New York Supreme Court

Appellate Division – First Department

In the Matter of the Application of,

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

Petitioners-Appellants,

For an Order and Judgment Pursuant to CPLR Article 78

-against-

THE CITY OF NEW YORK; BILL DE BLASIO, in his official capacity as Mayor of the City of New York; SCOTT M. STRINGER, in his official capacity as 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, in his official capacity as Commissioner of DHS and Commissioner of HRA; JACQUELINE BRAY in her official capacity as 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,

Respondents-Respondents.

NY County Index No.: 56196/2018

AD No.: 2019-3801

MEMORANDUM OF LAW IN SUPPORT OF MOTION

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PRELIMINARY STATEMENT

Petitioners-Appellants, West 58th Street Coalition, Inc., 152 W. 58 St. Owners Corp., Suzanne Silverstein, Carroll Thompson, Xianghong Di Stella Lee, Doru Iliesui and Elizabeth Evans-Iliesiu (collectively referred to herein as the "Petitioners" or "Appellants" as appropriate) submit this memorandum of law in support of a motion for leave to appeal from an order of this Court, dated August 13, 2020, (1) modifying an order of the Supreme Court, New York County (Tisch, J.), dated April 25, 2019, which denied and dismissed Appellants' Article 78 Petition challenging the determination by Respondents, New York City Department of Homeless Services ("DHS"), New York City Human Resources Administration ("HRA"), and the New York City Department of Buildings ("DOB") (together with the remaining governmental Respondents, the "City" or "City Respondents") to open a homeless shelter (the "Proposed Shelter" or "Proposed Facility") and (2) directing a hearing on whether the use is consistent with general safety and welfare standards.

This appeal presents issues of public importance that should be decided by the Court of Appeals. This Court's decision rests primarily on the DHS's prediction that residents will remain in the Proposed Shelter for 30 consecutive days or more. The City did not present evidence to support this prediction, which is implausible given the City's past practices. Instead, the City submitted an

uncorroborated affidavit purporting to rely on the City's experience. The State's highest Court should decide if the bar for agency deference is so low that an uncorroborated affidavit that is inconsistent with past practice deserves this Court's deference.

In addition, this appeal presents novel statutory interpretation questions. First, this appeal requires the courts to determine whether an owner can choose different versions of the Building Code to apply to different portions of a building. Although Section 27-118 of the New York City Administrative Code expressly permits the owner to do so, Section 28-101.4.3, which allows an owner to take advantage of Section 27-188, does not. Compare New York City Administrative Code § 27-118(a) with New York City Administrative Code § 28-101.4.3. Second, the Court of Appeals should decide whether homeless shelters used transiently fall into the R-1 Group. Finally, this appeal presents the legal question of whether an alteration that results in a change to the Use Group under the New York City Zoning Resolution constitutes a "change in use or occupancy" that requires compliance with the current version of the Building Code.

This Court is the first to decide these statutory interpretation questions. The Court of Appeals should have the opportunity to resolve these issues once and for all. These questions of law are precisely the type of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, which are

not entitled to agency deference. These legal issues are dispositive in this case, but they also carry ramifications for all pre-2008 buildings in New York City, which will influence the New York City real estate market in profound ways. Thus, even if this Court's interpretation is correct, these novel issues carry such public importance that the courts and the public deserve the certainty that only a Court of Appeals decision can provide.

STATEMENT OF FACTS

A. Background

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 is a mixed-use, nine-story high rise building owned by Respondents New Hampton, LLC ("New Hampton" or "Owner") and located at 158 West 58th Street in Manhattan (A-169-170).[1]

The DHS has an outstanding "Open-Ended Request for Proposals" (the "OERFP") through which it seeks proposals for homeless shelter operators to open new sites, which appears to have been last amended on December 19, 2016 (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, in part, that the shelter is to be "operated as a temporary shelter and not as a long-term shelter" (A-783).

