that there -- it runs counter to development. And
15 Judge, to a degree, I agree with that. This public
16 trust doctrine and the public use requirement does
17 create a threshold that has to be met in order for the
18 property to be sold and taken out of the public use and
19 put into a private -- a different private use, and there
20 is a threshold that has to be met.

21 Judge, I want to talk about the special use
22 permit because we haven't talked about that yet.

23 THE COURT: You told me you were going to be
24 belief, Mr. Melber.

25 MR. MELBER: I'm terrible with being brief,

1 Judge, and I confess that, but I'm hoping I'm also being
2 helpful. You asked about numbers -- so special use
3 permit. I want you to you look at two exhibits that are
4 part of the record. The first is Exhibit 1, to the
5 affidavit submitted by the respondents of
6 Ms. Juron-Borgese, it's Exhibit 1.

7 Here's a drawing -- and this is where we get
8 the figures that the City argues "are" -- "are," and
9 we're going to talk about verb tense, "are," part of
10 this project, and that's where they represent to the
11 Court that the -- that the warehouse is 9,580 feet, and
12 that the combination of the retail space -- the retail
13 mezzanine and the office are 11,320 feet.

14 Judge, if you look at that exhibit, there's no
15 date on it, there's no indication that it's part of the
16 record, that it was part of what was submitted to the
17 planning board or to the Common Council. It's not a
18 part of the agenda item, it doesn't have the hallmarks
19 of having been part of the public record, and Judge,
20 that's because it wasn't.

21 This drawing, those figures, those dimensions,
22 those square footages, were not what was presented to
23 the planning board, were not what was acted on by the
24 Common Council, but if we look at the record of what was
25 acted on by the planning board and the Common Council --

1 and here's the second exhibit I'd like you to look at,
2 Judge.

3 If we look at the -- it's called the
4 Transportation Demand Management Plan, and we've
5 attached that -- that's attached to our papers, it's
6 Exhibit K, to Mr. Stanton's affirmation -- the first
7 affirmation. And if you look at page 558, Judge -- it's
8 page 558 because that's the page of the Common Council
9 agenda item which we had accessed online -- that tells
10 us that this project, this building, was represented to
11 be -- I'm looking right at the top of that page -- an
12 approximately 20,000-square-foot commercial building
13 that includes a 6,320-square-foot fresh food market.
14 The remainder of the building to be used for a wholesale
15 market with food preparation area as well as an area --
16 as well as storage and back-of-house operation.

17 So, what the City acted on, what was presented
18 and submitted to the planning board and to the council,
19 was a 6,000-foot market, now it's a 9,000-foot market.
20 But you know, half again as large, and Judge, this comes
21 from nowhere. This drawing, as far as we can tell,
22 didn't appear in the record anywhere, but now it's being
23 presented here for litigation to argue to you that this
24 is not going to be a 10,000-foot -- excess of
25 10,000-foot warehouse, and I think, Judge, that means

1 that the City and the respondents concede that if it is
2 a 10,000-foot warehouse, and it was a 10,000-foot
3 warehouse that was presented to the planning board and
4 passed by the planning board and the Common Council,
5 then that was done based on a proposal and a plan where
6 there was a 10,000 -- a warehouse in excess of 10,000
7 feet, and they failed to get a special use permit.

8 If that's all correct -- and I think that's
9 what the record shows us -- we got to go back and we got
10 to go get the special use permit, or we got to go back
11 and present this drawing and this plan with these square
12 footages through this process. You can't just make it
13 up after the fact and then submit it to the Court with
14 an affidavit.

15 And Judge, look very carefully at the
16 affidavit. If you read the paragraphs that refer to
17 that document, they don't represent to you that that
18 document was ever presented to anybody else or was part
19 of the application, or even -- even this morning, Judge,
20 I listened very carefully. You asked what was presented
21 and what the square footage of the warehouse was. And
22 the answer was, the warehouse is 9,000-and-some square
23 feet. This has come up afterwards, and it was not part
24 of the application. That's why that cause of action has
25 a likelihood of success on the merits. That one alone

1 establishes that element for us, Judge.

