To Be Argued By:
Jeremy B. Honig
Time Requested: 30 Minutes

APL-2020-00161

New York County Clerk's Index No. 156196/18
Appellate Division, First Department Case No. 2019-3801

Court of Appeals

STATE OF NEW YORK

In the Matter of

WEST 58TH STREET COALITION, INC; 152 W. 58TH ST. OWNERS CORP; SUZANNE SILVERSTEIN; CARROLL THOMPSON; XIANGHONG DI (STELLA) LEE; DORU ILIESIU; and ELIZABETH ILIESIU,

Respondents-Appellants,

against

For Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

THE CITY OF NEW YORK; BILL DE BLASIO, MAYOR OF THE CITY OF NEW YORK; SCOTT M. STRINGER, COMPTROLLER OF THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES ("DHS"); THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION ("HRA"); THE NEW YORK CITY

(Caption Continued on the Reverse)

BRIEF FOR RESPONDENTS-APPELLANTS

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Date Completed: February 19, 2021

DEPARTMENT OF BUILDINGS ("DOB"); STEVEN BANKS, COMMISSIONER OF DHS and COMMISSIONER OF HRA; JACQUELINE BRAY, DEPUTY COMMISSIONER OF HRA; WESTHAB, INC.; NEW HAMPTON, LLC; JOHN PAPPAS; PAUL PAPPAS; B GENCO CONTRACTING CORP.; TMS PLUMBING & HEATING CORPORATION; and BASS ELECTRICAL CORPORATION,

Appellants-Respondents.

STATEMENT PURSUANT
TO COURT OF APPEALS RULE 500.1(f)

Respondents-Appellants, WEST 58th STREET COALITION, INC. and 152 W. 58 ST. OWNERS CORP., as and for their statement pursuant to 22 NYCRR § 500.1(f), hereby state as follows:

WEST 58th STREET COALITION, INC. and 152 W. 58 ST. OWNERS CORP. have no parent corporation and no such parents, subsidiaries and affiliates exist.

Dated: New York, New York
February 22, 2021

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PRELIMINARY STATEMENT

In this Article 78 proceeding, Petitioners West 58th Street Coalition, Inc., 152 W. 58 St. Owners Corp., Suzanne Silverstein, Carroll Thompson, Xianghong Di Stella Lee, Dorn Iliesui and Elizabeth Evans-Iliesiu (collectively the "Coalition") submit this brief in support of its appeal and in response to the City's appeal from an order of the Appellate Division, First Department, entered August 13, 2020, which (1) modified a Supreme Court judgment denying the petition to annul a determination by the City of New York, Bill De Blasio, Scott Stringer, New York City Department of Homeless Services, New York City Human Resources Administration, New York City Department of Buildings, Steven Banks, and Jacqueline Bray (collectively "the City") to open a homeless shelter at the subject property, (2) directed a hearing on whether the Building's use is consistent with general safety and welfare standards, and (3) otherwise affirmed, without costs.

The Appellate Division granted both parties leave to appeal. This brief will respond to the City's opening brief and support the Coalition's appeal. Point I will respond to the City's standing argument. Point II, which supports the Coalition's appeal, will explain the three reasons why the Appellate Division should have granted the Coalition's petition as a matter of law. Point III will respond to the City's argument that the Appellate Division lacked the authority to order a hearing.

The Appellate Division correctly held that the Coalition has standing to challenge the City's determination to open a homeless shelter (the "Proposed Shelter"). The Coalition consists of a group of citizens who reside, work or own property near the Proposed Shelter, including several Coalition members who share a common wall with the Proposed Shelter. The Coalition commenced this proceeding because the City's misapplication of the Building Code and failure to conduct an independent safety determination improperly allowed the Proposed Shelter to comply only with the safety standards in place when the building was constructed in 1910. The unsafe conditions in the non-code compliant building present a considerable risk to the health and safety of the proposed residents, neighbors and surrounding buildings from fire and other catastrophes and will cause an increased demand for fire, police, and medical emergency services.

This injury establishes standing. The Coalition's injury is within the zone of interests or concern sought to be protected by the Building Code, and an injury in fact is presumed – without the need to be pleaded and proven – because of the Coalition members' close proximity to the Proposed Shelter.

Policy considerations further support the Coalition's standing in this unique dispute. If Petitioners are found to lack standing in this unique situation, the City's decision would be rendered unchallengeable since the neighboring property owners are the only ones with the incentive and ability to challenge the City's incorrect

determination. The Owner and Westhab have no incentive to challenge the City because they are profiting from the City's misapplication of the law, while the homeless New Yorkers who will inhabit the Proposed Shelter are in no position to stand up to the City. The City's proposed interpretation of standing would give it unfettered and unchallengeable discretion; but the law, public policy, and common sense demand that adversely affected neighbors have standing to ensure that the City follows the Building Code by challenging decisions that imperil their health and safety and the health and safety of others.

The City also attempts to minimize the harm posed to the Coalition by impugning the motives of individual Coalition members. See City's Opening Brief at 27, 35-36, 52. This underhanded tactic distracts from the City's own lack of transparency as demonstrated by the failure to disclose the Proposed Shelter to the community until *after* the City had already entered a contract with Westhab (A-377). While both sides blame each other for a lack of transparency and cooperation, this dispute is not legally relevant to any of the issues on appeal.

The Appellate Division should have granted the petition as a matter of law for three reasons. First, the Proposed Shelter constitutes a change of use that requires the Proposed Shelter to comply with modern safety standards. A change of use occurs when the new use requires a change in the "Use Group" listed on a building's certificate of occupancy. Here, the Proposed Shelter constitutes a

change to Use Group 3 from Use Group 2, irrespective of whether the residents will reside at the Proposed Shelter for more or less than 30 days.

Second, the Proposed Shelter constitutes a change of occupancy from R-2 to R-1, which independently requires the Proposed Shelter to comply with modern safety requirements. The owner elected to be subject to the current version of the Building Code in filings with the DOB and that selection must apply to the entire Building, rather than particular floors. Further, the City's proposed classification rests on its unsubstantiated prediction that residents will remain in the Proposed Shelter for more than 30 days. However, the City classified an *identical* employment shelter operated by the same not-for-profit (Westhab) with the same name (Rapid Re-Housing Center) in Group R-1, not Group R-2. Having departed from its own prior precedent, the City must explain its reasoning for reaching a different result on essentially the same facts in order to earn the Court's deference. Instead, the City offered no explanation whatsoever, aside from pretextual justifications that were constructed for litigation purposes.

Third, the petition should have been granted as a matter of law because the City did not submit any evidence that it conducted an independent assessment of whether the Proposed Shelter will protect "the safety and welfare of the occupants," as is required if the owner is to be permitted to take advantage of older, less stringent requirements under New York City Administrative Code § 27-

118. The partial Temporary Certificate of Occupancy ("TCO") issued by the City does not establish that the City concluded the Proposed Shelter is safe. The partial TCO, which only applies to a portion of the Proposed Shelter, might show that the City concluded part of the Proposed Shelter is safe, it does not prove that the City's conclusion was rational. Even assuming that the partial TCO establishes that a portion of the Building is safe for occupancy, this creates nothing more than a rebuttable presumption of safety, and that presumption was effectively rebutted by Petitioners' numerous experts through sworn affidavits and compelling documentary evidence establishing that that the Proposed Shelter is actually unsafe. On that basis alone, the Court should affirm the Appellate Division order with respect to the need for a hearing. Further, the City admits that the partial TCO, by its nature, is temporary. See City's Opening Brief at 15, 25. The City plans to issue a final certificate of occupancy provided the Proposed Shelter complies with the Multiple Dwelling Law ("MDL") but will not conduct the independent safety determination required by law. See City's Opening Brief at 15, 25. Indeed, the City argues on appeal that it has no duty, or even the authority, to conduct an independent safety determination. The City's interpretation of the law, however, defies Section 27-118, which demands the City evaluate whether alterations – beyond those required by the MDL – are "necessary to protect the safety and welfare of the occupants."

In light of the City's legal argument that mere code compliance establishes safety and the Coalition's voluminous evidence from safety experts, which describe the Proposed Shelter as a "fire trap" and a "disaster waiting to happen" due to its "dead-end corridors and a single means of egress down a narrow, winding staircase that does not lead directly onto the street (among numerous other safety issues), a hearing is required to determine if the City's tacit decision on safety was arbitrary and capricious or an abuse of discretion. Thus, even if the TCO "embodies" the City's safety determination, questions of fact exist about whether that determination was arbitrary and capricious, which requires a hearing.

QUESTIONS PRESENTED

1. Do the Petitioners have standing?

Yes.

2. Should the Coalition's Petition be granted as a matter of law?

Yes.

3. If the Coalition's Petition cannot be granted as a matter of law, is an evidentiary hearing necessary?

Yes.

STATUTORY FRAMEWORK

To protect the "public safety, health, welfare and the environment," the Legislature enacted the New York City Construction Code, which establishes

"reasonable minimum requirements and standards…for the regulation of building construction in the city of New York[.]" New York City Administrative Code ("NYCAC") § 28-101.2. The Construction Code's current minimum standards for buildings are found in the Building Code. See NYCAC § 28-701 et seq.

