SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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LANDMARKWEST! INC.,

Petitioner,

-against- Index No. 160565/2020

NEW YORK CITY BOARD OF STANDARDS AND APPEALS, NEW YORK CITY DEPARTMENT OF BUILDINGS, EXTELL DEVELOPMENT COMPANY, AND WEST 66TH SPONSOR LLC,

Respondents.

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CITY RESPONDENTS' MEMORANDUM OF LAW

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February 16, 2021

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CITY RESPONDENTS' MEMORANDUM OF LAW

Respondents, NEW YORK CITY BOARD OF STANDARDS AND APPEALS ("BSA") and NEW YORK CITY DEPARTMENT OF BUILDINGS ("DOB"), ("City Respondents") by their attorney, JAMES E. JOHNSON, Corporation Counsel of the City of New York, submit this memorandum of law in opposition to the Verified Petition ("Petition"), which seeks to annul and vacate the BSA's January 28, 2020 Resolution filed on November 6, 2020 ("BSA Resolution") affirming the issuance of a permit by DOB to proceed with construction of a proposed building at 36 West 66th Street in the Special Lincoln Square District ("Special District").

PRELIMINARY STATEMENT

The instant proceeding involves the proposed development of a 39-story residential and community-facility building in the Special District. The main issue considered by the BSA was whether the architectural and mechanical plans for the proposed building show

sufficient mechanical equipment in the area identified as mechanical space to justify floor-area deductions pursuant to Zoning Resolution § 12-10.[1]

The BSA correctly and reasonably rejected Petitioner's contention that the proposed building does not contain sufficient mechanical equipment to justify the floor-area deductions taken. BSA noted that DOB's mechanical engineers reviewed the proposed building's architectural and mechanical plans, which demonstrate sufficient floor space used for mechanical equipment to justify the floor area deductions. Moreover, the expert testimony provided by the Owner and relied upon by the BSA demonstrates that the number of floors of mechanical equipment is well within the range of standard practices for construction of buildings of this scale.

For the reasons set forth herein, as well as those set forth in the Verified Answer, the challenged BSA Resolution was rational, lawful and supported by the record as a whole. As such, the BSA Resolution should be upheld and the Petition dismissed.

RELEVANT ZONING RESOLUTION PROVISION

Section 12-10 of the Zoning Resolution, entitled "Definitions," states, in pertinent part:

[1] The BSA Resolution at issue herein is the culmination of prior proceedings that resulted in a prior September 17, 2019 BSA Resolution. That prior September 17, 2019 BSA Resolution related to two main issues: i) whether the floor-to-ceiling heights of floor space used for mechanical equipment in the proposed building comply with the floor area definition of Zoning Resolution § 12-10 in effect before May 29, 2019; and ii) whether the proposed building complies with the applicable bulk distribution regulations for zoning lots located in the Special District in accordance with Zoning Resolution § 83-34. The September 17, 2019 BSA Resolution determined that the proposed building did comply with those provisions of the Zoning Resolution. While Petitioner herein did not appeal the September 17, 2019 BSA Resolution, the City Club of New York commenced an Article 78 proceeding entitled *The City Club of New York v. New York City Board of Standards and Appeals, et al.* (Index No. 161071/2019), which resulted in a September 25, 2020 Decision and Order, entered as a Judgment on November 18, 2020 (R. 002407 – R. 002417), which, *inter alia*, voided the permit for the proposed building. The City Respondents' appeal of that decision is pending.

> However, the *floor area* of a *building* shall not include:
>
> * * *
>
> 8) floor space used for mechanical equipment, except that such exclusion shall not apply in R2A Districts, and in R1-2A, R2X, R3, R4, or R5 Districts, such exclusion shall be limited to 50 square feet for the first *dwelling unit*, an additional 30 square feet for the second *dwelling unit* and an additional 10 square feet for each additional *dwelling unit*. For the purposes of calculating floor space used for mechanical equipment, *building segments* on a single *zoning lot* may be considered to be separate *buildings*;

STATEMENT OF MATERIAL FACTS

City Respondents respectfully refer the Court to their accompanying Verified Answer at ¶¶ 120 – 170, and to the Administrative Record (R. 000001 – 003403), for a full statement of the relevant facts.

ARGUMENT

POINT I

THE BSA's DETERMINATION SHOULD BE SUSTAINED.