2 One more thing, if I could, and I don't mean
3 to try the Court's patience. My friend, counsel for the
4 respondents, persists in arguing to the Court that the
5 verified petition is not a part of this application. If
6 I could just refer you, Judge, to the Order to Show
7 Cause, where we not only refer to the verified petition,
8 we always -- we say --

9 THE COURT: To be honest, I -- while I
10 appreciate your argument, I think you should move on.

11 MR. MELBER: Okay. So, I want to talk about
12 one just one more thing, then, Judge. The Brighton
13 Beach case -- I'm sorry, the Finger Lakes case, we heard
14 a quote from that Finger Lakes case where -- and that
15 record is being compared to the record that we have
16 here -- I think what the quote said was that there was
17 nothing presented saying that the noise would increase
18 or that there would be any -- or it wasn't quantified.

19 Judge, we've given you an expert's affidavit
20 that quantifies it, that measures it. We've given you
21 factual affirmance in the verified petition and in the
22 affidavits that say it's going to be increased if we
23 have these trucks. It's going to be increased if we
24 have this construction noise for a period of two years.
25 That's where the -- that's a part of the irreparable

1 harm, and that's what distinguishes us from that case.

2 That's all I have, Judge.

3 THE COURT: Thank you. Ms. Persico, briefly.

4 MS. PERSICO: Yes. Thank you, your Honor. I
5 hear what you're saying.

6 So, two things. The special use permit, I
7 think, is kind of a red herring here. I think they
8 failed to exhaust their administrative remedies. They
9 should have asked for a code interpretation if they
10 wanted to challenge that issue. But let's go back to --
11 we're really getting into the meat of the petition here.

12 We're here on the -- so we don't have a
13 record. We don't have the record of what the City used
14 to make the determination. There has been no dispute
15 that the 14,000-square-foot representation made in the
16 petitioners' -- either the petition or the moving papers
17 is not the right number, right? And that the -- we need
18 a 10,000 -- there is a 10,000-square-foot threshold.

19 Nothing that we're talking about rises to that
20 level, A. B, that isn't just a warehouse back there.
21 But again, that -- and I know that goes to the
22 likelihood of success on the merit, and so I just want
23 to run through that quickly.

24 I don't believe that they have established a
25 likelihood of success on the merits on -- on any of

1 their causes of action. But perhaps more importantly,
2 there is simply no -- nothing besides a conclusory
3 allegation by a couple of petitioners that they will be
4 irreparably harmed. And really, that's what we have to
5 think about. There is nothing in any of the papers
6 submitted by the petitioner -- and they have the burden
7 on this -- that presents the Court with any imminent and
8 irreparable harm that's going to happen.

9 This isn't going to be an expedited
10 proceeding. We will have a record. We will come back
11 in front of the Court, you will decide the merits of the
12 case. If the preliminary injunction -- and if the TRO
13 was lifted today and the preliminary injunction is not
14 granted, here's what's going to happen: There will be
15 notices sent out by virtue of the contract to the
16 parkers at -- that use that lot, right? That's going to
17 take some time. There's some time there.

18 Although there are things that need to happen,
19 such as the closing and the -- in the -- in Denise's
20 affidavit, we identified --

21 THE COURT: Wasn't there a date set for the --

22 MS. PERSICO: There is. It's on the 9th.

23 MR. HOPKINS: Anticipated.

24 MS. PERSICO: Well, it's anticipated, right.

25 Well, I mean, we're not going to do it unless we can,

1 but hopefully we will be able to do that.

2 But, conversely, nothing is going to happen --
3 nothing, really, is going to happen to any of the
4 petitioners within -- you know, tomorrow, the next day,
5 the day after, the next month. Really, nothing is going
6 to happen to them. In about a month, people won't be
7 able to park there. None of the petitioners are
8 parkers, right? None of the people who are petitioning
9 for this injunction really are even going to be impacted
10 immediately if parking is ceased there.

11 So, without showing irreparable harm, I don't
12 believe that this Court -- even if you think they're
13 going to succeed on the merits, I don't think that the
14 Court can grant injunctive relief without that very
15 important element. They don't talk about the balancing
16 of the equities other than to say they're in our favor.

