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 the Application of

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

Respondents-Appellants,

against

For Judgment Pursuant to CPLR Article

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

Appellants-Respondents,

(Caption Continued on the Reverse)

SUPPLEMENT TO REPLY BRIEF

RIVKIN RADLER LLP
Attorneys for Respondents-Appellants
477 Madison Avenue, Suite 410
New York, New York 10022
212-455-9555
henry.mascia@rivkin.com
jeremy.honig@rivkin.com

Of Counsel:

Erez Glambosky
Cheryl F. Korman
Jeremy B. Honig
Henry M. Mascia

Date Completed: April 12, 2021

SCOTT M. STRINGER, in his official capacity as Comptroller of the City of New York, THE CITY OF NEW YORK DEPARTMENT OF HOMELESS SERVICES ("DHS"), THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION ("HRA"), THE NEW YORK CITY DEPARTMENT OF BUILDINGS ("DOB"), STEVEN BANKS, in his official capacity as Commissioner of DHS and Commissioner of HRA, JACQUELINE BRAY, in her official capacity as 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

The Coalition submits this brief in further support of its 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 ("the Building"), (2) directed a hearing on whether the Building's use is consistent with general safety and welfare standards, and (3) otherwise affirmed, without costs.

Under the City's view of the law, the Department of Buildings ("DOB") can exempt a building from modern safety standards, and the neighbors who share a wall with that exempt building lack the standing to challenge the decision. The City adds insult to injury by further claiming that the courts cannot review the DOB decision in any event because the DOB relied on a pretextual prediction from the Department of Homeless Services ("DHS"). It makes no difference, in the City's view, that the prediction is self-contradictory, uncorroborated and inconsistent with DHS's own prior decisions. According to the City, DHS said it and that settles it.

Even when the overwhelming expert evidence details the severe danger posed by the exemption from modern safety standards, the City agencies can find refuge

in agency deference and standing, which combine to prevent any court from reviewing the City's determinations. Armed with an unreviewable determination, the City is free to exempt buildings from modern safety standards and disregard the law.

The City's view of the law is wrong. This Court should not allow the City to hide in the darkness of its own misguided interpretations of laws intended to protect the public safety. The courts must have the power to review the City's decision in the full light of day for all to see why the City exempted this Building from modern safety requirements.

POINT I

THE PROPOSED SHELTER CAUSED A CHANGE IN USE REQUIRING THE OWNER TO COMPLY WITH THE CURRENT VERSION OF THE BUILDING CODE

The Coalition argued in its opening brief that the Petition should have been granted as a matter of law, requiring the Building to comply with the current version of the Building Code before the Proposed Shelter could open (A-915). The Coalition explained that alterations to the Building resulted in a change of use, which require the Building to comply with the current version of the Building Code. Recognizing the strength of the Coalition's position, the City ignores the Coalition's textual arguments and raises new arguments for the first time on appeal. Nevertheless, the change of use that occurred here requires the Court to reverse the Appellate Division order and grant the Petition as a matter of law.

A. General Legal Principles

The Grandfathering Provisions exempt owners from modern safety standards and 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. The Grandfathering Provisions' use of the disjunctive demonstrates that "use" and "occupancy" are not synonymous. See NYCAC §§ 28-101.4.3(2), (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.[1] See ZR §§ 22-11 to 22-15. Indeed, 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.

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). Although the Zoning Ordinance permits an owner to changing Use Groups, a certificate of occupancy is limited to a particular Use Group, and a change in Use Group requires a new certificate of occupancy. See NYCAC § 28-118.3.1 (prohibiting buildings from being "altered so as to change…from one zoning use group to another… until the commissioner has issued a certificate of occupancy"). Throughout this litigation, the City has tacitly conceded that a change in Use Group constitutes a "change of

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

use" under the Building Code's grandfathering provisions (A-2043, RA-32) but changed its position after the Appellate Division held otherwise.

