20-739

No. _____

ORIGINAL

In The
Supreme Court of the United States

ISAAC LEVIN,

Petitioner,

v.

KENNETH J. FRANK, BRIAN SEACHRIST, THE CITY OF BINGHAMTON

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Isaac Levin
Petitioner, Pro se
960 Cliffside Avenue
N. Woodmere NY 11581
516-374-0188
Isaaclevin2010@gmail.com

QUESTION(S)/ ISSUE(S) PRESENTED

This Court should grant certiorari to resolve the existing conflict of law which exists as to the application of abandonment to a property which was grandfathered and whether applicable municipal zoning ordinances are applicable.

LIST OF PARTIES

Petitioner – Isaac Levin

Respondent – Kenneth J. Frank, individually and as Corporation Counsel for The City of Binghamton

Respondent – Brian Seachrist, individually and as first Corporation Counsel

Respondent – The City of Binghamton, a governmental entity

STATEMENT OF RELATED CASES

33 Seminary LLC, 26 Seminary Avenue Project LLC, and Isaac Levin vs. City of Binghamton, et al., Index No. 10-134, State of New York Courtland County Supreme Court. Case currently under appeal to the New York State Appellate Division 3rd Department.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

Other Authority

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the order below.

OPINIONS BELOW

The opinion of the highest court to review the merits appears at Appendix "B" to the petition and is found at *Levin v. Kenneth J. Frank, et. al.*, No. 19-1102 (2nd Ct., 2020).

JURISDICTION

The date on which the highest court reviewed the merits of the case was May 11, 2020. A copy of that decision appears at Appendix "B." Petitioner moved for rehearing and/or rehearing en banc, which the United States Court of Appeals for the Second Circuit denied on July 1, 2020. See Appendix "A."

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On April 19, 2019, the Honorable Mae A. D'Agostino of the United States District Court for the Northern District of New York dismissed with prejudice Petitioner's Section 1983 claims contained in the Amended Complaint and denied reconsideration of Petitioner's request for emergency injunctive relief as moot. This is a civil action brought by a non-offending injured party who thereafter inexplicably found himself in a legal battle for over 11 years trying to protect the property he purchased and the money he invested. This is a civil action brought forth to redress violations of Petitioner's rights guaranteed under the United States Constitution. Petitioner sought compensatory damages, punitive damages, and a declaratory judgment as a result of Respondents' wrongful and illegal conduct. Following extensive discovery and adequate proffering of sufficiently admissible evidence, the District Court erred by: (1) blatantly ignoring Petitioner's exhibits; (2) refusing to consider the correct applicability of certain portions of the Zoning Code of the City of Binghamton, which was annexed to the complaint and provided undisputed evidence that the 26 Seminary property (the "subject property") was grandfathered; (3) adjudicating the claims as dismissed based on an erroneous theory of res judicata; and, perhaps most importantly, (4) erroneously finding that Petitioner was "converting" the property from one zoning classification to another. The Second Circuit Court of Appeals blindly affirmed the District Court's erroneous decision.

It was undisputed that at the time the advisory letter Petitioner received from Respondents, specifically Mr. Chadwick, the Head of the Building Department for the

City of Binghamton (the "advisory letter") at the time that the subject property was purchased—that the subject property contained a vacant, abandoned and empty space on the first floor, two residential units on the second floor, and one residential unit on the third floor. The lower tribunals erroneously concluded that 26 Seminary was required to obtain Series A Site Plan approval for the property when the advisory letter from and the permits granted were based on a typical floor plan. Respondents contended that the issue was the specific use of the ground floor, which Petitioner sought to change from commercial to residential, thereby triggering the need for site plan review and an attendant zoning variance for parking. However, the parties did not dispute that the first floor—at the time of purchase contained what was zoned as a commercial first floor—was in fact vacant and abandoned for more than 12 years. Mr. Chadwick explained that the advisory letter was a zoning compliance letter which indicated that the use of the subject property on the date of the letter was legally approved as a nonconforming use. In fact, Mr. Chadwick's deposition testimony (admitted into evidence to the District Court and made part of the record herein) explicitly stated that his determination was that the property in question "was being used as a three family legally nonconforming use." Mr. Chadwick agreed that this was based on the fact that this use "predated whatever ordinance which would otherwise make it illegal [.]" He went on to explain that "whatever zoning restrictions for a nonconforming use...continue...with the nonconforming use."