17 And lastly, I think it's very important that
18 we talk about the undertaking, because if, in fact, the
19 Court doesn't lift the TRO and grants the preliminary
20 injunction, we do need -- you know, it's mandatory for
21 there to be an undertaking, although, Mr. Stanton cited
22 a list of cases in his either memorandum of law or
23 petition, those cases were meant to apply, and the
24 nominal \$1,000 bond was meant to apply where there is a
25 citizens action group and they're trying to save an

1 endangered species or protect parkland.

2 But they're -- this is really about economic
3 damage to both sides. And so, the petitioner is
4 alleging economic damages primarily, and we will indeed
5 suffer economic damages. So we would -- if the Court is
6 inclined to grant the injunction, which we don't believe
7 they are entitled to, we would be requesting a bond in
8 the amount set forth in our papers.

9 THE COURT: Anything further from you,
10 Counsel?

11 MS. LAZARIN: No, your Honor.

12 THE COURT: All right. The underlying
13 action -- oh, go ahead. Mr. Stanton?

14 MR. STANTON: I was going to point out that
15 the Ambrose affidavit and the Koessler affidavit point
16 to the immediate reliance on parking and people that
17 actually park there.

18 THE COURT: So noted. All right. The
19 underlying action involves a sale of property located at
20 201 Ellicott Street owned by the City of Buffalo to the
21 respondent, should plan to and have been approved to
22 erect a mixed use property to include a fresh produce
23 grocery store, warehouse, and housing. Property which
24 is currently a parking lot that has been operated by the
25 Buffalo Civic Auto Ramps is directly across from the

1 petitioners' building, offices, places of work, and
2 residence.

3 Petitioners objected to transfer on several
4 grounds, including but not limited to, a necessity of
5 the parking lot which they maintain is a public use that
6 is governed by the public trust doctrine that cannot be
7 sold without authorization of the state legislature and
8 to accommodate their guests and patrons.

9 Further, they allege that the City of Buffalo
10 failed to properly transfer the property to the
11 respondent developer and, in doing so, violated the city
12 code. Also, petitioners allege that the respondent,
13 City of Buffalo, failed to properly comply with the
14 requirements of the State Environmental Quality Review
15 Act, SEQRA, which purpose is to assess the environmental
16 impacts of projects on the affected surrounding area and
17 to mitigate the significant environmental impacts of the
18 activity proposed.

19 Petitioners have moved by way of Notice of
20 Petition, pursuant to Article 78 of the CPLR, seeking to
21 to, inter alia 1) declared null and void the granting of
22 variances to Ciminelli Real Estate Corporation, 2)
23 declare null and void ab initio the granting of a site
24 plan approval to Ciminelli Real Estate and other related
25 entities, and 3), vacating and declaring null and void

1 ab initio all prior determinations related to the
2 determination made by the Planning Board of the City of
3 Buffalo, including but not limited to the SEQRA Negative
4 Declaration voted on by the planning board on or about
5 May 6th, 2019 regarding the property located at 201
6 Ellicott Street in the City of Buffalo.

7 Petitioners also seek a permanent injunction
8 from respondents proceeding with the project on 201
9 Ellicott Street and an order directing respondents to
10 engage in a proper environmental review by strictly
11 complying with the procedural and substantive
12 requirements of SEQRA.

13 On June 24th, 2019, this Court granted an
14 Order to Show Cause filed by petitioners wherein they
15 sought a temporary restraining order preventing the
16 Respondent City from the sale and/or transfer of any
17 portion or the whole of the properties currently
18 operated at a parking lot at 201 Ellicott Street,
19 Buffalo, New York, and told that this matter may come to
20 be fully heard and decided. B, the abandonment or
21 discontinuance of the public usage of any portion or the
22 whole of the properties currently operated at a parking
23 lot at 201 Ellicott Street, Buffalo, New York, including
24 but not limited to discontinuing any tenancies until
25 this matter may come to be fully heard and decided. C,

1 executing any deeds or instruments in title or control
2 of the premises commonly known as 201 Ellicott Street
3 until this matter may come to be fully heard and
4 decided. And D, taking any action in furtherance of the
5 sale, transfer, alteration, or redevelopment of the
6 existing parking lot at 201 Ellicott Street, Buffalo,
7 until the City of Buffalo and its boards and agencies
8 fully comply with the substantive requirements of
9 Article 8 of the New York State's Environmental
10 Conservation Law, parenthesis, SEQRA.