B. The Proposed Shelter Requires A Change Of Use Group

The parties do not dispute that the Building'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 irrespective of whether the residents will remain at the shelter for more or less than 30 days. 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. The Proposed Shelter, therefore, constitutes a change to Use Group 3 from Use Group 2 regardless of whether the residents will remain at the shelter for more or less than 30 days. Accordingly, the Proposed Shelter must 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.

C. The City's Response

Unable to explain the text of the Zoning Resolution, the City argues that it is irrelevant to determine a change of use – an argument never made before the trial court. The City, however, never contradicts the Coalition's observation that the City, in fact, uses the Zoning Resolution on a regular basis to determine whether a change of use occurred. See Coalition's Opening Brief at 41-42. Indeed, a change of use *requires* a new certificate of occupancy. See NYCAC § 28-118.3.1.

The City suggests that the Building Code, not the Zoning Resolution, should determine what constitutes a change of use. But instead of grappling with the Building Code's definition of "use", the City sidesteps that analysis altogether, claiming falsely that "petitioners acknowledge that the Building Code contains its own 'use' definition (see Resp. Br. 41)" but "never claim that a change of use occurred within the scope of that definition." City's Reply-Responsive Brief at 21.

As the Coalition noted in its opening brief, 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." See Coalition's Opening Brief at 39 (citing NYCAC § 28-101.5). The Coalition further argued that "a change in Use Group represents an even more significant change than a change of 'use' as

defined by the Building Code" and that "a change in Use Group, *a fortiori*, qualifies as a 'change in use' for purposes of the Grandfathering Provisions." See Coalition's Opening Brief at 41. Thus, the Coalition recognized that the Building Code definition of "use" governs and argued that changing the building's use from a commercial single-room occupancy apartment hotel (Use Group 2) (A-2018) to a non-profit homeless shelter (Use Group 3) constituted a change of "use" as broadly defined under the Building Code and as defined under the Zoning Ordinance.

Unable to address the text of either statute, the City ignores them. The DOB's blatant disregard for the law illustrates the results oriented nature of the DOB's decision-making process. Because the DOB is not above the law, the Appellate Division should have granted the petition as a matter of law due to the Owner's change of use.

POINT II

THE PROPOSED SHELTER CAUSED A CHANGE IN OCCUPANCY REQUIRING THE OWNER TO COMPLY WITH THE CURRENT VERSION OF THE BUILDING CODE

The Petition should have been granted as a matter of law also because the Proposed Shelter constitutes a change in occupancy. A change in occupancy occurred for two discrete reasons. First, the owner expressly admitted a change in occupancy in multiple filings with the DOB. Second, the City's determination that the Proposed Shelter falls into the R-2 category was arbitrary and capricious. The City did not offer a meaningful response to these arguments.

A. The Owner Admitted a Change of Occupancy

1. General Legal Principles

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[.]"

2. The Owner Admitted a Change in Occupancy

Here, the owner admitted a change of occupancy (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 provides that "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. McKinney's Cons. Law of NY, Book 1, Statutes § 222.

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, and the Petition should be granted as a matter of law. See NYCAC § 28-101.4.3.

3. The City's Response Lacks Merit

The City attempts to explain the textual difference between the 1968 Grandfathering Provision and the Current Grandfathering provision with the following statement: "What petitioners fail to recognize is that other provisions of the current code do the work that is performed internally in the 1968 Building Code's

alteration provisions, bringing the two versions of the code in close alignment." City's Reply-Responsive Brief at 28-29. In support, the City observes that the current code defines "main use or dominant occupancy" of a building, recognizing that a building can have a dominant occupancy that differs from how a particular space within that building is occupied. See NYCAC § 28-101.5.