B. The Owner's Alt-1 Application

To accommodate the Proposed Shelter, the Owner filed the Alt-1 Application summary seeking, *inter alia*, 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 specifically notes that the work will result in a "change of use" that is "inconsistent with the current certificate of occupancy"

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[1] Numbers receded by "A-" refer to pages of the Appendix.

(A-564). On the “DOB Inspections Now” website, a summary of the Alt-1 Application reads as follows under the heading “Job Description”: “Herewith filing an Alteration Type I Application Amend the Number of Dwelling Units and Change of Use” (A-646-648).

C. <u>The Construction Code Determination Form</u>

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 granted Owner’s approval to maintain a single means of egress in the Building (A-588).

D. <u>The Petition and Amended Petition</u>

On July 2, 2018, Appellants commenced the instant Article 78 proceeding by filing a Verified Petition (the “Petition”) in the Supreme Court, wherein it challenged the City’s determination to open a homeless shelter in the Building. Within the Petition, Appellants demanded, *inter alia*, a permanent injunction barring Respondents from opening the Proposed Facility, along with a proposed Order to Show Cause (the “OSC”) requesting preliminary injunctive relief barring Respondents from opening the Proposed Facility during the pendency of the action (A-11-92). Appellants asserted in the Petition, among other things, that the

decision to open the Proposed Facility was arbitrary and capricious because the Building is unsafe and does not comply with the Building Code (A-61-64).

Appellants submitted numerous sworn expert affidavits in support of the Petition, 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).

Appellants filed the operative 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).

E. <u>The DOB Issues a Partial TCO</u>

On September 4, 2018, (just 2 days before the City Respondents' opposition to the Appellants' Petition was due to be filed), the DOB issued a partial TCO for the first four floors of the nine-story Building, thereby allowing the Building to house individuals on those floors, even while construction continues on the upper floors (A-118-119).

F. <u>City Respondents' Answer</u>

In their answer to the Amended Petition, dated September 6, 2014, the City Respondents expressly admit and concede the truth of the allegations set forth in paragraph 57 of the Amended Petition, to wit, 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).

G. City Respondents' Opposition Papers

In response to the Amended Petition and the OSC, the City Respondents argued, among other things, that the Building was allowed to open notwithstanding the City's admission that the Building did not meet current Building Code standards because: (a) the Building was grandfathered into its non-compliance with the Code; and (b) the Building is safe to occupy solely because the DOB issued a partial TCO for the first 4 floors (A-2042-2046).

Notably, the City Respondents did not submit a single sworn statement by any fire safety expert, City official, or FDNY employee to refute the Appellants' expert affidavits that the Building was a "fire trap" or stating that the Building was actually safe for residents and neighbors alike.

H. Westhab's Answer

In its answer to the Amended Petition, dated September 7, 2018, Westhab also admits (by failing to deny) that it previously filed documents with the DOB representing that the proposed construction work under the Alt-1Application would result in a "change in use" of the Building that is "inconsistent with the current certificate of occupancy." (A-857; A-962-990).

I. <u>Petitioners Reply</u>

In reply memorandum of law that was not included in the record but is available on the New York State Courts Electronic Filing system, Petitioners maintained that Building must comply with the current Building Code. Petitioners argued that the Proposed Shelter would constitute a change in occupancy or use, which precludes application of any grandfathering provision. Petitioners further argued that the owner expressly conceded that the Proposed Shelter would require a change in use or occupancy.

J. <u>The Supreme Court Order</u>

On April 25, 2019, the Supreme Court issued the Order denying and dismissing the Amended Petition, finding that the Building is not required to comply with the current Building Code because of a grandfathering provision that permitted compliance with older safety standards (A-4-10).

While the Supreme Court acknowledged that: (a) the Building does not comply with the current codes; (b) Appellants' experts established that the Building may be unsafe; and (c) the City failed to present any evidence to refute the Appellants' expert affidavits, it nonetheless conclusively found that the Building does not endanger the general safety and public welfare solely because the DOB issued a partial TCO for the Building (A-6-7). Appellants appealed.