A. The Applicable Standard of Review.

The BSA is a local body of experts, comprised of persons with unique professional qualifications, including a planner, a registered architect, and a licensed professional engineer, all with at least ten years of experience, appointed by the Mayor for six-year terms. *See* Charter §659; *People ex rel Fordham M.R. Church v. Walsh*, 244 N.Y. 280, 287 (1927). The BSA is empowered to, *inter alia*, "hear and decide appeals from and review… (a) except as

otherwise provided by law, any order, requirement, decision or determination of the commissioner of buildings…" *See* Charter §666(6).

The Court of Appeals "has frequently recognized that … the BSA is comprised of experts in land use and planning, and that its interpretation of the Zoning Resolution is entitled to deference." *New York Botanical Gardens v. BSA*, 91 N.Y.2d 413, 418-19 (1998); *see also, Matter of Peyton v New York City Bd. of Stds. & Appeals,* 2020 N.Y. LEXIS 2873*,* *8-10 (N.Y. 2020); *Matter of Toys "R" Us v Silva,* 89 N.Y.2d 411, 419 (1996); *Applebaum v. Deutsch*, 66 N.Y.2d 975, 977 (1985). "[W]hen applying its special expertise in a particular field to interpret statutory language, an agency's rational construction is entitled to deference." *Matter of Raritan Dev. Corp. v Silva,* 91 N.Y.2d 98, 102 (1997); *see also Parkway Village Equities Corp. v. BSA*, 279 A.D.2d 299 (1st Dep't 2001).

Where, as here, the BSA reviews an appeal from a DOB determination, the BSA's determination is reviewable in the Supreme Court of this State. See Charter § 669; CPLR § 7803. The reviewing court cannot, however, substitute its judgment for that of the local zoning body. Rather, it is the function of the court to determine whether the challenged determination was illegal, arbitrary, or an abuse of discretion, and whether it had a rational basis and is supported by the evidence in the record. *See* CPLR § 7803; *Cowan v. Kern*, 41 N.Y.2d 591, 599 (1977); *Pell v. Board of Education*, 34 N.Y.2d 222, 231 (1974); *V.R. Equities v. New York City Conciliation and Appeals Board*, 118 A.D.2d 459 (1st Dep't 1986); *Purdy v. Kreisburg*, 47 N.Y.2d 354 (1979); *300 Gramatan Avenue Associates v. State Division of Human Rights*, 45 N.Y.2d 176, 181 (1978). If so, the challenged determination must be sustained.

As the Court of Appeals stated in *Cowan*, 41 N.Y.2d at 599:

> Where there is a rational basis for the local decision, that decision should be sustained. It matters not

> whether, in close cases, a court would have, or should have, decided the matter differently. The judicial responsibility is to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them.

The reviewing court is to consider "substantial evidence" only to determine whether the record contains sufficient evidence to support the rationality of the decision. *Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 231 (1974). Accordingly, this Court's review of the BSA Resolution should be limited to consideration of whether the decision was rational and based upon the record before the BSA.

B. The Resolution Satisfies the Standard of Review.

The BSA's decision to uphold DOB's issuance of the building permit for the proposed building was rational and lawful, supported by the record as a whole and in accordance with the provisions of the Zoning Resolution.

The BSA correctly and reasonably rejected Petitioner's contention that the proposed building does not contain sufficient mechanical equipment to justify the floor-area deductions taken. The BSA correctly reasoned that the proposed building's architectural and mechanical plans do demonstrate sufficient floor-based mechanical equipment, stating, in relevant part:

> Much of this equipment sits directly on the floor or directly on pads—indisputably representing "floor space used for mechanical equipment"—and because of the nature of mechanical equipment, these pieces require clearance and service areas that further justify the New Building's floor-area deductions.

(R. 003369). *See* composite drawings annexed to DOB's October 16, 2019 Submission (R. 002418 – R. 002448) and Owner Respondents' October 21, 2019 Submission (R. 002449 – R. 002480).

The BSA further noted that DOB's mechanical engineers reviewed the proposed building's drawings and appropriately deemed DOB's review reasonable (R. 003369). The BSA also correctly pointed out that expert testimony provided by the Owner Respondent demonstrates that the number of floors of mechanical equipment is well within the range of standard practices for construction of buildings of this scale (R. 003369 – R. 003370). Finally, the BSA appropriately noted that the Owner Respondent's reliance on DOB's practices regarding the justifications for floor-area deductions for mechanical equipment to be reasonable in the instant case (R. 003370).