The Building Code was originally enacted in 1968 ("1968 Building Code") and codified at Title 27.[1] See NYCAC § 27-101 et seq. The Legislature has periodically revised the Building Code, once in 2008 when it was re-codified at Title 28 and most recently in 2014. See NYCAC § 28-101.4; see generally NYCAC § 28-701 et seq.

The New York City Construction Code includes administrative volumes ("the Code"). See NYCAC, Chapters 1-5 of Title 28 and Articles 1-4 of Chapter 1 of Title 27.[2] The Code establishes, among other things, the interplay between the various versions of the Building Code.

The Code provides that, subject to certain exceptions, "all work shall be performed in accordance with the provisions of [the Building Code]." NYCAC §

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[1] Before 1968, the New York State Multiple Dwelling Law ("MDL") set forth the minimum standards for buildings in New York City. See MDL §§ 2, 3(1); see also Lyons v Prince, 281 NY 557, 562 (1939).

[2] For clarity, this brief will refer to the administrative volume as "the Code" and the Building Code itself as "the Building Code." Citations to the administrative volume will be cited as "NYCAC" followed by the section number. New York City Building Code itself will be cited as "BC" followed by the section number. See BC 101.1 (Title 28, Chapter 7, Article 701, Chapter 1, Section 101.1).

28-101.4. One such exception allows buildings to remain subject to the 1968 Building Code if the owner so chooses. See NYCAC § 28-101.4.3 (the "Current Grandfathering Provision").[3] The Current Grandfathering Provision, however, is subject to a list of exceptions, including a "change of use or occupancy." Id.

If there is no change of use or occupancy, among other conditions and exceptions, the owner can choose to comply with the 1968 Building Code. The 1968 Building Code, however, contains a grandfathering provision of its own (the "1968 Grandfathering Provision"). See NYCAC § 27-118. The 1968 Grandfathering Provision authorizes compliance with the Multiple Dwelling Law ("MDL"), which was enacted in 1929 and allows buildings that existed at that time to comply with pre-1929 safety standards. See MDL § 13. Accordingly, alterations that cause a change in "use or occupancy" preclude the application of both the Current Grandfather Provision and the 1968 Grandfather Provision, and require compliance with the current version of the Building Code. See NYCAC §§ 28-101.4.3.2, 28-101.4.3.5, 27-118.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Owner's Prior Illegal Use of the Building

The Proposed Shelter is to be located at the former Park Savoy Hotel site at 158 West 58th Street in Manhattan (the "Building"). The Building, which was

[3] For consistency, the Coalition will continue to use the term "grandfathering" in this brief, as all parties, including the City, have done throughout this litigation. See, e.g. (A-2043).

constructed in 1910, is a mixed-use, nine-story high rise building owned by New Hampton, LLC ("Owner") and located at 158 West 58th Street in Manhattan (A-169-170).[4] For over twenty years, the Owner had illegally operated a commercial hotel from the Building in violation of its certificate of occupancy (A-189-192), receiving multiple violations relating to its unlawful use of the Building for commercial restaurants and hotel rooms, which was not permitted by the certificate of occupancy (A-628-634).

To legalize the use of the Building, the Owner filed an Alteration Application ("Alt-1") in January 2014 to renovate and convert the existing single-room occupancy Building into a "transient hotel with [a] commercial first floor/cellar" (A-953-958). The Alt-1, which by Owner's admission would have changed the occupancy classification of the Building to Residential 1 ("R-1"), a designation reserved for residential buildings being occupied transiently, indicated that the proposed "alteration is a major change to exits", and a "change in occupancy/use." (A-955). However, the Alt-1 was rejected by the New York City Department of Buildings ("DOB") in November 2016 and subsequently withdrawn (A-954). The Owner nevertheless continued to operate the Building illegally as a hotel, along with unpermitted restaurants on the first floor, until the City

[4] Numbers preceded by "A-" refer to pages of the Appendix.

inexplicably and conveniently gave it a pass once it determined it wanted to operate a shelter from the Building.

B. The Shelter Contract

The New York City Department of Homeless Services ("DHS") seeks proposals for homeless shelter operators to open new sites (A-193-246). In 2018, the City awarded a contract (the "Contract") to Westhab to operate a shelter for 150 adult males at the Building (A-669-820). The Contract provides that the shelter is to be "operated as a temporary shelter and not as a long-term shelter" (A-783).

C. The Owner's Alt-1 Application

To accommodate the Proposed Shelter, the Owner filed a new Alt-1 seeking, among other things, to amend the number of dwelling units in the Building and change the use of the Building from a hotel to a homeless shelter (A-562-566). The Alt-1 Application recognizes that the proposed alteration will result in a "change of use" that is "inconsistent with the current certificate of occupancy" (A-564, A-646-648).

D. The Construction Code Determination Form

On April 6, 2018, the Owner filed a Construction Code Determination Form ("CCD1") requesting approval from the DOB to maintain the existing single means of egress in the Building (A-587-597). Notwithstanding that a building's failure to have at least two means of egress violated the current Building Code requirements,

the DOB inexplicably granted Owner's request to maintain a single means of egress in the Building (A-588).

E. The Petition

On July 2, 2018, the Coalition commenced this Article 78 proceeding by filing a Verified Petition (the "Petition") to challenge the City's determination to open a homeless shelter in the Building. The Coalition demanded, among other things, a permanent injunction barring Respondents from opening the Proposed Shelter and preliminary injunctive relief barring Respondents from opening the Proposed Shelter during the pendency of the action (A-11-92). The Coalition asserted that the decision to open the Proposed Shelter was arbitrary and capricious because the Building is unsafe and does not comply with the Building Code (A-61-64). As a result, the Coalition's members will suffer "considerable risk to health and safety from fire and other catastrophes resulting from the unsafe conditions" at the Proposed Shelter and by "increased traffic congestion, noise, and the increased demand for fire, police, and medical emergency services, as well as reduced property and business values that will result from operation" of the Proposed Shelter (A-26, A-845-846).

The Coalition submitted numerous sworn expert affidavits in support, including several by former high-ranking officials from the New York City Fire

Department ("FDNY"), DOB and DHS attesting to the fact that the Proposed Facility is a "fire trap" and a "disaster waiting to happen" (A-148-174).

1. Affidavit of Robert G. Kruper

Robert G. Kruper ("Kruper") is the president of Kruper Consultants Inc., a consulting firm that specializes in preparing and reviewing fire safety plans and emergency action plans for buildings and hotels in New York City (A-149). Kruper was a member of the FDNY from 1981-2002, serving as a lieutenant in the FDNY from 1990-1998 (A-149). As an FDNY lieutenant, Kruper supervised building inspection activities and enforcement of the New York City fire prevention laws (A-149). Kruper later served as a captain in the FDNY, and company commander of a ladder company where he was responsible for the fire company's overall readiness, staffing, training, policies, and procedures (A-149). Based upon his extensive experience with the FDNY and as a fire consultant, Kruper "is knowledgeable about use and occupancy classifications, as they have an impact on fire safety requirements under the Fire Code" (A-151).

After reviewing the DOB filings for the Building, Kruper concluded that the Building "…is extremely dangerous from a fire safety standpoint…" since, among other things, "…there is only one (1) means of egress from the Building" (A-150). According to Kruper, the Building is a "disaster waiting to happen" and "there is a

significant risk that people will lose their lives if this Building is permitted to open and operate as a homeless shelter" (A-150).

Kruper explained that a single means of egress would be "extremely unsafe" in this Building because "as many as 150 people would all be rushing to the same exit in the event of an emergency, like a fire. Moreover, in the event of a fire, the occupants would have to use as their means of egress the same stairway as any firefighters coming up the stairs" (A-154). In Kruper's expert opinion, "every occupant and neighbor will be in significant danger due to the significant fire safety risks posed by this Building" (A-157).

Kruper further concluded that the "Owner has improperly classified the Building as being in the Residential 2 use and occupancy group R-2 when the Building should be in the Residential use and occupancy group R-1" (A-151). Kruper explained that the Building should be in the R-1 use group in accordance with Section 310.1.1 of the Code because: (a) it is a residential building that will be occupied transiently, (b) the Building is a Class B multiple dwelling as defined by Section 27-2004 of the New York City Housing Maintenance Code and Section 4 of the MDL; and (c) the Building is going to be operated as a homeless shelter by a not-for profit organization (A-151-152).

Further, Kruper notes, Section 405 of the Fire Code specifically addresses emergency preparedness for homeless shelters and "makes it clear that homeless

shelters are properly classified as being in the R-1 use and occupancy group" (A-152). "Sections 405.4.1, 405.4.2, 405.4.3 and 405.5 of the Fire Code all specify that homeless shelters fall under the R-1 use and occupancy classification" and that there is not a single provision in the Fire Code "which applies to a group R-2 homeless shelter, because a homeless shelter is not part of the R-2 use and occupancy group." (A-152).

2. <u>Affidavit of Robert Skallerup</u>

Robert Skallerup ("Skallerup") has been a professional licensed architect for thirty years and served as both Manhattan Borough Commissioner for the DOB from June 2001 until June 2002 and the Deputy Commissioner of Facilities and Management for DHS from 2002 until his retirement in April of 2011 (A-168-169).

