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BOARD OF STANDARDS AND APPEALS

MEETING OF: January 28, 2020
CALENDAR NO.: 2019-94-AII
PREMISES: 36 West 66th Street, Manhattan
Block 1118, Lots 14, 45, 46, 47, 48, and 52

ACTION OF BOARD — Appeal denied.

THE VOTE —

**Affirmative: Commissioner Sheta and
Commissioner Scibetta.....2**
Negative: Chair Perlmutter and Vice-Chair Chanda.....2
Recused: Commissioner Ottley-Brown.....1

THE RESOLUTION —

The building permit issued by the Department of Buildings (“DOB”) on June 7, 2017, as amended and reissued April 11, 2019, under New Building Application No. 121190200 (the “Permit”), authorizes construction of a 39-story residential and community-facility building with a total height of 776 feet (the “New Building”) by West 66th Sponsor LLC (the “Owner”) on a zoning lot with 54,687 square feet of lot area.

This is an appeal for interpretation under Section 72-11 of the Zoning Resolution of the City of New York (“Z.R.” or the “Zoning Resolution”) and Section 666 of the New York City Charter, brought on behalf of Landmark West! (“Appellant”), alleging errors in the Permit pertaining to whether the architectural and mechanical plans for the New Building show sufficient mechanical equipment in the area identified as mechanical space to justify floor-area deductions.

For the reasons that follow, the Board denies this appeal.

I.

The Premises are located on West 66th Street, between Columbus Avenue and Central Park West, in the Special Lincoln Square District (the “Special District”), located partially in a C4-7 zoning district and partially in an R8 zoning district, in Manhattan. They have approximately 350 feet of frontage along West 66th Street, 201 feet of depth, 175 square feet of frontage along West 65th Street, 54,687 square feet of total lot area (35,105 square feet in a C4-7 zoning district and 19,582 square feet in an R8 zoning district), and are occupied by a two-story building and the New Building, which is under construction.

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In *15 East 30th Street, Manhattan*, BSA Cal. No. 2016-4327-A (Sept. 20, 2017) ("*15 East 30th Street*"), the Board denied an interpretive appeal, finding that DOB appropriately permitted "floor space used for mechanical equipment" to be deducted from floor area without regard to floor-to-ceiling height, Z.R. § 12-10.

On June 7, 2017, DOB issued the Permit, authorizing construction of the New Building, originally proposed as a 27-story residential and community-facility building with a total height of 292 feet on a zoning lot with 15,021 square feet of lot area. On April 11, 2019, DOB reissued the Permit, as amended, authorizing the taller New Building on a larger zoning lot.

Appellant and the City Club of New York and certain members (collectively, "Appellants") commenced appeals in May 2019 under BSA Calendar No. 2019-94-A and under BSA Calendar No. 2109-89-A, challenging the Permit.

On May 29, 2019, the City Council approved with modifications a citywide text amendment generally providing that neither mechanical spaces taller than 25 feet nor mechanical spaces within 75 feet of one another would be deducted from floor area.

Vice-Chair Chanda and Commissioner Scibetta performed inspections of the site and surrounding neighborhood.

II.

A public hearing was held on this appeal on August 6, 2019, after due notice by publication in *The City Record*, with a continued hearing on September 10, 2019, and then to decision on September 17, 2019, as to two issues initially presented. These two initial issues were: (1) whether, at the time of the Permit's reissuance, spaces in the New Building designated to be "used for mechanical equipment" count as floor area under Z.R. § 12-10 and (2) whether the New Building, which is situated on a zoning lot that is divided by zoning district boundary lines, complies with bulk-distribution regulations applicable in the Special District under Z.R. § 82-34.

On the other hand, as discussed at hearing, a timely third issue had not been presented by Appellants regarding whether the amount of floor space used for mechanical equipment in the New Building would be excessive or irregular, and Appellants' discussion of mechanical space in the New Building in their initial filings instead centered on the volume and floor-to-ceiling heights of mechanical spaces. However, based on the lack of clarity about LW Appellant's ability to procure a final determination from DOB, testimony corroborated by DOB that a subsequent final determination would be refused, and Appellants' requests to proceed separately, the Board found it appropriate to address this third issue, regarding (3) whether the architectural and mechanical plans for the New Building show

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sufficient mechanical equipment in the area identified as mechanical space to justify floor-area deductions, in continued hearings.