After considering all of the arguments on appeal, but finding them unpersuasive, the BSA correctly found that Petitioner failed to demonstrate that the architectural and mechanical plans for the proposed building show insufficient mechanical equipment in the area identified as mechanical space to justify floor area deductions.

Moreover, Petitioner's new allegations concerning the BSA's review that (i) the BSA allegedly erred in misreading the word "use" concerning the mechanical equipment deductions; (ii) the BSA Chair allegedly "usurped power" not granted by the City Charter and the RCNY; and (iii) that the BSA allegedly erred by not compelling Owner Respondents to produce mechanical plans submitted in an earlier application are without merit and cannot serve as a basis to invalidate the BSA Resolution.

First, contrary to Petitioner's allegations "use" and "used for" are clearly defined in the Zoning Resolution and the BSA properly applied the Zoning Resolution definition. See Zoning Resolution §§ 12-10 and 12-01(f). Zoning Resolution § 12-10 states as follows:

> A "use" is: (a) any purpose for which a ***building or other structure*** or an open tract of land may be designed, arranged, intended, maintained or

> occupied; or (b) any activity, occupation, business or operation carried on, or intended to be carried on, in a ***building or other structure*** or on an open tract of land (Emphasis in original)

Zoning Resolution § 12-01(f) states as follows: The phrase "used for" includes "arranged for", "designed for", "maintained for", "or occupied for." Thus, Petitioner's erroneous arguments that the term "use" must be interpreted according to the "commonly accepted meaning" of such words (Petition at ¶¶ 65-73) and that "use" must be "actual use" (Petition at ¶ 73) falls flat. Indeed, under the plain meaning of the definitions of "use" and "used for" under the Zoning Resolution, the design of a space for mechanical equipment or the intention for the space to be used for mechanical equipment constitutes mechanical space "use" to justify the floor-area exemptions.

Second, contrary to Petitioner's allegations, the notion that the BSA Chair "usurped power not granted by law" is similarly without merit (Petition at ¶¶ 89-90). Petitioner seemingly argues that the BSA is without authority to issue a written resolution denying an appeal when there is a tie vote. Such a proposition is nonsensical and contrary to Petitioner's implication, is not supported by Charter § 663 and 2 RCNY § 1-12.1. Charter § 663 states, in relevant part:

> All hearings before the board shall be open to the public and shall be before at least three members of the board, and a concurring vote of at least three members shall be necessary to a decision to grant an application or an appeal, to revoke or modify a variance, special permit or other decision of the board, or to make, amend or repeal a rule or regulation.

2 RCNY § 1-12.1 states, in relevant part:

> An application must receive three (3) affirmative votes to be granted. If an application fails to receive

> three (3) affirmative votes, the action will be deemed denied.

Here, two Commissioners voted against Petitioner's appeal and two Commissioners voted in favor of Petitioner's appeal. Pursuant to Charter § 663, the appeal of DOB's determination by the Petitioner did not have enough votes to be granted. Further pursuant to 2 RCNY § 1-12.1, the appeal must be deemed denied. The erroneous notion that such a tie vote prevents the formal written resolution from being drafted setting forth the reasons for a denial is unsupported by any statute and case law. Petitioner cannot point to any support for this position because none exists. Further, despite Petitioner's allegations otherwise, the BSA Resolution detailed the opinions of the two Commissioners that voted in favor of Petitioner's appeal. *See* BSA Resolution (R. 003370 – R. 003371); City Respondents Answer at ¶ 168. Notably, there is no legal obligation to do more than set forth the reasons for the denial.

Lastly, BSA's rejection of Petitioner's request for a comparison of mechanical plans submitted by Owner Respondents to DOB in earlier applications with the mechanical plans for the proposed building at issue herein was proper. The implication that a comparison of the current mechanical plans with earlier mechanical plans "could reveal reasons for a particular layout that were divorced from the requirement for the equipment" (Petition at ¶ 92) is a speculative fishing expedition. Petitioner fails to point to any authority requiring or even advising the BSA to engage in such a review.