11 The Court, on that date, granted the
12 petitioners that temporary restraining order. Having
13 heard argument, the Court's decision is as follows.
14 Entitlement to a preliminary injunction requires a
15 showing of, (1), the likelihood of success on the
16 merits, (2), irreparable injury absent the granting of
17 the preliminary injunctive relief, and (C), a balancing
18 of the equities in the movant's favor.

19 See CPLR Section 6301; *Nobu Next Door, LLC v.*
20 *Fine Arts Hous, Incorporated*, 4 N.Y.3d 839. It follows
21 that in order to move for such an injunction,
22 petitioners must have standing. Here, essentially,
23 petitioners seek to enjoin the respondents from entering
24 into a contract to which they are not parties. For
25 standing, petitioners must show that they have suffered

1 an injury in fact, distinct from the general public.
2 They have alleged that if this contract is executed,
3 same will permanently interfere with their use of the
4 parking lot, which serves their needs, the project would
5 cause noise, traffic problems, among other injuries.
6 These constitute injury-in-fact and thus have standing
7 to bring this petition.

8 Further, close proximity alone may give rise
9 to an inference of injury enabling the petitioners to
10 challenge the administrative determination. That's
11 *Committee to Preserve Brighton Beach & Manhattan Beach*
12 *Incorporated v. Planning Commission*, 259 A.D.2d 26, and
13 *Matter of Gernatt Asphalt Products v. Town of Sardinia*,
14 87 N.Y.2d 87 668.

15 However, this Court today will only determine
16 whether the preliminary injunction shall continue, which
17 essentially, enjoins the Respondent City from
18 transferring the property to the Respondent Developer.
19 This Court finds that petitioners have not established
20 irreparable injury if the contracts are executed and the
21 deeds transferred, as there exists no imminent
22 disruption should the sale take place. While they still
23 may be able to demonstrate that the project itself
24 necessitates an injunction, that is not before the Court
25 today. As such, the Court is vacating the preliminary

1 injunction.

2 However, this Court must still address the
3 substance of the petition. As such, the Court will
4 afford the City and the non-municipal respondents time
5 to answer or move to dismiss pursuant to 7803.

6 With respect to oral argument, the Court will
7 go off the record for -- to set a date for argument, as
8 well as a scheduling order for papers to be submitted.

9 (Discussion held off the record.)

10 THE COURT: Let's go back on the record.
11 Further, respondents shall file their motion to dismiss
12 no later than July 15th. Any reply papers to that must
13 be due no later -- or must be filed no later than August
14 9th and any sur-reply papers shall be filed no later
15 than August 12th. Argument will be heard on August 13th
16 at 2:00 p.m. This shall constitute the order of the
17 Court. The Respondent City shall submit an order
18 together with a transcript of the decision.

19 Any points of clarification?

20 MR. STANTON: Yes, your Honor. On the current
21 parking, you've lifted the stay on the transfer of the
22 land; is there any --

23 THE COURT: No, I lifted about everything.

24 MR. STANTON: That's the point of
25 clarification.

1 THE COURT: The temporary restraining order
2 that was signed as part of the June 24th, 2019 Order to
3 Show Cause, that preliminary injunction is vacated in
4 its entirety, okay?

5 Anything else?

6 MS. PERSICO: No. That was my question, your
7 Honor. Thank you, very much.

8 THE COURT: Thank you.

9 (Whereupon, the proceedings adjourned at 3:46 p.m.)

10 Certified to be a true and accurate transcript.

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LAUREN A. ADAMS, NYRCR, RMR, CRR

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Official Court Reporter

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