To be Argued by:
CHERYL F. KORMAN
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New York Supreme Court
Appellate Division – First Department

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,

Petitioners-Appellants,

– against –

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, JACQUELINE BRAY, WESTHAB, INC., NEW HAMPTON, LLC, JOHN PAPPAS, PAUL PAPPAS, B. GENCO CONTRACTING CORP., TMS PLUMBING & HEATING CORPORATION and BASS ELECTRICAL CORPORATION,

Respondents-Respondents.

REPLY BRIEF FOR PETITIONERS-APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Other Authorities

PRELIMINARY STATEMENT

Petitioner-Appellants, West 58th Street Coalition, Inc., 152 W. 58th St. Owners Corp., Suzanne Silverstein, Carroll Thompson, Xianghong Di Stella Lee, Doru Iliesui and Elizabeth Evans-Iliesiu (collectively referred to herein as "Appellants") respectfully submit this brief in response to the brief filed by Defendants-Respondents, The City of New York and associated individuals and City agencies (collectively the "City") and in further support of its appeal from 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 shockingly irresponsible, arbitrary and capricious determination by the City to open a homeless shelter for 150 adult males in the unsafe "fire trap" located at 158 West 58th Street in Manhattan (the "Building").

The City's opposition brief fails to refute the Appellants' core argument in this appeal---namely, that the Supreme Court committed reversible error by finding that the City's determination to permit an old, unsafe Building that admittedly does not comply with the current New York City Building (the "Building Code or the "Code") or the New York City Fire Code (the "Fire Code") and is plagued with unrefuted serious life and fire safety issues, to open as a homeless shelter was arbitrary and capricious. The City has asked the Courts to look the other way on undisputed issues of safety out of blind deference to the Department of Buildings

("DOB") and the Department of Homeless Services ("DHS"). But the City's decision to open a homeless shelter in the unsafe Building has no rational basis based upon the binding case law, the plain terms of governing statutes and codes and the unrefuted facts in the record.

Instead of explaining to this Court how the record below supports a finding that the Building is actually safe, the City spends virtually all of its time coming up with excuses for why it's technically permissible for the Building to be unsafe. The City does not dispute that the Appellants are the only ones who submitted sworn affidavits from fire safety experts and former high-ranking City officials from the Fire Department (the "FDNY"), DOB and DHS, all of whom swore that the Building is a "fire trap" and a "disaster waiting to happen". The City does not explain why it could not find a single person, let alone a fire safety expert or FDNY employee, to swear, for example, that it was safe for the 9-story high rise Building without fire escapes that will house 150 adult men in rooms without fire sprinklers to have a single means of egress; a narrow, winding staircase that leads to the rear of the lobby instead of directly to the street. Even the Supreme Court recognized that "the respondents did not submit any affirmative evidence from a City representative specifically stating that the building and the proposed plans would not "endanger" "the general safety and public welfare". (A-6).

Instead, the City argues that such unsafe and life threatening conditions are technically permissible because the Building is so old that it is not required to comply with the current Building Code requirements. But the City can't escape the language of this grandfathering provision of the Code (the "Grandfathering Provision") which expressly provides that the Grandfathering Provision is inapplicable if a building in its current condition endangers "the general safety and public welfare". Admin Code § 27-120. The City also can't escape that the Supreme Court failed to even analyze whether the Building was actually safe, instead adopting the City's erroneous argument that the Building must necessarily be safe because the City, through the DOB, issued a partial temporary certificate of occupancy (the "TCO") to the Building. (A-6; "a partial TCO was issued, which demonstrates to the Court that the building is presumably safe and in compliance with applicable laws.")

At its core, the City's circular logic, which was inexplicably adopted by the Supreme Court, is best summarized: "The Building is irrefutably safe because the DOB issued a partial TCO, and the DOB issued the TCO because the Building is safe." This severely flawed argument is directly at odds with the well-settled, and unrefuted, controlling law that the issuance of a TCO creates nothing more than a rebuttable presumption that a building complies with the Code. The Supreme Court committed reversible error by failing to even consider whether this presumption

was refuted by the Appellants' submission of multiple sworn affidavits from fire safety experts and former high ranking City officials who all swore that the Building was an unsafe "fire trap". The conclusions of the Appellants' experts remain unrefuted.