As Facilities Commissioner for DHS, Skallerup scouted and approved potential new locations for shelter facilities (A-168-169). In that capacity, he supervised a staff of 250 people for the purpose of "analyzing and inspecting prospective buildings for safety purposes and to assure that they were generally suitable to serve as homeless shelters" (A-168). Skallerup alone had the authority to make the final determination with respect to all proposed facilities (A-168-169).

On at least two occasions, Skallerup made the decision not to approve a proposed facility because the building was unsafe since "the policy during my time

with the DHS was that we would not risk the safety and welfare of future occupants of a building, or the public, in order to open a new facility" even if "there was a shortage of homeless housing capacity at the time (A-169). After reviewing the documents filed with the DOB, Skallerup concluded that the "Building is unsafe and unsuitable to open as a homeless shelter" because, among other things: (a) the corridors are too narrow; (b) the Building contains dead-end corridors; (c) the travel distance to the sole means of egress is too far; and (d) the sole means of egress improperly and illegally exists to the lobby of the Building (A-170).

Narrow Corridors

Skallerup advised that section 1018.2 of the Building Code requires corridors to be 44 inches wide but, according to the floor plans, the corridors in this Building are only 36 inches wide (A-171). Narrow hallways are "a significant safety concern as it will prevent occupants from being able to quickly exit the Building in the event of an emergency as 150 people will be forced to travel through narrow corridors in order to access a single means of egress (A-171).

Dead-end Corridors

Skallerup also concluded that "each floor of the Building has a single stair tower exit located in the middle of the exit corridor, creating a condition called a "dead-end corridor" (A-171). A dead-end corridor is particularly dangerous

because "in the event of a fire, residents on either ends of the corridor will be forced to travel a great distance to reach the stair tower exit" and "if the fire breaks out between the rooms on the end of the corridor and the only stair tower exit located in the middle, the residents in the rooms at the end of the corridor will be trapped, as they will be unable to reach the stair tower exit" (A-171).

Travel Distance to Sole Means of Egress

Skallerup further concluded that the travel distance to the sole means of egress did not appear to meet Building Code standards. Section 1014.3 of the Building Code provides that the travel distance to a means of egress may not exceed 50 feet, and it appears that "the travel distance from the farthest point of the most remote occupied rooms on each floor to the sole means of egress exceeds 50 feet" (A-172).

Sole Means of Egress Exits to the Lobby, not the Street

Finally, Skallerup concluded the Building was dangerous because it had one means of egress that did not exit directly to the street. According to section 1027.1 of the Building Code, every building must have at least one means of egress that exits directly to the street (A-172). In the Building, there is only one means of egress, and that means of egress exits directly to the rear of the Building's lobby, requiring residents to travel through the lobby and out the front door in the event of a fire (A-172). According to Skallerup, "the lack of an exit directly to the street

constitutes a significant safety hazard as there are emergency situations where the residents may not be able to safely exit through the lobby, for example, if the lobby is filled with smoke (A-172). Without a means of egress which exists directly to the street, the residents will be forced to walk through the dangerous condition in the lobby instead of directly to the safety of the street." (A-172).

Partial Sprinkler System

The Owner and the City admit that, the Building is only partially sprinklered because there are no sprinklers in the occupants' rooms (A-172-173; A-1100). A partial sprinkler system is permitted by the MDL but not the current version of the Building Code (A-172-173). Skallerup concludes that the lack of sprinklers in the individual rooms "is a critical omission because that is where fires are most likely to start." (A-172-173).

Conclusion

Skallerup concluded that as former Borough Commissioner and Facilities Manager for DHS, he "never would have accepted this Building as the site of a homeless shelter, nor would [he] have permitted this Building to operate as a homeless shelter in its current condition (A-173). Skallerup added that since his retirement in 2011, he had "not consulted in any litigation", but he "felt compelled to offer [his] services to the Petitioners in this matter" because of "significant concerns about the safety and welfare of the future occupants of this Building, as

well as the public at large, should this Building open as a homeless shelter" (A-170). He felt it was his "duty to share [his] knowledge and experience with the Court to prevent this homeless shelter from opening until the Building is confirmed to be safe." (A-170).

3. Affidavit of Robert Mascali

Robert Mascali ("Mascali") is the former Deputy Commissioner for Operations, Chief of Staff, Assistant Commissioner for Government and Community Affairs and Director of Field Operations for DHS from 1999 to 2007 (A-160). Since leaving DHS, Mascali served as a homelessness expert and consultant for years (A-160).

With respect to the unsafe conditions in the Building, Mascali stated: "In my time at DHS, I would never have allowed a shelter to open with any of the continuing building code and safety issues present at the Shelter. I would have ensured that basic safety issues were remedied…and that the building was up to code, before authorizing the opening of a homeless shelter. Based on my experience, the Building is currently dangerously unsafe for occupation, and is a disaster waiting to happen" (A-166).

F. The Amended Petition

The Coalition filed the Amended Verified Petition (the "Amended Petition"), dated August 6, 2018, along with the supplemental expert affidavit of

Paul G. Babakitis ("Babakitis") and additional exhibits (A-829-917; A-922-962). Babakitis is the founder and Chief Executive Officer of PGB Executive Investigations, Inc. (A-960). On July 29, 2018, Babakitis used a laser to measure the hallways, stairway, and elevator of the Building (A-960-961). According to the measurements, both the stairway and hallways are too narrow according to the current day Building Code requirements (A-171; A-2140; A-2143-2144).

G. The DOB Issues a Partial TCO

On September 4, 2018 – just two days before the City Respondents' opposition to the Amended Petition was due – the DOB issued a partial TCO for the first four floors of the nine-story Building, allowing the Building to house individuals on those floors, even while construction continues on the upper floors (A-118-119).

H. The City's Answer and Opposition

On September 6, 2014, the City answered (A-1065-1090). The City conceded that the Alt-1 Application filed by the Owner specifically represented to the DOB that the work will result in a "change of use" of the Building that is "inconsistent with the current certificate of occupancy." (A-857; A-1072).

In response to the Amended Petition and the OSC, the City argued that the Building was allowed to open despite noncompliance with current Building Code standards because: (a) the Building was grandfathered into pre-1968 standards; and

(b) the Building is safe to occupy solely because the DOB issued a partial TCO for the first four floors (A-2042-2046).

The City did not submit a single sworn statement by any fire safety expert, City official, or FDNY employee to refute the Coalition's expert affidavits that the Building was a "fire trap" or stating that the Building was actually safe for residents and neighbors alike. The only affidavit submitted by the City Respondents that even attempts to address the myriad fire safety issues raised by the Coalition's experts is that of Rodney F. Gittens ("Gittens"), the Manhattan Borough Commissioner for the DOB who is not a fire safety expert (A-2040-2047).

1. Gittens Affidavit

Gittens, the Manhattan Deputy Borough Commissioner for the DOB, is an architect, not a fire safety expert. Gittens confirmed that the DOB issued a temporary certificate of occupancy permitting use of the building's cellar and first through fourth floors (A-2042).

Gittens conceded that: (a) the Building has only one means of egress in violation of the current Building Code; (b) the Building's stairs are too narrow in violation of the current Building Code; (c) the Building has impermissible stair winders in violation of the current Building Code; and (d) the elevator is too small in violation of the current Building Code (A2043-2046). However, Gittens states in

his affidavit that the Building is excused from compliance with these current Building Code requirements because "the building was built in 1910 and has a final certificate of occupancy from 1942" (A-2043). Gittens did not state that a single, narrow, winding staircase for 150 adult men is actually safe (A2040-2047).

Gittens concluded that the Proposed Shelter would not require a change of use and occupancy classification (A-2042). Gittens, however, conceded that he arrived at this conclusion because "according to DHS, residents of this shelter will stay at the shelter for 30 days or more" (A-2042).

2. Affidavit of Jackie Bray

Jackie Bray, who was the First Deputy Commissioner for DHS, conceded that the Building has been used as a single-room occupancy apartment hotel (A-2018). On May 1, 2017, Westhab submitted a proposal to DHS to operate a shelter with 140 beds for single homeless men in the Building (A-2018). Ms. Bray explained that Westhab operates three sites in New York City: "the Willow Avenue Rapid Re-Housing Center and the Bruckner Rapid-Rehousing Center in the Bronx, and the East Corona Rapid Re-Housing Center in Queens" (A-2019). According to Ms. Bray, the Proposed Shelter "will be an employment-focused facility that will serve those who are currently employed, or who are employable and actively seeking employment (defined as those with no demonstrated barriers to employment such as serious mental health or substance use issues who have

previous employment history, show a willingness to actively seek employment or are currently employed)" (A-2019). DHS will prioritize "those from Manhattan, with an emphasis on those from Community District 5 and the surrounding districts" (A-2019). "Westhab will provide Shelter residents with food, laundry services, on-site social services including case management and housing placement assistance, and access to health and mental health services should they need them" (A-2020). But the goal of the Proposed Shelter "is to move every client into the best permanent living solution as quickly as possible" (A-2020).

According to Ms. Bray, the Building needed renovations before it could open. The renovations to first and fifth through ninth floors required a building permit, but the renovations to the second through fourth floors did not (A-2020). The Department of Buildings and Westhab decided to complete the work on the first through fourth floors immediately and to leave the remaining work for a later date (A-2020). Ms. Bray confirmed that the DOB issued a temporary certificate of occupancy for the cellar and first through fourth floors only and that a certificate of occupancy would need to be granted for the fifth through ninth floors before they could be occupied (A-2021).

