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

Index No.:
(Oral Argument Requested)

--against--

VERIFIED PETITION

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

Petitioner LandmarkWest! Inc. (Petitioner), by its attorney, Klein Slowik, PLLC, for the Verified Petition pursuant to CPLR Article 78, alleges as follows:

PRELIMINARY STATEMENT

1. This Article 78 proceeding attacks the November 6, 2020 resolution ("the Resolution") of the New York City Board of Standards and Appeals (the "BSA" or the "Board") to affirm the issuance of a building permit (the "Permit") by Respondent New York City Department of Buildings ("DOB"), allowing Respondents Extell Development Company and West 66th Street Sponsor LLC (together, "Extell") to proceed with construction of a *775-foot-tall* ultra-luxury condominium tower (the "Building") at 36 West 66th Street ("the Parcel") in the Special Lincoln Square District. A true and accurate copy of the Resolution is annexed hereto as Exhibit A. The Resolution issued to resolve a proceeding brought by Petitioner to BSA to challenge issuance of the Permit ("the BSA Proceeding"), which the BSA heard pursuant to its charter to review determinations by the DOB in the capacity of an appellate body.

2. Extell secured the Permit despite that the Building grossly exceeds the height allowed by the New York City Zoning Resolution ("ZR"). Extell exploited a loophole in the ZR

whereby "mechanical spaces," for HVAC equipment and the like, do not count toward allowable floor area. By filling *196 feet* vertical feet in the middle of the building with gigantic spaces, containing nothing but a few token pieces of equipment (the "Voids"), Extell elevated the upper floors to an absurd height – thus maximizing their spectacular views and, of course, their market value.

3. Petitioner hereby attacks the Resolution on the ground that the DOB's approval of the Permit was arbitrary and capricious, an abuse of discretion, and/or an error of law, as was the BSA's inexcusable failure to require the DOB to properly analyze Extell's floor area deduction for mechanical equipment ("ME").

4. The DOB acknowledged to the BSA that the DOB follows two separate policies for calculating ME deduction: one for the majority of projects involving modest construction, such as one-to-three family homes, or small condominiums and another for large-scale commercial and luxury residential towers. In case of smaller projects, the DOB reviews the the amount of space claimed for ME use and disallows floor area deductions that appear pretextual and excessive, often forcing private home owners to incur additional expenses in developing alternative plans and, for example, limiting their ability to add an extension to a small home because of the ZR's limits on the buildable Floor Area Ratio (FAR) for a particular district.

5. With regard to multi-story towers, the DOB does not review the ME plans for appropriateness of claimed FAR deductions, and grants them as a matter of course, simply because the DOB claims the ME plans in huge buildings are too complex to figure out. As a result, the DOB has adopted a hands-free approach that any area on the plans that is designated for ME will be granted a 100% FAR deduction.

6. This "policy," which the DOB made up from whole cloth and which finds no support in any law or regulation, allowed Extell to designate four floors as fully exempt from FAR calculations, despite the presence of only the tiniest installation of token mechanical equipment. Then Extell coupled this exemption with the lack of any express limits placed on floor heights in the ZR, to create hundreds of feet of vertical space, none of which is counted against FAR limits – and luxe apartments on top of the empty space, like birds' nests on top of flagpoles.

7. As designed, the Building has fourteen floors i.e. the floors up to 150 feet, and twenty-seven floors in the tower, of which five are mechanical floors. The Building has three contiguous, putatively mechanical floors (17, 18, and 19), for a total *of 168 feet* (an ordinary story is about ten feet) Just below these, on the 16th floor, is a "residential amenity space" 42 feet high (also of questionable legality), and below that, on the 15th floor, yet another mechanical space, approximately 20 feet high. The illegal mechanical floors between the base and the residential portion of the tower increase the Building's height by another 196 feet. Thus, a substantial portion of the Tower's height – *196 vertical feet, or about twenty stories* – is comprised of the Voids.

8. As a result, if allowed, the Building would be the tallest on the Upper West Side by hundreds of feet, dwarfing other buildings in the vicinity – but would contain only 39 stories of residential units. Yet Extell would only be able to realize this perverse vision due to the DOB's irrationality in approving the absurd Permit - the BSA's inability, refusal, or neglect to discharge its duty under the City Charter to review the DOB's decisions as a true appellate body, and not as a rubber stamp.

9. Petitioner's appeal of a building permit issued to Extell specifically attacked legality of the claimed FAR deduction for the 15th, 17th 18th and 19th floors. The BSA was not able to reach a consensus and split in a tie 2-to-2 vote, with one recusal. The tie vote constitutes a denial of Petitioner's application pursuant to New York City Charter §663, as the concurring vote of three members is required to grant an appeal.

10. However, while the tie vote has the effect of a denial, there was not a majority vote to enable the BSA to make findings of fact and law. The Chair and Vice-Chair, with two votes against, authored what they claimed a formal written resolution, in which they made factual and legal finding for the DOB and Extell on behalf of the BSA. The written resolution did not afford Commissioners Sheta and Scibetta, who voted in favor of the appeal, any room to directly voice their opinions. What makes this quite concerning is that Commissioner Sheta is the only engineer on the Board, and is therefore the Board member most qualified to expose the irrationality of the proposition that the Voids are necessary or appropriate to house mechanical equipment.

11. Petitioner now seeks judicial review of the Resolution, and for the reasons set forth herein and before the Board in the underlying Proceeding respectfully prays for an order and judgment of this Court to reverse and annul same. Because, the BSA was not able to have the majority of its members concur on this issue, with denial being a technicality, Petitioner requests that the Court afford the Chair and Vice-Chair's views no deference and review the issues presented on this application *de novo*. Nonetheless, if reviewed under the arbitrary and capricious standard, the same conclusion obtains.

PARTIES

12. Petitioner is a not-for-profit domestic corporation dedicated to preservation efforts for the Upper West Side of Manhattan. Since 1985, LANDMARK WEST! has worked to achieve landmark status for individual buildings and historic districts on the Upper West Side Petitioner has to its credit more than 3,200 designations of architectural and cultural landmarks from 59th to 110th Streets, Central Park to Riverside Park. It is dedicated to building community and promoting awareness of the neighborhood's special character.

13. Respondent NEW YORK CITY DEPARTMENT OF BUILDINGS ("DOB") was and is a mayoral agency which, *inter alia,* is charged with the enforcement of the Building Code, the Multiple Dwelling Law, the Zoning Resolution and the Housing Maintenance Code. It reviews construction plans prepared by either Professional Engineers or Licensed Architects on behalf of property owners. By law (Admin. Code §28-104.7.1), these plans must be so detailed as to allow the department's examiners the ability to determine if they comply with the various codes' rigid standards.

14. Respondent NEW YORK CITY BOARD OF STANDARDS AND APPEALS ("BSA") was and is empowered by the City Charter as an independent board charged with the duty to grant relief from the ZR and to interpret the meaning or applicability of the New York City Zoning Resolution ("ZR"), Building and Fire Codes, Multiple Dwelling Law, and Labor Law. The BSA is the City agency with the authority under N.Y.C. Charter §666(6)(a) to review DOB permitting decisions.

15. Respondent West 66th Sponsor LLC is a Delaware limited liability company with offices c/o Extell Development Company, 805 3rd Avenue, New York, New York 10022. It is the

owner of record of the property in question, and on information and belief, a subsidiary of Extell Development Company.

16. Respondent Extell Development Company is a Delaware general corporation with oddices at 805 Third Avenue, New York, New York 10022 and is considered to be one of the more prolific purveyors of luxury real estate development on Manhattan.

VENUE

17. Petitioner designates New York County as the place of trial. The basis of venue is pursuant to CPLR §506(b), as the material events took place in that county, and pursuant to New York City Administrative Code §25-207(b), as the proceedings concern real property situated in New York County.

RELEVANT LAW

18. Section 645 of the New York City Charter ("the Charter") sets forth the powers and duties of DOB and in subsection (b) provides, in pertinent part:

> With respect to buildings and structures, the commissioner shall have the following powers and duties exclusively, subject to review only by the board of standards and appeals as provided by law... to examine and approve or disapprove plans for the construction or alteration of any building or structure.

19. Section 659(a) of the Charter states:

> There shall be an independent board of standards and appeals located within the office of administrative trials and hearings. The board of standards and appeals shall consist of five members to be termed commissioners to be appointed by the mayor each for a term of six years.

20. Members of BSA are chosen after careful vetting based on their experience in various zoning and building code issues, as set forth in Section 659(b):

> One of the members shall be a planner with professional qualifications and at least ten years' experience as a planner. One of the members shall be a registered architect and shall have had at least ten years' experience as an architect. One of the members shall be a licensed professional engineer and shall have had at least ten years' experience as an engineer.

