APL-2020-00161

To be argued by:
BARBARA GRAVES-POLLER
15 minutes requested

Court of Appeals
State of New York

In the Matter of

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

Respondents-Appellants,

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

against

THE CITY OF NEW YORK; BILL DE BLASIO,
Mayor of the City of New York;

(*caption continued on inside cover*)

Appellants-Respondents,

RESPONDING/REPLY BRIEF FOR THE MUNICIPAL APPELLANTS

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March 19, 2021

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

Appellants-Respondents,

and

WESTHAB, INC.,

Respondent.

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PRELIMINARY STATEMENT

This case is an object lesson in how, absent judicial vigilance, pretextual litigation can bring crucial public initiatives to a halt. Petitioners' brief confirms that they cannot trace a concrete injury to the challenged governmental action—much less one that falls within the zone of interests protected by the provisions of the Building Code on which their case rests. This proceeding should have been dismissed on threshold grounds long ago, enabling the shelter to open its doors and advance the public interest.

On the merits, too, petitioners' brief reinforces the case's many fundamental infirmities. Petitioners ignore binding authority on the deference owed to administrative determinations and side-step the ample basis for the finding of the Department of Buildings (DOB) that the temporary and conditional use of the building would not jeopardize safety. Nor do petitioners' misplaced arguments about how the building has been classified provide any justification for the lower court's half-deference. This Court should dismiss or deny the petition.

REPLY POINT I

PETITIONERS' BRIEF REINFORCES THAT THIS LITIGATION FAILS ON THRESHOLD GROUNDS

At every turn, petitioners' brief confirms that they have failed to carry their burden to establish that they have standing to pursue this case. Standing requirements may be relaxed, but they are not the nullity that petitioners seem to believe they are.

To begin, petitioners do not dispute that, to try to justify their failure to exhaust administrative remedies, they expressed doubt about whether they had standing to bring an administrative challenge (*see* Br. for the Municipal Appellants ("App. Br.") 35). Yet petitioners never explain how they could have standing to pursue this suit if they lacked standing on the administrative level. Petitioners offer no principled distinction between standing in the two arenas. By citing their lack of standing as a reason to give them a pass on administrative exhaustion, petitioners have only underscored that they lack standing here too.

Petitioners were right to express doubt about their standing. As an initial matter, petitioners have not articulated how their

professed concerns fall within the zone of interests protected by any of the provisions of the Building Code on which their case depends. Of the two categories of alleged injuries that petitioners mention—(i) diminished property and business values and (ii) the threat of spreading fire (Br. for Respondents-Appellants ("Resp. Br.") 32)—petitioners reference the first only in passing, without even claiming that such economic risks are protected by the Building Code (or, for that matter, providing so much as a description of any specific threat faced by a property or business).

What remains is petitioners' contention about the "risks of spreading fire" (Resp. Br. 36).[1] On this score, petitioners argue they satisfy the zone-of-interests test because the Building Code—as a general matter—is "designed to protect the public safety, health, and welfare" (Resp. Br. 33). Petitioners misunderstand their burden. The entire point of the zone-of-interest test is to weed out litigants "whose interests are only marginally related to … the purposes of the statute," and it is for this reason that a

[1] One can only guess what petitioners have in mind by other unspecified "catastrophes" (Resp. Br. 32).

litigant must situate an injury within the specific "statutory provision under which the government agency has acted." *Soc'y of Plastics Indus. v. Cnty. of Suffolk*, 77 N.Y.2d 761, 773, 774 (1991); *accord Matter of Mental Hygiene Legal Serv. v. Daniels*, 33 N.Y.3d 44, 51 (2019). Petitioners do not even try to make this more particularized showing.