It would be an illogical, absurd and dangerous outcome should this Court similarly adopt the City's circular logic as it would mean that nobody could ever again challenge the DOB's issuance of a TCO or CO no matter how unsafe a building actually is because, after all, the mere issuance of a TCO would constitute an irrefutable presumption that a building is safe. Such an outcome would have a chilling effect on New York City residents' right to protect their own safety by challenging the DOB's issuance of a TCO or CO to an unsafe building, and would render Article 78 proceedings meaningless.

Even assuming that the City is correct that the issuance of a TCO means that the Building is irrefutably safe (which it is not), the Grandfathering Provision is also inapplicable because the City expressly admitted that the proposed use of the Building as a homeless shelter represents a change in use and occupancy of the Building. The City offers no explanation for its express and binding admissions, in both documents filed with the DOB and in its answer in this proceeding, that the Building's proposed use as a homeless shelter constitutes a change in use and occupancy of the Building.

There is a change in use of the Building as a matter of zoning law irrespective of the City's damning admissions because, as the City admits and concedes, homeless shelters are specifically identified in the Code as belonging in occupancy group R-1 (Building Code § 310.1.1), a classification for residential buildings being occupied on a transient basis, while the former occupancy group for the Building was the equivalent of R-2, which is reserved for residential buildings occupied on a permanent basis. Additionally, the Fire Code itself "makes it clear that homeless shelters are properly classified as being in the R-1 use and occupancy group" as evidenced by "Sections 405.4.1, 405.4.2, 405.4.3 and 405.5 of the Fire Code" which "all specify that homeless shelters fall under the R-1 use and occupancy classification" and because 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).

The City makes the demonstrably false argument, which the Supreme Court adopted, that the DOB conveniently made an exception for this particular Building because it is going to be used as a "specialized homeless shelter for single adult men who are employed or employable", otherwise known as a "Rapid Re-Housing Shelter" and, thus, is not really transient because it will "be occupied by residents for stretches of 30 days or more." See Resp. Br. at p. 35. But the Court should take judicial notice that an *identical* employment shelter also operated by Westhab

in Corona, Queens, and also called a "Rapid Re-Housing Center" (the East Corona Rapid Re-Housing Center) is classified by the DOB in occupancy group R-1[1] thereby eviscerating the City's argument that this type of "Rapid Re-Housing Shelter" is properly classified as R-2. Tellingly, Petitioners have not found, nor does the City point out, any homeless shelter in New York City that is classified as R-2. (A-152). The only logical conclusion is that the City, recognizing that it did not have the ability to perform the construction necessary to ensure that this Building complied with the current Code requirements, determined instead to classify the use as "R-2" and hope nobody noticed. Unfortunately for the City, the Appellants noticed.

Further, the Court should take judicial notice that, according to a New York Presbyterian Bronx Health and Housing Consortium presentation from June 12, 2019, a successful "rapid re-housing" in New York City means that "households in the program move to permanent housing in an average of 30 days or less.[2] The Building's proper classification as an R-1 homeless shelter means that there is a change in use and the Building must comply with the current Code requirements.

As a backstop, the City argues that the Building is in compliance with the Multiple Dwelling Law ("MDL") with respect to the egress requirements and,

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[1] http://a810-bisweb.nyc.gov/bisweb/JobsQueryByNumberServlet?requestid=2&passjobnumber=421925590&passdocnumber=01

[2] https://www.nyp.org/documents/pps/webinars/housing-and-youth.pdf

therefore, it is not required to comply with the Code. But the MDL expressly provides that "[w]henever a provision of any local law, ordinance, resolution or regulation" --such as the New York City Building Code-- "is more restrictive in a requirement for height, area or use, such local law, ordinance, resolution or regulation shall govern and take precedence over any lesser requirements of this chapter." MDL §3. Thus, the stricter egress requirements of the Building Code and Fire Code cited throughout Petitioners' papers apply, despite what the MDL may permit. The City ignores this express statutory directive. Moreover, as more fully set forth herein, the Building does not even comply with the MDL requirements even if the MDL is applicable.