21. Section 666 of the Charter provides that BSA "shall have power," *inter alia*:

> To hear and decide appeals from and review... any order, requirement, decision or determination of the commissioner of buildings or of a deputy commissioner of buildings or any borough superintendent of buildings.

22. ZR 12-10 is the ZR's definitional section of the ZR. For the purposes of this proceeding, the following definitions are highly relevant (emphasis in bold is in original text and indicates that the word(s) so emphasized are themselves defined in Section 12-10):

> "Floor area" is 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**.
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> . . .
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> However, the floor area of a building shall not include:
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> . . .
>
> (8) floor space used for mechanical equipment . . .
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> . . .
>
> "Floor area ratio" is the total ***floor area*** on a ***zoning lot***, divided by the ***lot area*** of that ***zoning lot***. If two or more ***buildings*** are located on the same ***zoning lot***, the ***floor area ratio*** is the sum of their ***floor areas*** divided by the ***lot area***. (For example, a ***zoning lot*** of 10,000 square feet with a ***building*** containing 20,000 square feet of ***floor area*** has a ***floor area ratio*** of 2.0, and a ***zoning lot*** of 20,000 square feet with two ***buildings*** containing a total of 40,000 square feet of ***floor area*** also has a ***floor area ratio*** of 2.0)

FACTUAL BACKGOUND AND ADMINISTRATIVE CHALLENGES TO DOB APPROVALS

23. On November 24, 2015, Extell applied for a permit ("the Earlier Permit") to build a relatively modest 25-story, 292-foot-tall residential building, with a community facility on street level, on four small tax lots along 66th Street, i.e. the Parcel. Significantly, the only areas designated for mechanicals in the filings for the Earlier Permit were the sub-cellar, cellar, and roof. A true and accurate copy of October 24, 2016 Zoning Diagram (ZD1 Form) is annexed hereto as Exhibit B.

24. On June 7, 2017, DOB issued a New Building permit for that anodyne building. At the job site, Extell posted a disarming rendering of it and got to work. In fact, Extell never intended to build this building. It was only a stalking horse. A true and accurate copy of the June 7, 2017 Permit is annexed hereto as Exhibit C.

25. Extell's plans for the supertall building now being built are dated April 15, 2015, or seven months before it filed for the Earlier Permit indicating that it never intended to build a building of less than three hundred feet.

26. In June 2016, the Attorney General approved the Jewish Guild's sale to Extell of a building fronting on 65th Street (address), which was then incorporated into the Parcel via zoning lot merger, which allowed Extell to proceed with the larger building. Yet Extell continued to press its pending application for a permit to build the smaller building, which DOB approved a full year later, in June 2017.

27. On December 13, 2017, Extell filed its plans for the 775-foot Building, which despite far outstrips the allowable FAR.

28. On or about July 26, 2018, Extell filed a Zoning Diagram (ZD1) with the DOB, depicting a drastically revised exterior envelope and floor plan. A true and accurate copy of the

July 26, 2018 ZD1 Form is annexed hereto as Exhibit D. The building now comprised forty-one stories, at a height of 775.56 feet. The seventeenth, eighteenth, and nineteenth floors were designated "mechanical," and together, they were 196 feet high; the eighteenth floor alone was 160 feet high.

29. On September 9, 2018, Petitioner herein subsequently filed a Zoning Challenge with DOB, pursuant to 1 RCNY §101-15. On November 19, 2018, DOB denied the Zoning Challenge. [1] A true and accurate copy of Zoning Challenge and Denial is annexed hereto as Exhibit E.

30. On December 19, 2018, Petitioner herein then filed an Appeals case at BSA, to appeal the denial of the Zoning Challenge. Cal. No. 2018-199-A. A true and accurate copy of the 2018 BSA Appeal is annexed hereto as Exhibit F.

31. However, before the BSA could address the issue, DOB reversed itself, and on January 14, 2019, it issued a Notice of Intent to Revoke Approval of the Zoning Diagram that had been the object of Petitioner's Zoning Challenge and subsequent appeal to the BSA. A true and accurate copy of the January 14, 2019 Notice is annexed as Exhibit G.

32. The notice stated that "[t]he proposed mechanical space on the 18th floor of the Proposed Building does not meet the definition of 'accessory use' of § 12-10 of the New York City Zoning Resolution. Specifically, the mechanical space with floor-to-floor height of

[1] With respect to the void, DOB reason for denial of challenge stated, "The Zoning Resolution does not prescribe a height limit for building floors." With respect to the Bulk Distribution Rule, DOB's response was more extensive. The challengers had raised the fact that Extell calculated bulk distribution based on the entire zoning lot while calculating tower coverage based only on the C4-7/R10 portion of the lot. They argued that the Bulk Distribution and Tower Coverage Rules must both apply to the same area. DOB's response followed the reasoning of Extell's counsel David Karnovsky, now in private practice but for fifteen years previous General Counsel at the Department of City Planning, set forth in a December 18, 2017 memorandum. Mr. Karnovsky and DOB correctly pointed out that under the Zoning Resolution's provisions governing split lots (ZR §§ 33-48 and 77-02), the Tower Coverage Rule can only apply to the C4-7/R10 portion of the zoning lot, where towers are permitted. However, they argued that the split lot provisions do not apply to the Bulk Distribution Rule, because the Special District's version of that rule begins with the phrase "Within the Special District. . ."

approximately 160 feet is not customarily found in connection with residential uses." The Notice also announced that DOB was rescinding its denial of Petitioner's Zoning Challenge, from which Petitioner had appealed. As a result, Petitioner's December 19, 2018 appeal to the BSA became moot.

33. Three months later, on April 4, 2019, DOB reversed its reversal: it withdrew its Notice of Intent to Revoke and, on April 11, 2019, for the first time, issued a building permit for the 775-foot tower. The final April 4, 2019 ZD1 featured a different height breakdown of the mechanical floors. A true and accurate copy of April 4, 2019 ZD1 Form is annexed hereto as Exhibit H.

34. The July 26, 2018 ZD1 featured four mechanical floors, the 15th (22 feet high), the 17th (16 feet high), the 18th (160 feet high) and the 19th (16 feet high), totaling 214 feet.

35. After the City Fire Department objected on safety grounds to the 160-foot height of the 18th floor, the April 4, 2019 ZD1 sized the Voids to an only slightly less ridiculous height. There were still four mechanical floors, but their respective height was altered as follows: the 15th (22 feet high), the 17th (64 feet high), the 18th (64feet high) and the 19th (48feet high), totaling 198 feet.

36. Shortly thereafter, on May 13, 2019, Petitioner herein filed at BSA Appeal No. 2019-94-A, seeking revocation of the Permit. A true and accurate copy of Petitioner's May 13, 2019 Statement of Facts is annexed hereto as Exhibit I. A few days before, on May 7, 2019, another not-for-profit community organization the City Club of New York, had filed BSA Appeal No. 2019-89-A, also seeking revocation of the Permit.

37. On July 5, 2019, DOB provided sets of Extell's plans for the Building to Petitioner, in response to a Freedom of Information Law request previously made by Petitioner. These documents were used by Petitioner in the subsequent proceedings.

38. Extell filed its opposition to Petitioner's appeal with BSA on July 24, 2019. A public hearing was had on these applications on August 6, 2019, which was continued on September 10, 2019, and calendared for decision on September 17, 2019.

39. On August 21, 2019, Petitioner herein filed a supplemental statement of facts and findings to expand on the portion of its original argument concerning lack of use of mechanical voids for actual mechanical use. A true and accurate copy of the August 21, 2019 Supplemental Statement is annexed hereto as Exhibit J. Specifically, Petitioner argued that "the issue of mechanical deductions is not solely defined by height but by the spatial needs of the equipment and its associated elements." However, the plans submitted totally lacked in any specifications of the mechanical equipment, its size and the amount of volumetric space that it needed for optimal operation. DOB filed papers in opposition on August 27, 2019, to which Petitioner filed a brief reply on August 28, 2019.

40. At the September 10 hearing, Petitioner specifically argued that the foot print of the mechanical equipment exhibited on the ME plans was wholly out of proportion to the amount of square footage claimed deducted from the FAR calculations.[2] In its argument, Petitioner relied on in the BSA's 2017 decision in 15 East 30th Street, Manhattan, BSA Cal. No. 2016-4327-A (Sept. 20, 2017) ("the Skyhouse Case"), wherein the Board recognized the need to evaluate whether the, "…[a]mount of floor space used for mechanical equipment in the Proposed

[2] The video recording of BSA's September 10 hearing is available on the BSA's official video channel on YouTube and can be found at the following hyperlink: https://www.youtube.com/watch?v=lgHK_CosysE. Petitioner's presentation begins at time code 47:40.