The Board also notes its wide discretion to consider interpretive appeals based on the totality of the circumstances. Here, the final determination that forms the basis for DOB's final determination is the Permit—not a specific written determination. As noted above, the Board also heard testimony from DOB that Appellant might be forever foreclosed from receiving a final determination on this third issue. The Board further notes that this third issue is directly related to the two issues already decided, as presaged by the Board's consideration of *15 East 30th Street*. As the Board's consideration of this third issue is at its discretion, the Board also notes that Appellant raised this issue early in the hearing process—mollifying any concern that consideration of this issue might amount to a fishing expedition, especially given that courts (at their own discretion) routinely allow petitioners to amend petitions. Lastly, the Board notes that the City Charter, the Zoning Resolution, and the Board's rules are silent to this specific issue, and nothing in the record indicates the Owner has been prejudiced by such review.

Accordingly, on September 17, 2019, the Board reopened the appeal filed by Appellant under BSA Calendar No. 2019-94-A to receive additional testimony only with respect to this third issue, which had not yet been decided.

The initial resolution, deciding the first two issues and setting forth the Board's vote to reopen, was issued on October 15, 2019.

A continued hearing was held on December 17, 2019, and then to decision on January 28, 2020.

III.

Because this is an appeal for interpretation, the Board “may make such . . . determination as in its opinion should have been made in the premises in strictly applying and interpreting the provisions of” the Zoning Resolution, Z.R. § 72-11. The Board has reviewed and considered—but need not follow—DOB's interpretation of the Zoning Resolution in rendering the Board's own decision in this appeal, and the standard of review in this appeal is *de novo*.

As discussed herein, the Board finds that (A) Appellant has not demonstrated that the architectural and mechanical plans for the New Building show insufficient mechanical equipment in the area identified as mechanical space to justify floor-area deductions. In reaching this decision, the Board has considered (B) the alternate position of two commissioners as well as (C) all of the parties' arguments on appeal, including those summarized below.

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A.

The Zoning Resolution defines “floor area” as “the sum of the gross areas of the several floors of a *building* or *buildings*, measured from the exterior faces of exterior walls or from the center lines of walls separating two *buildings*.” Z.R. § 12-10 (emphasis in original indicating defined terms). However, the Zoning Resolution also provides for certain deductions from floor area. At issue in this appeal is the following deduction: “the *floor area* of a *building* shall not include . . . floor space used for mechanical equipment.” *Id.*

More particularly, the Board has considered whether the architectural and mechanical plans for the New Building show sufficient mechanical equipment in the area identified as mechanical space to justify floor-area deductions. Appellant disputes these deductions, but the Board is ultimately unpersuaded.

Notably, consistent with its decision in *15 East 30th Street*, the Board has reviewed the record in its entirety, including expert testimony and plans for the New Building. This independent review reveals that the composite mechanical plans prepared by the Owner and submitted by DOB are overinclusive in the impression they impart about the amount of mechanical equipment within the New Building. For instance, because of the three-dimensional nature of the mechanical floors, much of the ductwork depicted in the composite plans’ flattened view might have no relation to “floor space”—where, for instance, a duct is situated immediately adjacent to a ceiling.

However, the New Building’s mechanical plans do demonstrate sufficient floor-based mechanical equipment. 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.

Furthermore, the Board notes that DOB’s mechanical engineers have reviewed the New Building’s drawings. Although the exact scope of this review is unclear from the record with respect to the Zoning Resolution, it is apparent from the mechanical plans themselves that this lack of clarity in DOB’s procedures is an insufficient basis upon which to grant this appeal. (To do otherwise would be to venture into speculation that DOB is not performing its function in administering and enforcing the Zoning Resolution and—more importantly—would fall outside the ambit of this interpretive appeal, in which the Board strictly interprets and applies zoning provisions.)