Based upon the foregoing, Petitioner's First Cause of Action alleging that the BSA Resolution is arbitrary and capricious is without merit and must be dismissed.

POINT II

PETITIONER IS NOT ENTITLED TO REVOCATION OF THE PERMIT FOR THE PROPOSED BUILDING.

Petitioner's request for an order for the BSA to revoke the permit for the proposed building is not an available or appropriate remedy and must be denied. *See* Notice of Petition at subsection "a." Such a request is in the nature of mandamus to compel and is not available here, where the revocation of the permit is a discretionary act. Mandamus is an extraordinary remedy used to compel performance by an administrative body or officer of a duty positively required by law. See *Hamptons Hosp. & Med. Ctr., Inc. v. Moore*, 52 N.Y.2d 88, 96 (1981); *Gimprich v. Bd. of Educ.*, 306 N.Y. 401, 406 (1954). This remedy is available only where there is a clear and absolute right to the relief sought, and the body or officer whose duty it is to enforce such right has refused to perform such duty. *See Brusco v. Braun*, 84 N.Y.2d 674 (1994); *County of Fulton v. State of New York*, 76 N.Y.2d 675, 678 (1990); *Lisa v. Bd. of Educ.*, 83 A.D.2d 949 (2d Dep't 1981). Further, this remedy is only available to compel an act that is ministerial and non-discretionary, premised upon specific statutory authority mandating performance in a specified manner. *See Grisi v. Shainswit*, 119 A.D.2d 418, 420 (1st Dep't 1986); *Peirez v. Caso*, 72 A.D.2d 797 (2d Dep't 1979); *Posner v. Levitt*, 37 A.D.2d 331, 332 (3d Dep't 1971). The courts will not interfere with the details of municipal administration and will not review the exercise of discretion by public officials in the enforcement of the laws. *Matter of Kerness v. Berle*, 85 A.D. 2d 695, 696 (2d Dep't 1981), *aff'd*, 57 N.Y.2d 1042 (1982); *Perazzo v. Lindsay*, 30 A.D.2d 179, 181 (1st Dep't 1968), *aff'd*, 23 N.Y.2d 764 (1968).

The case law is clear that such relief is not available where, as here, petitioner seeks to compel performance of an act that is solely in the discretion of DOB, with review oversight by the BSA. *See* Charter § 666.

A TRIAL OF FACT PURSUANT TO CPLR § 7804(h) IS INAPPROPRIATE AND UNWARRANTED.

Petitioner's Second Cause of Action, which is pled in the alternative, for a trial of issues of fact pursuant to CPLR § 7804(h), is without merit and must be denied.

Tellingly, Petitioner fails to set forth any specific facts regarding the design of the mechanical space for the proposed building that is missing from the factual administrative record before the Court. Consequently, the conducting of an evidentiary hearing here is inappropriate and unwarranted, there being no findings of fact for this Court to make. *DGM Partners-Rye v. Bd. of Architectural Review*, 148 A.D.2d 608 (2d Dep't 1989), citing *American Tel. & Tel. Co. v. State Tax Comm'n*, 61 N.Y.2d 393(1984) ("[T]he court erred in ordering a *de novo* judicial hearing ... Judicial review of an administrative determination is limited [to question of whether it has a rational basis]"); *Aguayo v. Div. of Housing and Community Renewal*, 150 A.D.2d 565 (2d Dep't 1989) (conduct of evidentiary hearing is precluded where scope of review is limited to question of whether agency action was arbitrary and capricious). Here remand is unwarranted based upon the fullness of the record. If the Court determines that it is unable to make a determination as to the reasonableness of the BSA Resolution based on the administrative record before the Board, the appropriate course is not to conduct an evidentiary hearing, but to remand the matter to the Board so that the administrative record may be expanded.

CONCLUSION

For all of the above reasons, as well as those set forth in the Verified Answer, the BSA Resolution challenged herein should be upheld and the Petition dismissed.

Dated: New York, New York
February 16, 2021

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CERTIFICATION UNDER UNIFORM CIVIL RULE 202.8-b

According to Microsoft Word 2010, the portions of the City Respondents' Memorandum of Law that must be included in a word count contain 2,609 words, and comply with Uniform Civil Rule 202.8-b.

Dated: New York, NY
February 16, 2021

Respectfully submitted,

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