The 2011 Prior Action v. The 2018 Current Action.

On November 2, 2011, Petitioner's companies brought a lawsuit alleging that Ordinance 009-009 was unconstitutionally vague and arguing that the denial of certain building permits and variances violated the companies' rights under the Due Process and Equal Protection Clauses. See 120 F. Supp. 3d at 231. On July 28, 2015, the District Court granted summary judgment against the plaintiffs, which the Second Circuit affirmed on November 23, 2016. See 670 Fed. Appx. at 730-31; see also *33 Seminary LLC v. City of Binghamton N.Y.*, 138 S. Ct. 222 (2017) (denying certiorari).

On November 11, 2018, Petitioner commenced this action pursuant to 42 U.S.C. §1983 in the Northern District of New York. On December 12, 2018 Petitioner filed the amended complaint. Petitioner alleged that Respondents violated Petitioner's rights under the Due Process and Equal Protection Clauses by denying certain building permits and variances. Petitioner discovered new 'DNA,' not available before to Petitioner that clearly demonstrated that the subject property, 26 Seminary Avenue, was grandfathered to a 1983 City Ordinance.

In the prior action, 33 Seminary 1 (the "prior action"), the issue was the status of the first floor which 30 years earlier, was perhaps a grocery store type establishment. Since then, it was abandoned.

On April 19, 2019, the District Court issued its Decision and Order that dismissed Petitioner's substantive and procedural due process claims with prejudice related to the property as collaterally estopped by a July 28, 2015 Decision, Order

and Judgment a decision by the United States District Court for the Northern District of New York granting summary judgment under Fed. R. Civ. P. 56(a) against Plaintiff's claims brought pursuant to 42 U.S.C. § 1983 for Defendants' violations of Plaintiffs' rights under the Equal Protection and Due Process Clauses to the U.S. Constitution based upon a selective enforcement theory. See *33 Seminary LLC v. City of Binghamton*, 120 F. Supp. 3d 223 - Dist. Court, ND New York 2015.

Had the District Court or United States Court of Appeals for the Second Circuit considered the above, and given it minimal weight, the prior decision in 33 Seminar 1 and the current action would undoubtedly have been rendered in Petitioner's favor and discontinued within a short time. Simply stated, the District Court and the United States Court of Appeals for the Second Circuit elected to overlook the fact that 26 Seminary was grandfathered.

In this action, the District Court and the United States Court of Appeals for the Second Circuit elected to overlook the newly discovered 'DNA' demonstrating that 26 Seminary was grandfathered for all "subsequent amendments thereof." While Petitioner was excited with the new 'DNA,' the lower courts elected to call it an old zoning code. Grandfathering laws are old. The grandfathering clause was established in the late 1800s. In August 2018, Petitioner discovered the grandfathering ordinance, the 1983 "Appendix A" zoning code. The current action followed this crucial discovery.

Petitioner demonstrated that Respondents worked in concert to commit a hate crime against him, using an ordinance as the weapon, resulting in substantial

financial and emotional damages, which have thus far been unrecognized. The District Court and the United States Court of Appeals for the Second Circuit committed reversible errors in dismissing Petitioner's claims against Respondents and further denying injunctive relief as 'moot.'

A 2-Stage Unconstitutional Taking.

As the record demonstrates, Respondents engaged in a 2-stage unconstitutional taking of the subject property. The first stage involved the revocation of the necessary permits and the second stage was when Respondents took actual possession of and subsequently demolished the subject property.