Under DOB’s current practices, it is clear that DOB has acted reasonably in reviewing and approving the New Building’s mechanical plans. Notably, expert testimony provided by the Owner demonstrates that other similar buildings contain 12 mechanical floors, whereas the New Building contains 4—well within the range of standard practices

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for constructing buildings of this scale. The Owner's reliance on DOB's practices is similarly reasonable and reflected in the mechanical drawings showing sufficient mechanical equipment to justify the New Building's floor-area deductions.

Accordingly, with respect to this specific case, the Board finds that Appellant has not demonstrated that the architectural and mechanical plans for the New Building show insufficient mechanical equipment in the area identified as mechanical space to justify floor-area deductions.

B.

The Board's Rules provide that all types of applications—including interpretive appeals—must receive a “concurring vote of at least three (3) commissioners” to be granted. *See* Rules § 1-11.5; *see also id.* § 1-12.5. However, if an interpretive appeal “fails to receive the requisite three (3) votes,” it is “deemed a denial.” *Id.* Here, two commissioners voted to grant this interpretive appeal, and two commissioners voted to deny this interpretive appeal. Accordingly, this interpretive appeal has not garnered the three affirmative votes necessary to grant, and the Board's decision is deemed a denial.

In reaching its decision denying this interpretive appeal, the Board has considered but ultimately declines to follow the alternate positions of the two commissioners that would grant this appeal. As explained at hearing, the commissioners in favor of this interpretive appeal find Appellant's testimony and evidence credible and DOB and the Owner's unpersuasive.

One commissioner expresses concern that DOB has not provided adequate explanation on its procedures for determining whether certain mechanical equipment is sufficient to allow mechanical-equipment deductions from floor area under the Zoning Resolution; rather, it seems that there may be no procedure in place for analyzing mechanical equipment under the Zoning Resolution. Further, said commissioner expressed fairness concerns in the disparate scrutiny DOB appears to apply to small projects, such as single-family residences, versus tall towers, like the New Building. Next, this commissioner notes the conflicting expert testimony in the record about the location of mechanical equipment and the absence—in his view—of any adequate justification for the placement of mechanical equipment (structural or otherwise) that would lead to the conclusion that the New Building's mechanical equipment could be justified. Accordingly, this commissioner would grant this appeal.

The second commissioner expresses similar concerns, finding that the New Building's floor-area deductions cannot be justified. In interpreting the words “floor space used for mechanical equipment,” Z.R. § 12-10 (“floor area” definition), this commissioner would note that the space is what the mechanical equipment reasonably requires, that the space is exclusively devoted to housing mechanical equipment, that

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the space has no other use, and that the space cannot be realistically occupied for purposes other than housing the servicing of said equipment. This commissioner views this as DOB's position, citing disparate scrutiny DOB applies to single-family residences as opposed to residential towers. Additionally, the commissioner expressed constitutional concerns and the absence in the record of prior mechanical plans.

Based on these considerations, two commissioners would grant this appeal.

C.

In reaching its decision set forth herein, the Board has considered all of the parties' arguments on appeal, including those put forth by Appellant, DOB, and the Owner, but ultimately finds Appellant's arguments unpersuasive.

Appellant

Appellant contends that this appeal should be granted because the New Building does not contain sufficient mechanical equipment to justify the floor-area deductions taken.

First, Appellant alleges that DOB's statement does not include the necessary specifications on the mechanical equipment to be used in the New Building's claimed mechanical spaces or support from a professional engineer, so it is not possible to determine that a footprint and service area for the equipment marked on the plans matches the mechanical equipment's operational requirements. Appellant also states that the Owner's submitted plans do not completely match the plans submitted by DOB, as they included additional sheets and an equipment schedule Appellant had never seen. Appellant also alleges that its review of the available plans demonstrate that the Owner is spreading the equipment "as thin as possible to take up unnecessary space and attempting to get the entire area of the four mechanical floors excluded from the FAR calculation."