Nor could they. On the one hand, petitioners point to provisions of the Building Code governing a property owner's interest in using and renovating its own property—not the interests of anyone who happens to live nearby (*see, e.g.*, Resp. Br. 39 (citing Admin. Code § 28-101.4.3, describing choices made "at the option of the owner," and Admin. Code § 27-118, describing "the costs of alterations" chosen by an owner)). On the other hand, petitioners fundamental complaints are about building features, like the means of egress and the width of corridors, that are obviously about affording building occupants and users a safe path through and out of the building—not preventing a fire from spreading to neighbors (*see* Resp. Br. 16–18).

And so, petitioners resort to "policy considerations" (Resp. Br. 34). Recognizing that other than the building's owner it is the shelter residents who would have a real interest here, petitioners profess to stand in the shoes of the "homeless New Yorkers who are most at risk," on the theory that these individuals "are in no position" to protect their own interests (Resp. Br. 34). That is an audacious claim considering petitioners' disparaging views of shelter residents (*see, e.g.*, A-855).[2] But the more basic point is that petitioners cannot avoid showing a cognizable interest of their own by raising "the legal rights of another." *Soc'y of Plastics*, 77 N.Y.2d at 773.

Not only have petitioners failed to identify an interest protected by the relevant statutory provisions, they have not shown an injury in fact: a direct and immediate harm. *Matter of*

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[2] New Yorkers experiencing homelessness are also more than capable of vindicating their own rights. *See, e.g.*, *McCain v. Koch*, 70 N.Y.2d 109 (1987); *Downtown New Yorkers, Inc. v. City of N.Y.*, 2020 N.Y. Slip Op. 33891[U] (Sup. Ct., N.Y. Cnty. Nov. 24, 2020). Indeed, the City's obligation to provide emergency shelter arises out of litigation brought by such individuals. *See Callahan v. Carey*, 307 A.D.2d 150 (1st Dep't 2003). Moreover, Coalition for the Homeless, the very organization that represented homeless litigants in *Callahan,* intends to seek this Court's permission to file an amicus brief opposing petitioners' efforts to block the Westhab shelter from opening.

Acevedo v. N.Y. State Dept. of Motor Vehs., 29 N.Y.3d 202, 218 (2017). Petitioners do not seriously dispute that the authorized temporary use poses no imminent risk of a fire breaking out in the building and threatening adjacent properties. Indeed, they do not deny that the round-the-clock presence of fire guards (A-2045), the removal of the restaurant on the first floor (A-2020), and the first-floor sprinkler upgrades (*id.*) *enhance* the building's safety profile. The building is safer now than before.

Rather than engage on this terrain, petitioners speculate about the hypothetical future use of parts of the building that DOB has not approved for occupancy (Resp. Br. 55). This is at best a gesture to the possibility of future harm dependent on future action, not a showing of direct and immediate harm. And even as to that hypothetical future, petitioners are ultimately left with nothing more than conjecture that the building's fire-safety

measures and fire-safety plan will fail (A-1094–1117).[3] That remote possibility is too speculative to constitute an injury-in-fact.

All of which helps explain why petitioners are so insistent that they need not establish an injury in fact (Resp. Br. 33). But petitioners misapprehend the principles governing land-use and environmental challenges that they seek to import and extend here.[4] In such challenges, this Court requires "special harm"—"injury that is in some way different from the public at large"—because the governmental action can have such sweeping impact that it "may aggrieve a much broader community." *Soc'y of Plastics Indus.*, 77 N.Y. 2d at 774–75. Otherwise, courts will be left with an unwieldly class of litigants with diffuse interests. And "proximity" operates either as an exception to the "special harm"

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[3] Petitioners' speculation is also flawed on its own terms. It relies on false analogies to tragedies that occurred in high-rise buildings and nightclubs that bear no resemblance to this building or its intended use as a shelter (*compare* Resp. Br. 55, *with* A-2079, 2083–84). And petitioners mistakenly assume that the building will be used transiently, even where such use would contradict any certificate of occupancy—an assumption that is at odds with the evidence of administrative vigilance in this case (*see, e.g.*, A-954, 955).