Petitioner is the controlling member in 26 Seminary LLC, a limited liability company that he created to purchase the subject property in a multifamily residential zoning district. When the LLC purchased the Property in 2007, it contained a building with empty commercial space on the ground floor, two apartments on the second floor, and one apartment on the third floor. Additionally, the subject property did not have any off-street parking. Petitioner applied and obtained various permits for a three-family house. Each floor was typical, meaning residential three-bedroom house. Days prior to the adoption of the new zoning law, the building permits were cancelled or revoked. In March of 2009, the City of Binghamton adopted Ordinance 009-009, which increased the amount of off- street parking that certain residential buildings are required to have. The new parking requirements are triggered "when a building owner sought to **modify** the use of an existing structure on the property." (emphasis added). The LLC applied for a variance from Ordinance 009-009's parking

requirements, which the town arbitrarily and unlawfully denied. On August 25, 2018, Respondents demolished the building on the subject property after it partially collapsed. Respondents intentionally demolished the building on the Sabbath, so that Petitioner would not discover that the building had been demolished until 9:50 p.m. It has been a practice of the anti-Semites to hurt the Jewish population on Saturday knowing that they could not be found or could only be found for various degrees of abuse.

Petitioner was targeted by employees of Respondents with an ordinance because he was recognized as Jewish by, among other things, his clothing, his slight accent, and his name. Petitioner has been circling around the courts for 11 years, unable to find equitable justice.

Petitioner timely appealed the order of dismissal to the United States Court of Appeals for the Second Circuit. On May 11, 2020, the Second Circuit issued its Summary Order of Affirmance. Petitioner sought rehearing and/or rehearing *en banc*, which was denied on July 1, 2020.

This petition follows.

REASONS FOR GRANTING THE PETITION

The District Court and the United States Court of Appeals for the Second Circuit have misconstrued the issues of abandonment in the State of New York and grandfathering, which is defined as the "continuation of land uses that are made nonconforming by a change in zoning." Certiorari should be granted to once and for all settle the conflicts which exist as to the definition and application of abandonment to municipality Zoning Codes.

This case presents a unique opportunity for this Court to resolve the existing conflicts and barriers for those in the public domain who choose to rehabilitate and attempt to revitalize neighborhoods around the Country through the purchase of properties in these neighborhoods. Real estate purchases can assist in increasing property values and brining life back to these neighborhoods. Much like Petitioner's experience herein, the arbitrary and capricious application of certain Zoning Codes can disturb and frustrate these purchases. This case does not simply present an individual grievance of errors. This case likely affects the real estate industry as a whole, affecting people nationwide.

This Case Presents an Opportunity for the Court to Clarify Conflicting Laws re: Abandonment as applied to municipal Zoning Codes.

At the heart of the underlying case is the issue of whether Petitioner intended a 'conversion' of the first floor of the subject property. The District Court erroneously found, and the Second Circuit affirmed, the erroneous finding that there was an intent to convert and thus the newly enacted 2009 zoning ordinance applied as stated

by Respondents throughout the course of litigation. Petitioner sufficiently demonstrated that the subject property was grandfathered (pursuant to the 1983 Appendix A), and thus the parking requirements were not applicable to the project. In contrast to the finding in *Ellentuck v. Klein*, 570 F.2d 414, 418, the Second Circuit determined that the proffered facts showing that there was an abandonment of the first-floor commercial space were 'meritless.' The *Ellentuck* Court found that "under New York law, abandonment of a nonconforming use may be found if there was a manifestation of intent to discontinue the prior nonconforming use, coupled with an actual discontinuance."