K. This Court Modifies and Orders a Hearing

The Court modified the Supreme Court order to direct a hearing on whether the Building's use is consistent with general safety and welfare standards, but otherwise affirmed. A copy of this Court's decision with notice of entry is annexed to the affirmation of Jeremy Honig ("Honig Aff.") as Exhibit A. The Court held that DOB's determination that the Code's grandfathering provisions apply to the Building was not arbitrary and capricious. The Court reasoned that "[b]ased on the finding that the Building would be used as a nontransient employment shelter, DOB rationally determined that the Building….is thus properly classified as 'R-2' under the current Code as an 'apartment hotel (nontransient)'." See Appellate Division Decision at 12-13 (citations omitted). The Court explained that this decision "is based on DHS's factual determination that the Building residents, on average, will be occupying the units for more than 30 days, and are thus nontransient." See id. at 13.

The Court also rejected Appellants' argument that the Owner elected to conform to the current version of the Building Code. The Court reasoned that "only the work to be done on the first floor is to conform with the current Code" because Section 27-118(b) of the New York City Administrative Code permits the Owner to choose different versions of the Building Code to apply to different portions of the building. See id. at 17.

Finally, the Court rejected Appellants' argument that a change in "Use Group" under the New York City Zoning Resolution constituted a change in use or occupancy that required compliance with the current version of the Building Code. See id. at 18. This Court concluded that a change in "Use Group" does not have any "impact on its classification under the Building Code" and, in any event, the "Use Group" is dependent on the agency finding that residents would occupy the shelter for 30 days or more.

BASIS FOR THE INSTANT APPLICATION

Appellants now seek leave to appeal to the Court of Appeals to determine if a change in use or occupancy requires the owner to comply with the current version of the Building Code.

The "primary function of the Court of Appeals" is to declare and develop an authoritative body of decisional law for the guidance of the lower courts, the bar and the public." Karger, The Powers of the New York Court of Appeals, §1:1 at 2-3 (3d ed rev 2005). Leave to the Court of Appeals is therefore warranted when an appeal presents a novel question of public importance that will help clarify and develop the law. See 22 NYCRR 500.22(b)(4); 22 NYCRR 1250.16.

A Court of Appeals decision on this appeal will clarify what the City must do to earn this Court's deference and will resolve novel statutory interpretation questions about the Building Code. The Building Code has a direct impact on New York City real estate, where predictability is paramount, but is infrequently interpreted by the courts. In short, a Court of Appeals decision will provide the parties, the agencies that enforce the New York City Building Code, the real estate industry, and the public in general with much needed predictability.

ARGUMENT

POINT I

THE CITY'S UNCORROBORATED ASSERTION THAT RESIDENTS WILL REMAIN IN THE HOMELESS SHELTER FOR 30 DAYS OR MORE WAS NOT ENTITLED TO DEFERENCE

This Court held that the outcome of this proceeding turns on the issue of deference to the agency's prediction about how long residents will remain in the Proposed Shelter. This Court concluded that the DOB enjoys the benefit of this Court's deference because it submitted an uncorroborated affidavit from DHS predicting residents will remain in the Proposed Shelter for 30 days or more. The Court of Appeals should decide if an uncorroborated statement that is inconsistent with an agency's past practices deserves a court's deference.

A. General Principles on Agency Deference

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.'" Klein v Levin, 305 AD2d 316, 318 (1st Dept), appeal denied, 100 NY2d 514 (2003) (quoting Field Delivery Serv., 66 NY2d at 517); see also Matter of Terrace Ct., LLC v New York State Div. of Hous. and Community Renewal, 18 NY3d 446, 453 (2012).

B. The Building Code

The current Building Code, subject to a list of exceptions, allows "work on prior code buildings" to be performed according to the 1968 Building Code, if the owner so chooses. See New York City Administrative Code §§ 28-101.4.3.1 to 28-101.4.3.19. One exception provides that "changes of use or occupancy" must comply with chapter 11 of the current Building Code, which relates to accessibility. See New York City Administrative Code § 28-101.4.3.5.

