

TO BUILD OR NOT TO BUILD? IS IT WORTH THE RISK?

New York's Second Department has clarified the mootness doctrine in construction cases to require that a party challenging another property owner's right to construct, must exhaust all opportunities to preserve the *status quo* pending the determination of an appeal from an Article 78 Petition

Until recently, in land use zoning cases in the Second Department, it was uncertain whether a case becomes moot once a construction project is fully or substantially completed – absent a stay of construction or request for a preliminary injunction from the appellate court after injunctive relief is denied by the lower court.

The general rule is that a Court's jurisdiction only extends to actual controversies¹ and a case is moot when a change in circumstances prevents a court from issuing a decision that would resolve an actual controversy.

The Second Department resolved the issue of mootness in a land use context involving construction by its decision in *Matter of Shoshanah Katz v. Town of Hempstead*, 2025 WL 395858, *1 (2d Dep't 2025). The Appellants, neighbors to the proposed construction, commenced an Article 78 proceeding to review a determination of the Board of Appeals of the Town of Hempstead (the "Board") that granted Respondent's, YBC Holding, LLC ("YBC"), application for area variances to build a two-story residence on YBC's property. At the same time, Appellants moved for a preliminary injunction enjoining further construction of the residence. Supreme Court Justice Thomas A. Rademaker denied Appellant's request for an injunction and ultimately denied their petition and dismissed the proceeding. Appellants appealed, but failed to seek a stay of construction or otherwise move in the Second Department to maintain the *status quo* and enjoin

¹See, *Saratoga v. County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 810-811 (2003), *cert. den.* 540 U.S. 1017 (2003); *see also*, *Matter of Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 713-714 (1980).

YBC from building. As a result, by the time the appeal had been perfected, at least 75% of YBC's residence had been completed.

YBC moved to dismiss the appeal upon the grounds that it was moot given the substantial completion of the residence on the Subject Property together with the fact that Appellants failed to preserve the *status quo* following the Trial Court's denial of Appellants' requested temporary restraining order and preliminary injunction.

In ruling on YBC's motion to dismiss, the Second Department stated that the mootness doctrine applies "where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy."² The Court identified and applied the well-settled three (3) factors to determine if the case had become moot: (i) change, as applied to construction projects, means how far the work has progressed towards completion; (ii) whether work had commenced without authority or in bad faith and whether substantially complete work is readily undone without an undue hardship; and (iii) whether the challenger of the board's approval failed to seek a preliminary injunction or otherwise acted to preserve the *status quo* pending litigation which the court stated was chief among the factors to determine mootness.

Applying these principles, the Second Department found that although Appellants moved in the Supreme Court for a preliminary injunction to temporarily stop construction, they failed to move in the Appellate Division for a preliminary injunction. Thus, Appellant failed to preserve the *status quo*. (Emphasis added.) Additionally, YBC had substantially completed its construction with the Board's authority. Finally, the Second Department stated that the construction could not be undone without substantial prejudice and undue hardship to YBC. Therefore, the Second

²See, *Matter of Dreikhausen v. Zoning Bd. of Appeals of City of Long Beach*, 98 N.Y.2d 165, 172 (2002); see also, *Matter of Citineighbors Coalition of Historic Carnegie Hill v. New York City Landmarks Presv. Commn.*, 2 N.Y.3d 727, 728-29 (2004).

Department held that a substantial change in circumstances had occurred rendering the case moot and preventing the Second Department from determining the facts of the case.

After *Katz v. Town of Hempstead*, it is now clear that anyone opposing municipal approvals of a construction project must seek a stay at every stage of the proceeding to adequately preserve the *status quo* or risk losing the court's jurisdiction under the doctrine of mootness.