[4] Although petitioners at one point raised land-use and environmental challenges, they have since abandoned them (*see* App. Br. 28).

requirement or a means to satisfy it.[5] *See generally Matter of Save the Pine Bush, Inc. v. Common Council of City of Albany*, 13 N.Y.3d 297, 309 (2009) (Pigott, J., concurring) (explaining how proximity is an exception to the "special harm" requirement). In that context, proximity is a filtering mechanism: a way for a litigant in a land-use or environmental challenge to show that it will face harm "that is in some way different from that of the public at large." *Soc'y of Plastics Indus.*, 77 N.Y.2d at 774.

The situation is the inverse here, where petitioners' claims are targeted not just at a single building, but a handful of its interior features. Things like the width of a single building's corridors are not assumed to have community-wide impact (*see* App. Br. 15–17), and so there is no need for a "special harm" rule to begin with, let alone a "proximity" presumption. The problem with such a discrete challenge lies not in separating the wheat from the chaff, but rather in ensuring that a litigant who neither

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[5] Even then, "[t]he status of neighbor does not … automatically provide the entitlement, or admission ticket, to judicial review in every instance." *Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals*, 69 N.Y.2d 406, 414 (1987).

owns nor uses the subject building has any concrete interest to speak of. Notably, petitioners have failed to cite a single case in which a litigant was presumed to have standing to challenge how the government has applied building code standards to the internal features of a neighbor's building. There is simply no reason to afford petitioners the benefit of a proximity rule designed for another purpose, when doing so would only proliferate pretextual lawsuits like this one.

REPLY POINT II

PETITIONERS FAIL TO JUSTIFY THE LOWER COURT'S HALF-DEFERENCE

Petitioners devote scant attention to the "extremely deferential" standard that governs this proceeding. *Matter of Beck-Nichols v. Bianco*, 20 N.Y.3d 540, 559 (2013). It is hardly a surprise. Where, as here, a litigant challenges agency action that "involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn," a court must defer to the agency's rational judgment—*not* equate that judgment with a litigant's competing views. *Matter of Peyton v. N.Y. City Bd. of Stds. & Appeals*,

___N.Y.3d___, 2020 N.Y. Slip Op. 07662, at *3 (2020). But the First Department, led astray by petitioners, did the latter in remanding for a hearing on "competing evidence," where the trial court would weigh their claims against the findings of DOB.

A. Petitioners concede that DOB is charged with assessing safety and identify no safety issue directed specifically at the building's authorized temporary use.

To be clear, petitioners concede that DOB, not a court, bears responsibility for determining whether the building's temporary use would jeopardize safety (*see, e.g.*, Resp. Br. 53, 55–57). This is not an area that permits debate. The City Charter empowers DOB to issue a temporary certificate of occupancy when it finds that "such temporary occupancy or use would not in any way jeopardize life or property." City Charter § 645(f).

Petitioners, however, never actually confront the specifics of DOB's determination concerning the building's temporary use. Setting aside their impractical expectations for elaboration in a temporary authorization arising out of on-the-ground observations

(Resp. Br. 51–52),[6] petitioners do not dispute that DOB considered the building's history, renovation plans, and intended use—as the First Department itself found (*see* RA-248–56). Petitioners do not dispute our points about how the first-floor renovations and the various conditions imposed by DOB improve the building's safety profile during the authorized temporary use (*see* App. Br. 19, 22, 25–27). And petitioners do not dispute that the authorized temporary use is subject to periodic review, enabling DOB to reassess the situation should circumstances change (*see id.* at 26).