A nonconforming use is a lawful use in existence on the effective date of the zoning restriction and continuing thereafter in nonconformance to the ordinance. 6 Powell on Real Property ¶ 871[1][a] (1981). A provision permitting continuance of a nonconforming use is ordinarily included in zoning ordinances because of the hardship and doubtful constitutionality of compelling the immediate discontinuance of nonconforming uses. However, the general purpose of zoning ordinances is to achieve conformity, eventually terminating all nonconforming uses. Zoning ordinances ordinarily establish separate areas, locating in each the appropriate uses, and forbidding other uses that will tend to impair the development and stability of the area for appropriate uses. The public welfare is considered in the context of the objectives of the zoning and the effect of the zoning on all of the property within any particular district. It is not contemplated that pre-existing nonconforming uses are to be perpetual. "The presence of any nonconforming use endangers the benefits to be

derived from a comprehensive zoning plan." *City of Los Angeles v. Gage*, 127 Cal.App.2d 442, 459, 274 P.2d 34, 43 (1954).

Every zoning ordinance involves some impairment of vested rights either by restricting prospective uses or by prohibiting the continuation of existing uses, because it affects property already owned by individuals at the time of its enactment. The distinction between an ordinance restricting future uses and one requiring the termination of present uses is merely one of degree. The general policy of the courts is to permit municipalities to impose various restrictions and limitations on nonconforming uses. See, e.g., *Ringtown Enterprises, Inc. v. Borough of Ringtown*, 34 Pa.Cmwlth. 349, 383 A.2d 1292 (1978); *Kelly Supply Co. v. Anchorage*, 516 P.2d 1206. Nonconforming uses represent conditions which should be reduced to conformity as quickly as is compatible with justice. *Id.*

The issue of abandonment is one crucial for the Supreme Court's review as it is apparent that a split exists in existing state and federal law which requires clarification from the highest Court. In fact, Federal courts have struggled in deciphering the reasoning of the cases on this issue. In *C.F. Lytle Co. v. Clark*, 491 F.2d 834 (10th Cir.1974), the Tenth Circuit Court of Appeals construed these types of cases to mean that intent to abandon need not be shown when the zoning ordinance specifies a time period for terminating the nonconforming use. *Id.* at 837 & n. 1 (relying on *Beszedes v. Board of Comm'r*, 116 Colo. 123, 178 P.2d 950 (Colo.1947) and finding *Service Oil Co. v. Rhodus,* 500 P.2d 807 (1972) inapplicable).

Adding to the necessity for this Court's review is the fact that commentators similarly have been unable to discern whether the law requires proof of intent to abandon a nonconforming use when a zoning ordinance specifies a time for discontinuance. Compare 8A E. McQuillan, *The Law of Municipal Corporations* § 25.193, at 70 n. 8 (3d ed. 1986) (intent to abandon is irrelevant (citing *Service Oil* and *Beszedes*)) and 4 A. Rathkopf & D. Rathkopf, *The Law of Zoning and Planning* § 51.08[2], at 51-137 n. 17 (4th ed. 1988) (intent to abandon is irrelevant (citing *Beszedes*)) and 4A N. Williams & J. Taylor, *American Land Planning Law* § 115.14, at 216-17 (rev. ed. 1986) (intent to abandon is irrelevant (citing *Beszedes*)) and 4 E. Yokley, *Zoning Law and Practice* § 22-13, at 94 (4th ed. 1979) (ordinance that fails to require proof of intent to abandon is not unreasonable so long as it specifies time for discontinuance (citing *Service Oil*)) and 82 Am.Jur.2d Zoning and Planning § 220, at 742 n. 10 (1976) (intent to abandon is irrelevant (citing *Perlmutter*)) with 1 R. Anderson, American Law of Zoning § 6.68, at 650 n. 3 (3d ed. 1986) (intent to abandon is required (citing *Beszedes*)) and 101A C.J.S. *Zoning and Land Planning* § 174, at 532 n. 84 (1979) (intent to abandon is required (citing *Service Oil*)) and Annotation, *Zoning: Right to Resume Nonconforming Use of Premises After Voluntary or Unexplained Break in the Continuity of Nonconforming Use*, 57 A.L.R.3d 279, 323-24 (1974) (intent to abandon is required but may be inferred from destruction of nonconforming building coupled with failure to take reasonably prompt action to rebuild (citing *Service Oil*)) and Annotation, *Zoning: Right to Resume Nonconforming Use of Premises After Involuntary Break in the Continuity of Nonconforming Use*

Caused by Difficulties Unrelated to Governmental Activity, 56 A.L.R.3d 14, 43 (1974) (intent to abandon is required (citing *Service Oil*)).