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.[2] 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 [New York City Administrative Code § 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[.]"

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[2] For clarity, this memorandum will cite the New York City Building Code, which can be found at Chapter 7 of Title 28 of the New York City Administrative Code, as "BC" followed by the section number, as noted by BC § 101.1.

C. **The Deference, If Any, That Is Owed To An Uncorroborated Affidavit Which Is Inconsistent With Past Practice**

Here, the DOB classified the Building in Group R-2 because DHS expects the residents of the homeless shelter will reside there for 30 days or more (A-2038-2039, A-2042-2043). See Honig Aff. at Ex. B. This Court concluded that the City Respondents' statement was entitled to deference. See Honig Aff., Ex. A at 6, 25.

The only support for the City's determination is the uncorroborated statement from Jackie Bray of DHS (A-2009-2039).[3] See Honig. Aff. at Ex. B. 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. The affidavit explains: "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 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).

[3] 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). See Honig Aff., Ex. B.

Ms. Bray admits that DHS attempts to find permanent housing as quickly as possible but 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). This Court expressly relied on this explanation. See Honig Aff., Ex. A at 13.

D. The Court Of Appeals Should Decide Whether An Uncorroborated Affidavit That Is Inconsistent With Past Practice Deserves Deference

This explanation is arbitrary and capricious because it is not rational or supported by any evidence. The factors identified in the affidavit – time needed for administration, training, and housing assistance remains – exist for every resident of every employment shelter. The affidavit does not explain why these factors are specific to the residents served by the Proposed Shelter. Further, these factors should be less of a barrier to this shelter's particular "sub-population", which is described by the affidavit as stable and "employed or employable and actively seeking employment (defined as those with no demonstrated barriers to employment…)" (A-2019). See Honig Affl, Ex. B. 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. Given these wait times, one would rationally expect to find other R-2 shelters throughout New York City, but neither party could find 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 (A-152, A-572-586). See Honig Aff., Ex. B.

The absence of any R-2 shelters should come as no surprise because the law anticipates that homeless shelters will generally fall into the R-1 category. The Building Code specifically lists homeless shelters as an example of a use covered by the R-1 Group. See BC § 310.1.1(3). Section 310.1.1(3) provides:

> "Congregate living units owned and operated by a government agency or not-for-profit organization, where the number of occupants in the dwelling unit exceeds the limitations of a family as defined, including, but not limited to, the following:
>
> Adult homes or enriched housing with 16 or fewer occupants requiring supervised care within the same building on a 24-hour basis
>
> Fraternity and sorority houses
> Homeless shelters"

It is undisputed that Building was previously approved for R-2 non-transient use, and that it is now going to be used as a homeless shelter. This constitutes a change in occupancy from R-2 to R-1 because the Building is going to be used as a

"congregate living" space operated by a "not-for-profit" (Westhab), and is going to be a "homeless shelter." Building Code § 310.1.1. A homeless shelter is properly classified in occupancy group R-1, a classification reserved for residential buildings occupied transiently (A-151-152). See Honig Aff., Ex. B. In particular, based on Section 310.1.1 of the Building Code, the Building is included in the definition of an R-1 occupancy group because: (1) it is a residential building that will be occupied transiently—specifically, as a temporary housing shelter (see, e.g., 18 NYCRR § 352.35); (2) the Building is a Class B multiple dwelling as defined by Section 27-2004 of the New York City Housing and Maintenance Code and Section 4 of the Multiple Dwelling Law; and (3) the Building is going to be operated as a homeless shelter by a not-for-profit organization (A-151-152). See id. Indeed, the Building Code explicitly places "homeless shelters" in the R-1 occupancy classification (A-151-152). See id.