Indeed, petitioners never even claim that the conditions that DOB placed on the building's temporary use—limiting occupancy to particular floors and requiring round-the-clock fire guards—leave any specific risks unaddressed. Petitioners' silence on these issues is remarkable, given the First Department's ruling is all about the temporary certificate of occupancy (*see* RA-256–57 (citing City Charter § 645(b)(3)(f) and Admin. Code § 28-118.15,

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[6] Temporary certificates of occupancy require on-site inspections, coupled with review of forms and supporting documents, such as architectural drawings and blueprints. *See* DOB, *Certificate of Occupancy Worksheet*, available at https://perma.cc/CLG9-J2MJ (captured on Mar. 11, 2021).

which govern temporary certificates of occupancy). The absence of argument from petitioners should settle the question of whether DOB rationally authorized the building's temporary use.

The best petitioners can do is poke at the building's comprehensive fire protection plan (A-1117). But despite their claims (*see* Resp. Br. 58–59), the plan was approved by the FDNY under normal procedures, and it accurately described the building (*see* A-1096 (listing R-2 classification); RA-158–65 (describing plan and FDNY approval process)). In any event, there is no dispute that the owner must comply with the fire protection plan, and petitioners never say why the plan's substance does not support the rationality of DOB's safety determination.

This record also reflects DOB's vigilance in requiring Building Code compliance. As petitioners' own brief notes (*see* Resp. Br. 9), the agency has not hesitated to issue appropriate violations or stop work orders when building conditions or renovations fell short of code requirements (A-625–37). And when the owner attempted to seek DOB's approval to use the building as a transient hotel, a use inconsistent with its certificate of

occupancy, the agency denied that application (A-954). Since the record demonstrates DOB's watchful oversight before and during renovations, it lends no support to petitioners' attempt to second-guess DOB's authorization of the building's temporary use.

B. Petitioners' demand for an "independent" assessment of the safety of legislatively authorized features is misplaced.

Against this backdrop, petitioners contend that DOB was obligated to conduct an "independent" assessment of the building features they claim present a risk of spreading fire: the stairway, corridors, and means of egress (Resp. Br. 51–54). But there is no dispute that DOB was well aware of these features when it issued the temporary certificate of occupancy. Since there was a rational basis for DOB to authorize the building's temporary use, for the reasons explained (*supra* Reply Point II.A), petitioners' argument about the need for an "independent" assessment leads nowhere.

In any case, petitioners do not dispute that their complaints are directed to the very nature of these building features, because there is nothing special about the building's temporary use, as compared to its long-term use, when it comes to such features (*see*

App. Br. 48). And petitioners do not dispute that all of these features are legislatively authorized if the building is properly classified (*see id.* at 51), a point we address below (*see infra* Responsive Point).

Nonetheless, petitioners claim that DOB had to perform a free-form, "independent" analysis of the challenged features. But as this Court has explained, legislatures are responsible in the first instance for specifying which "standards of safety should be required for multiple dwellings." *Lyons v. Prince*, 281 N.Y. 557, 563 (1939). And the Building Code directs DOB to issue a *final* certificate of occupancy when a building substantially complies with "with all retroactive requirements of the 1968 Building Code." Admin. Code § 28-118.3.4.1. If the challenged features would be no obstacle to the issuance of a *final* certificate of occupancy provided the building has been properly classified—a point petitioners must concede (*see* App. Br. 50–52)—we are left to wonder why the same features, used in the same way, should have more significance for a *temporary* certificate of occupancy.

The law anticipates that older buildings like this one will conform to the 1968 Building Code. *See* Admin. Code § 28-101.4.4. Contrary to petitioners' view, DOB is not at all derelict in its duty when it authorizes a building's use and occupancy "based only on compliance with a conventional Building Code." *Atl. Beach v. Gavalas*, 81 N.Y.2d 322, 326 (1993). And while petitioners quibble with the notion of "substantial compliance" (*see* Resp. Br. 55), that is indeed what the law requires. *See* Admin. Code § 28-116.2.4.1.