Ms. Bray also addressed the Building Code use and occupancy classification of the Building. Ms. Bray concluded that the Proposed Shelter "is properly within an 'R-2' occupancy group" because "[b]ased on DHS's

experience, singe adult men in an employment shelter will have a length of stay of over thirty days, making a residential occupancy classification appropriate" (A-2038). Ms. Bray stated that the "average length of stay for a single adult in a particular employment shelter, and in the same bed is well over thirty days" and "experience shows that the sub-population of DHS's single adult clients in employment shelters remain more stable in their shelter placements than those in other types of shelters." Ms. Bray did not offer any statistics or figures to substantiate this claim but, instead offered the following footnote:

> "While DHS endeavors to assist all clients in finding permanent housing as quickly as possible, this process frequently takes longer than 30 days. First, DHS must conduct several assessments of the client to determine the most appropriate pathway to permanent housing, and develop with the client a permanent housing plan. Additionally, the client often must complete several programs in job training and skill development. Finally, the process by which homeless New Yorkers get housing vouchers and rental assistance may take time, notwithstanding they must then find a place to live."

(A-2038-2039).

I. The Coalition's Reply

In further support of the petition, the Coalition submitted the affirmation of Randy M. Mastro (A-2073-2074), which annexed photographs of the lobby of the proposed facility (A2075-2076); the affidavits of John Bongiorno (A-2082-2084)

and Suzanne Silverstein (A-2085-2088); and the supplemental expert affidavit of Kruper (A-2077-2088).

1. Affidavit of John Bongiorno

John Bongiorno ("Bongiorno") was a firefighter with the FDNY from 1977 to 2002, serving as a Lieutenant from 1991until his retirement (A-2083). During his years with the FDNY, Bongiorno participated in fighting approximately 100 fires in high-rise buildings in the City of New York, including the fires inside the World Trade Center on September 11, 2001 (A-2083).

Drawing upon his significant experience fighting high-rise fires in New York City, Bongiorno details the significant challenges that come with fighting a fire in a high-rise building with only a single means of egress as follows:

> (a) "it is significantly more difficult and dangerous to fight a fire in a high-rise building that has only one means of egress than it would be to fight a fire in a building with more than one means of egress" because of the firefighters' "inability to quickly access the fire floor since both the firefighters and the residents will have to share the lone staircase" (A-2083).
>
> (b) "the firefighters, carrying all of their equipment, would be forced to move all the way to one side of the stairway as they climbed the stairs to access the fire floor, while the residents would have to move all the way to the other side as they attempted to exit. A traffic jam in the stairway would be a substantial impediment to the firefighters who are trying to quickly access and fight the fire and the residents who are trying to safely and quickly exit the building. In this particular Building, this issue would be further complicated by the narrow, winding staircase as there would be no room for both firefighters and residents to occupy the staircase at the same time" (A-2083-2084).

(c) "until the residents safely exited the stairwell, it would be difficult for the firefighters to attach a hose to the water supply contained in the standpipe since the standpipe is located in the crowded stairwell. This would further delay the firefighters from safely accessing and fighting the fire" (A-2084).

(d) "rescuing residents trapped on or above the fire floor would be delayed significantly since the firefighters would be sharing the stairwell with all of the other residents in the building who were trying to escape. Every minute matters when fighting a fire. Any delay at all could cause a firefighter, a resident or both to lose his or her life. Having one means of egress all but ensures such a delay" (A-2084).

Bongiorno concluded that he would "never want to fight a fire in a 9-story building that has only one means of egress. It is simply too dangerous" (A-2084).

2. <u>Expert Affidavit of Kruper</u>

Kruper described the City's opposition as "shocking", especially the claim that a single means of egress in a nine-story Building is sufficient (A-2079). Kruper notes that a single means of egress, along with narrow stairs, "was one of the primary causes of over 80 deaths from the catastrophic Happy Land Social Club fire in the Bronx." (A-2079).

Kruper refuted Gittens' unsupported assertion that "where a building's lobby has no uses that would obstruct egress, egress through the lobby may properly be considered a direct street access." (A-2080). Kruper explained that Building Code §1027.1 requires that a means of egress exit directly to the street (A-2080). The City does not cite to any code provision that permits egress through a lobby to

substitute for direct street access because "there is no basis in the Building Code for such claim" (A-2080).

Kruper concluded that "there is nothing in Respondents' opposition papers that alters my conclusions about this Building. This Building is a fire trap, and there is a significant risk that residents, firefighters, and neighbors will lose their lives if this Building is permitted to open and operate as a homeless shelter at this time." (A-2081).

3. Affidavit of Suzanne Silverstein

Suzanne Silverstein ("Silverstein"), the President of the West 58th Coalition, Inc., states that she and other Coalition members worked to identify a safe alternative site for a homeless shelter in their neighborhood (A-2087). The Coalition took the initiative and identified the building located at 500 West 57th Street (the "Alternate Site"), which is just four blocks from the Proposed Facility (A-2087).

The Coalition had discussions with the owner of the Alternate Site, who expressed a willingness to lease the building for use as a homeless shelter for approximately 15% less per year that the Proposed Facility (A-2087). The Alternate Site is an 8-floor building, which includes a walk-out basement and seven residential floors, is currently used for transient drug rehabilitation housing and related services (A-2087). It is properly configured for use as a homeless

shelter and was move-in ready for more than 150 residents (A-2087). The basement level contains a kitchen, laundry facilities, and dining room, and the residential floors are a mix of joint and private rooms (A-2087). The building has an elevator and two stairways (A-2087).

After identifying the Alternate Site as a promising location and having preliminary discussions with the owner, the Coalition proposed the site to City representatives (A-2087). The City, however, refused to meet with the Coalition's to discuss the Alternative Site (A-2087). The Coalition's efforts to find the Alternate Site contrast with the City's mischaracterization of the Coalition as intolerant of the homeless population in general (see The City's Opening Brief at 27, 35-36, 52) and unwilling to have a collaborative discussion (A-2025-26).

J. The City's Supplemental Affirmation

On October 11, 2018, the City filed the supplemental affirmation of counsel, Kathleen C. Schmid ("Schmid"), in further opposition to the Amended Petition. Schmid argued that the Building is not required to comply with the current Building Code requirements due to the grandfathering provisions (A-2090-2098). Yet the City did not state that the Building is safe (A-2086-2099) or submit an expert affidavit to refute the experts' findings that the Building is a "fire trap" and a "disaster waiting to happen" (A-2086-2099).

K. Supreme Court Order

Supreme Court conducted oral argument on the request for injunctive relief (RA-84-124) and denied the request (RA-229-232). Supreme Court, without conducting a hearing, also denied the application and dismissed the Amended Petition (A-9). Contrary to the City's contention, Supreme Court never "conducted a lengthy hearing." See City's Opening Brief at 29.

Supreme Court reasoned that the Building is not required to comply with the current Building Code because the Grandfathering Provisions permit compliance with older safety standards (A-4-10). Supreme Court acknowledged that: (a) the Building does not comply with the current codes; (b) the Coalition's experts established that the Building may be unsafe; and (c) the City failed to present any evidence to refute the Coalition's expert affidavits, yet held that the Building does not endanger the general safety and public welfare because the DOB issued a partial TCO for the Building (A-6-7). The Coalition appealed.

L. Appellate Division Order

The Appellate Division, First Department modified the Supreme Court order and directed a hearing on whether the Building's use is consistent with general safety and welfare standards. The Appellate Division rejected the City's contention that Petitioners lacked standing, explaining that "since petitioners live

within a few blocks of the proposed shelter, they have standing to raise the safety-based objections concerning it" (RA-247).[5]

After addressing this threshold question, the court addressed the Coalition's argument that the grandfathering provisions did not apply because the Proposed Shelter constituted a change of use or occupancy. The court held that the DOB's determinations that the grandfathering provisions applied and that the Proposed Shelter was not a change of use or occupancy (RA-248). The court reasoned that the applicability of the Grandfathering Provisions depended on the City's prediction that residents would remain in the Proposed Shelter for more than 30 days (RA-249-250). The Court deferred to the City's prediction, finding that it was not arbitrary and capricious, based solely on the information in the footnote of Ms. Bray's affidavit (RA-250, A-2038-2039).

[5] Numbers preceded by "RA-" refer to pages of the Respondent's Appendix.

ARGUMENT

POINT I

CONRARY TO THE CITY'S ARGUMENT ON APPEAL, THE COALITION HAS STANDING TO CHALLENGE THE DETERMINATION THAT THE PROPOSED SHELTER IS SUBJECT TO PRE-1929 STANDARDS

The City in its appeal argues that the Appellate Division order should be reversed. According to the City, the Coalition lacks standing to challenge the City's determination that the Proposed Shelter is not subject to the current Building Code and is instead subject to the standards that existed when the building was constructed in 1910. The argument lacks merit because it mischaracterizes this Court's precedent as a means to construct a rule that insulates the City from any judicial review.