The City concedes that homeless shelters are specifically identified in the Code as belonging in occupancy group R-1 (Building Code § 310.1.1), a group reserved for transient use buildings, which would constitute a change in use from R-2 to R-1. See Honig Aff. Ex. D at 36-37. The City has no response to the fact that such a "homeless shelter" is expressly placed in R-1 by the Building Code. In fact, the City expressly concedes that "the Current Code lists homeless shelters as

one type of building typically classified as a "transient", and within the R-1 occupancy group. See Honig Aff. Ex. D at 36-37.

Additionally, the Fire Code repeatedly refers to homeless shelters in the R-1 Group (A-152). Honig Aff. Ex. B. "Section 405 of the Fire Code, which specifically addresses emergency preparedness for homeless shelters, makes it clear that homeless shelters are properly classified as being in the R-1 use and occupancy group" (A-152). See id. In fact, 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). See id.

This is not to say that all homeless shelters are identical or even inherently transient. Cf. Honig Aff. Ex. A at 14. Rather, it means that the City, having departed from "its own prior precedent", 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. 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 determination made", "promote stability in the

law" and "maintain the appearance of justice.'" Klein, 305 AD2d at 318 (1st Dept 2003) (quoting Field Delivery Serv., 66 NY2d at 517).

The City could have pointed to other R-2 homeless shelters, if any existed, or submitting the data from DHS to corroborate its naked assertion that residents will occupy the Proposed Shelter for 30 days or more. The City – without the any explanation – chose not to do so. In this context, the City's uncorroborated affidavit rings hollow and is therefore not entitled to deference.

The issue of agency deference is critical to the outcome of this case and can be decided as a matter of law. See, e.g., Matter of Murphy v New York State Div. of Hous. and Community Renewal, 21 NY3d 649, 654 (2013). But this issue also has vast State-wide importance, given the ubiquity of agency determinations. This Court's decision lowered the standard for what an agency must do to earn a court's deference. The Court of Appeals should decide if the bar for agency deference is so low that an uncorroborated affidavit that is inconsistent with past practice deserves this Court's deference.

POINT II

THIS APPEAL PRESENTS STATUTORY INTERPRETATION QUESTIONS THAT THE COURT OF APPEALS SHOULD RESOLVE

In addition, this appeal presents novel statutory interpretation questions about the Administrative Code provisions that allow an owner to take advantage of older safety standards. The Court of Appeals should provide a definitive statement on these issues.

A. Agency Deference for Statutory Interpretation Issues

Whether the agency made an "error of law", often turns on the agency's interpretation of a statute. When "the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute." Kurcsics v Merchants Mut. Ins. Co., 49 NY2d 451, 459 (1980). Under this deferential standard, the court will uphold the agency's interpretation if it is not "irrational or unreasonable." Id. "Where, however, the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight." Id.

B. The Interplay Between the Grandfathering Provisions

1. General Legal Principles

The New York City Building Code, along with the Plumbing Code, Mechanical Code and Fuel Gas Code, are part of the New York City Construction Code. The application of the different versions of the Building Code is governed by the administrative volume ("the Administrative Code") of the Construction Code, which is codified at Chapters 1-5 of Title 28 of the New York City Administrative Code. The New York City Building Code itself, which was enacted in 2008 and revised in 2014 (see New York City Administrative Code § 28-101.4), is codified at Chapter 7 of Title 28 of the New York City Administrative Code. See New York City Administrative Code 28-701 et seq.[4]

The Administrative Code provides that, subject to certain exceptions, "all work shall be performed in accordance with the provisions of [the Building Code]." New York City Administrative Code § 28-101.4. One exception is Section 28-101.4.3 of the New York City Administrative Code (the "Current Grandfathering Provision"), which allows buildings to remain subject to the previous version of the Building Code ("1968 Building Code"), if the owner so chooses. The Current Grandfathering Provision provides:

[4] For clarity, this memorandum will refer to the administrative volume as "the Administrative Code" or "the Code" and the Building Code itself as "the Building Code". Citations to the administrative volume will be cited as "New York City Administrative Code" followed by the section number. New York City Building Code itself will be cited as "BC" followed by the section number.

> "At the option of the owner, and subject to applicable provisions of this code, 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."