To be sure, as petitioners note (*see* Resp. Br. 53–54), the 1968 Building Code provides that, when alterations effectuate a change of use or occupancy to one space within a building, "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." Admin. Code § 27-118(b). But this is not, as petitioners seem to believe, a maxim that whenever alterations are done to a discrete space within a building, every feature in the remainder of the building must be assessed for safety according to some rudderless standard. It is just a recognition that when renovations to one space compromise the building—in terms of its

structural integrity or similar characteristics—DOB may require corresponding adjustments to be made to the remaining spaces. The current code reflects the same concern that alterations—even ones undertaken under the most up to date standards—can have negative effects. *See* Admin. Code § 28-101.4.4.

But petitioners do not contend that the renovations to the first floor of the building—in connection with the conversion of that space from a restaurant to a lobby—undermine the safety of the remainder of the building. They challenge the very nature of building features that existed before and after the renovations. It bears emphasis, the work performed on the first floor—the sprinkler system upgrades and removal of restaurant facilities—*enhanced* the building's overall safety profile. If anything, performing the substantial structural work that petitioners demand—by increasing the width of corridors and creating a second exit—might trigger structural integrity issues that undermine, rather than aid, building safety.

Setting all of that to one side, the simple fact is this record is more than sufficient to conclude that DOB had a rational basis for

finding that the building could be safely used and occupied. There is no legal basis for petitioners' proposed "independent" safety assessment, and it does not change the outcome regardless.

C. Petitioners have no defense for the lower court's order remanding this case for a fact-finding hearing on "competing evidence."

In the end, petitioners' brief never brings the real target of their challenge into focus. Since the record is clear that DOB carefully inspected the building and imposed various conditions to ensure the building's use would be safe, it strains credulity to claim that DOB's authorization had no rational basis. And it bears repeating that the First Department made no such finding (*see* RA-250–53). Instead, the court found that "competing evidence" required a fact-finding hearing on whether the building's use would jeopardize safety within the meaning of the City Charter and Administrative Code provisions governing the issuance of temporary certificates of occupancy (RA-256–57 (citing City Charter § 645(b)(3)(f); Admin. Code § 28-118.15)).

Petitioners have no justification for this maneuver. In a single paragraph, they posit that a temporary certificate of

occupancy "merely creates a rebuttable presumption that a building complies with New York City law" (Resp. Br. 52). In support, petitioners rely exclusively on three decisions of the Appellate Division that they concede did something entirely different from what they ask the Court to do here, applying an evidentiary presumption to resolve "private party contracts or tort claims" (*id.*) rather than reimagining article 78 review to make agency determinations little more than a prelude to contested judicial hearings. At the same time, petitioners never acknowledge the Court's observation, in a far closer context, that a "common-law presumption" has "no role to play" in article 78 review. *Matter of Infante v. Dignan*, 12 N.Y.3d 336, 340 (2009). The bottom line is that petitioners make no serious attempt to square their rebuttable presumption with bedrock principles of article 78 review (*see* App. Br. 45–48).

A hearing in an article 78 proceeding is appropriate under rare circumstances, like when there is reason to believe agency action was motivated by unlawful animus. *See, e.g.*, *Matter of Anonymous v. Comm'r of Health*, 21 A.D.3d 841, 844 (1st Dep't

2005) (hearing ordered to evaluate allegation of unlawful retaliation underlying administrative action). But a hearing is not an opportunity to weigh an agency's rational determination against so-called "competing evidence," essentially allowing a judge to question the soundness of an agency's decision and usurp the agency's core statutory authority. *Cf. Toys "R" Us v. Silva*, 89 N.Y.2d 411, 424 (1996) ("Courts may not weigh the evidence" or reject an agency's rational choice "where the evidence is conflicting."). This Court has long held that once a reviewing court finds that an agency action has a rational basis, the judicial function in an article 78 proceeding reaches its end. *See Sullivan County Harness Racing Ass'n v. Glasser*, 30 N.Y.2d 269, 277 (1972). Petitioners offer no justification for a remand order that flies in the face of that well-established principle.