Obviously concerned with its meritless substantive arguments, the City attempts to erect procedural barriers to the Appellants' requested relief by erroneously arguing that the Petition should have been dismissed outright because Petitioners, as private parties, cannot seek to enjoin the opening of a building under Article 78 or public nuisance law, or do not have standing to do so because they have not suffered an injury in fact. However, as set forth in more detail below, the Appellants, who live and work mere feet from the Building, have standing to seek judicial review of the City's conduct without pleading or proving any special damages.

Accordingly, the Order of the Supreme Court, New York County (Tisch, J), dated April 25, 2019, which denied and dismissed Appellants' Article 78 Petition challenging the arbitrary and capricious determination by the City to open a homeless shelter in the Building, must be reversed, with costs.

ARGUMENT

POINT I

THE SUPREME COURT ERRED IN FINDING THAT THE CITY'S APPLICATION OF THE GRANDFATHERING PROVISION TO EXCUSE THE UNSAFE BUILDING'S NON-CONFORMANCE WITH THE CURRENT CODE HAD A RATIONAL BASIS

That the Building does not comply with the current provisions of the Building Code or the Fire Code is not disputed by the City. There is also no dispute in the record below that the Building poses serious life and fire safety risks to residents and neighbors alike as set forth in the unrefuted sworn affidavits from former high-ranking City officials from the Fire Department, DOB and DHS who unanimously agree that the Building is a "fire trap" and a "disaster waiting to happen" because, among other things, (a) the Building has only a single means of egress for 150 men (A-951); (b) the sole means of egress is too far from the residential rooms; (c) the stairs are too narrow and contain stair winders; (d) the Building contains "dead-end" and "too-narrow" corridors; (e) the Building does not have a means of egress that exits directly to the street; and (f) the Building does not have sprinklers in the residential rooms. (A-140-157; A-166; A-171-174; A-2077-2081; A-2083-2084).

The City does not explain why it could not find a single person, let alone a fire safety expert or FDNY employee, to swear, for example, that it was safe for the 9-story high rise Building without fire escapes that will house 150 adult men in rooms without fire sprinklers to have a single means of egress; a narrow, winding staircase that leads to the rear of the lobby instead of directly to the street. Even the Supreme Court recognized that "the respondents did not submit any affirmative evidence from a City representative specifically stating that the building and the proposed plans would not "endanger" "the general safety and public welfare". (A-6).

Unable to deny the Building's non-compliance with current Building Code and Fire Code requirements, the City argues that the Supreme Court was correct in finding that the City's determination to operate a homeless shelter from an unsafe Building was rational because the Building's non-compliance with the current Code is excused by the Grandfathering Provisions due to the age of the Building. To be clear, at no time does the City even attempt to argue that these conditions are "safe" but, rather, rely exclusively on the argument that such conditions are "permissible" because of the Grandfathering Provision.

However, the application of the Grandfathering Provision to this Building was erroneous as a matter of law and, thus, arbitrary and capricious, because, among other reasons: (a) the City completely ignored the operative provision of the

Grandfathering Provision which provides that grandfathering is only available where "the general safety and public welfare are not thereby endangered"; (b) there was an admitted change of use and occupancy for the Building that renders the Grandfathering Provision inapplicable; and (c) even ignoring the City's admissions, the use of this Building as a homeless shelter represents a change in use and occupancy from the prior use based upon statutory authority.

As the Court of Appeals recently held, the "Building Code do[es] not blindly 'grandfather' preexisting requirements"; rather, it "require(s) existing buildings to confirm to the new standards under certain circumstances." Powers v. 31 E. 31 LLC, 24 N.Y.3d 84, 91 (2014) (where the Court refused to accept a certificate of occupancy as proof that the building in question was up to Code). In *this* particular instance, the Building has undergone a change in occupancy under the Building Code and is actually unsafe which renders *this* Building unable to take advantage of grandfathering. Admin Code § 27-112; § 27-120.