In a post-hearing submission, Appellant takes issue with DOB's purported dereliction of duty, claiming that DOB's assertion that it accepts the calculations that property owners and their design professionals present DOB is "irresponsible." Appellant states that DOB must set forth a "concrete set of criteria to compute FAR deductions for mechanical space as required by the ZR," and DOB's refusal to set forth such criteria reflects a dereliction of duty under Section 643 of the City Charter. Appellant states that DOB must review the plans the owner submitted on the 15th, 17th, 18th, and 19th floors of the New Building because the Owner claimed a full-floor deduction of floor space used for mechanical equipment. Appellant states that DOB's review should determine the proper square feet dedicated to the floor print of the mechanical equipment, with any

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associated access and service area, and what portion of the remaining space would count as unused, and therefore, chargeable as floor area. Appellant takes issue with DOB's purported policy of not having examiners review mechanical plans for accuracy of the FAR calculations and deductions and only for code compliance and asserts that is further dereliction of duty. Appellant also suggests using DOB's draft bulletin, which lists mechanical items which may be exempted from floor area. More specifically, this draft identifies as exempt "floor space directly adjacent to mechanical equipment necessary for the purpose of access and servicing of such equipment." This bulletin further states that adjacent space is either equal to the size of the equipment to which it provides access or the manufacturer's recommendation, and it identifies exempt items with no access space such as ducts, chutes, and chases. Appellant urges DOB to engage in its case-by-case basis review and look more closely at the New Building because its floor area is only one square foot less than the maximum allowed as of right.

Next, Appellant's analysis demonstrates the presence of 20 percent empty space on the New Building's 17th floor: namely a boiler room that contains three heat pumps, only two of which take up floor space, and a mechanical equipment room that contains one heat pump and two tanks.

Based on the foregoing, Appellant alleges that the New Building does not contain sufficient mechanical equipment to justify the floor-area deductions taken, and the Permit was issued in error.

DOB

DOB urges that this appeal be upheld because the Permit was properly issued, and the New Building contains sufficient floor space used for mechanical equipment to justify its floor-area deductions. In particular, DOB submits that it has conducted a review of the New Building of the same type the Board found satisfactory in *15 East 30th Street*.

First, DOB states that total number of floors devoted to mechanical equipment deducted from floor area for the New Building is appropriate. DOB notes it has reviewed the floors in the New Building's zoning diagram and the mechanical drawings in response to the Board's request that DOB review whether the number of floors devoted exclusively to mechanical equipment was typical for buildings of a similar nature. DOB notes that it has reviewed the mechanical drawings for the New Building and has concluded that the "floor space on such floors devoted to housing the mechanical equipment of the Proposed Building and those floors cannot be occupied for purposes other than the housing of such equipment." Accordingly, DOB finds that the floor space devoted to mechanical equipment is properly exempt from floor area.

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Next, DOB notes that stories devoted entirely to mechanical equipment do contain sufficient mechanical equipment to be deducted. Using its analysis in *15 East 30th Street* as a guide, DOB submits that the New Building contains the following mechanical equipment. At the first-floor mezzanine, the New Building contains expansion tanks, hot water exchangers, cold water heat exchangers, air separators, electric cabinet unit heaters, a pipe fan coil unit, an electric unit heater, water source heat pumps, and exhaust louvers. At the 15th floor, the New Building contains a storm water detention tank, electrical switchboard, electric unit heaters, water source heat pumps, fan units, a duct heater, an electric humidifier, energy recovery unit (water source heat pump), an emergency generator, an exterior lighting dimmer rack, intake sound attenuators, and a metal plenum behind louver. At the 17th floor, the New Building contains boilers, electric unit heaters, water source heat pumps, fan units, a 2-pipe fan coil unit, hot water expansion tanks, air separators, hot water pumps, hot water exchangers, an air handler unit, an air intake louver, an exhaust louver, and pipe chase containing the elevator smoke vent and the elevator shaft supply duct passing through the floor. At the 18th floor, the New Building contains a water-cooled direct expansion air conditioning (DX) unit, cold water pumps, cold and hot water pumps, expansion tanks, air separators, water source heat pumps, electric unit heaters, electric panels, water cooled chillers, fan units, heat exchangers, an exhaust louver, and an intake louver. At the 19th floor, the New Building contains fire reserve storage tank, water source heat pumps, energy recovery units (water source heat pumps), fan units, an electric humidifier, electric unit heaters, an intake louver, and an exhaust louver. Further, in response to the Board's questions, DOB notes that, for other floors of the building where only a portion of the floor space was deducted for mechanical equipment, those floors primarily contain "principal residential use and the floor space containing mechanical equipment deducted is used for plumbing and gas pipe risers and chases including their enclosures," citing the 16th floor as an example.