A. General Legal Principles

"Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria." Socy. of Plastics Indus., Inc. v County of Suffolk, 77 NY2d 761, 769 (1991). To establish standing, the plaintiff must meet two requirements. First, the injury a plaintiff asserts must fall "within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has

acted." New York State Ass'n of Nurse Anesthetists v Novello, 2 NY3d 207, 211 (2004). Second, "a plaintiff must show 'injury in fact,' meaning that plaintiff will actually be harmed by the challenged administrative action. As the term itself implies, the injury must be more than conjectural." 2 NY3d at 211. To establish an injury-in-fact, the plaintiff must show an actual legal stake in the matter and a cognizable harm that is sufficiently concrete and particularized to warrant judicial intervention. Mental Hygiene Legal Serv. v Daniels, 33 NY3d 44, 50 (2019); see Society of Plastics, 77 NY2d at 772 (1991) and Novello, 2 NY3d at 214.

An injury in fact, however, is not required in all situations. In the land use context, for example, this Court has held that a "property holder in nearby proximity to premises that are the subject of a zoning determination may have standing to seek judicial review without pleading and proving special damages, because adverse effect or aggrievement can be inferred by the proximity." See Matter of Sun-Brite Car Wash, Inc. v Board of Zoning & Appeals of Town of N. Hempstead, 69 NY2d 406, 409-410 (1987); see also Matter of E. Thirteenth St. Community Ass'n v New York State Urban Dev. Corp., 84 NY2d 287, 295 (1994). Indeed, "an allegation of close proximity alone may give rise to an inference of damage or injury…without proof of actual harm." Id. at 414. This Court relaxes the standing requirements in the land use context because such laws "are enacted to protect the health, safety and welfare of the community" and "a person acquiring

premises in a restricted zone may reasonably rely both on the promise the ordinance itself provides and on the fact that the municipality will enforce the ordinance, thereby protecting against diminution in the value of the property by nonpermitted uses." Id. at 412.

B. The Coalition Has Standing To Challenge The City's Determination That The Proposed Shelter Is Subject The Standards That Existed In 1910

Here, a group of citizens who reside, work or own property near the Proposed Shelter, including several members who share a common wall with the Proposed Shelter, started this proceeding to challenge the City's decision to exempt the Proposed Shelter from modern safety standards and allow it to comply with the standards in place when the Building was constructed in 1910 (A-2043). See MDL §§ 2, 3, 13; see also The City's Opening Brief at 9. The City's decision will harm the Coalition's members by creating a "considerable risk to health and safety from fire and other catastrophes resulting from the unsafe conditions" at the Proposed Shelter and "reduced property and business values that will result from operation" of the Proposed Shelter (A-26, A-845-846). The Coalition will suffer this harm because the City improperly applied the Building Code to exempt the Proposed Shelter from modern safety standards and failed to conduct the independent safety assessment mandated by law. See NYCAC §§ 28-101.4.3.2, 28-101.4.3.5, 27-118, 27-120.

This injury establishes standing. First, the Coalition's injury is within the zone of interests or concern sought to be protected by the Building Code. See Novello, 2 NY3d at 211. The Building Code was designed to protect the public safety, health and welfare while maintaining minimum standards for buildings. See NYCAC § 28-101.2. The City's misinterpretation of the Building Code imperils the Coalition members' safety, health and welfare by increasing the "risk to health and safety from fire and other catastrophes resulting from the unsafe conditions" at the Proposed Shelter and by "reduced property and business values" (A-26) resulting from the close proximity to a "fire trap" and a "disaster waiting to happen" (A-150). Thus, the City's injury is within the zone of interests or concern sought to be protected by the very laws the City misapplies. See New York State Ass'n of Nurse Anesthetists, 2 NY3d at 211.

Second, the Coalition need not plead and prove an injury in fact. The Coalition's injury is presumed because of its members' close proximity to the Proposed Shelter. Indeed, many Coalition members share a common wall with the Proposed Shelter (A-842). Others reside a mere 50 feet away, which is far closer than the proximity in other cases where an injury in fact was presumed. See, e.g., Matter of Manupella v Troy City Zoning Bd. of Appeals, 272 AD2d 761, 761-762 (3d Dept 2000) (persons living within 714 feet from homeless shelter had standing). Finally, the Coalition members' close proximity to Proposed Shelter

implies a reliance interest. As this Court has explained, neighboring property owners "may reasonably rely on both the promise the ordinance itself provides and on the fact that the municipality will enforce the ordinance." See Sun-Brite, 69 NY2d at 412. These facts distinguish this case from New York State Ass'n of Nurse Anesthetists where the Plaintiffs were registered nurses challenging New York State Department of Health guidelines, not neighbors in close proximity to property subject to a land use decision imperiling the neighbors' safety and property. See 2 NY3d at 211. Accordingly, the Appellate Division correctly held that the Coalition has standing to challenges the City's misapplication of the Building Code and Zoning Ordinances.

Policy considerations fortify this conclusion. As a practical matter, neighbors are the only ones with the incentive and ability to challenge the City's misapplication of the law. The Owner has no incentive to challenge the City's misapplication of the Building Code because that very misapplication of the law allows the Owner to discontinue its illegal hotel and to save the cost of further alterations. Similarly, Westhab, the operator of the Proposed Shelter, stands to profit from a multi-million-dollar contract issued by City itself. Lastly, the future inhabitants of the Proposed Shelter, homeless New Yorkers who are most at risk, are in no position to challenge the City's determination. Thus, if the Coalition lacks standing in these unorthodox circumstances, the City would enjoy unchecked

authority. The City may prefer standing rules that give it absolute authority, but the law, public policy, and common sense demand that adversely affected neighbors have standing to ensure that the City follows the Building Code by challenging decisions that imperil their health and safety without pleading and proving an injury in fact.

C. The City's Standing Argument Lacks Merit.

To avoid these principles, the City whittles the Coalition's harm down to the risk of a fire that will spread to their residences and argues that this harm is too speculative to warrant standing. See The City's Opening Brief at 36-40. To address the presumption of harm to neighboring property owners, the City mischaracterizes this Court's precedents, claiming they are limited to "environmental impact" and "zoning changes." See id. at 40.

This City is wrong. In Matter of Sun-Brite Car Wash, the Court considered two cases together. The first challenged a variance issued to a neighboring business. The second challenged a building permit issued to a neighbor, which allowed a radio tower to be built. Id. at 410-11. This case had nothing to do with "zoning changes" or "environmental impact," yet Court held that the neighbor had standing. Id. at 415-416. The Appellate Division Departments have also applied this principle beyond "zoning changes." See, e.g., Matter of Committee to Preserve Brighton Beach & Manhattan Beach v Planning Commn. of City of N.Y.,

259 AD2d 26, 28 (1st Dept 1999) (neighbors in close proximity to a public park had standing to challenge a City agency's grant of a "concession" as defined by the New York City Charter § 374(b), for the construction and operation of a privately owned recreation center in a public park because it would interfere with their use and enjoyment of the park).

The cases cited by the City do not alter this conclusion. In Matter of Christian v City of N.Y., for example, a neighbor challenged amendments to 1 RCNY 104-09, which eliminated the requirement of qualifying experience to obtain a license to operate a crane. 139 AD3d 457, 458 (1st Dept), lv. denied, 28 NY3d 903 (2016). The decision does not contain any evidence that the parties disputed whether the petition was entitled to an inference of harm based on proximity, and in any case, the prediction that unspecified injuries would result from eliminating the experience requirement for crane operators was pure speculation. See id.

In Tappan Cleaners v. Zoning Bd. of Appeals of Vil. of Irvington the petitioner's primary challenge to the issuance of a building permit and variance to a neighbor was based on the fear of business competition, which is outside the "zone of interests" meant to be protected by the zoning law (57 AD3d 683, 684 [2d Dept 2008]). The petitioners made only passing reference to safety issues and property value reduction in a letter to the chairman of the zoning board. Those

concerns related to the use of combustible solvents on the neighboring property's dry-cleaning business and, according to the Second Department, were "conclusory and speculative."

By contrast, the Coalition has submitted voluminous evidence of dead-end corridors, one means of egress leading to the lobby rather than the street, narrow corridors, a winding staircase with no platform, absence of sprinklers in the rooms where the residents will sleep, and expert affidavits concluding that these conditions make the Proposed Shelter is a "fire trap" and "a disaster waiting to happen" (A-148-174). These safety concerns are magnified in the context of this Proposed Shelter, where the DOB contemplates the use of modern equipment, such as laundry facilities, offices and an eatery (A-569), in a building that need only comply with the safety standards in place when the Building was constructed over a hundred years ago. See MDL §§ 2, 3, 13. And Coalition members share a common wall with the Proposed Shelter (A-824). When a neighbor shares a wall with a "fire trap" that does not meet modern safety standards, the risk of damage to life, health and property cannot be considered speculative.

The proximity of the Coalition members is especially significant in this particular case, where a unique constellation of factors leaves neighbors of the Proposed Shelter as the only ones to challenge the City's decision to apply safety standards that are a century old as a crass means to achieve a political goal. The

Owner and Westhab have no incentive to challenge the City because they are profiting from the City's misapplication of the law, while the homeless New Yorkers who will inhabit the Proposed Shelter are in no position to stand up to the City. Thus, if the Court finds the Coalition lacks standing, the Court will gift the City unfettered authority to misinterpret the law with impunity. And the merits of this case demonstrate that the City has every intention of doing so.