The definition of "main use and dominant occupancy" in the current version of the Building Code, however, does not "do the work that is performed internally" by the 1968 Grandfathering provision (see City's Reply-Responsive Brief at 28-29) because the Current Grandfathering Provision uses the phrase "use or occupancy," not "main use or dominant occupancy." See NYCAC § 28-101.4.3(2), (5). If the Legislature had wanted to bring the Current Grandfathering Provision into "close alignment" with the 1968 Grandfathering provision, it would have used the phrase "main use or dominant occupancy" in the Current Grandfathering Provision. It would have been easy to do so since the Legislature had already defined that phrase. The Legislature, however, made a different policy choice by selecting the phrase "use or occupancy." Thus, the existence of a statutory definition of "dominant occupancy" confirms what the statutory text already makes clear: the 1968 Grandfathering Provision allows an owner to choose different versions of the Building Code to apply to different portions of a building, but the Current Grandfathering Provision does not.

Recognizing the weakness of its textual argument, the City contends that the consequences of the Legislature's policy choice will be inconvenient. This argument lacks merit. The Courts must assume that the Legislature chose the statutory text with the full knowledge of the policy implications, which is why the text of a statute is the best evidence of the Legislature's intent. Matter of Daimler Chrysler Corp. v Spitzer, 7 NY3d 653, 660 (2006). Although the City may have made a different policy choice, the Legislature expressed its choice with clear unambiguous language. See NYCAC § 28-101.4.3(2), (5).

B. The Pretext Offered By DHS Was Insufficient To Earn The Court's Deference

In its opening brief, the Coalition explained that the decision to exempt the Building from modern safety standards was arbitrary and capricious because DHS offered only pretextual justifications for its prediction that residents will remain in the Proposed Shelter for more than 30 days. The Coalition explained that the three reasons for DHS's prediction – administration, training, and finding housing assistance – exist for every resident of every employment shelter, yet DHS did not explain how the factors are specific to *this* Proposed Shelter, a surprising omission given the City's insistence that no two homeless shelters are alike. The Coalition further explained that the justifications provided by DHS contradict DHS's claim that the uniquely stable sub-population that will be housed at this Proposed Shelter is "employed or employable", implying that the residents should be able to find

housing *faster* than other sub-populations (A-2019, A-2039). These deficiencies alone demonstrate that the basis for DHS's prediction is a pretext that was carefully tailored for this litigation. It is impossible to reconcile the DHS's prediction with the vague, contradictory reasons offered. And the City does not even try.

Instead of confronting these arguments, the City ignores them and responds to other, independent arguments made by the Coalition. See City's Reply-Responsive Brief at 24-25. Those responses, however, do not justify the DHS's pretextual prediction. For example, the City takes issue with Coalition's argument that the City could not explain why its prediction about this Proposed Shelter differs from its actual treatment of other shelters. According to the City, there is no evidence of an identical shelter with an R-1 classification, and the City identified other employment shelters with the same categorization. These responses do not address the Coalition's contention that the DHS's prediction was a pretext, and in any event both contentions are false.

The Coalition submitted evidence of several R-1 homeless shelters (A-152, 572-586), and the Court can take judicial notice from publicly available documents from the Department of Buildings that 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.[2]

The City's contention about other R-1 (transient) homeless shelters is also inaccurate. The City did not submit any evidence of how similar shelters have been classified, as did the Coalition (A-152, 572-586). Rather, during oral argument in connection with the Coalition's request for a temporary restraining order (RA92), the City attorney claimed that there were three employment shelters with R-2 designations but did not submit any evidence to support that claim (RA-205). By relying on a bare assertion from a City attorney, the City illustrates its unending demand for deference, but the word of an attorney during oral argument is not entitled to deference.

[2] See http://a810-bisweb.nyc.gov/bisweb/JobsQueryByNumberServlet?requestid=2&passjobnumber=421925590&passdocnumber=01 (last accessed April 12, 2021) (Note that this web address does not contain a hyperlink. To access, the address must be copied and pasted into a web browser).