New York City Administrative Code § 28-101.4.3. The Current Grandfathering Provision, however, does not apply to work that results in a "change of use or occupancy." See, e.g., New York City Administrative Code §§ 28-101.4.3.2, 28-101.4.3.5. If the Current Grandfather Provision applies, the owner can elect to be subject to the 1968 Building Code. New York City Administrative Code § 28-101.4.3. The 1968 Building Code authorizes compliance with the code in effect prior to December 6, 1968 through a grandfather provision of its own – 1968 Grandfathering Provision. See New York City Administrative Code § 27-118.

The 1968 Grandfathering Provision is different from the Current Grandfathering Provision in two fundament ways. First, although the 1968 Grandfathering Provision does not apply if there are alterations causing a change in use or occupancy, it distinguishes alterations that change the use or occupancy of the *entire building* from an alternation that changes the use or occupancy of *part of the building*. Compare New York City Administrative Code § 27-118(a) with New York City Administrative Code § 27-118(b). The Current Grandfathering Provision does not make any such distinction. Compare New York City Administrative Code § 27-118(a) with New York City Administrative Code § 28-

101.4.3. Second, the 1968 Grandfathering Provision provides that if an owner changes the use or occupancy of only part of a building, the "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." New York City Administrative Code § 27-118(b). The Current Grandfathering Provision does not make any such distinction. Compare New York City Administrative Code § 27-118(b) with New York City Administrative Code § 28-101.4.3.

As a consequence, to remain subject to pre-1968 standards, both the Current Grandfathering Provision (New York City Administrative Code § 28-101.4.3) and the 1968 Grandfathering Provision (New York City Administrative Code § 27-118) must apply. The Current Grandfathering Provision allows the owner to be subject to the 1968 Building Code. The 1968 Building Code contains the 1968 Grandfathering Provision, which allows the owner to be subject to the pre-1968 Building Code.

2. Competing Interpretations Of The Grandfathering Provisions

This Court rejected Petitioner's argument that the owner elected to comply with the current Building Code. See Honig Aff. Ex. A at 16-17. The Court reasoned that 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. See id.; see also New York City Administrative Code

§ 27-118. To reach this conclusion, the Court necessarily concluded 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. No other Court has ever reached this conclusion or decided the interplay between the Current Grandfathering Provision and the 1968 Grandfathering Provision

Further, the statutory language of the Current Grandfathering Provision suggests that the Legislature did not want owners to subject different portions of a building to different versions of the Building Code. The Current Grandfathering Provision, unlike the 1968 Grandfathering Provision, does not expressly authorize the owner to elect different standards to apply to different portions of the building. Compare New York City Administrative Code § 27-118(a) with New York City Administrative Code § 28-101.4.3. When crafting the Current Grandfathering Provision, the Legislature omitted any authorization to allow different versions of the Building Code to apply to different portions of a building. By omitting such authorization, the Legislature signaled its intent to prevent the Current Grandfather Provision from allowing an owner to select different versions of the Building Code to apply to different portions of the building. See McKinney's Cons. Law of N.Y., Book 1, Statutes § 74 at 158. The Legislature knew how to ensure the Current Grandfathering Provision would allow different portions of a building to be subject

to different versions of the Building Code because the Legislature expressly did so in the 1968 Grandfathering Provision, and the "Legislature is presumed to act with deliberation and with knowledge of the existing statutes on the same subject." McKinney's Cons. Law of NY, Book 1, Statutes § 222; Coster v City of Albany, 43 NY 399, 417 (1867); Theurer v Trustees of Columbia Univ. in City of New York, 59 AD2d 196, 198 (3d Dept 1977).

As a result, the admitted change in use and 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 New York City Administrative Code § 28-101.4.3

C. Homeless Shelters Fall Into The R-1 Category As A Matter Of Law

In addition, the Court of Appeals should decide whether homeless shelters should be categorized in the R-1 Group. According to the City and the majority opinion, the R-1 Category, BC § 310.1.1, contains only facilities where the residents remain for less than 30 days. See Appellate Division Decision at 14. The concurring opinion, by contrast, held that only the first subcategory, BC § 310.1.1(1), required a transience finding, but not the second and third subcategories, BC § 310.1.1(2)-(3). Appellants, by contrast, argued that all

homeless shelters fall into the R-1 Group. The Court of Appeals should resolve this dispute.