Building is excessive or irregular...." In fact, in the *Skyhouse* decision, the Board specifically reviewed Developer's affidavits describing in great detail the equipment to be used and stated:

> WHEREAS, the *Board credits DOB's review of the specific mechanical equipment proposed* and, in the absence of contradicting testimony or evidence from a licensed and appropriately experienced engineer, the Board has no basis upon which to question the evidence in the record suggesting that the floor space on the second, third and fourth stories of the Proposed Building is 'clearly incidental' to the principal use of the Proposed Building, in satisfaction of subdivision (b) of the 'accessory use' definition in ZR §12-10 (emphasis added).
>
> WHEREAS, in response to an inquiry from the Board regarding whether a standard percentage of floor space dedicated to mechanical equipment has been interpreted as reasonable for similar developments and, thus, properly exempt from floor-area calculations, *DOB states that mechanical floor space deductions are evaluated on a case-by-case basis* and that the deduction of floor space on the second, third and fourth stories of the Proposed Building is consistent with its evaluation of mechanical floor space in comparable mixed-use developments in the City . . . (emphasis added)

41. By resolution filed October 15, 2019, BSA denied both of these appeals.[3]

However, BSA elected to bifurcate its hearing on this issue of whether the mechanical equipment appearing on the plans for the mechanical floors is sufficient to justify 100% of the claimed FAR deductions on the basis of ME use. See October 15, 2019 resolution, at p. 2, fn. 1:

> There is no dispute that vesting under ZR § 11-33 is not before the Board in this appeal. On the other hand, as discussed at hearing, a timely third issue has not been presented by Appellants regarding whether the amount of floor space used for mechanical equipment in the New Building is excessive or irregular, and Appellants' discussion of

[3] The BSA posted its decision affirming the issuance of the building permit. According to the Board, the phrase "Within the Special District . . ." rendered the Bulk Distribution Rule applicable throughout the District, even in the R8 area, which does not permit towers other than in certain rare situations not relevant here. The BSA specifically rejected the argument that the Bulk Distribution Rule and Tower Coverage Rule were integrated components of a single regulatory framework and must be applied together —in particular, using the same denominator. According to the BSA, the text of ZR § 82-34 is unambiguous and therefore its legislative history and statutory context are irrelevant: "Appellants have presented no persuasive basis to find the applicability of the Special District's bulk-distribution regulations unclear, so the Board declines Appellants' invitation to delve further into the legislative history 'in strictly applying and interpreting the provisions' of the Special District's bulk-distribution regulations in this appeal, ZR § 77-11." As for voids, the BSA refused to hear any argument from the challengers, holding that the claim was "issue-precluded" in that it had been settled in the developer's favor in the BSA's 2017 decision in 15 East 30th Street, Manhattan, BSA Cal. No. 2016-4327-A (Sept. 20, 2017) ("the Skyhouse Case"):

> mechanical space in the New Building in their initial filings instead center 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 finds it appropriate to address this third issue, regarding (3) 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, in a subsequent decision. See ZR § 72- 11 (Dec. 15, 1961) (authorizing the Board "on its own initiative" to "review any . . . order, requirement, decision or determination of the Commissioner of Buildings, [and] of any duly authorized officer of the Department of Buildings"). Accordingly, on September 17, 2019, the Board reopened the appeal filed by LW Appellant under BSA Calendar No. 2019-94-A to receive additional testimony only with respect to this third issue, which is not decided herein and is set for a continued hearing on December 17, 2019.

A true and accurate copy of the October 15, 2019 BSA Resolution is annexed hereto as Exhibit K.

42. The appeal on this issue was denominated by BSA as Cal. No. 2019-94-AII.[4] It is this bifurcated appeal that is the subject of the instant Article 78 proceeding.

[4] Petitioner elected not to challenge in court the October 15, 2019 denial, not to duplicate the effort of the City Club, which commenced an Article 78 proceeding, challenging denial of the Bulk Packing and mechanical voids arguments. This proceeding was commenced in New York State Supreme Court, New York County, entitled *The City Club of New York v New York City Board of Standards of Appeals*, Index No. 161071/2019. (NYSCEF Docket Link: https://iapps.courts.state.ny.us/nyscef/DocumentList?docketId=uEfC0z1/9PTChHFAQnfjEQ==&PageNum=2&narrow=) The case was assigned to Hon. Arthur Engoron, who, by decision and order dated September 25, 2020 and entered on November 18, 2020, granted the City Club's petition, determined that the DOB and BSA acted arbitrarily and capriciously in respectively issuing and upholding the April 4, 2019 permit, and declaring that the mechanical voids, "meaning space in a building denoted as 'mechanical' but without mechanical equipment or mechanical purpose, or vastly larger than necessary for any mechanical purpose" were illegal and had to be included in all FAR and height calculations. Extell and the City filed their notices of appeal on November 25 and December 4, respectively. Judge Engoron's decision establishes that the BSA's complacency as to the height aspect of the mechanical voids has already been judicially rebuked. The purposed of this Petition is to dispense with the remaining aspect of the voids issue that concerns the exaggerated footprint of the mechanical equipment and the excesses in corresponding FAR deductions.

43. As part of this bifurcated appeal, the BSA requested that Extell submit complete ME plans to the DOB and the DOB review them for accuracy of the FAR deductions.

44. DOB filed papers in opposition to the appeal on October 16, 2019. A true and accurate copy of the DOB submission is annexed hereto as Exhibit L. The DOB did not submit an affidavit or a statement from any of its design professionals who ostensibly review the ME plans and check the FAR calculations. In fact, the DOB submitted only a letter from its attorney, which stated

> The Department has reviewed the mechanical drawings for the Proposed Building and has concluded that the floor space on such floors is devoted to housing the mechanical equipment of the Proposed Building and those floor cannot be occupied for purposes other than the housing of such equipment. As such, the floor space devoted to mechanical equipment is properly exempt from the zoning floor area.
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> With regard to the Board's request to compare the amount of floors deducted with similarly situated buildings, this is not an analysis that the Department typically makes since each building is reviewed individually based on its unique characteristics and needs. For instance, similarly sized buildings may have different amounts of mechanical equipment based on the design of the building and different energy efficiency goals of different applicants.
>
> In any event, the Department submits that the amount of stores devoted entirely to mechanical in the Proposed Building is consistent with the similarly sized buildings.

45. Upon review of these papers, Extell made a filing on October 21, 2019, submitting additional plans, which did not appear attached to the DOB's submission. Extell filed further opposition papers on October 29, 2019. A true and accurate copy of Extell's October 21 submission is annexed as Exhibit M. Petitioner made a supplemental filing on November 6, 2019. A true and accurate copy of Petitioner's November 6, 2019 submission is annexed hereto as Exhibit N. On November 7, 2019, Petitioner made an additional submission to correct an

inadvertent error in the exhibits submitted. A true and accurate copy of the November 7, 2019 submission is annexed hereto as Exhibit O.

46. Petitioner's submission zeroed in on three main points. First, through the testimony of its expert, Mr. Michael Ambrosino, P.E., Petitioner established that the layout of the mechanical equipment was purposefully stretched to appear to use much more space than the equipment and all of the related ductwork used or needed. By showing how the mechanical equipment could be reorganized, Ambrosino exposed substantial amount of square footage on each of the mechanical floors that had no operational relationship to the equipment.

47. Second, Petitioner brought to the BSA's attention the DOB's and Extell's repeated refusal to provide the ME plans for Extell's initial building, as well as the building version reflected on the July 26, 2018 ZD1, which contained a 160-foot void in the 18th ME floor; a comparison of those plans, where similar ME installations were housed in much smaller spaces, to the plans at issue herein would have shown that the Voids were superfluous.

48. Third, Petitioner brought to the Board's attention the existence of a 2013 draft Building Bulletin (the Draft Bulletin) prepared by Thomas Fariello, R.A. then DOB's First Deputy Commissioner, which sets forth proposed rules for interpreting the amount of space that should be allowed for ME deductions. The DOB irrationally disavowed its use here and attacked Petitioner for its own use of it, notwithstanding DOB's constant reliance on it generally despite the fact that it was never formally adopted *(see infra).*

49. Extell supplemented its filings with a statement on November 27, 2019. A true and accurate copy of Extell's November 27, 2019 submission is annexed hereto as Exhibit P. Petitioner filed a supplemental statement on December 3, 2019, providing additional alternative ME arrangements that Ambrosino prepared. A true and accurate copy of Petitioner's December

3, 2019 submission is annexed hereto as Exhibit Q.[5] A further public hearing was held on December 17, 2019, following which Petitioner filed a supplemental statement on December 31, 2019. A true and accurate copy of Petitioner's December 31, 2019 statement is annexed hereto as Exhibit R.