RESPONSIVE POINT

PETITIONERS' ARGUMENTS ABOUT CLASSIFICATION DO NOT WARRANT A DIFFERENT RESULT

Without raising any serious question about the rationality of DOB's decision to authorize the building's temporary use, petitioners complain that DOB has misclassified the building. But petitioners' three core arguments on this issue fundamentally misunderstand the record, the law, or both, and their position would have serious negative consequences if it were accepted.

A. Petitioners fail to show that it was irrational for DOB to find that the building's "use" under the Building Code would not change.

As explained in our opening brief (*see* App. Br. 12), a change in "use" under the Building Code requires compliance with current standards. While petitioners invoke this concept, they distort it. They argue that any change in a building's "use group," a classification under the Zoning Resolution, necessarily constitutes

a change in "use" under the Building Code (Resp. Br. at 39–42).[7] But petitioners misapprehend not one but two statutes.

The Zoning Resolution and the Building Code are distinct statutes crafted for distinct purposes. As the First Department observed, the Zoning Resolution's "use groups dictate only where different types of structures are permitted as-of-right" as a matter of zoning and, therefore, do not control a building's classification under the Building Code (RA-255). Remarkably, petitioners acknowledge that the Building Code contains its own "use" definition (*see* Resp. Br. 41), yet they never claim that a change of use occurred within the scope of that definition.

Rather, petitioners maintain, without citing any relevant Building Code text, that a Zoning Resolution "use group" governs Building Code classifications. Their attempt to graft one statute's definitions onto another violates basic principles of statutory

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[7] Insofar as petitioners suggest that we have conceded a change in use and occupancy (Resp. Br. 17), they misrepresent our position. We have always maintained that the *first floor* will undergo a change in use (A-2020); that is why DOB required the first-floor alterations to conform to current standards (*see* App. Br. 19). We have consistently disputed petitioners' claim of a broader change in use and occupancy.

interpretation. *See Matter of N. v. Bd. of Examiners of Sex Offenders of State of N.Y.*, 8 N.Y.3d 745, 751–52 (2007) (rejecting conflation of terms in "distinct legislation enacted in separate statutory schemes that fulfill different functions"). When the drafters of the Building Code intended to incorporate terms from the Zoning Resolution, they did so explicitly.[8]

B. Petitioners fail to show that it was irrational for DOB to find that the building's future "occupancy" would not change either.

Petitioners fare no better when it comes to "occupancy"—another characteristic that, when changed, requires compliance with current standards (*see* App. Br. 12). The question here is whether the building would be occupied non-transiently (as DOB found) or transiently (as petitioners claim). Abandoning their core strategy below (RA-113–18), petitioners do not contest the First

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[8] *See, e.g.*, Admin. Code § 28-103.25 (referencing "applications for new construction of or conversions to transient hotels, as defined in the zoning resolution"); Bldg. Code. § 1101.3.1 (identifying "a change in the zoning use group of such space in accordance with the New York City Zoning Resolution" as grounds for implementing new accessibility standards); Bldg. Code. § 1206.2 ("Yards shall not be less than the dimensions prescribed by the Zoning Resolution").

Department's finding that DOB rationally defined non-transient occupancy to mean stays of 30 days or more (RA-252). Instead, petitioners contend there was no rational basis for DOB to conclude that shelter residents' stays would, as a factual matter, generally meet or exceed 30 days (Resp. Br. 46–51).

Petitioners take aim at the affidavit of Jackie Bray, Deputy Commissioner of the Department of Homeless Services, as cursory or unbelievable (Resp. Br. 47–48).[9] But just by describing the Bray affidavit—an exercise that spills over two pages in their brief—petitioners highlight how thorough the affidavit is. There is no avoiding it: the affidavit provides a detailed account of why employment shelter residents typically remain in place for 30 days or more (A-2009–39), explaining, for instance, that (i) DHS must "conduct several assessments of the client" and develop a "permanent housing plan" and (ii) residents must "complete