POINT II

THE APPELLATE DIVISION SHOULD HAVE GRANTED THE PETITION AS A MATTER OF LAW BECAUSE THE PROPOSED SHELTER IS SUBJECT TO THE CURRENT VERSION OF THE BUILDING CODE

For three reasons, the Appellate Division should have granted the petition as a matter of law. First, the Proposed Shelter constitutes a change of use. Second, the Proposed Shelter results in a change in occupancy. Finally, the City failed to establish that it made an independent assessment that this particular shelter has been altered "to such an extent as may be necessary to protect the safety and welfare of the occupants." NYCAC § 27-118. Each fact, by itself, prevents the Owner from taking advantage of the standards that existed in 1910 through the Grandfathering Provisions. Thus, the Petition should have been granted as a matter of law, and the Appellate Division order must be reversed.

A. The Proposed Shelter Is A Change In Use

1. General Legal Principles

The Grandfathering Provisions allow owners to take advantage of older safety standards, but not when alterations result in a change of use or occupancy. See NYCAC §§ 27-118, 28-101.4.3. Both the Current Grandfather Provision and the 1968 Grandfather Provision use the disjunctive, stating that they do not apply if there is a "change in use *or* occupancy" demonstrating that the two words are not synonymous. See NYCAC §§ 28-101.4.3.2, 28-101.4.3.5, 27-118.

The Building Code defines the word "use" broadly as "[t]he purpose for which a building, structure, or space is occupied or utilized, unless otherwise indicated by the text." NYCAC § 28-101.5. Under this broad definition, a change in the "Use Group" established by the New York City Zoning Resolution ("ZR" or "Zoning Resolution") constitutes a change in use for purposes of the Grandfathering Provisions.[6] See ZR §§ 22-11 to 22-15. The Zoning Resolution classifies "the uses of buildings or other structures and the open uses of zoning lots" into Use Groups. See id. at 22-00. A certificate of occupancy specifically identifies a property's Use Group (A-189-192). The Zoning Ordinance permits an owner to changing Use Groups. However, a certificate of occupancy is limited to a

[6] The Zoning Resolution can be found at https://zr.planning.nyc.gov/.

particular use group, and the City considers such a change triggers a "change of use" under the Building Code's grandfathering provisions (A-2043, RA-32).

2. The Proposed Shelter Requires a Change of Use Group

Here, the parties do not dispute that the property's prior use was covered by Use Group 2 (A-2043, RA-32). Converting the Building into the Proposed Shelter results in a change of use because the Proposed Shelter falls under Use Group 3 and is excluded from Use Group 2.

Use Group 2 consists of all "residences" not listed in Use Group 1. See ZR § 22-12. The New York City Zoning Resolution defines "residence" as "one or more dwelling units or rooming units" but excludes "community facility buildings." See ZR § 12-10. In turn, "community facility buildings" are defined as any "use listed in Use Group 3 or 4." Id. Use Group 3 includes "[p]hilanthropic or non-profit institutions with sleeping accommodations." Id. at 12-13. Thus, any non-profit institution with sleeping accommodations is excluded from Use Group 2. Because the Westhab is a non-profit institution providing sleeping accommodations (A-1255, A-1259), the Proposed Shelter falls into Use Group 3 and is excluded from Use Group 2. Thus, the Proposed Shelter constitutes a change to Use Group 3 from Use Group 2 irrespective whether the residents will remain at the shelter for more or less than 30 days. A change of Use Group qualifies as a "change of use" for purposes of the Current and 1968 Grandfathering

Provisions. See NYCAC §§ 28-101.4.3, 27-118. The Proposed Shelter must therefore comply with the current version of the Building Code, and for this reason alone the petition should have been granted as a matter of law.

3. The Appellate Division Order

Despite the clear statutory language, the Appellate Division held that a "structure's classification within a given use group does not control its classification under the Building Code, and vice versa" and concluded that such a change in Use Group "would have no impact on its classification under the Building Code." (RA-255). The Appellate Division, instead, analyzed whether the Proposed Shelter resulted in a change of occupancy code only.

This legal conclusion was error. The Building Code refers to "a change in use *or* occupancy", demonstrating that the two words are not synonymous. See NYCAC § 27-118. Further, the Building Code broadly defines the word "use" as "[t]he purpose for which a building, structure, or space is occupied or utilized, unless otherwise indicated by the text." NYCAC 28-101.5. Thus, a change in Use Group represents an even more significant change than a change of "use" as defined by the Building Code. Accordingly, a change in Use Group, *a fortiori*, qualifies as a "change in use" for purposes of the Grandfathering Provisions.

For this reason, the City never argued that a change in Use Group does not qualify as a change in "use" for purposes of the Grandfathering Provisions (A-

2043, RA-32). Indeed, the City identifies the Use Group on certificates of occupancy (A-1119) and requires owners to identify any changes in Use Group on the application for a work permit (A-1342). Thus, no principled reason exists for the Appellate Division's restrictive definition of the word "use" (RA-255).

The Court also mistakenly held that the City's transience "finding" supports the City's position that no change in Use Group occurred. The definition of "residence" in Use Group 2 includes non-transient housing, but it expressly excludes "community facility buildings" in Use Group 3, such as a "[p]hilanthropic or non-profit institutions with sleeping accommodations". See Zoning Ordinance § 12-10. Since the Proposed Shelter has sleeping accommodations and is run by a non-profit, it is a community facility building, and the City's conclusion about how long residents will remain in the Proposed Shelter is irrelevant. Because the Proposed Shelter constitutes a change of use, the Proposed Shelter must meet modern safety standards, the petition should be granted as a matter of law, and the Appellate Division order must be reversed.

B. The Proposed Shelter Is A Change In Occupancy

The Petition should have also been granted as a matter of law because the Proposed Shelter constitutes a change in occupancy. A change in occupancy occurred for two discrete reasons. First, the owner admitted a change in

occupancy. Second, the City's determination that the Proposed Shelter falls into the R-2 category was arbitrary and capricious.

To determine a change of occupancy, the City agencies look to the "use and occupancy" classifications listed in Chapter 3 of the Building Code. See BC § 301 to 312. The residential classification – identified as "Residential Group R" – contains three categories: Group R-1, Group R-2, and Group R-3. See BC §§ 310.1.1 – 310.1.3. Group R-2 includes "buildings or portions thereof containing sleeping units or more than two dwelling units that are occupied for permanent residence purposes as defined in [NYCAC § 27-2004 (8)(a)]". See BC § 310.1.2. The phrase "permanent residence purposes," as defined by New York City Housing Maintenance Code § 27-2004 (8)(a), consists of an "occupancy of a dwelling unit by the same natural person or family for thirty consecutive days or more[.]"

1. The Owner Admitted A Change In Occupancy

Here, the owner admitted a change of occupancy on the first floor (A-955, A-2044). The City and the lower courts reasoned that the admitted change of occupancy was limited to the first floor because the 1968 Grandfathering Provision allows an owner to choose the standards in the current Building Code for the first floor, but pre-1968 standards for the remaining floors (RA-253); see also NYCAC § 27-118. This conclusion assumes that the Current Grandfathering Provision,

which allows an owner to take advantage of the 1968 Grandfathering Provision in the first place, also allows the owner to choose different standards for different portions of the building.

The Current Grandfathering Provision, however, does not allow an owner to choose different versions of the Building Code to apply to different portions of a building. The Current Grandfathering Provision provides "work on prior code buildings may be performed in accordance with the requirements and standards set forth in the 1968 building code, or where the 1968 code so authorizes, the code in effect prior to December 6, 1968" except that certain portions of the current code apply to "changes of use or occupancy" among other enumerated exceptions. NYCAC § 28-101.4.3(2), (5). This unqualified language stands in contrast to the 1968 Grandfathering Provision, which expressly permits different versions of the Building Code to apply to different portions of a building:

> "if the *alteration of a space* in a building involves a change in the occupancy or use thereof, the *alteration work involved in the change* shall, except as provided for in this section, be made to comply with the requirements of this code and *the remaining portion* of the building shall be altered to such an extent as may be necessary to protect the safety and welfare of the occupants."

NYCAC § 27-118 (b) (emphasis added).

By omitting the same clear authorization from the *Current* Grandfathering Provision, the Legislature signaled its intent for the Current Grandfathering

Provision to give owners two mutually exclusive choices: the current version of the Building Code or the 1968 Building Code (subject to the enumerated exceptions), but not both. If the Legislature had intended a different result, it would have chosen different statutory language. The Legislature knows what language would allow different versions of the Code to apply to different portions of a building because the Legislature chose such language for the 1968 Grandfathering Provision. McKinney's Cons. Law of NY, Book 1, Statutes § 222 ("Legislature is presumed to act with deliberation and with knowledge of the existing statutes on the same subject"). Instead of making the same policy choice when passing the Current Grandfathering Provision, the Legislature made a different policy choice and, accordingly, used different statutory language. See NYCAC § 28-101.4.3 (2), (5).

As a result, the admitted change in occupancy of the first floor of the building precludes the owner from taking advantage the Current Grandfathering Provision. Without the Current Grandfathering Provision, the owner lacks the option to choose to be subject to the 1968 Grandfathering Provision in the first place. See NYCAC § 28-101.4.3. For this reason alone, the Proposed Shelter must meet modern safety standards, the petition should be granted as a matter of law, and the Appellate Division order must be reversed.