While the City erroneously argues for "deference" with respect to its application of the Code based upon the mistaken assertion that such interpretation involved pure evaluations of fact within the agency's expertise, in actuality the City's justifications for the Building's non-compliance with current Code are rooted in pure questions of law—specifically, interpretations of the Grandfathering Provisions and the MDL that the City is so clearly violating here.

As a matter of law the City is entitled to no deference regarding these dispositive questions of statutory interpretation of the Code and, more specifically, the Grandfathering Provision; that is up to the courts to decide. *See* Kurciscs v. Merchants Mut. Ins. Co., 49 N.Y.2d 451, 459 (1980) ("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."); *accord, e.g.*, Lighthouse Pointe Prop Assocs. LLC v. N.Y. State Dep't of Env't Conservation, 14 N.Y.3d 161, 176 (2010) (declining to defer to agency's interpretation of statute; Matter of Gruber, 89 N.Y.2d 225, 231-32 (1996) (same).

As evidence that the DOB's determination to apply the Grandfathering Provision was rooted in its own statutory interpretation of the Code, Rodney F. Gittens, the Manhattan Deputy Borough Commissioner for the DOB, provides his in depth (albeit erroneous) analysis of the relevant Code provisions in his September 6, 2018 affidavit (R. 2040-2047) to explain how the DOB allegedly interpreted the Code. The statutory interpretations of Mr. Gittens and the DOB are entitled to no deference as a matter of law. Kuciscs, *supra*.

The City's repeated invocation of deference to the issuance of the partial TCO cannot substitute for a reasoned defense of its dangerous decision to permit

the Building to open under these conditions. It is not the law, and could not be the law, that courts can dismiss Article 78 proceedings by blindly deferring to precisely the determination that Appellants' challenge—particularly where, as here, the case turns on issues of clear statutory interpretation and application such that the challenged determination was issued in a manner affected by errors of law. CPLR 7803(3) (allowing Article 78 challenges when a determination "was affected by an error of law…").

The Supreme Court was derelict in its duties to resolve these dispositive questions of statutory interpretation.

A. The Supreme Court Failed To Consider Whether The Building Endangers The General Safety And Public Welfare

The Grandfathering Provision will not excuse a building's non-compliance with the current Code if such non-compliance endangers "the general safety and public welfare". (Admin Code § 27-120). Therefore, to receive the benefits of the application of the Grandfathering Provision, an analysis or investigation must be done as to whether a building in its current condition endangers the general safety and public welfare. There is no evidence in the record that such analysis or investigation of the Building was done here.

While the City makes vague assertions of DOB "inspections" allegedly performed prior to the issuance of the TCO (See Resp. Br. at p. 17), noticeably

absent from the City's submissions below are any affidavits from individuals with knowledge of the scope of such purported inspections. It is nothing more than rank speculation as to whether the inspectors who approved the issuance of the partial TCO ever considered that the single means of egress for 150 adult males, the narrow and winding staircase that fails to lead directly to the street, the lack of sprinklers in the residential rooms and/or the dead-end corridors would endanger the general safety and public welfare.

The City has not response to Appellants' high-ranking former City official experts who painstakingly analyzed the evidence regarding this specific Building, and found that its combination of safety hazards—including a single, narrow and illegally winding staircase; narrow egress hallway; and narrow corridors—renders this Building dangerous, particularly in the event of a fire. It is the unrebutted opinion of these experts that people are likely to die in the event of a fire in this Building due to these conditions. (A-157; A-2081; A-2084). The Building's written Fire Protection and Fire Safety Plans---which do not address any of the structural issues highlighted by Appellants' experts—do nothing to counter the expert affidavits as to the unsafe conditions in the Building. (A-1005; A-1094).