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[9] Petitioners also mention (without argument) a reference to "temporary shelter" in the shelter operator's contract (Resp. Br. 19). But all DHS facilities offer "temporary shelter" in this sense because DHS does not oversee the "long term" facilities, like adult homes or supportive housing, described in the Social Services Law. *See generally* Soc. Svcs. Law § 460, *et seq*. That hardly means that all DHS facilities are occupied non-transiently within the specific meaning of the Building Code.

several programs in job training and skill development" (A-2038–39). In other words, Bray did not simply aver that residents would remain for more than 30 days; she outlined the basis for the City's projections. That predictive judgment is entitled to deference. *Cf. Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 1994) (holding, in addressing constitutional challenge to legislation, that "courts must accord substantial deference to predictive judgments").

Otherwise, petitioners suggest that the City had an obligation to "explain" why its analysis of shelter residents' stays departed from supposed administrative "precedent" (*see* Resp. Br. 50). But occupancy determinations are inherently building specific; and the City has never articulated a universally applicable policy requiring all buildings that house employment shelters to be classified as non-transient, even if the structure already meets higher safety standards for transient occupancy. *Cf. In re Charles A. Field Delivery Serv.*, 66 N.Y.2d 516, 521 (1985) ("when an agency determines to alter its prior stated course it must set forth its reasons for doing so"). Petitioners never explain

what follows from their argument when there is a rational basis for DOB's determination in this case.

Here, as the First Department concluded, the owner of an existing building with an R-2 classification (denoting non-transient use) applied for and received a temporary certificate of occupancy that allowed the building's non-transient use to continue, consistent with DHS's projections. Nothing requires DOB to interrogate the details of DHS's projections about each employment shelter's proposed use or to make any specific determinations about supposedly similar shelters. Nor have petitioners explained why, as a policy matter, DOB would ever force a property owner of a building with an R-1 classification (denoting transient use) that satisfied the more exacting specifications for transient use to obtain a new certificate of occupancy and R-2 classification simply because residents would remain in the facility for an extended period of time.

In any event, the premise of petitioners' argument about "precedent" is unsupported: they do not offer a shred of record support for their claim that an "identical" shelter even exists. As

petitioners' omission of citations suggests, this record does not contain *any* information about DOB's decisions involving an "identical" shelter (*see* Resp. Br. 50). At the same time, petitioners are wrong that that "neither party could find a single R-2 homeless shelter" other than this one (*id.*). In fact, the City identified—by name, street, and borough—three employment shelters categorized in the same way as this building (RA-205). Petitioners' unsubstantiated assertion that one unspecified facility may have a different designation does not establish that DOB arbitrarily classified this particular building.

C. Petitioners fail to show that it was irrational for DOB to find that first floor alterations did not compel building-wide changes.

Petitioners' remaining arguments boil down to the notion that alterations to the building's first floor required DOB to analyze whether "further alterations … were necessary to protect the safety and welfare" of residents (Resp. Br. 56–57). But petitioners misread the record, misapprehend the relevant statutes, and ignore the practical consequences of their position.

To start, petitioners' theory that the owner opted to apply new standards throughout the building defies any fair reading of the record (Resp. Br. 9, 19). The plans included with the owner's work permit application made clear that significant alterations were confined to the first floor, where a restaurant space would be converted into the shelter's lobby (A-564). And petitioners do not dispute that the cost of those renovations fell far below the valuation thresholds that would require updating the entire building (A-2096–97, RA-147, 149; *see* App. Br. 11–12). In fact, the expansive building-wide work that petitioners envision—things like creating a new means of egress and widening hallways—would likely implicate the kind of demolition, reconstruction, and asbestos abatement that could not be completed under the owner's single "Alt-1" application (*see* RA-23, 36).