50. The December 17 hearing was the culmination of the Proceeding.[6] It featured Petitioner's expert witnesses, as well as Extell's design professionals. The DOB was represented by its General Counsel who, incredibly, admitted that the DOB, as a policy, does not review ME plans for accuracy of FAR calculations on large-scale commercial or residential condominium projects. This means that the DOB did not check for the appropriateness of the ME FAR deductions in the *Skyhouse* Case, nor did it do so here.

51. Extell produced its architect, Luigi Russo, an engineer, Vivek Patel, and Michael Parley, an "urban development consultant." Mr. Patel's testimony was the most relevant to the contested issues and he generally emphasizes the concept that myriad engineering considerations feed into ME layout and that Ambrosino prioritized space saving over all other considerations.

52. BSA calendared the matter for decision on January 28, 2020. At the January 28, 2020 hearing, the vote was a deadlock: two affirmative votes, to grant Petitioner's application (Commissioners Nasr Sheta, P.E., Ph.D, and Salvatore Schibetta, Esq.,), two negative votes (Chair Marjorie Perlmutter, R.A., Esq., and Vice-Chair Shampa Chanda), and one abstention (Commissioner Dara Ottley-Brown).[7]

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[5] Although, BSA did not initially accept this submission, but allowed that it be resubmitted at the December 17 hearing.

[6] While the transcript of the December 17 hearing is currently unavailable, a link to the video of the hearing is available on the BSA's official YouTube video channel at https://www.youtube.com/watch?v=7ZpbkkkqgjE. The hearing is the first one of the day in the video. Further references in the petition to the testimony heard at the December 17 hearing, will be made by reference to the video and particular time mark.

[7] https://www.youtube.com/watch?v=MgHGgYIkmTs, time code 0:00 to 27:29.

53. The BSA then kept the matter under consideration for ten months – an unusually long period of deliberation for an Appeals case – before filing the written Resolution. Although the resolution states, on p. 1, that the appeal was "denied,"

54. The Chair and the Vice-Chair authored the Written Resolution in the person of the Board and determined as quoted below:

> 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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> The Chair and the Vice-Chair then proceeded to make specific findings on behalf of the Board:
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> 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 (sic) 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.
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> 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.
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> 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 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.

55. Concluding their statement, the Chair and Vice-Chair state in the written resolution:

> 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.

56. Although the written resolution made reference to the opinions of Commissioners Sheta and Scibetta, the Resolution contained no statements in the nature of dissenting opinions, and no indication that Chair gave them the opportunity to do so. Their opinions are available only from the review of the video of the BSA vote on January 28, 2020. These commissioners voted in favor of Petitioner's application because the proposed layout of mechanical equipment and the proffered reasons in justification thereof were pretextual and irrational.

57. Commissioner Sheta voted in favor of the appeal because Extell's engineer was prevaricating in an attempt to justify the layout of the mechanical equipment. Sheta specifically demanded that the Board should compel DOB to explain its methodology for reviewing and approving Extell's mechanical FAR deductions, but DOB did not answer, with the Chair's acquiescence. DOB's review concerned only the Mechanical Code i.e. the specifications for the equipment itself, and not the ZR as pertains to the size of the Voids, despite the fact that the entirety of Petitioner's appeal concerned challenge to issuance of a building permit on the basis of non-compliance with the ZR.

58. Sheta was also concerned with the inherent unfairness of the DOB's policy of scrutiny of the mechanical plans for the propriety of FAR deductions. The DOB, without any justification at law therefor, subjected only private residential home construction of two or three

stories to zoning analysis of mechanical plans, while routinely approving FAR deductions on high-rise developments. Sheta opined that if the DOB was not implementing the Draft Bulletin, then it was not clear what mechanism it implemented.[8]

59. Commissioner Scibetta also voted in favor of Petitioner's appeal because it was apparent to him that most FAR deductions taken for mechanical use had no basis. Scibetta stated that

> It is my interpretation that mechanical space that does not count toward floor area applies when the space is what the equipment reasonably requires, that the space is devoted exclusively to housing the mechanical equipment used for the service of the building, that the space has no other use, that the mechanical plans cannot realistically be occupied for purposes other than housing the servicing of said equipment and we know that to be DOB's position. If the DOB was presented with plans for a one family home that included an entire floor being deducted because mechanical equipment is placed in the center or corner of a floor, they would and they do use the appropriate amount of diligence to determine whether that is an appropriate deduction.
>
> The evidence presented along with the standard of... the statements of the DOB which do not mirror the statements made in *SkyHouse* do not lead me to believe that this was done here. Further, pursuant to the testimony before the Board along with statements made from experts on the Board, it is clear to me that much of the mechanical deductions are without merit. I also fear finding otherwise would institute a precedent that not only would permit a subversion to zoning and the obligations of government agencies, but would also raise a constitutional question as to whether it is appropriate to scrutinize an owner of a one family home more stringently or otherwise hold them to a different standard than the owner of a tower.

[8] Petitioner asserts that this is not only arbitrary, irrational, and an error of law, *infra,* but it is unfair and unjust on its face. Since there is no legal basis for scrutinizing mechanical equipment floor-area deductions differently, the most plausible explanation is that the DOB cracks down on Mom and Dad and their three-deckers in the outer boroughs, saddling them with expensive revisions to their modest renovations, but bends over backwards for Manhattan developers – by looking the other way to enable legal subterfuges that further enrich the ultra-wealthy, while consigning the surrounding neighborhoods to bear the impacts of outsized buildings. As a matter of public policy and simple morality, this is, frankly, disgusting. If Respondents can advance another explanation during this proceeding that does not involve punching down at the little guy, Petitioners would welcome the opportunity to evaluate it; but Respondents resolutely refused to offer *any* rationale or guiding principle for its evaluations of mechanical equipment deductions from floor area.

60. Scibetta also deemed it necessary to emphasize that on numerous occasions, requests were made for the mechanical plans developed by Extell for the original "stalking horse" project, but were ignored. Scibetta significantly felt that the plans were not only relevant but could have been dispositive, by proving Petitioner's argument. For those reasons, Scibetta voted in favor of granting Petitioner's application.

FIRST CAUSE OF ACTION

Mandamus for Review Pursuant to CPLR Article 78

61. CPLR Article 78 enables a petitioner to bring a proceeding sounding in the writ of mandamus to review, for a judgment as to "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." CPLR 7803(3).

62. Here, review of all the submissions and testimony before the BSA evidences that the mechanical equipment with all the ductwork depicted on the plans did not support the 100% of FAR deduction that Extell claimed for the mechanical voids.

A. BSA Erred as Matter of Law in Misreading Word "Use" to Mean Claimed Use, Not Actual Use, in Definition of Floor Space ME Deduction

63. The ZR §12-10 definition of floor space excludes "floor space used for mechanical equipment." At the December 17, 2019 hearing, Kurt Steinhouse, BSA's General Counsel, stated that under the ZR, an applicant needs to establish only that the deducted space is *used* for mechanical equipment, as opposed to *required to be used*. The underlying inference does away with the need to review any spatial requirements for proper exploitations and servicing of the subject mechanical equipment. The Resolution adopts this position.

64. However, the failure of this argument is exposed when viewed on the flip side: it would mean that the ZR reads that for deduction to apply, the subject space needs to be *claimed for use*, as opposed to being *actually used* for mechanical equipment.

65. "Use" is not a defined term in the ZR. To discern what "floor space used for mechanical equipment" means, in the absence of a statutory definition, we must turn to the dictionary. A court will construe words of ordinary import with their usual and commonly understood meaning, and in that connection will regard dictionary definitions as useful guideposts in determining the meaning of a word or phrase. *Yaniveth R. ex rel. Ramona S. v. LTD Realty Co.*, 27 N.Y.3d 186, 192 (2016); *see also* McKinney's Statutes §94, "Intent determined from language used; natural and obvious meaning: The legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construct."

66. The Webster's dictionary definition of the word "use" is "to put into action or service**:** avail oneself of**:** EMPLOY", with the word "utilize" being closest synonym.[9]

67. "Floor space used for mechanical equipment" means that the equipment "puts into service" or "employs" the floor space. The space to be set aside as deductible from floor area is that space necessary for the equipment to do its job. Space beyond that, by definition, is superfluous, and not exempt from floor area calculations. The space housing the mechanical equipment, as accessory use exclusion to bulk, needs to be given its commonly accepted meaning of covering only footprint area and volumetric space, or spatial clearance, necessary for optimal operation and servicing of the equipment as per the manufacturer's guidelines

[9] *Available at* https://www.merriam-webster.com/dictionary/use (last accessed December 5, 2020).