In a post-hearing submission, DOB notes that the plans submitted are true copies of approved mechanical plans and that the Owner's submitted drawings depicting the New Building's mechanical piping system are also true and accurate copies. Similarly, DOB confirms that the Owner's written descriptions of mechanical equipment in the New Building are accurate.

Lastly, DOB submits that composite drawings of the interstitial mechanical floors help illustrate the complete layout of the mechanical equipment in the New Building. These drawings, submitted by DOB, were not the official approved drawings but are a compilation "overlaid for illustrative purposes."

Based on the foregoing, DOB requests that this appeal be denied and its determination upheld.

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Owner

As a preliminary matter, the Owner alleges that the Board lacks authority and jurisdiction under the City Charter to expand the scope of the appeal, *sua sponte*, to include issues not timely raised by Appellant in this appeal. In support of this, the Owner notes Section 666(8) of the City Charter: “The Board shall have power...[t]o review, upon motion of any member of the board, rule, regulation, amendment, or repeal thereof, and any order, requirement, decision or determination from which an appeal may be taken to the board under the provisions of this chapter or of any law, or of any rule, regulation or decision of the board; but *no such review shall prejudice the rights of any person who has in good faith acted thereon before it is reversed or modified*” (Owner’s emphasis). The Owner cites section 669 of the City Charter on “Procedure on Appeals” which defines who may file an appeal (subdivision a), the procedure for filing of an appeal in accordance with rules of the Board (subdivision b), the timing for the hearing of appeals and notice thereof (subdivision c), and the method for appeal of a decision of the Board (subdivision d). From these, the Owner concludes that the Board’s reopening of this case is *ultra vires* and should be discontinued and dismissed.

Turning to the merits, the Owner submits that DOB has properly approved the mechanical deductions for the New Building.

First, the Owner submits that the amount of mechanical space and number of full mechanical floors in the Building are comparable to those found in similar buildings. More particularly, the Owner submitted a report on the amount of mechanical deduction as a percentage of gross floor area, concluding that the New Building’s mechanical deductions at approximately 13 percent of total gross floor area set the New Building within the normal range for buildings of a similar scale and that the New Building’s four interstitial mechanical floors also fall within industry standards for buildings of this scale.

Next, the Owner notes that DOB’s draft bulletin cited and relied upon by Appellant does not dictate the amount of mechanical deductions for the New Building, especially considering the draft bulletin has not been officially issued in final form by DOB. Further, industry professionals have noted a number of issues that should be considered before issuance. The listed types of mechanical equipment are underinclusive, and over time expansion tanks, air separators, VFDs, control panels, HVAC chemical treatment stations, and pool equipment have been added. Although specifically delineated, the deductions would “unduly restrict” floor-area deductions by only allowing floor space for equipment-service areas at a 1:1 ratio for equipment to equipment-service areas or manufacturer’s specifications. Typically, a 1:1 ratio proves insufficient in practice, and manufacturer’s specifications set forth the bare minimum. The draft bulletin further does not adequately account for architectural

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considerations—including that mechanical floors require corridors, vestibules, and general access routes that allow individuals to circulate and meet applicable egress standards.

The Owner also submits that the New Building's mechanical floors were appropriately deducted from floor area calculations, while Appellant's diagram and calculations are fatally flawed. First, Appellant fails to account for various forms of equipment that are shown on the HVAC mechanical ductwork plans such as the mechanical fans, heaters, shafts, chases, horizontal ductwork distribution and plenums. Appellant's analysis is based on the HVAC mechanical ductwork plans alone and omits all the equipment shown on the other sets of mechanical plans for each floor. Appellant also erroneously applies the standards in the DOB's draft bulletin, which has not yet been adopted by DOB, are unduly restrictive and inapposite to current DOB practice. Lastly, because Appellant includes building core, structure, and curtain wall within the total area of the floor in calculating the percentage of floor area used for mechanical equipment and service areas, even Appellant's calculations for the 90-percent threshold in DOB's draft bulletin is faulty.