Next, petitioners take issue with the very idea that the first floor could be subject to current standards—as the conversion of that space from a restaurant to a lobby would be a change in use and occupancy (*see* App. Br. 12)—while the remainder of the building would remain subject to earlier standards (*see id.* at

22).[10] To be sure, petitioners correctly note distinctions between the 1968 Building Code's provisions on "alteration of *a space*," which on their face permit different versions of the Building Code to apply to different spaces within a building, and the current code, which does not on its face refer to a "space" within a building when outlining alteration requirements (*see* Resp. Br. 44) (emphasis added). *See* Admin. Code § 28-101.4.4. But petitioners misapprehend these differences as support for reading the current code to create a sweeping rule that whenever the use or occupancy of one discrete space within a building is changed, the use or occupancy of the entire building changes with it.

What petitioners fail to recognize is that other provisions of the current code do the work that is performed internally in the

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[10] In their haste to avoid the Multiple Dwelling Law (MDL) and its provisions governing older buildings like this one, petitioners ignore that the current code specifies that "[b]uildings containing 3 or more dwelling units shall be subject to the New York State Multiple Dwelling Law." Bldg. Code § 310.1. DOB's application of the MDL to portions of the building was neither irrational nor unique to this project. *See, e.g.*, *Mullen v. Zoebe*, 86 N.Y.2d 135, 139 (1995) (noting applicable MDL standards for fire safety). DOB engaged in precisely the kind of fluid analysis this Court alluded to in *Powers v. 31 E. 31 LLC*, 24 N.Y.3d 84, 90 (2014). Petitioners never explain why, if a century-old building and later alterations made different laws apply to portions of the building there, this Court should adopt their rigid approach here.

1968 Building Code's alteration provisions, bringing the two versions of the code in close alignment. *See generally Matter of N.Y. Cnty. Lawyers' Ass'n v. Bloomberg*, 19 N.Y.3d 712, 721 (2012) (explaining that "a statute must be construed as a whole and … its various sections must be considered together and with reference to each other") (cleaned up). In particular, the current code's definitional section clarifies that a building may have a "main" use or "dominant" occupancy that differs from how a particular space within that building is used or occupied. *See* Admin. Code § 28-101.5 (compare definition for "main use or dominant occupancy (of a building)" with definitions for "use (used)" and "occupancy"). And here, DOB rationally found that a change in the first floor's use did not change the entire building's principal use, especially when the alterations to the first floor would enable that principal use.

It is worth noting the far-reaching consequences of petitioners' flawed interpretation of the current code. Under petitioners' reading, any change in use of a space within a building necessarily requires the entire building to undergo substantial renovations, including ones not otherwise required. An

expansive and costly requirement of this kind would wreak havoc on older, mixed-use buildings throughout the city that often contain street-level storefronts with residential spaces above. If, for example, the first floor of such a building changed from a clinic to a language school—changing the use, *see* Bldg. Code §§ 304–05—every one of the dwelling units above may have to undergo renovations. That is not what the current code requires, and it would likely dissuade owners of older buildings from making incremental improvements. *See generally Matter of Chin v. N.Y. City Bd. of Stds. & Appeals*, 97 A.D.3d 485, 487 (1st Dep't 2012) (outlining policy rationale for not "subjecting owners wishing to alter pre-1948 buildings to the more stringent requirements" that would have "chilling effect" on "improvements to those buildings most in need of renovation").

* * *

The court below went astray by finding no irrationality in DOB's determination yet nonetheless remanding for the trial court to resolve supposedly "competing evidence." No fair understanding of article 78 review authorizes such half-deference. The record is clear: DOB brought its judgment to bear on the proposed use and occupancy of this building. Its rational determination should be upheld, and the pretextual petition should be dismissed on threshold grounds or denied on the merits.

CONCLUSION

This Court should modify the First Department's order by (a) vacating the instruction remanding the proceeding for an evidentiary hearing, and (b) either dismissing the petition due to its threshold defects or, in the alternative, denying it on the merits.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word 2010, and according to that software, it contains 5,702 words, not including the table of contents, the table of cases and authorities, the statement of questions presented, this certificate, and the cover.

BARBARA GRAVES-POLLER