68. The owner can subjectively claim that it will *use* any square footage for operation of mechanical equipment it needs to square away its FAR calculations, but only objective review of operational requirements for the amount of space that the mechanical equipment needs can lead the DOB to determine what square footage will actually be utilized or *used*. No maintenance worker will ever employ more space than he/she needs.

69. To credit the DOB's subjective interpretation instead is to allow that a builder could design a room with a small piece of machinery in it; then, claim that the room is intended to be "used for mechanical equipment," and then set the dimensions of the room to whatever it wishes, without regard to whether the construction of the room. Under the DOB's interpretation, an architect could submit plans depicting an air handler the size of a footlocker in a room the size of the main hall at Grand Central Terminal, and as long as the plans stated that the room was "used for floor equipment," then the builder could claim that the rest of the space need not count toward the building's allowable bulk.

70. The Court of Appeals has established, in a holding applicable not only to the BSA, but also to the DOB and administrative agencies generally:

> The BSA, comprised of five experts in land use and planning, is the ultimate administrative authority charged with enforcing the Zoning Resolution (*see,* N.Y. City Charter §§ 659, 666). Consequently, in questions relating to its expertise, the BSA's interpretation of the statute's terms must be "given great weight and judicial deference, so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute." Its determination, moreover, must be sustained if it has a rational basis and is supported by substantial evidence. Where, however, the question is one of pure legal interpretation of statutory terms, deference to the BSA is not required.
>
> *Toys R Us v. Silva*, 89 N.Y.2d 411, 418–20 (1996) (citation omitted).

71. If the DOB, and the BSA as the appellate body charged with reviewing its decisions, choose to disregard and torture the common meaning of "use," this court need not

defer to its interpretation. *See also Williams v. Williams*, 23 N.Y.2d 592, 599 (1969): "We will not blindly apply the words of a statute to arrive at an unreasonable or absurd result."

72. The principle of the "commonly accepted meaning" that does not require definition in the ZR was adopted by the BSA in the *Matter of Benjamin Shaul*, Magnum Management, BSA Cal. No. 67-07-A. In that appeal, the BSA encountered difficulty in application of the word "height," which was not defined in the ZR. A developer betted that the absence of the definition created an ambiguity as to whether the limitations on the vertical height of the building could be defeated by setting back penthouses deep out of sight from the street view. The DOB adopted what became known as the "penthouse" trick, erroneously believing that as height limitations under the Sliver Law[10] were merely aesthetic in purpose, the "word" height took on the meaning of "visual" height, as opposed to "actual" height. The BSA disapproved of DOB's twisted logic, and adopted a definition of the word "height" as the vertical distance from curb to the highest roof level, e.g. the everyday meaning. The BSA relied on a common-sense principle that where the ZR lacks a definition, the common one applies.

73. Thus, a common sense reading of the word "used" must mean "actually used". All of the Respondents here failed: Extell submitted plans based on an outrageous and unsupportable construction of the ZR; the DOB irrationally enabled same; and the Chair and Vice-Chair acted arbitrarily in failing to direct review, as per "the *Skyhouse* Case".

74. Considering that no branch of government is more attuned to the task of statutory interpretation than the judiciary, Petitioner requests that the court afford no deference to the

[10] The "Sliver Law" is an unofficial name to the ZR §§23-692 & 33-492 that aim to prevent very tall narrow buildings in a set of specific zoning districts. It applies height restrictions to buildings on certain properties under 45 feet wide.

Chair and Vice-Chair's twisted reading of the ZR's definition of the term "floor space used for mechanical equipment" and conduct an independent analysis.

B. Review of Plans Showed That Space Allocated to Mechanical Equipment Was Far Greater Than What Would Be Used for Operation and Servicing.

75. In order to illustrate the excessive FAR deductions regarding the amount of equipment, the "footprint" and spatial organization, Ambrosino color-coded all of the differing components of the MEP system. The color-coded plans, which Ambrosino labeled "Existing Conditions Drawings, D-15, D-17, D-18, and D-19" were submitted to the BSA and presented at the December 17 hearing. These drawings delineated each major mechanical floor identifying the area of the equipment, the access/service space required for each, as well as other uses on the floor and the unassigned or "white space." As designed, the equipment and service area requirements are approximately as follows:

15th floor…… 18 %
17th floor……. 20 %
18th floor…… 27 %
19th floor……. 28 %

76. In particular, in the example of the 17th floor, Ambrosino identified two instances of close to 4,297 SF in FAR deductions taken for two pieces of equipment covering, together with access space, 1,039 SF, which results in an excessive deduction of 3,257 SF. This translates into anywhere between $16,290,000.00 and $32,580,000.00 in illicit sales through violation of floor area limitations. (See final page in Exhibit R that identifies the subject areas on the 17th floor plan).

77. Specifically, the eastside boiler room is 3,289 SF and contains three heat pumps, one of which is hung and takes no floor space. There are five boilers. The total area of all the

equipment and service areas in this room is 1,059 SF: 97 SF for the two heat pumps on the floor and 962 SF for the boilers. As already shown on this drawing, the other two heat pumps could be hung or moved so as not to artificially increase the MER deduction. This leaves 2,327 SF of unused floor area. The design employs a 32 % use factor, with a ceiling height of 60 feet.

78. The second example is the MER is this the same thing as the abbreviation above? Be consistent between columns 12 and 14 and is 1,008 SF. The room contains one heat pump and 2 tanks. The total area of the equipment and service areas is 77 SF. There is no justification in the record for awarding a 1,300% deduction of mechanical space, or 930 SF, for 77 SF of equipment footprint and 1 SF of ductwork.

79. Moreover, Ambrosino shows how the mechanical equipment can be more efficiently positioned without negatively impacting its operability. Extell's deployment creates vastly more empty space than the equipment needs. Ambrosino identifies a mean 60% deduction that should be made from the claimed deductible floor area. Simply put, most of the area on the subject mechanical floors is empty space and it does not need to be there for the placement and proper functioning of the equipment. It is there to project the top floors higher into the sky and for no other reason.

80. Extell's witnesses did not refute Ambrosino's analysis. The only engineer appearing for Extell, Patel, argued that Ambrosino'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 plans (HVAC mechanical piping, fire protection, and plumbing); and that they omit pieces of equipment shown on the HVAC mechanical ductwork plans. Patel also took issue with the hypothetical alternative layouts as being 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. Patel also asserted that the plans showing more efficiently arranged mechanical equipment did 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.

81. However, when pressed by Commissioner Sheta, the only engineer on the Board, Patel was not able to specify or give at least one example as to how exactly any piece of mechanical equipment would not operate optimally if either grouped together or rearranged to a different portion of the floor or elevated and affixed to the sides within the cavernous space under the ceiling. Patel simply repeated conclusory references to "many different considerations."

82. Patel also attempted to justify Extell's particular layout of ME as being necessary due to considerations of structural stability. Yet, when asked by Sheta if that could explain why Ambrosino's alternative layout was not workable. Patel said that his structural engineer rejected Ambrosino's proposed layout as undesirable, without saying why or how[11]

83. At the January 28, 2020 vote hearing, Sheta revealed that the issue of structural stability was a red herring. When Pattel testified, he initially posited mechanical efficiency as an explanation of why the ductwork could not be elevated to allow for the space underneath to be used for non-mechanical purposes. When Sheta started an inquisitive questioning of the nitty-gritty details of the mechanical efficiency, including lack of pressure drop due to height elevations, significantly undermining the validity of the mechanical efficiency argument, Pattel switched to the "structural stability" argument as an alternative.

[11] https://www.youtube.com/watch?v=7ZpbkkkqgjE&t=8682s, time code 2:21:30.

84. Sheta revealed that he made up the concern of structural stability to proverbially smoke out if Extell had a good engineering reason for purposefully stretching the layout of the equipment.[12] As his specialty is structural engineering, Sheta explained, he knew full well that any decent structural engineer could make any adjustments necessary for supporting the grouping of all the mechanical equipment together. Sheta explained that "I was a very talented structural engineer and even it doesn't need a talented structural engineer to gather all the mechanical equipment, put them in the corner of a building and come up with an economic, cost-effective structural design for the building." The concern of structural stability was plainly pretextual and intended to simply fill to qualify space for FAR deduction.