POINT III

THE PETITION SHOULD BE GRANTED AS A MATTER OF LAW BECAUSE THE CITY REFUSED TO SUBMIT ANY EVIDENCE IT CONDUCTED AN INDEPENDENT ASSESSMENT THAT THE SAFETY AND WELFARE OF THE OCCUPANTS WILL BE PROTECTED

A. The Coalition's Argument on Appeal

The Coalition argued in its opening brief that the Appellate Division should have granted the Petition as a matter of law, permanently barring the City from opening the Proposed Shelter until the Owner corrected the violations of the Current Building Code (A-915). The Coalition is entitled to this relief because the City did not submit any evidence that it assessed whether the Proposed Shelter protects the safety and welfare of the occupants, as required for the 1968 Grandfathering Provision to apply. See NYCAC § 27-118. And, as all the parties agree, if the 1968 Grandfathering Provision does not apply, the Building must comply with the Current Building Code. The Coalition further explained that the partial TCO cannot serve as a proxy for the independent assessment required by the 1968 Grandfathering Provision for a variety of reasons.

B. The City's Response

The Coalition provided a variety of reasons for why the partial TCO cannot substitute for the assessment required by the 1968 Grandfathering Provision. The

City ignores all of them. For example, the City does not discuss its admission that the DOB issued the partial TCO based on code-compliance alone, not on safety. See The City's Opening Brief at 50; The Coalition's Opening Brief at 53. Further, the City ignores that the partial TCO is incomplete because it applies only to part of the Building, floors 1-4 (A118-119, A-2024, A-2046). Thus, there is no evidence that the DOB considered the safety of the entire building as required. See 28-118.15.

More fundamentally, even if the partial TCO did reflect that the DOB made a safety determination, the partial TCO is not unassailable proof that the safety determination was rational. Indeed, the Code makes clear that the "issuance of a certificate of occupancy shall not be construed as an approval of a violation of the provisions of this code or of other applicable laws and rules." See NYCAC § 28-118.1. The Code also acknowledges that certificates of occupancy can be issued in error. See NYCAC § 28-118.17. For this reason, the Appellate Division Departments have consistently held that a TCO creates a mere rebuttable presumption of safety or compliance. 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).

But in this case, the Coalition does not seek to revoke the partial TCO or challenge the initial determination by the DOB to issue the partial TCO. The

Coalition takes the unremarkable position that the partial TCO does not *prove* that, for purposes of the Grandfathering Provisions, the DOB's safety determination was rational.

The City did not submit any evidence that it considered safety beyond mere code compliance. In 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, an absence of sprinklers in the rooms where the residents will sleep, and expert affidavits concluding that these conditions make the Proposed Shelter a "fire trap" and "a disaster waiting to happen" (A-148-174).

The Proposed Shelter has only one staircase for 150 residents even though modern standards require at least two independent means of egress for the residents. This winding staircase, which is illegally narrow, lacks the requisite landings and leads to the rear of the Building's lobby, even though it is supposed to lead directly to the street. The City's strained explanation for why this violation is permissible (A-2080) illustrates the results-oriented nature of the DOB's decision. What's more, the entrance to the staircase is located in the middle of each floor's hallway, meaning that the residents who occupy the rooms on either end of the hallway would be trapped should a fire break out between their room and the staircase entrance.

Further compounding this obvious danger, the individual units are not equipped with fire sprinklers or fire escapes.