2. The City Did Not Submit Sufficient Evidence Of Non-Transience To Earn The Court's Deference

The City's determination that a change of occupancy did not occur because the Proposed Shelter falls into the R-2 category was arbitrary and capricious. The DOB concluded that a change in occupancy did not occur because the "Use and Occupancy Group" of the Proposed Shelter will continue to be R-2. This conclusion was arbitrary and capricious for two reasons. First, the DOB purportedly classified the Building in Group R-2 because DHS predicted the residents of the homeless shelter will reside there for 30 days or more (A-2038-2039, A-2042-2043), and both the majority and the concurrence, to different extents, deferred to this prediction (RA-256, RA-262). The only support for this prediction, however, is the uncorroborated statement from Jackie Bray of DHS, which provides a pretextual justification for this prediction (A-2009-2039). Second, the uncorroborated affidavit does not explain why the City departed from its own precedent by classifying an *identical* employment shelter operated by the same not-for-profit (Westhab) with the same name (Rapid Re-Housing Center) in Group R-1. This analysis will address the error in both the majority and concurring opinions. In refusing to grant the petition, both deferred to the City's prediction that residents of the Proposed Shelter would remain for 30 days or more (RA-237-264).

i. General Legal Principles

Article 78 of the Civil Practice Law and Rules (CPLR) authorizes the petitioner to ask a court to decide whether a determination by a governmental body or officer "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." CPLR 7803(3). When determining if the agency's determination was arbitrary or capricious under CPLR 7803(3), the court's function is to scrutinize the record and determine whether the decision of the administrative agency in question "has a rational basis and is supported by substantial evidence." Byrne v Bd. of Standards and Appeals of City of New York, 5 AD3d 261, 265 (1st Dept 2004) (citing Matter of Toys "R" Us v Silva, 89 NY2d 411, 419 (1996). The arbitrary or capricious test chiefly "relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact." Pell v Bd. of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County, 34 NY2d 222, 230-32 (1974) (internal quotation marks, alterations and citations omitted).

"A decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious." Matter of Charles A. Field Delivery Serv., Inc., 66 NY2d 516, 517 (1985). The purpose of this rule is "to provide

guidance for those governed by the determination made; to deal impartially with litigants; promote stability in the law; allow for efficient use of the adjudicatory process; and to maintain the appearance of justice." Field Delivery Serv., 66 NY2d at 517 (citations omitted); see also Matter of Terrace Ct., LLC v New York State Div. of Hous. and Community Renewal, 18 NY3d 446, 453 (2012).

ii. The City's Prediction About The Residents' Length Of Stay Is Unsupported By The Record And Inconsistent With The City's Past Practices

The only support for the City's determination is the uncorroborated statement from Jackie Bray of DHS (A-2009-2039).[7] According to the affidavit, the shelter "will serve those who are already employed, or who are employable and actively seeking employment" (A-2019). Id. Those who are "employable and actively seeking employment" are "defined as those with no demonstrated barriers to employment such as serious mental health or substance use issues" (A-2019). Id. Ms. Bray predicted: "Based on DHS's experience, single adult men in an employment shelter will have a length of stay of over thirty days…The average length of stay for a single adult in a particular employment shelter, and in the same bed, is well over thirty days. Moreover, experience shows that the sub-population

[7] The City submitted an affidavit from Rodney F. Gittens, the Manhattan Deputy Borough Commissioner for the DOB, but he admitted that his determination about the residents' expected length of stay came from DHS. He thus lacked any personal knowledge about the expected length of stay (A-2042-2043).

of DHS's single adult clients in employment shelters remain more stable in their shelter placements than those in other types of shelters" (A-2038-2039).

Ms. Bray admits that DHS attempts to find permanent housing as quickly as possible but claims the process frequently takes longer than 30 days for three reasons: 1) "DHS must conduct several assessments of the client to determine the most appropriate pathway to permanent housing, and develop with the client a permanent housing plan"; 2) "the client often must complete several programs in job training and skill development"; and 3) the process by which homeless New Yorkers get housing vouchers and rental assistance may take time[.]" (2038-2039).

The Appellate Division should not have deferred to this pretextual explanation. The factors identified in the affidavit – time needed for administration, training, and housing assistance remains – exist for every resident of every employment shelter (2038-2039) and certainly for every resident of the exact same type of employment shelter, a Rapid Re-Housing Shelter. Yet the affidavit does not explain why these factors are specific to the residents served by *this* Proposed Shelter. The absence of any explanation is striking given that this shelter's particular "sub-population", which is stable and "employed or employable", should be able to find housing faster than other sub-populations (A-2019, A-2039). If this uniquely stable homeless sub-population cannot find housing in less than 30 days, it is difficult to conceive of any homeless

subpopulation that could. If the timeline to find housing is similar for the homeless population, one would rationally expect to find numerous other R-2 shelters throughout New York City, but neither party could identify a single R-2 homeless shelter. Indeed, the City classified an *identical* employment shelter operated by the same not-for-profit (Westhab) with the same name (Rapid Re-Housing Center) in Group R-1, not Group R-2. Similarly, Petitioners' experts found several R-1 shelters but could not find a single R-2 shelter in all of New York City (A-152, A-572-586).[8]

Having departed from "its own prior precedent", the City must explain "its reasoning for reaching a different result on essentially the same facts" in order to earn the Court's deference. Field Delivery Serv., 66 NY2d at 517. The City failed to provide any explanation for why this highly politicized homeless shelter is apparently the only R-2 homeless shelter in all of New York City or why this proposed Rapid Re-Housing employment shelter is in a different occupancy group than other Rapid Re-Housing employment shelters. The City's failure to offer any explanation for this disparate treatment undermines the very purpose of agency deference, which is to "'to provide guidance for those governed by the

[8] At oral argument before Supreme Court, the City claimed other R-2 homeless shelters exist but did not submit any evidence. The City also stated that the other homeless shelters were, in any event, irrelevant and outside the record (RA-205).

determination made", "promote stability in the law" and "maintain the appearance of justice.'" Field Delivery Serv., 66 NY2d at 517.

The City could have pointed to other R-2 homeless shelters, if any existed, or submitted the data from DHS to corroborate its naked assertion that residents will occupy the Proposed Shelter for 30 days or more. The City – without any explanation – chose not to do so. As a result, the City turns agency deference on its head, using it to promote administrative tyranny rather than guidance, stability, and the appearance of justice. Field Delivery Serv., 66 NY2d at 517. In this context, the City's pretextual determination that the Proposed Shelter falls in the R-2 category is not entitled to deference.

C. The Petition Should Be Granted As A Matter Of Law Because The City Refused To Submit Any Evidence That It Conducted An Independent Assessment That The Safety And Welfare Of The Occupants Will Be Protected.

Even if the Court disagrees with the foregoing arguments, the Appellate Division should have granted the Petition as a matter of law because the City did not submit any evidence that it conducted an independent assessment of whether the Proposed Shelter will protect the safety and welfare of the occupants, as required for the 1968 Grandfathering Provision to apply. The 1968 Grandfathering Provision provides:

> [I]f the alteration of a space in a building involves a change in the occupancy or use thereof, the alteration work involved in the change shall, except as provided for

> in this section, be made to comply with the requirements of this code and *the remaining portion of the building shall be altered to such an extent as may be necessary to protect the safety and welfare of the occupants*."

NYCAC § 27-118 (b) (emphasis added).

The City contends that the partial TCO demonstrates that the Proposed Shelter is safe. This conclusion is mistaken for several reasons. First, a TCO might show that the City concluded the Proposed Shelter is safe, but it does not prove that this conclusion was rational. The partial TCO, thus, creates nothing more than a rebuttable presumption of safety. See Bd. of Managers of Loft Space Condo. v. SDS Leonard, LLC, 142 AD3d 881, 882 (1st Dept 2016); Cirino by Gkanios v. Greek Orthodox Cmty. of Yonkers, Inc., 193 AD2d 576 (2d Dept 1993); Slomin v. Skaarland Constr. Corp., 207 AD2d 639 (3d Dept 1994). Although these cases involve private party contracts or tort claims, this fact does not obviate the principle that a TCO creates a rebuttable presumption that a building complies with the Code. Considering the multiple, unrefuted sworn affidavits from Appellants' experts explaining the host of life-safety and fire-safety issues in the Building, the Coalition rebutted the presumption created by the TCO.

In any event, the partial TCO was, at best, an incomplete determination. The partial applies only to floors 1-4 (A118-119, A-2024, A-2046) and therefore fails to show the City concluded the other floors will be safe to occupy. Further, the TCO is temporary by its very nature (see City's Opening Brief at 45), and therefore

does not shed any light on the long-term safety of the Building's proposed use. As a consequence, the fire guard requirement of the TCO, though not required by the MDL, is a temporary measure that is required only until the Owner installs all the required sprinklers (A-1795, A-2043).

More fundamentally, the City admits it did not make an independent safety determination. Instead, the City issued the TCO because the Proposed Shelter complied with the Code and the MDL. Indeed, the conditions on the TCO, such as sprinklers, were required by the MDL because the dwelling units have one means of egress; they were not the additional alterations contemplated by Section 27-118. See MDL § 248(4)(b). The City's arguments on appeal confirm it did not perform an independent safety analysis. The City declares that "the question of whether a code-compliant building is safe answers itself: the applicable state and local laws tell us the answer is yes." See The City's Opening Brief at 50.