85. However, the Chair and Vice-Chair, without justification, ignored both Ambrosino's analysis and Sheta's complete evisceration of Patel's disingenuous testimony. The reason why the City Charter §659(b) requires that the Board include at least one planner, one registered architect and one licensed professional engineer in its composition is so that the Board would have the benefit of expertise of various professional areas that are necessary to review issues argued before it. Ignoring the expertise of its only professional engineer to evaluate the testimony of both Petitioner's and Extell's engineers beyond a shade of doubt satisfies the Article 78 standard of arbitrary and capricious action.

C. BSA's Chair Usurped Power Not Granted Her Position by Law

86. NYC Charter § 663 specifically provides that

> 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.

[12] https://www.youtube.com/watch?v=MgHGgYIkmTs&t=1648s, time code 18:40.

87. A corresponding provision in the Rules of the City of New York adopted pursuant to City Charter §666, 2 RCNY §1-12.1, also provides that "[i]f an application fails to receive (3) affirmative votes, the actions will be deemed denied."

88. While this language specifically provides that obtaining two votes in favor of appeal is insufficient to prevail on the appeal, it does not specifically address the question of tie votes, where there is no majority or plurality vote. The majority vote, by its very nature, is the vote of more than half of the commissioners. Due to the fact that BSA has only five members, when two commissioners vote in favor of the appeal the presumption is that the majority of three voted against. This allows the three concurring votes to form the basis of the basis of a final determination that takes the form of a written resolution pursuant to 2 RCNY §1-12.1, according to which "[s]uch resolution will state the rule, regulation, order, requirement, decision, or determination upon which the application has been made, and will set forth the Board's findings and conclusion."

89. However, because of the recusal of one commissioner, BSA encountered a rare situation of a tie vote. Although under the rules, a tie vote is insufficient to enable an appellant to prevail on appeal, it also deprives BSA of authority to adopt a resolution or make any findings of fact calling for judicial deference, where the four commissioners were in sharp disagreement on those facts and their proper application, causing them to split evenly. There is nothing in either relevant provisions of the City Charter, the Administrative Code or the BSA's own rules and regulations that cloaks the Chairperson with sole authority to act on behalf of the BSA in the event of a tie-vote and issue a resolution which claims to adopt a determination, marginalizes the other half of the vote and does not appear to explain why the two commissioners who voted

against the appeal are authoring a resolution, while the two commissioners who voted in favor of the appeal evidently cannot set forth their findings.[13]

90. There is no statutory provision of any kind that endows the Chair with a "super vote" power or affords the Chair's vote more weight than that afforded any other commissioner when the Board votes or authorizes the Chair to ride roughshod over the Board in the event of a tie vote. Here, the Chair, together with the Vice-Chair, made findings of fact that the quorum of members of the Board evenly split on. Nothing in any relevant statutory provision or precedential caselaw may serve as the basis of such an action.

D. BSA Erred in Failing to Compel Extell to Produce Original Mechanical Plans for Comparison

91. The Chair allowed Extell to persistently ignore requests made by Petitioner and Commissioners Sheta and Scibetta for a complete set of mechanical plans for the initial project that did not involve use of mechanical voids in an attempt to elevate residential floors. The request was to enable comparison of the type, quantity and placement of mechanical equipment under the Earlier Permit, to those shown in the plans for the Permit under consideration. Extell's

[13] A careful review of all the relevant legal provisions reveal that the role and authority of the BSA's Chairperson is meticulously delineated. The authority of BSA's Chairperson includes calling meetings of the board; administering oaths and subpoenaing witnesses pursuant to City Charter §663; issuing written authorizations to other members, their subordinates or any other employee or committee of commissioners to perform field inspections and report back to the BSA pursuant to City Charter § 667 and 2 RCNY §1-03.2, 1-10.3 and setting out certain unspecified duties for co-members pursuant to City Charter §659(c); directing performance of duties of the Executive Director and General Counsel pursuant to 2 RCNY §1-03.1(a), (b); signing official correspondence relating to administrative matter or previous Board decisions; designating staff who can sign official correspondence; issuing determinations on request regarding whether an application may be appropriately filed on the Special Order Calendar pursuant to 2 RCNY §1-07.1 (a)(1) or 2 RCNY §1-07.3(b)(3)(i); and calling special public hearings and special review sessions pursuant to 2 RCNY §1-11.2. Pursuant to 2 RCNY §1-11.4, the Chairperson presides at all hearings and review sessions and may designate another commissioner to preside and perform the duties of the Chair at hearings and review sessions. Pursuant to 2 RCNY §1-11.7, the Chair decides all points of order or procedure at public hearings, controls the order of speakers, the admission of evidence, the time permitted for each speaker and the general decorum of the hearing room. The Chair may also set a deadline for all submissions on an application pursuant to 2 RCNY §1-11.10. The Chair may also move to table a reargument or rehearing request pursuant to 2 RCNY §§1-12.4,1-12.5. The Chair may also grant by letter minor amendment to previous approvals without a hearing pursuant to 2 RCNY §1-12.11.

counsel at the BSA simply elected to not even acknowledge that such requests existed. The Chair suppressed repeated attempts of Sheta and Scibetta to compel Extell to produce these plans for comparison.

92. The importance of this withholding cannot be overstressed. The underlying project went through several iterations and comparison of ME plans at each stage of development of the project could reveal reasons for a particular layout that were divorced from requirements for the equipment.[14]

E. DOB's Policy Decision Not to Review ME Plans for Accuracy of FAR Deductions on large-scale construction projects is Clear Dereliction of Its Statutory Duties

93. At the December 17, 2019 hearing, the DOB admitted for the first time on record that it had never performed a full and proper analysis of the FAR deductions for the mechanical space in the *Skyhouse* Case, that it had not done so in this case, nor did it intend to correct this irresponsible abstention of its code responsibilities in the future. Instead, the DOB stated that, as policy, it simply trusts, at face value, whatever calculations the owner or the owner's representative, puts down on paper (unless, as shown supra, it doesn't – but there are no rules). [15]

94. Instead, the DOB asked Extell to prepare composite drawings that overlay all of the separate mechanical equipment drawings approved for each mechanical floor. This generally

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[14] In addition, considering that the word "space" is not separately defined in the ZR, it is safe to assume that it is a volumetric, three-dimensional concept. According to Webster's Dictionary, "space" is defined as " a limited extent in one, two, or three dimensions: distance, area, volume" (https://www.merriam-webster.com/dictionary/space [last visited December 6, 2020]). Given that the height ceiling for mechanical floors changed with possibly the same equipment in place, the height of the mechanical floors is clearly excessive for the equipment's use. However, determining that requires access to all iterations of the ME plans.

[15] The referenced statement can be found at the following hyperlink to the video recording of the December 17, 2019 hearing uploaded by the BSA to its YouTube channel: https://www.youtube.com/watch?v=7ZpbkkkqgjE. The referenced testimony of the DOB's general counsel starts at 1:14:20. The DOB Counsel specifically admitted that the DOB examines the mechanical plans only for code compliance, not for FAR calculations under the ZR, and generally reviews only smaller private residential homes for abuse of the mechanical FAR deduction, as opposed to plans for larger buildings.

makes it look as if "there is a lot of mechanical stuff" in there. However, this two-dimensional view is purposefully misleading, as it overlooks that most of the piping is located well above the floor area, and while it looks on a plan to occupy space, it has no foot print on the floor. In fact, the gargantuan Voids allow for the piping to be elevated at such a height that the floor area below could be put to other use (but it then would count against floor area, thereby defeating the owner's scheme). By electing not to use empty space below the piping or to run the piping so low as to purposefully make the available space useless, Extell availed itself of DOB's lack of analytical rigor.

95. When prodded, the DOB Counsel explained that DOB examiners do not review mechanical plans for accuracy of the FAR calculations and deductions, but only for compliance with code of the equipment itself. With regard to the FAR deductions, the examiner merely looks at the plans[16] to check if the submitted plan in essence appears to be a floor designated as one fully dedicated to mechanicals, and as long as there is more than one piece of mechanical equipment on such a floor, the examiner accepts the applicant's claimed FAR deductions without further inquiry.

96. The DOB Counsel added that the examiner also looks for the presence of any suspended ductwork or sprinkler piping that adds to what can only be described as a "feeling" that the full floor is a "mechanical" floor. Apparently, the DOB is now reviewing plans intuitively, without regard to fact, on the theory that the plans are "too complex." The level of complexity of the mechanical plans, however, is not a consideration under ZR §12-10.