Generally, abandonment of a nonconforming use requires both an intent to relinquish and some overt act or failure to act, indicating that the owner neither claims nor retains any interest in the subject matter of the abandonment (see, 1 Anderson's American Law of Zoning § 6.65, at 678 [Young 4th ed]). In New York, however, the inclusion of a lapse period in the zoning provision removes the requirement of intent to abandon — discontinuance of nonconforming activity for the specified period constitutes an abandonment regardless of intent. See *Matter of Prudco Realty Corp. v Palermo*, 60 N.Y.2d 656, 657-658. Abandonment, or intention to abandon, cannot be presumed but must be based on an affirmative action of the one who is abandoning. *City of Binghamton v. Gartell*, 275 A.D. 457, 90 N.Y.S.2d 556 (3d Dept. 1949). "Generally, abandonment of a nonconforming use requires both an intent to relinquish and some overt act or failure to act, indicating that the owner neither claims nor retains any interest in the subject matter of the abandonment." *Toys R Us v. Silva*, 89 N.Y.2d 411, 421, 654 NYS2d 100, 105 (1996). Abandonment "depends upon the concurrence of two factors, namely an intention to abandon and some overt act, or some failure to act, carrying the implication that the owner neither claims nor retains any interest in the subject matter of the abandonment." *Putnam Armonk, Inc. v. Town of Southeast*, 52 A.D.2d 10, 15, 382 N.Y.S.2d 538, 542 (2d Dept 1976).

The Tenth Circuit has established that under some provisions, however, non-use for a stated period of time is conclusively deemed to be an abandonment of the non-conforming use. See 101 C.J.S. Zoning § 199 (1958), citing *Beszedes v. Board of Comm'r*, 116 Colo. 123, 178 P.2d 950 (Colo.1947). In *Beszedes*, the provision, in pertinent part, provided that "if such non-conforming use is discontinued for a period of one year . . . any further use of said premises shall be in conformity with the provisions of this resolution." *Id.*

Generally, the right to a nonconforming use exists only so long as the use continues to exist. A nonconforming use may terminate in one of several ways. These include amortization, abandonment, nonuse, or discontinuance for a prescribed period, and voluntary or involuntary destruction. 6 Powell on Real Property ¶ 871[3][f][i]. Some zoning ordinances provide that if a nonconforming use is "discontinued" for a designated period of time it may not be resumed. The apparent objective of a provision using the term "discontinued" or "ceased" is to avoid the problem of having to prove intent to abandon a nonconforming use. See, e.g., *C. F. Lytle Co. v. Clark*, 491 F.2d 834, 837 (10th Cir.1974). The City of Binghamton Zoning Code from 2006 through 2018, including the newly enacted 2009 Zoning Code, states that:

> §410-78 Cessation of use of nonconforming building, structure, or land.
>
> A. If any nonconforming use of a building, structure, or land ceases, for any reason, for a period of 12 consecutive months, such nonconforming use shall not thereafter be established. Any further use of such building, structure or

land shall be in conformity with the standard specified by this chapter for the district in which such building, structure or land is located.

The language in the Code is unambiguous and could not be disputed that there was no commercial space at any given time. If the first floor were in conformity with the district, all residential, how could the District Court or Second Circuit find a conversion? Clearly, there was no commercial space and no change of use.

Respondents have argued that they did not agree to the 'conversion' of the first floor from commercial to residential despite the fact that the permits issued were for a three-family house, each floor typical to each other. If that is true, then their contention runs contrary to the fact that the parties agreed that the building was grandfathered as nonconforming. In fact, the commercial first floor was abandoned and no longer in existence; in light of this fact, there was no reason for Petitioner to seek any change from one nonconforming use to another. Notwithstanding this fact, even if it was in existence, Permit 8A issued to Petitioner, via the LLC, removed such a requirement.