With an exemption from these modern safety requirements, it is not difficult to imagine how a tragedy could unfold. In the event of a fire, as many as 150 people would all be rushing to the same narrow, winding staircase in an attempt to exit the Building. As the residents were rushing down the treacherous staircase to escape the fire, the responding firefighters, with all of their equipment, would be forced to move all the way to one side of the already illegally narrow staircase as they climbed the stairs to access the fire floor. Those residents in the rooms that were located on the wrong side of the fire would be trapped and would almost certainly perish as there would be no means of escape. A traffic jam in the illegal staircase would be a substantial impediment to the firefighters who are trying to access and fight the fire quickly and the residents who are trying to exit the Building safely and quickly. 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. Additionally, until the residents safely exited the staircase, it would be difficult for the firefighters to attach a hose to the water supply contained in the standpipe since the standpipe is also located in the illegal staircase. This would further delay the firefighters from safely accessing and fighting the fire, and rescuing the residents who were trapped in the floors above.

This is why John Bongiorno, a former FDNY firefighter who bravely rushed into the burning World Trade Center buildings during 9/11, stated in his sworn affidavit: "As a firefighter for 25 years, I would never want to fight a fire in a 9-story building that has only one means of egress. It is simply too dangerous."

In fact, there is no need to imagine how a tragedy would unfold; this City has already seen first-hand what can happen when there is only one narrow staircase in a building. The 1990 Happy Land Social Club fire took the lives of 87 people when the floor of the only exit to the building ignited. The two-story building had only one narrow staircase and an incomplete sprinkler system, much like the Building here, which, according to the Coalition's fire safety expert Robert G. Kruper, "was one of the primary causes of over 80 deaths." If 87 people perished in a two-story building because there was only one narrow staircase, imagine how many people would lose their lives if there was a fire in a nine-story building with only one narrow staircase.

This incident illustrates why safety standards that are a hundred years old do not necessarily protect the safety and welfare of the population of *this* Proposed Shelter. The Legislature has learned from past tragedies and updated the Building Code accordingly. When deciding whether to exempt a building form modern safety requirements, the DOB should do the same. But in this case, the DOB has ignored past tragedies and is doomed to repeat them. New York's most vulnerable and their neighbors will suffer the consequences.

At any time, the City could have submitted expert affidavits to rebut these expert findings, but never did. There is not a single affidavit in the record from anybody, expert or otherwise, affirmatively stating that the Building is actually safe. At no time did any fire safety expert refute the conclusion that a single narrow means of egress or dead-end corridors on every floor are unsafe. Instead, the City hid behind purported code compliance and the hasty, and conveniently timed, issuance of a partial TCO.

Finally, the partial TCO was issued *after* the Coalition started this proceeding and two days before the City's answer was due. This timing demonstrates that the partial TCO was a hurried, results-oriented decision motivated by expediency and political pressure, not a deliberate, reasoned decision of an agency acting to fulfill its statutory duty. In this context, the mere issuance of a partial TCO – issued in the middle of litigation to support the arguments made in that very litigation – does not insulate the DOB from judicial review.

CONCLUSION

Accordingly, 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, with costs.

Dated: April 12, 2021

Yours, etc.
RIVKIN RADLER LLP
Attorneys for Respondents-Appellants

By: Erez Glambosky

Erez Glambosky
477 Madison Ave., Suite 410
New York, New York 10022
212.955.4555

Of Counsel:
Cheryl F. Korman
Jeremy B. Honig
Henry Mascia

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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COUNTY OF NEW YORK) SS

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

That on 4/12/2021 deponent caused to be served 3 copy(s) of the within

Supplement to Reply Brief

upon the attorneys at the address below, and by the following method:

By Overnight Delivery

James E. Johnson,Corporation Counsel, City of New York
Attorneys for Appellant-Respondent
100 Church Street
New York, NY 10007-2601
(212) 356-2275

By Overnight Delivery

Nathan M. Ferst, Esq.
Attorney for Appellants-Respondents
New Hampton LLC, John Pappas, Paul Pappas, B Genco Contracting Corp.,TMS Plumbing & Heating Corporation& Bass Electrical Corporation

By Overnight Delivery

Fran M. Jacobs Esq.
Duane Morris LLP
Attorneys for Respondent
Westhab, Inc.
1540 Broadway
New York, NY 10036-4086
(212) 692-1060