Instead, the City continues to advance its erroneous argument that the DOB's mere issuance of the partial TCO constitutes irrefutable proof that the Building is safe and satisfies the City's obligation to determine whether the

Building endangers the general safety and public welfare. The circular logic in the City's argument, which was incorrectly adopted by the Supreme Court, is astonishing. At its core, the City's argument is best summarized as follows: "The Building is irrefutably safe because the DOB issued a partial TCO, and the DOB issued the TCO because the Building is safe." But the fact that DOB has granted the partial TCO means nothing: DOB is named here as a respondent because it has acted arbitrarily and capriciously, and erred as a matter of law, as a result of its own incorrect interpretation of Building and Fire Code requirements. The City cannot point to its own self-certification (through DOB) to justify the very conduct that is being challenged.

In adopting this circular logic, the Supreme Court ignored the well-settled, and unrefuted, case law that the issuance of a TCO "merely creates a rebuttable presumption that a building complies with New York City law." Bd. of Managers of Loft Space Condo. v. SDS Leonard, LLC, 142 A.D.3d 881, 882 (1st Dep't 2016). Such presumption may be rebutted by the submission of expert affidavits establishing that the building does not comply with the building code or is otherwise unsafe. See Cirino by Gkanios v. Greek Orthodox Cmty. of Yonkers, Inc., 193 A.D.2d 576 (2d Dep't 1993); Slomin v. Skaarland Constr. Corp., 207 A.D.2d 639 (3d Dep't 1994)(the issuance of a certificate of occupancy would not preclude a finding that there was a dangerous condition in the building).

The City's attempt to refute this case law by arguing that the disputes did not arise in the context of an Article 78 proceeding is unavailing. The fact that the above-cited cases involve private party contracts or tort claims does not obviate the basic premise of law that the issuance of a TCO creates nothing more than a *rebuttable* presumption that a building complies with the Code. Considering the multiple, unrefuted sworn affidavits from Appellants' experts explaining the host of life-safety and fire-safety issues in the Building, it was arbitrary and capricious for the DOB to issue a TCO for this Building, and it was reversible error for the Supreme Court to refuse to even analyze or consider whether such affidavits and the corresponding documentary proof refuted the presumption of safety simply based on DOB's self-issuance of the TCO.

Quite simply, it is arbitrary and capricious to conclude that housing 150 homeless individuals on a transient basis in a one-egress, hundred-plus year old building with narrow hallways and narrow stairs that has not been brought up to code does not endanger general safety and public welfare. *Cf.* City of New York's Reply Memorandum of Law in Amelius v. Grand Imperial LLC, 2016 WL 9663131 (Sup. Ct. New York Cnty. Sept. 26, 2016) (noting the stricter "construction and fire safety requirements for transient occupancies" because of the "increased hazards associated with transient use"). This is especially true considering there is no evidence in the record to establish that the City even

considered these serious safety concerns in its application of the Grandfathering Provision.

Should the Court find that the issuance of the TCO constitutes irrefutable proof that the Building is safe, it would have far reaching implications throughout the City of New York. This would mean that no party would ever be able to challenge the DOB's issuance of a certificate of occupancy no matter how unsafe a building actually is. Such a determination would, in effect, declare that the DOB is infallible. Such a result would set an absurd, and dangerous, precedent.

Indeed, the City's position is irreconcilable with the cases in which the courts have vacated a certificate of occupancy because a subject building failed to "complete fire, safety, and habitability work" required by the Building Code and other applicable law. Byrne v. Bd. of Standards & Appeals, 5 A.D.3d 261, 265, 267 (1st Dep't 2004) (affirming decision granting Article 78 petition). Municipalities have "a duty, in the face of the alleged blatant and dangerous code violations, to refuse to issue a certificate of occupancy", and this "obligation" to deny a certificate of occupancy in such circumstances "cannot be viewed as discretionary." Green v. Irwin, 174 A.D.2d 897, 881 (3d Dep't 1991) (quoting the Court of Appeals in Garrett v. Holiday Inns, Inc., 58 N.Y.2d 253m 263 (1983).