Even if there was a conversion, which there was not, but if there was, the conversion was not from one type of nonconforming use to another type of nonconforming use. The commercial space restored itself to residential 'as of right' some thirty years earlier, and the subject property remained nonconforming to everything else such as parking, setback, height, yard etc. The record reflects that the lower courts realized that the abandoned space restored itself to be in conformity with the district (residential) some thirty years earlier, but still believed that

Petitioner made a modification from commercial to residential and had to comply with the newly enacted zoning code. It is well established that the primary purpose of grandfathering laws is to protect properties from newly enacted ordinances that they cannot comply with. Due to the length of time of abandonment of the subject property, Respondents could not reestablish the property's non-conforming use as to the first floor being commercial. The evidence clearly showed that the 1st floor commercial non-conforming use was discontinued. As a result, Respondents could not require the reviews and procedures against the clear stipulations of the ordinance.

In the instant case, the first "commercial" floor in question had been abandoned for more than 12 years. Under New York law, abandonment of a nonconforming use may be found if there was "manifestation of intent to discontinue the prior nonconforming use, coupled with an actual discontinuance." *Ellentuck*, 570 F.2d 414, 418 fn8 (C.A.N.Y. 1978). Likewise in this lawsuit, Petitioner, through its applications and other correspondence with the Planning Commission and Building Department prior to purchase, expressed his intent to use the property in question in a manner other than how it was originally classified 12 years earlier, as evident by the permits granted and the typical floor plan.

The Appellate Division, Fourth Department, has held that a nonconforming use was abandoned when it was clear that there was discontinuance for at least 20 months, much more than the 12-month period specified in the ordinance. *Darcy v. Zoning Board of Appeals of the City of Rochester*, 185 A.D.2d 624, 586 N.Y.S.2d 44 (4th Dep't 1992). See also *Village of Waterford v. Amna Enterprises, Inc.*, 27 A.D.3d

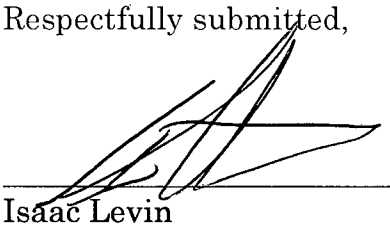
1044, 1045-1046, 812 N.Y.S.2d 169 (N.Y.A.D. 3 Dept. 2006); *Town Bd. of Town of Southampton v. Credidio*, 21 A.D.3d 547, 548, 800 N.Y.S.2d 732 (2005). The Appellate Division, Fourth Department, has similarly held that a set period of time of abandonment for a property's nonconforming use results in the zoning designation being discontinued. *Laughlin*, at 622. In that decision, the court stated that the town zoning code's provision that a nonconforming use is abandoned if "any part or portion" of that use is discontinued for an 18-month period did not require complete cessation of activity to sustain an abandonment. *Id.* By comparison, a 12-year period of complete abandonment [and perhaps 40 years according to the neighbors] can only be viewed as a clear and unmistakable cessation of the prior non-conforming commercial use. Such is the case with the subject property in question in this appeal: the first commercial floor has been abandoned for more than 12 years. [according to the Respondents]. Petitioner did his due diligence, made inquiries, and investigated with Respondents' Planning Commission and Building Department prior to and subsequent to purchase, distinctly and conspicuously showing his manifest intent to use the property in a manner other than its original classification.

CONCLUSION

For the reasons herein, the petition for writ of certiorari should be granted.

Dated: November 17, 2020.

Respectfully submitted,



Isaac Levin
Pro Se Petitioner
960 Cliffside Avenue
N. Woodmere, NY 11581
Isaaclevin2010@gmail.com
1.516.374.0188