Further, while the New Building's mechanical layout was carefully designed in accordance with best practices to meet the New Building's specific needs, the Owner contends that Appellant's hypothetical alternative layout of certain equipment for the 17th floor does not reflect a complete engineering plan and is unrealistic. In support of this contention, the Owner submitted a technical affidavit attesting that there are many considerations an engineer must take into account when designing mechanical layouts for a building—including accessibility, constructability, proximity of equipment and systems to the occupied spaces they serve, required separations between specific systems, and proximity to exterior walls for air intake and exhaust—but Appellant's analysis does not take them into consideration.

In a post-hearing submission, the Owner reiterates that the New Building's mechanical layouts were carefully designed in accordance with best practices and design criteria in order to meet the New Building's specific needs. In support of this contention, the Owner provided testimony by multiple design professionals, including the associated mechanical engineer and professional engineer, detailing how the New Building's mechanical floors were designed and how there is significant variation in the amount of mechanical space and floors in residential buildings.

Additionally, the Owner submits that Appellant's analyses do not accurately reflect the New Building's mechanical layouts and do not demonstrate credible alternative designs. First, Appellant's diagrams understate the amount and types of mechanical equipment on the floor because they are based on the HVAC mechanical ductwork plans alone and omit all the equipment shown on the three other sets of mechanical

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plans (HVAC mechanical piping, fire protection, and plumbing) and they omit pieces of equipment shown on the HVAC mechanical ductwork plans. Second, Appellant's hypothetical alternative layouts are misleading because the layouts were not developed using the design process employed by mechanical engineers, which involves consideration of several design criteria and coordination with consultants. More specifically, these diagrams do not depict realistic layouts because they do not take into account the full range of mechanical equipment shown on the mechanical drawings, and the reorganization of equipment was performed without consideration of any design criterion.

The Owner notes that DOB properly approved the mechanical deductions for the New Building. More particularly, the Owner notes that DOB has summarized its standard for making mechanical deductions as: "If the room contains so much equipment and associated room to maneuver around it and to be able to operate equipment such that other uses can't be occupied in the space . . . that would be considered deductible without a doubt." Even though this standard has not been codified, the Owner argues that it can be considered the applicable standard for the purposes of this hearing and counts as the methodology that DOB's plan examiners follow.

Lastly, the Owner reiterates the position that this continued hearing should be dismissed on the basis that Appellant had not properly raised the issue considered herein in its filing, and the City Charter does not give the Board jurisdiction to expand the scope of an appeal on its own accord.

For the foregoing reason, the Owner submits that this appeal should be dismissed or, if the merits are reached, denied.

IV.

The Board has considered all of the arguments on appeal but finds them ultimately unpersuasive. In response to community concerns expressed with the review of mechanical plans, the Board notes that nothing herein shall be interpreted as preventing or delaying DOB's issuance of appropriate guidance on standards clarifying when "floor space" is "used for mechanical equipment." Z.R. § 12-10. It is clear from this appeal that, going forward, DOB should improve its analytical methods in reviewing these floor-area deductions to further incorporate its technical expertise in mechanical engineering into its zoning review to confirm whether a building complies with all applicable zoning regulations.

Based on the foregoing, the Board finds that Appellant has failed to demonstrate that the architectural and mechanical plans for the New Building show insufficient mechanical equipment in the area identified as mechanical space to justify floor-area deductions.

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Therefore, it is Resolved, that the building permit issued by the Department of Buildings on June 7, 2017, as amended and reissued April 11, 2019, under New Building Application No 121190200, shall be and hereby is *upheld* and that this appeal shall be and hereby is *denied*.

Adopted by the Board of Standards and Appeals, January 28, 2020.

CERTIFICATION

*This copy of the Resolution
dated January 28, 2020
is hereby filed by
the Board of Standards and Appeals
dated November 6, 2020*



**Carlo Costanza
Executive Director**