The Building is going to be used as a "congregate living" space operated by a "not-for-profit" (Westhab) and is going to be a "homeless shelter." Building Code § 310.1.1. The Supreme Court and the majority opinion failed to even address the fact that a "homeless shelter" is expressly placed in the R-1 occupancy category by the Building Code (A-4-9); see Honig Aff. Ex. A at 1-21.

A homeless shelter is properly classified in occupancy group R-1, a classification reserved for residential buildings occupied transiently (A-151-152). See Honig Aff. Ex. B. In particular, based on Section 310.1.1 of the Building Code, the Building is included in the definition of an R-1 occupancy group because: (1) it is a residential building that will be occupied transiently—specifically, as a temporary housing shelter (see, e.g., 18 NYCRR § 352.35); (2) the Building is a Class B multiple dwelling as defined by Section 27-2004 of the New York City Housing and Maintenance Code and Section 4 of the Multiple Dwelling Law; and (3) the Building is going to be operated as a homeless shelter by a not-for-profit organization (A-151-152). See Honig Aff. Ex. B. Indeed, the Building Code explicitly places "homeless shelters" in the R-1 occupancy classification (A-151-152). See id.

Additionally, "Section 405 of the Fire Code, which specifically addresses emergency preparedness for homeless shelters, makes it clear that homeless shelters are properly classified as being in the R-1 use and occupancy group." In fact, 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). See id.

Appellants' experts have reviewed available public documents and have not found a single traditional transient homeless shelter with an R-2 (or J-2) occupancy group classification in all of Manhattan (A-152). See id. To the contrary, transient homeless shelters are regularly classified as R-1 under the current Code, or else are subject to predecessor code designations for commercial, institutional, residential, assembly, or mercantile classifications (A-152; A-572-586). See id. In referencing a plan to convert the Building to R-2, the Alt-1 Application and Schedule A are, therefore, incorrect (A-151; A-170). See id.

Since the Building, as a homeless shelter, is properly classified in the R-1 occupancy group, this would constitute a change in use of the Building from the current R-2 classification, thereby nullifying the application of the Grandfathering Provision. Without the benefit of the Grandfathering Provision, the Building must comply with the current Building Code requirements which, as City Respondents readily concede, this Building does not.

D. <u>The Change in Zoning Use Group</u>

Irrespective of the change in occupancy group, Petitioners also established a change in "use," as defined by the zoning law. This Court rejected that argument, holding that "even if the Building's change in use from new law tenement SRO to homeless shelter had effected a change in 'Use Group' under the New York City Zoning Resolution, this would have no impact on its classification under the Building Code." See Honig Aff., Ex. A at 18. This legal issue presents an issue of public importance warranting Court of Appeals review.

1. <u>General Legal Principles</u>

Alterations that cause a change in use or occupancy preclude the application of both the Current Grandfather Provision and the 1968 Grandfather Provision. See New York City Administrative Code §§ 28-101.4.3.2, 28-101.4.3.5, 27-118. The Administrative Code defines the terms "use" and "occupancy" broadly. The Building Code defines "use" as "[t]he purpose for which a building, structure, or space is occupied or utilized, unless otherwise indicated by the text." New York City Administrative Code § 28-101.5. Likewise, the Administrative Code defines "occupancy" as "[t]he purpose or activity for which a building or space is used or is designed, arranged or intended to be used." Id. 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." See New York City Administrative Code §§ 28-101.4.3.2, 28-101.4.3.5, 27-118.