As we have seen from recent fatal fires in New York City in buildings covered by a valid certificate of occupancy[3], the issuance of a certificate of occupancy does not mean that a building is actually safe or in compliance with the Code. The DOB makes mistakes and parties must be able to challenge those mistakes in an Article 78 hearing without the DOB being able to conclusively point to the issuance of a certificate of occupancy as irrefutable proof that a building is safe.

B. There Was a Change in Use and Occupancy Of The Building

The City does not dispute that a building loses grandfathering protections where there is a "change in occupancy or use" of the building (Admin. Code § 27-112), rendering the Grandfathering Provision inapplicable. *See e.g.*, Pavon v. 19th Street Assocs. LLC, 17 Misc.3d 1125(A) (Sup. Ct. N.Y. Cnty. 2007) ("Where a change in occupancy or use is made, the re-establishment of a prior occupancy or use that existed before 1968 is prohibited unless there is compliance with the [current] Code.").

Here, the Owner's Alt-1 permit application correctly indicates a "Change in Occupancy/Use," and in the "Job Description" specifically notes that the work will

[3] Tragically, on May 8, 2019, six members of the Pollidore family, including four children under the age of 12, were trapped and burned alive inside their apartment in the "grandfathered" New York City Housing Authority building in Harlem that had a valid certificate of occupancy, in part, because there were not two independently accessible means of egress. https://nypost.com/2019/05/09/thousands-in-deathtrap-nycha-buildings-face-same-risk-as-harlem-fire-family/

result in a "change of use". (A-562-566). The form also correctly notes that the change in occupancy/use is "inconsistent with the current certificate of occupancy." (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; emphasis added).

The City expressly admits these facts in its answer. Specifically, in its September 6, 2018 answer to the Amended Petition, the City expressly admits and concedes 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 use of the Building as a homeless shelter constitutes "change of use" of the Building "that is inconsistent with the current certificate of occupancy". (A-1072).

In its opposition brief, the City offers no valids explanation for its express admissions, in both documents filed with the DOB and in its answer in this proceeding, that the Building's proposed use as a homeless shelter constitutes a change in use and occupancy of the Building. It is well settled that the City is bound by the admissions in its answer that the use of the homeless shelter constitutes a change of use. DeSouza v. Khan, 128 A.D.3d 756, 758 (2d Dep't 2015)("Facts admitted in a party's pleadings constitute formal judicial admissions,

and are conclusive of the facts admitted in the action in which they are made"). Moreover, although the City argues that such change in use applies only to the first floor of the Building, there is nothing in either the DOB filings or its answer that makes such qualification. For this reason alone, the Grandfathering Provision is inapplicable and the Building must be made to comply with the current Code as a matter of law.

Even without the City's damning admissions, there is a change in use of the Building as a matter of zoning law. It is undisputed that the Building was previously approved for R-2 non-transient use, and that it is now going to be used as a homeless shelter. The City admits and 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. The City has no response to the fact that such a "homeless shelter" is expressly placed in the R-1 category 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 Resp. Br. at p. 36.

Instead, the City makes the demonstrably false argument that the DOB, quite conveniently, made an exception for this particular Building because it is going to be used as a "specialized homeless shelter for single adult men who are employed

or employable", otherwise known as a "Rapid Re-Housing Shelter" and, thus, is not really transient because residents "would be expected to remain there for periods longer than 30 days". See Resp. Br. at p. 37. But the Court should take judicial notice that an *identical* employment shelter also operated by Westhab in Corona, Queens, and also called a "Rapid Re-Housing Center" (the East Corona Rapid Re-Housing Center[4]) is classified by the DOB in occupancy group R-1[5] thereby eviscerating the City's argument that this type of "Rapid Re-Housing Shelter" is properly classified as R-2.

