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Split Panel Rebuffs Bid to Block Hospital's Building of Addition

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A divided state appeals panel has rejected a bid for an injunction blocking a new addition to St. Mary's Hospital in Bayside, Queens, ruling that the appeal is moot because the addition is almost built and the petitioner, a community group, failed to seek temporary relief during the appeal.

The Appellate Division, First Department's 3-2 opinion in *Weeks Woodland Association v. Dormitory Authority of the State of New York*, 110502/10, handed down May 31, came over a strongly worded dissent, which held that the ruling allowed a "race to complete construction" to determine mootness.

The petitioner, community group Weeks Woodland Association, filed a lawsuit in 2010 to block a disabled children's addition to St. Mary's Hospital, claiming it exceeded the maximum floor area ratio allowed by local zoning. Floor area ratio is the ratio of total floor area in a building to the area of its plot.

The petitioner argued that the hospital's addition was not "grandfathered" in under the original zoning variance granted to the hospital when it was being planned in 1948, and that the Dormitory Authority of the State of New York, which analyzed the impact of the planned addition, had not been thorough.

The suit targeted the hospital and various regulators involved in the approval of the addition, including the Dormitory Authority, New York City's Department of Building and the state's Department of Health.

Manhattan Supreme Court Justice Emily Jane Goodman ([See Profile](#)) denied the petitioner's motion for a preliminary injunction, and the petitioner appealed.

However, the petitioner never asked the First Department for a stay pending appeal. Since the addition is mostly built, the appeal is moot, according to the unsigned majority opinion joined by Justices David Friedman ([See Profile](#)), Helen Freedman ([See Profile](#)) and Sallie Manzanet-Daniels ([See Profile](#)).

"It now appears that the excavation, foundation walls, steel superstructure, concrete slabs, metal stud frames and duct work are complete," the majority wrote. "We see no evidence that the work was performed in bad faith, and the work completed could not be readily undone without undue hardship."

The panel continued, "While we would adopt the dissent's cogent analysis of the zoning issue if we were to reach the merits, in view of petitioners' failure to seek injunctive relief from this Court and the advanced stage of work on the project, we find that the appeal has become moot and therefore must be dismissed."

Justice James Catterson ([See Profile](#)) dissented, joined by Justice David Saxe ([See Profile](#)).

Catterson said that the petitioner's zoning argument was correct, and that by failing to reach the merits the majority "tacitly

but knowingly affirms an error of law, namely the erroneous interpretation of New York City Zoning Resolution."

Furthermore, he said, the decision deprived the petitioner of its right to appellate review.

"No public policy justifies abrogating that right simply because a party with the means to press on regardless with a multi-million dollar construction has done so," Catterson said. "Any argument that emphasizes the ground gained in the respondents' race to complete construction has been explicitly and soundly rejected by the Court of Appeals."

He cited a 2002 Court of Appeals case, *Dreikausen v. Zoning Board of Appeals of City of Long Beach*, 98 NY2d 165, in which then-Chief Judge Judith Kaye wrote that a "race to completion" could not determine mootness.

The majority rejected that argument, saying it ignored the petitioner's failure to seek injunctive relief from the First Department.

"Petitioners and the dissent fail to come to grips with the fact that petitioners, by failing to seek injunctive relief from this Court upon any of the occasions when they were denied relief by Supreme Court, are themselves complicit in the project's having reached its present advanced stage," the majority wrote.

Catterson also objected to the majority's decision on the grounds that it favored the hospital for having the "power and money" to go forward with construction.

The majority called this an "emotional appeal," and pointed out that the addition is meant to benefit disabled children. It said that, while this fact was not relevant anyway, it was not "accurate to characterize these children as persons well-endowed with 'power' and 'money.'"

Catterson, in turn, wrote that "the majority overlooks this violation of the law because it views the facility as one for a disadvantaged group."

He added, "Hence, in my opinion, the majority is compelled to fabricate the requirement that injunctive relief *must* be sought in the *Appellate Division*."

"We're obviously very pleased that the court dismissed the case," said Jesse Masyr of Wachtell Masyr & Missry, counsel to St. Mary's and to the state dormitory authority. "The mission of St. Mary's is a noble one, and we look forward to opening our facility."

Weeks Woodland Association is represented by Albert Butzel, a solo practitioner. He could not be reached for comment.

The state's Department of Health was represented by Assistant Attorney General Simon Heller. A representative of the attorney general's office could not be reached.

The city's Department of Buildings was represented by Julie Steiner, senior counsel in the Law Department's appeals division.

"We are pleased that the lawsuit was dismissed," she said.

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