The phrase "use or occupancy" is not synonymous with the "occupancy group classification" because the 1968 Grandfather Provision distinguishes the two. Subsection (a) of the 1968 Grandfather Provision states "if the alteration of a building or space therein results in a change in the *occupancy group classification* of the building…, then the entire building shall be made to comply with the requirements of this code." Id. (emphasis added). Subsection (b), by contrast, states that "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…be made to comply with the requirements of this code…." Id. (emphasis added).

2. Competing Interpretations Of The Phrase "Use Or Occupancy"

Despite these broad definitions, this Court held that an alteration that results in zoning use group is irrelevant because "[a] structure's classification within a given use group does not control its classification under the Building Code, and vice versa." See Honig Aff., Ex. A at 18. In the alternative, this Court held that the building's use under the zoning law depends on the transience finding by the City.

As an initial matter, the Court's conclusion that the Use Group depends on a finding of transience is inaccurate. The parties do not dispute that the property's

prior use was covered by Use Group 2. See Honig Aff. Ex. D at at 15. Use Group 2 consists of all "residences" not listed in Use Group 1. See New York City Zoning Resolution § 22-12; Honig Aff. Ex. G. The New York City Zoning Resolution defines "residence" as "one or more dwelling units or rooming units" but excludes "community facility buildings." See New York City Zoning Resolution § 12-10; Honig Aff. Ex. G. 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 accommodates." Id. Thus, the Westhab non-profit homeless shelter here is, by definition, covered by Use Group 3 and excluded from Use Group 2. Accordingly, the owner's alterations resulted in a change of Use Group. This conclusion does not depend on whether the residents will remain at the shelter for more or less than 30 days. As a consequence, this Court's holding depends on the purely legal decision that an alteration or renovation that results in a change to the Use Group under the New York City Zoning Resolution is irrelevant because "[a] structure's classification within a given use group does not control its classification under the Building Code, and vice versa." See Honig Aff. Ex. A at 18.

E. This Court Should Grant Leave to Appeal

For several reasons, the Court of Appeals should have the final word on these statutory interpretation questions. First, these questions of law are precisely

the type of "pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent," which are not entitled to agency deference. Kurcsics, 49 NY2d at 459.

On a more practical level, resolution of these legal issues directly affects this highly publicized project, which has the potential to change the character of one of Manhattan's most famous neighborhoods. The Appellate Division does not hesitate to grant leave to the Court of Appeals in cases with such regional significance. See, e.g., Connolly v Long Is. Power Auth., 30 NY3d 719, 726 (2018) (noting that "[t]he Appellate Division granted defendants leave to appeal to this Court, in each case, certifying the question of whether its order was properly made").

The effects of these statutory interpretation questions, however, are not limited to these facts. The Administrative Code has a profound effect on the New York City real estate market, and certainty in this area is paramount. See, e.g., Vermont Teddy Bear Co. v 538 Madison Realty Co., 1 NY3d 470, 475 (2004) (recognizing the importance of certainty in the context of contracts for commercial real estate); Joseph Martin, Jr., Delicatessen, Inc. v Schumacher, 52 NY2d 105, 110 (1981) (same). Yet the courts are infrequently presented with opportunities to provide a pure statutory interpretation of the Administrative Code or the Building Code.

The Court's interpretation of the 1968 Grandfathering Provision will affect the "tens of thousands" of other buildings in New York City that "are over a hundred years old" (RA 147-148),[5] and the Court's interpretation of the Current Grandfathering Provision will affect any work performed on buildings constructed before 2008. See Honig Aff. Ex. E. Thus, this Court's decision is *the* governing authority on which version of the Building Code applies to alterations of pre-2008 buildings. Even if this Court's interpretation is correct, these novel issues carry such public importance that the courts and the public deserve the certainty that only a Court of Appeals decision can provide.

[5] The citation "RA" followed by a number refers to pages of the Respondent's Appendix. See Honig Aff. Ex. E.

CONCLUSION

WHEREFORE, Appellants respectfully request that this Court grant the motion for an order granting leave to appeal to the Court of Appeals.

Dated: New York, New York
September 14, 2020

Yours, etc.

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