97. In this vein, DOB Counsel could not list a single criterion that plan examiners use, hiding behind vague statements that different plans call for different "things" to look at. On one

[16] Petitioner brought to the BSA's attention that the DOB reviewer was an architect, not a qualified mechanical engineer of even a structural engineer versed in mechanical installation.

hand, the DOB argued that it conducts individualized review, while at the same time offered an inherently inconsistent view that compared the instant tower to other super towers and determined that the amount of mechanical equipment proposed for the 36 West 66th project is comparable with other super towers. This only proved to show that the DOB may have allowed other high-rise developers to abuse mechanical equipment deductions in equal measure, but provides no support in law for its interpretations.

98. The DOB's findings, or lack thereof, are thus unsupportable under the hallmark case of administrative law in New York: that for purposes of Article 78 challenges to agency determinations, "[a]bitrary action is without sound basis in reason and is generally taken without regard to the facts." *Pell v. Bd. of Ed. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck*, 34 N.Y.2d 222, 231 (1974). DOB's inability to point to any ground in fact or law for its findings regarding floor-area deductions require their invalidation as arbitrary and capricious.

99. The observation of Commissioner Sheta fully exposes such a policy as non-sensical from the standpoint of engineering. As an engineer, Sheta said, the starting point in the process for determining how much space any piece of equipment, together with piping, would require would be to consult the engineer's specifications for the equipment. He did not consider the question to be in any way difficult or ambiguous. It was per se irrational as per *Pell* for the DOB to ignore these specifications.

100. The fact the DOB did not perform even such a basic review constitutes a dereliction of duties under the City Charter. Section 643 of the City Charter specifically provides:

> § 643. Department; functions. The department shall enforce, with respect to buildings and structures, such provisions of the building code, zoning resolution, multiple dwelling law, labor law and other laws, rules and regulations as may govern the construction, alteration, maintenance, use, occupancy, safety, sanitary conditions, mechanical equipment and inspection of buildings or structures in the city . . .

101. No enforcement of the ZR with regard to ME FAR deduction occurred here. In the total vacuum of an expressly adopted policy effectuating proper calculation of ME FAR deductions that is uniform and transparent, the DOB's favoring luxury developments bespeaks of a broad-based public policy determination and constitutes an act legislative in nature, rather than an exercise of administrative discretion. *See N.Y. Statewide Coalition of Hispanic Chambers v New York City Dept. of Health and Mental Hygiene*, 110 A.D.3d 1, 7-8 (1st Dept 2013), *aff'd* 23 N.Y.3d 681 (2014) (invalidating the Sugary Drinks Portion Cap Rule). This is well beyond any authority delegated to the DOB under the City Charter and constitutes violation of the principle of separation of powers.

F. DOB Has Arbitrarily and Capriciously Failed to Adopt Policy or Regulations Necessary to Effectuate Proper Calculations of FAR ME Deductions.

102. In addition to failing to comply with the BSA's instruction in this case, the DOB has refused to establish a concrete set of criteria to compute FAR deductions for mechanical space as required by the ZR, if the ZR is to be enforced in full measure. Its neglect appears to have gone on for decades since the definition section of the ZR was first passed into being.

103. DOB's willful acceptance of an owner's unsupported calculations, its refusal to require detailed plans and documents concerning requisite access space and operational clearance, and its failure to develop specific criteria to guide plan examiners' review for

compliance with applicable FAR limitations by, inter alia, disallowing excessive deductions for mechanical space, are, at minimum, a violation of lawful procedure or an error of law, constituting arbitrary and capricious actions or, at worst, belligerent and willful disregard for the law, allowing developers to play fast and loose with the ZR.

104. Petitioner proposed using the 2013 draft Building Bulletin (the Draft Bulletin) prepared by Thomas Fariello, R.A. who at the time was the First Deputy Commissioner, which details the DOB's interpretation of these spaces. The Draft Bulletin underwent certain changes in the following years, none of which detracted from its applicability to Extell's plans. Indeed, the purpose of the BB specifically states: "This document is to clarify the text to which floor space used for mechanical equipment may be excluded from the sum of a building's zoning floor area as defined by the Zoning Resolution (ZR) Section 12-10." The Draft Bulletin Part A(1) lists mechanical items that may be exempted from Floor Area. The Draft Bulletin Part A(2) identifies as exempt "[f]loor space directly adjacent to mechanical equipment necessary for the purpose of access and servicing of such equipment (except as otherwise noted in Part C)." The Draft Bulletin then goes on to explain that this adjacent space is either equal to the size of the equipment to which it provides access or the manufacturer's recommendation. In addition, the Draft Bulletin would clarify that there is no access space for several exempt mechanical items, such as ducts, chutes, flues, and chases, which the DOB would have determined not to require circulation or access space.

105. Both Extell and the DOB attacked the Draft Bulletin as being just a draft that was never adopted and cannot possibly be made applicable the subject mechanical drawings. DOB Counsel maintained that the DOB could not reach an agreement with industry actors on the Draft Bulletin, which hampered its adoption by the DOB. As a result, the DOB never developed any

policy principles with regard to enforcement of the portion of the Zoning Resolution that concerns mechanical deductions and the counting of unused space towards floor area. The DOB's apparent position that it cannot adopt any policy position absent approval from the real estate community is tantamount to capitulation by a government agency to entrenched private interests. If the industry leaders had veto power on the DOB, this agency would not exist, nor would the Zoning Resolution. The DOB can be said to possess the administrative discretion necessary to carry out a variety of important administrative functions, but discretion can be a veil for laziness, corruption, incompetency, lack of will, or other motives, and for that reason "the presence of discretion should not bar a court from considering a claim of illegal or arbitrary use of discretion." L. Jaffe, Judicial Control of Administrative Action 375 (1965).

106. DOB Counsel strenuously asserted that the DOB does not use the Draft Bulletin, except as a "safe harbor" or the "gold standard". Apparently, the DOB allows applicants to submit proof that its mechanical deductions meet the criteria listed in the Draft Bulletin. The DOB then reviews the argument in light of the Draft Bulletin and if it conforms to the standards set therein, it would approve the deductions, and that approval would bullet-proof, so to speak. However, if it is used as a guideline by applicants to prove their deductions accurate, how, other than through some form of legal alchemy, can the DOB shamefacedly argue that its standards are not used in the review process? That the DOB disingenuously argues that the Draft Bulletin was not officially adopted does not alter the fact that the Draft Bulletin and its more limiting successors are used by both examiners and applicants. DOB Counsel emphatic claim at the December 17 hearing that "no Bulletin exists" cannot be reconciled with the DOB's acceptance it as a "safe harbor" or the "gold standard". Either the Draft Bulletin governs, or it does not. To

apply it in some cases but not others, without rationale and at DOB's whim, is worse than not having a rule at all – it is the essence of arbitrariness.

G. BSA Erred by finding DOB's Consistent Policy to Not Review ME Drawings for FAR Calculations Meant that Extell's Plans Did Not Violate ZR.

107. A historic failure by the DOB to not subject ME plans of high-rise developments to the rigors of FAR deduction calculations cannot serve as the legal basis for dereliction of DOB's statutory duties.

108. The Chair went so far as to rely on the DOB's faulty comparison of the amount of the mechanical deduction used in this project as being on par with similarly sized towers on Manhattan. At most, this comparison showed that Extell abused the tradition similarly to other developers of skyscrapers in the City. To the Chair that meant for the BSA to compel the DOB to now start enforcing the law with regard to ME FAR deductions would unfairly punish Extell and spring a surprise enforcement on a developer who acted just like everyone else. In this version of the universe, no one would get a speeding ticket when travelling with the flow of traffic where everyone is speeding. [19]

109. This hands-free approach that the Chair adopted overlooks BSA's own prior precedent set in the *Benjamin Shaul* decision, supra, for breaking with traditions that violate the ZR. In that case, the developer argued that it fully complied with the DOB's own practice of defining height when it applied for the permit and it would have been unfair to punish it for DOB's consistent history of erroneous interpretation of the ZR, and that if the BSA decided to

[19] At the December 17, 2019 hearing, the Chair voiced a concern that if taken to its logical conclusion, Petitioner's proposal to require mechanical engineers to adopt the most space efficient layout will stifle engineering ingenuity and unnecessarily restrict mechanical options. Petitioner does not strive to dictate to building developers how to design their buildings, including mechanical floors. Petitioner simply wishes to enforce floor area limits in the Zoning Resolution. To qualify for FAR deduction, the mechanical layout should be efficient in the space it uses. Mechanical engineers can design their floors in myriad ways; the real question is to what extent the space on those floors is necessarily dedicated to mechanical equipment. If a designer elects to leave half of the floor empty and not use it, she is free to do so, but without entitlement to 100% FAR deduction.

them start enforcing the law that its Resolution would only have a prospective effect. The BSA rebuffed this reasoning, ruling that

> WHEREAS, the Board further agrees that, in the absence of action by the Board or by the City Planning Commission and City Council, DOB has exceeded its authority both in applying the Penthouse Rule and in limiting its application to instances in which the penthouse is set back and not visible from the street, such action being equivalent to a legislative act;
>
> WHEREAS, as to Owner's arguments with respect to equitable considerations, the Board disagrees that any hardship that may be imposed on the Owner is relevant to its disposition of the instant appeal
>
> WHEREAS with respect to Owner's argument that if the Board grants the appeal it should exercise equitable powers so that its determination only applies prospectively and would not apply to the Building, the Board does not have the authority simultaneously to determine that *the building permits for the expansion of the Building were issued unlawfully and to permit DOB to ignore that fundamental fact*; and
>
> WHEREAS, furthermore, as an administrative body, the Board does not have the equitable powers of a court to address any alleged unfairness to the Owner that may result from its decision in the instant appeal

(emphasis added).