This argument violates the statutory text of the 1968 Grandfathering Provision. When the Legislature intended to require compliance with the Building Code it used the phrase "made to comply with the requirements of this code" (see NYCAC § 27-118 [a], [b]) or "made in compliance with the applicable laws in existence on such sixth day of December, nineteen hundred sixty-eight" (see NYCAC § 27-118 [c]). But when the Legislature intended something other than mere code compliance, it used the phrase "shall be altered to such an extent as may

be necessary to protect the safety and welfare of the occupants." NYCAC § 27-118 (b); see Matter of DaimlerChrysler Corp. v Spitzer, 7 NY3d 653, 660 (2006) (holding that "[t]he statutory text is the clearest indicator of legislative intent").

The Legislature made the policy choice to require owners to make additional alterations not required by the Building Code for obvious reasons. Two different versions of the Building Code may be incompatible with one another, or the building's intended use combined with its older features may frustrate the primary purpose of the Building Code – keeping occupants safe. NYCAC § 28 101.2. The City's interpretation undermines this purpose and renders meaningless the phrase "shall be altered to such an extent as may be necessary to protect the safety and welfare of the occupants." Id. Because the City failed to submit any evidence that it made an independent determination – separate from code compliance – about the safety of the Proposed Shelter, the City's Petition should have been granted as a matter of law.

POINT III

CONTRARY TO THE CITY'S ARGUMENTS ON APPEAL, THE APPELLATE DIVISION CAN ORDER A HEARING IF THE PETITION IS NOT GRANTED AS A MATTER OF LAW

On appeal, the City argues that the Appellate Division lacked the authority to order a hearing because the TCO "embodied the City's safety determination",

and the Coalition challenges the "permanent features" authorized by the standards in place in when the Building was constructed in 1910. This argument lacks merit.

First, even if the TCO represented the City's safety determination, that determination was, at best, incomplete because the partial TCO did not apply to floors five through nine (A-2042). What's more, the City concedes that it will *not* take safety into account when deciding whether to issue a final certificate of occupancy. According to the City, it will issue a certificate of occupancy if the Proposed Shelter "conforms to the requirements of all laws, rules, regulations and orders applicable to it." See The City's Opening Brief at 15 (quoting City Charter § 645[b](3][d]). And despite praising the safety features imbedded within the MDL, the City further admits that actual compliance with the MDL is not even required. Instead, "substantial" compliance is good enough. See id. Thus, the TCO establishes that the City required substantial compliance with the applicable standards when the Owner altered the Building, but it does not establish that the City considered whether additional alterations were "necessary to protect the safety and welfare of the occupants" as required by Section 27-118.

The City also invokes principles of agency deference, arguing that the rational basis standard supports its conclusion that a hearing is improper. See The City's Opening Brief at 45-48. The standard of review, however, does not prevent a hearing.

Section 7803 (3) allows the courts to decide "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" among other things. See id. at § 561. Section 7804(h) authorizes a trial "[i]f a triable issue of fact is raised." Trials are not uncommon in proceedings under CPLR 7803 (3) to challenge a decision made without the agency's own evidentiary hearing. See CPLR 7803, Practice Commentaries, Vincent Alexander C:7803:2. Indeed, legal experts have observed that the "rationality of the agency's decision cannot be determined until the evidence relied upon by the agency is made known" (id.), and case law is replete with examples of such hearings. See ADC Contracting Construction Corp. v. NYC Dep't of Design and Construction, 25 AD3d 488 (1st Dept 2006); Anonymous v. Comm'r of Health, 21 AD3d 841, 843 (1st Dept 2005); Nodine v. Bd. of Trustees of Vill. of Baldwinsville, 44 AD2d 764 (4th Dept 1974); Pasta Chef, Inc. v. State Liquor Auth., 54 AD2d 1112, 1112 (4th Dept 1976), aff'd, 44 N.Y.2d 766 (1978).

Despite this deferential standard, a hearing is warranted here to ascertain if the City's safety "finding" – to the extent one exists – was arbitrary and capricious or an abuse of discretion. See CPLR 7803 (3). For example, a hearing will reveal what safety considerations, aside from code compliance, the City considered when it concluded that further alterations, such as a second means of egress or a sprinklers in every room, were not necessary to protect the safety and welfare of

the residents at the Proposed Shelter. The Coalition submitted voluminous evidence from safety experts, which describe the Proposed Shelter as a "fire trap" and a "disaster waiting to happen" due to its "dead-end corridors", partial sprinkler system, winding staircase with no platform, and single means of egress that does not lead directly onto the street.

Similar conditions have led to tragedies, and the City should have learned from past mistakes. The 2019 Harlem fire at the Frederick E. Samuel House resulted in four young children and two adults losing their lives to a fire because there were trapped in a building with only one way out. See Coalition's Reply Br. to the Appellate Division at 18. In the 1990 Happy Land Nightclub fire, 87 people lost their lives due to being trapped on the only single narrow staircase due to smoke inhalation (A-2079). In both instances, a second way out of the building would have saved lives. In light of this showing, a hearing is appropriate to determine if the City's tacit decision on safety was arbitrary and capricious or an abuse of discretion. Thus, the standard of review does not insulate the City from defending that decision at a hearing.

Moreover, the City cannot complain about such a hearing because it could have avoided one by providing its justification for finding the Proposed Shelter would be safe. The City, however, made the strategic decision to rely exclusively on code compliance as a proxy for safety and must now accept the consequences of

that litigation strategy. Mitchell v. New York Hosp., 61 NY2d 208 (1984) ("parties to a civil dispute are free to chart their own litigation course").

The City also makes passing reference to the Owner's fire protection plan (A-1094-1116), but the fire protection plan does not establish the Building is safe to be used as a homeless shelter. As an initial matter, the plan states it is for the Park Savoy Hotel (A-1094), not a homeless shelter. Further, this mistitled plan was not "approved" by the New York City Fire Department, as the City argues. See City's Opening Brief at 26. The Fire Department wrote a one-page letter stating it did not object to the plan, but it did not give an "approval" as required by the Fire Code. See NYCAC 28-109.1. The no-objection letter rested on the false assumption that the Building's use would fall into the R-1 occupancy group, not the R-2 occupancy group listed on the plan. These errors are unsurprising given that the Fire Department did not conduct a physical inspection. More fundamentally, the no-objection letter does not state that the building is safe, and it does not cast any doubt on the Coalition's experts who explain, in detail, the dangerous features of the Proposed Shelter. If the no objection letter tells us anything at all, it is that a hearing is needed to determine the basis for the City's determination, if one occurred at all, that the Building is safe to operate as a homeless shelter without further alterations. The Appellate Division recognized this fact and correctly ordered a hearing. To the extent the Appellate Division

exercised its direction in ordering a hearing, that discretionary determination is unreviewable by this Court, except for a "substantial…abuse as a matter of law" or "the exercise of its discretion is so outrageous as to shock the conscience." See, e.g., Matter of Von Bulow, 63 NY2d 221, 225-226 (1984); Arthur Karger, The Powers of the New York Court of Appeals at 16:4.

The City also contends that a hearing should not have been ordered because the Coalition challenges only "permanent features" that comply with MDL standards, many of which were set over a hundred years ago. See MDL § 13. Section 27-118, however, does not distinguish between "permanent" and "changeable" features, and the record does not contain any evidence that the dangerous conditions at the Proposed Shelter are "permanent." Further, Section 27-118 commands that "the building shall be altered…as may be necessary to protect the safety and welfare of the occupants" if the owner wishes to take advantage of earlier, less stringent standards. NYCAC § 27-118 (b). The City can characterize dangerous conditions as "permanent features", but the Legislature has already decided that the distinction between permanent and changeable features is not relevant. By contrast, protecting the "safety and welfare of the occupants" was the Legislature's primary concern when allowing owners to take advantage of standards set established in nearly one hundred years ago. Having failed to submit any evidence, other than the TCO, to establish the basis for the City's safety

determination, the City cannot complain about defending its decision-making process at a hearing.

CONCLUSION

For the reasons set forth above, the Court must (1) reverse the order of the Appellate Division, First Department, entered August 13, 2020, with costs, and (2) grant the petition, as a matter of law, enjoining the Respondents from using the Building as a homeless shelter until all code issues identified in the Verified Petition are resolved in accordance with the current version of the Building Code. In the alternative, the Court should affirm the Appellate Division order in its entirety.

Dated: February 22, 2021

Yours, etc.
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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 500.13(c) that the foregoing brief was prepared on a computer.

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Dated: February 22, 2021

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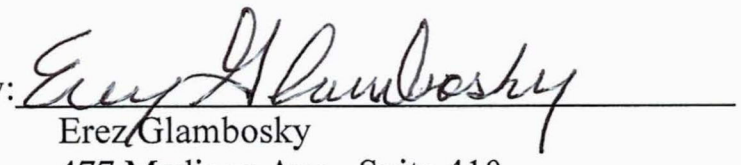
By: 

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Dave Jackson, Being duly sworn, deposes and says that deponent is not party to the action, and is over 18 years of age.

That on 2/19/2021 deponent caused to be served 3 copy(s) of the within

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