In DHS Deputy Commissioner's, Jackie Bray's, affidavit dated September 6, 2018, she touts the East Corona Rapid Re-Housing Center as proof of Westhab's experience while simultaneously arguing that the Building is properly classified as R-2 because it will be used as a "Rapid Re-Housing Center". (A-2019; 2038). Curiously, however, Ms. Bray neglects to inform the Court that the East Corona Rapid Re-Housing Center, the same exact type of homeless shelter as the one

[4] The Court should also take judicial notice that documentary proof that the East Corona Rapid Rehousing Center was classified in the R-1 occupancy group was included as an exhibit to the Reply Affirmation of Cheryl F. Korman in Further Support of Appellants' Motion for an Injunction During the Pendency of the Appeal filed with this Court on or about May 20, 2019. Therefore, it is completely disingenuous, and grossly misleading, for City's counsel to represent in its brief that "Petitioners cited to no proof that DOB classified other employment shelters within the R-1 occupancy group". See Resp. Br. at p. 38.

[5] http://a810bisweb.nyc.gov/bisweb/JobsQueryByNumberServlet?requestid=2&passjobnumber=421925590&passdocnumber=01

proposed to be operated from the Building, is classified in the R-1 occupancy group.

Tellingly, Petitioners have not found, nor does the City point out, any homeless shelter in New York City that is classified as R-2. (A-152). The City offers no proof that DHS operates three unnamed "employment" shelters that are classified in the R-2 category as they state in their brief and, in fact, City's counsel conceded during the October 4, 2018 hearing that "I don't consider them part of the record because we look at the building before us." (RA 205).

Further, the Court should take judicial notice that, according to a New York Presbyterian Bronx Health and Housing Consortium presentation from June 12, 2019, a successful "rapid re-housing" in New York City means that "households in the program move to permanent housing in an average of 30 days or less[6].

The only logical conclusion is that the City, recognizing that it did not have the ability to perform the construction necessary to ensure that this Building complied with the current Code requirements, determined instead to classify the use as "R-2" and hope nobody noticed. Unfortunately for the City, the Appellants noticed.

[6] (https://www.nyp.org/documents/pps/webinars/housing-and-youth.pdf.)

The Building's proper classification as an R-1 homeless shelter means that there is a change in use and the Building must comply with the current Code requirements.

POINT II

THE MDL DOES NOT EXCUSE THE BUILDING'S FAILURE TO COMPLY WITH THE BUILDING CODE

As a backstop, the City argues that the Building is in compliance with the MDL with respect to the egress requirement and, therefore, it is not required to comply with the Code. In fact, the DOB granted the Owner's Construction Code Determination Form ("CCD1") requesting approval to maintain a single means of egress in the Building, even though the Code required at least two means of egress, based upon the improper application of MDL §248. (A-588). The City is incorrect for multiple reasons.

First the MDL expressly provides that "[w]henever a provision of any local law, ordinance, resolution or regulation"—such as the New York City Building Code—"is more restrictive in a requirement for height, area or use, such local law, ordinance, resolution or regulation shall govern and take precedence over any lesser requirements of this chapter." MDL §3. Thus, the stricter egress requirements of the Building Code and Fire Code cited throughout Appellants' papers apply, despite what the MDL may permit. *See also* Schlidhaus v. Gilroy, 22 Misc. 2d 524, 526 (Sup. Ct. N.Y. Cnty. 1959), appeal dismissed, 8 N.Y.2d 850 (1960) (upholding City law imposing more severe penalties that those provided for in MDL because "the Multiple Dwelling Law [] expressly state[s] that a city may

adopt and enforce more restrictive measures than those provided in the Multiple Dwelling Law") (citing MDL §3). The City ignores this express statutory directive in arguing that the MDL permits the Building to have a single means of egress, even if a single means of egress is expressly prohibited by the Code.

Second, Section 248 of the MDL is only applicable to "Class A" multiple dwelling, defined as dwellings used for permanent residence purposes. For the same reason the Building is properly classified as an R-1 occupancy group building, it qualifies as a Class B "temporary abode" multiple dwelling. Section 248(4)(b) of the MDL is therefore inapplicable.