110. Considering that the BSA already set a precedent for compelling the DOB to abandon its tradition of violating the ZR when such a violation is discovered by the BSA, the Chair and Vice-Chair's departure from that precedent is arbitrary. *See Matter of Charles A. Field Delivery Serv., Inc.*, 66 N.Y.2d 516, 520 (1985) (an agency must provide an explanation for its departure from agency precedent adequate for a reviewing court to ascertain whether it has done so for valid reasons). In the *Field* case, the Court of Appeals opined that "[s]tare decisis is no more an inexorable command for administrative agencies that it is for courts." *Id.* Absence of an explanation for failure to conform to agency precedent "will, therefore, require reversal on the law as arbitrary, even though there is in the record substantial evidence to support the determination made." *Id.* (citations omitted).

111. Here, the BSA had to direct the DOB to perform an individualized review of the alleged operational need for the amount of space designation for use of the mechanical

equipment. The fact that the ZR 12-10 does not itself draw a specific line between appropriate and inappropriate amount of floor area claimed for mechanical equipment use, is hardly determinative. The Court of Appeals, analyzing whether a 480-foot radio tower qualified as an accessory use on a university campus, wrote, "The fact that the definition of accessory radio towers contains no such size restrictions supports the conclusion that the size and scope of these structures must be based upon an individualized assessment of need." N.*Y. Botanical Garden v. BSA*, 91 N.Y.2d 413 (1998); *see also Appeal of Paul K. Isaacs*, BSA Cal. No. 151-12-A. The New York County Supreme Court made the same point: "Since there is no specific definition of 'mechanical equipment' in the Zoning Resolution or any definitive finding by DOB on this issue, it demands administrative determination in the first instance." *Educ. Constr. Fund v. Verizon New York*, 36 Misc.3d 1201(A) (Sup. Ct. N.Y. Co. 2012), *aff'd,* 114 A.D.2d 529 (1st Dep't 2014). In other words, the question must be resolved based on the facts of the individual case.

SECOND CAUSE OF ACTION

Petitioners, in the Alternative, Respectfully Demand a Trial of Issues of Fact Pursuant to CPLR §7804(h)

112. Petitioners respectfully submit that they simply cannot get a fair hearing before BSA and DOB, and that, if the Court does not see fit to conclusively dispose of Petitioner's claims by declaring the FAR calculations invalid and subsequently revoking the building permit issued to Extell, it should itself order a trial on issues of fact.

113. CPLR §7804(h) states that, "[i]f a triable issue of fact is raised in a proceeding under this article, it shall be tried forthwith." *See, e.g., ADC Contracting and Const. Corp. v. New York City Dept. of Design and Const.*, 808 N.Y.S.2d 69 (1st Dept. 2006); *Northway 11 Communities, Inc. v. Town Bd. of Town of Malta*, 751 N.Y.S.2d 658 (3rd Dept. 2002); *Bethpage*

Federal Credit Union v. Greco, 137 A.D.2d 816, 525 N.Y.S.2d 279 (2d Dep't 1988); *Kirley v. Dep't. of Fire, City of Oneida*, 526 N.Y.S.2d 240 (3rd Dep't 1988); *Church of Scientology of N.Y. v Tax Commn. of City of N.Y.*, 501 N.Y.S.2d 863 (1st Dept. 1986); *Green v Comm'r of Envtl.. Conserv.*, 463 N.Y.S.2d 574 (3rd Dept. 1983).

114. It is respectfully submitted that a trial of issues of fact is especially indicated here, where BSA reached a stalemate and the Chairperson has endowed upon herself the powers of the entire Board in issuing a written resolution and making findings of fact despite a stalemate vote of the quorum of commissioners concerning the very facts. The Chair has also refused to exercise her administrative powers to develop a full record. The Chair has, without explanation, ignored numerous requests by both Petitioner and commissioners Sheta and Scibetta for disclosure of the mechanical plans for the original building. The Chair has refused to exercise her power of subpoena to call the principal of Extell as a witness to testify concerning true reasons behind Extell's layout of mechanical equipment in the most inefficient and space-consuming way.

115. Because the BSA could not reach a majority vote on the factual dispute over the design of the mechanical space and calculation of FAR deduction, the Court should conduct a *de novo* trial of issues of fact under CPLR §7804(h). *See, e.g.*, *Pantelidis v. New York City Bd. of Standards and Appeals*, 43 A.D.3d 314, 315-316 (1st Dept. 2007) (holding that BSA "could have," and "should have," allowed an applicant to develop a certain record, and that "given [the agency's] refusal to do so, we held that Supreme Court correctly determined to try the issue itself" under CPLR §7804(h); furthermore, that "we do not believe that courts are required to give [an agency] the option of indefinitely prolonging administrative proceedings by repeatedly considering less than all of the factors relevant to an application [for relief]." *See also Newbrand*

v. City of Yonkers, 285 N.Y.164 (1941); *O'Hagan v. Bd. of Trustees, New York City Fire Dep't. Pension Fund*, 402 N.Y.S.2d 391 (1st Dept. 1979); *McDonnell v. Lancaster*, 822 N.Y.S.2d 227 (Sup. Ct. N.Y. County 2006).

116. It is respectfully submitted that, if Petitioners allowed to call its own witnesses, and use subpoena power to compel DOB witnesses to appear, they will be able to demonstrate the validity of its claims, and the invalidity of the Building Permit, to the Court's satisfaction. *See Church of Scientology*, 501 N.Y.S.2d at 863 (acknowledging "the power of the court to order a trial where there is a factual issue relating to the ultimate question-- whether the administrative tribunal acted in an arbitrary or capricious manner").

117. Thus, although Petitioners respectfully submit that they have established that this Court should simply nullify the Resolution and declare the April 11, 2019 building permit invalid, they also respectfully request that, should the Court feel further inquiry is warranted, it should order a trial of issues of fact under CPLR §7804(h).

WHEREFORE the Petitioners respectfully pray to this court for a judgment pursuant to CPLR Article 78:

a. Nullifying and voiding the resolution of Respondent New York City Board of Standards and Appeals in BSA Calendar No. 2019-94-AII, dated November 6, 2020, which resolution denied the appeal of Petitioner LandmarkWest!, Inc. and revoking the building permit issued to Respondent; and in the alternative

b. Remanding this matter back to Respondent New York City Board of Standards and Appeals with instructions to direct Respondent New York City Department of Buildings to conduct an individualized review of the amount of

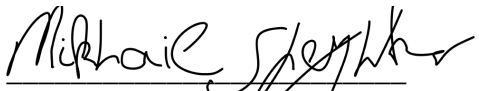
space and floor area necessary for optimal operation of the planned mechanical equipment based on technical operational specifications of the equipment in the most efficient layout of the equipment that does not conflict with any other specifically particularized considerations of mechanical engineering, and adjust FAR deductions accordingly; and in the alternative

c. Ordering a trial of relevant issues of fact under CPLR §7804(h); and

d. For such other and further relief as this Court may seem just, equitable and proper.

Dated: Brooklyn, New York
December 7, 2020

KLEIN SLOWIK, PLLC



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VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

The undersigned, Page Cowley, being duly sworn, states that he is Chair of LandmarkWest!, Inc., a domestic not-for-profit corporation and the Petitioner in the above-captioned proceeding and that the foregoing Petition is true to his/her own knowledge, except as to matters stated therein on information and belief, and as to those matters he/she believes them to be true.

Page Cowley

Sworn to before me this 7th day
of December, 2020.

Notary Public

CHRISTOPHER M. SLOWIK
Notary Public, State of New York
No. 02SL6173097
Qualified in Kings County
Commission Expires August 20, 2023