Third, even assuming that the MDL is controlling, and that the Building is a Class A multiple dwelling, Section 248(4)(b) of the MDL still does not permit a single means of egress from the Building; this section speaks only to the number of means of egress "accessible to each apartment." The MDL does not permit the Building as a whole to have only one means of egress.

Fourth, while the City argues that the Building falls within MDL Section 248's exception permitting a single means of egress from each apartment "provided [the owner] has installed an appropriate sprinkler system", they ignore that the MDL permits such a single means of egress only where "every stair hall or public hall or *passage within an apartment*, shall be equipped on each story with one or more automatic sprinkler heads approved by the department" (emphasis

added). In its opposition papers filed with the Supreme Court, the City's DOB affiant inexplicably omitted, without an ellipsis, the italicized language requiring that every "passage within an apartment" must be equipped with sprinklers in order to rely upon this exception (A-2043) likely because, in this Building: (a) each apartment has only one means of egress (the front door) as there is no fire escape; (b) and every "passage within an apartment" is not equipped with an automatic sprinkler head. (A-2045).

Therefore, not only was the City's reliance upon the MDL misplaced because the stricter requirements of the Building Code govern, the Building does not even comply with the MDL. As such, the City's approval of the CCD1 to permit for a single means of egress in reliance upon the MDL was arbitrary and capricious.

POINT III

APPELLANTS HAVE STANDING TO PROSECUTE THIS ARTICLE 78 PROCEEDING

As a threshold matter, the City argues that Appellants, as private parties, do not have standing to seek to enjoin the opening of a building under Article 78 because they have failed to plead that they suffered special damages. But the City ignores the well-settled controlling law that an allegation that property owners who reside in close proximity to a subject property have standing to seek judicial review of the City's conduct without pleading or proving any special damages because "adverse effect or aggrievement can be inferred from their proximity" to the subject property. Greentree at Murray Hill Condo. v. Good Shepherd Episcopal Church, 146 Misc. 2d 500, 500 (Sup. Ct. N.Y. Cnty. 1989); *see also* Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals, 69 N.Y.2d 406 (1987).

In fact, the City ignores the countless cases that turned away such standing challenges when an action is brought by neighbors and adjacent property owners, *see, e.g.*, Comm. To Pres. Brighton Beach and Manhattan Beach, Inc. v. Planning Comm'n, 259 A.D.2d 26, 32 (1st Dep't 1999)(injury in fact sufficient for standing to challenge facility's opening where some of the "individual petitioners live in close proximity to [it]"); Manupella v. Troy City Zoning Bd. of Appeals, 272 A.D.2d 761, 762-63 (3d Dep't 2000)(finding that neighbors had standing to bring

Article 78 action alleging conversion of old hotel to homeless shelter would have negative impact on safety and increase risk of fire).

Here, Appellants are comprised of a broad coalition of neighbors who live and work mere feet from the Building. Appellants specifically alleged in their Amended Verified Petition that: (a) West 58th Street Coalition, Inc. was formed "by a group of citizens who reside, work, or own property…on or near West 58th Street"; (b) 152 W. 58 St. Owners Corp. "owns the building immediately adjacent to the [Building], and has 33 units housing approximately 60 residents" and "[t]here are three children in the building who live in apartments that share a wall with the [Building]"; (c) Suzanne Silverstein "lives on the same block and within 200 feet of the [Building]"; (d) Carroll Thompson "lives on the same block and within 200 feet of the [Building]"; (e) Xianghong Di (Stella) Lee "lives on the same block and within 50 feet of the [Building]"; (f) Doru Iliesiu and Elizabeth Evans-Iliesiu "live on the same block and within 50 feet of the [Building]". (A842-843).

Based on the aforecited case law, Appellants, having sufficiently alleged that they live in "close proximity" to the Building, are not required to plead or prove any special damages and, as such, the City's standing argument has no merit.

CONCLUSION

For these reasons, it is respectfully submitted that the decision and order of the Supreme Court be reversed with costs.

Dated: New York, New York
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Yours, etc.

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