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

New York County Clerk's Index No. 156196/18

New York Supreme Court
Appellate Division: First Department

In the Matter of

Case No. 156196/18

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,

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

against

THE CITY OF NEW YORK; BILL DE BLASIO, MAYOR OF THE CITY OF NEW YORK; SCOTT M. STRINGER, COMPTROLLER OF THE CITY OF NEW YORK; THE NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES ("DHS"); THE NEW
(*caption continued on inside cover*)

Respondents-Respondents.

BRIEF FOR RESPONDENTS

GEORGIA M. PESTANA
Acting Corporation Counsel of the City of New York
Attorney for Respondents
100 Church Street
New York, New York 10007
212-356-2274 or -2275
bgraves@law.nyc.gov

AARON BLOOM
BARBARA GRAVES-POLLER
of Counsel

August 30, 2019

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

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PRELIMINARY STATEMENT

This article 78 proceeding represents an attempt by petitioners to block the opening of a specialized, employment shelter for homeless men in Midtown, Manhattan. Petitioners forewarn that the facility is "going to degrade the neighborhood." That sentiment, cloaked in self-serving interpretations of building codes and a demand for judicial second-guessing where deference is due, drives this litigation. In this proceeding, petitioners alleged that opening the shelter would violate a host of laws. Supreme Court (Tisch, J.) carefully reviewed the extensive, highly technical record and, finding proof that the City thoroughly reviewed and properly approved the project, denied the petition.

This Court should affirm. Petitioners have abandoned most of their unsuccessful claims. This appeal only challenges the denial of their claim that the New York City Department of Buildings (DOB) improperly determined that under current "grandfathering" provisions, the building, constructed in 1910, remained subject to the pre-1968 building design requirements under which it was built and with which it continued to comply.

Contending that standards the Legislature selectively imported into the current law through grandfathering provisions are presumptively unsafe, the Petitioners demanded that Supreme Court engage in a free-standing, unbounded adjudication of whether the building would endanger public welfare and safety—an assessment in which they proposed that their own consultant's opinions would play a starring role.

But it is the province of the Legislature to determine which existing safety precautions may remain and when circumstances require buildings to conform to newer standards; and the Legislature designated DOB as the agency to apply those grandfathering provisions and assess compliance with the relevant standards. Supreme Court thus correctly refused to countenance petitioners' invitation to subvert the legislative scheme and to substitute its judgment for that of DOB, the designated agency. Supreme Court properly found DOB's informed conclusion that the shelter could begin operating in this building, which complied with the applicable safety standards, to be rational and entitled to deference.

QUESTIONS PRESENTED

1. Did petitioners fail to establish the type of injuries in fact sufficient to confer standing to pursue their claims?

2. Did Supreme Court correctly determine that DOB's fact-driven determination as to which building code provisions are applicable to the building at issue here, and that the building complied with those provisions, was rational and entitled to deference in this article 78 proceeding?

STATEMENT OF THE CASE

A. The Westhab Shelter's role in the City's shelter plan

The New York City Department of Homeless Services (DHS), a division of the New York City Department of Social Services (DSS), is the municipal agency principally responsible for addressing the unprecedented demand for shelter the City faces each day (A-2010, 2012–15). The City's comprehensive plan for addressing these and many other issues surrounding the homelessness crisis is laid out in *Turning the Tide*, a report published by the City in February 2017 (A-2014). Central components of that plan include discontinuing the City's reliance

on commercial hotel facilities by creating a number of borough-based shelters with enhanced social services, security, and maintenance (A-1208–226).

1. The Westhab Shelter, an employment-focused facility, and the neighborhood where it will be located

The homeless shelter at the heart of this case, the Westhab Shelter, will function as a specialized facility aimed at helping approximately 140 currently employed and job-seeking men (A-2019–20). In addition to its professional skill-building and job search assistance, the Westhab Shelter will supply residents with food (as the shelter rooms are designed without kitchens), laundry services, and housing placement support (A-2019–20, 2100, 2101).

The facility is slated to open at 158 West 58th Street in Manhattan's Community District 5, a neighborhood dominated by commercial establishments and home to approximately 52,200 residents (A-2024–25).[1] Far from being a secluded residential area

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[1] *See also* N.Y. City Planning, *Community Profiles, Manhattan Community District 5* (Dist. Profile), available at https://communityprofiles.planning.nyc.gov/manhattan/5#built-environment,

(cont'd on next page)

of the City, the location "is frequented by tourists … drawn to the area by its many luxury shopping destinations" (A-848). The neighborhood immediately surrounding the proposed shelter "counts among its residents a boarding school, numerous specialty shops, a museum, theater and architectural landmarks" (*id.*).

The shelter will prioritize serving members of Community District 5 and adjacent areas who meet eligibility requirements (A-2019). Although the Community District is home to fewer very low-income residents than most other neighborhoods, it is an area rich with commercial and office spaces that offer employment opportunities and abundant transportation resources, optimally situating it to advance the Westhab Shelter's employment-related goals. *See* Dist. Profile, Indicators (listing a poverty rate in Community District 5 of approximately half that of New York City as a whole); RA 187.

Indicators (last visited Aug. 28, 2019) (noting commercial, office, industrial, and manufacturing space account for more than 67% of land use in Community District 5).

The Westhab project was proposed in 2017 by a building owner and a nonprofit organization seeking to convert the former Park Savoy Hotel at 158 West 58th Street (the Building), which had operated for decades as a single room occupancy building (SRO),[2] into a specialized homeless shelter.[3] The City undertook an extensive public engagement process, including meeting with petitioners, to describe the project and solicit feedback from the community (A-346, 349, 2024–26, 2179). The City also conducted a comprehensive regulatory review of the project, determining that the Westhab Shelter would not impose any significant adverse environmental impacts under the pertinent State and City environmental requirements. Finally, the City determined that DHS's use of the proposed site for the Shelter would be consistent with the City's Fair Share Criteria (A-1993–95).[4]

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[2] *See generally Seawall Assoc. v. New York*, 74 N.Y.2d 92 (1989) (discussing function of SROs within City homelessness prevention efforts).

[3] As the City described in its trial court submissions (*see* A-2017–18), DHS reviews nonprofit social services providers' proposals, submitted on a rolling basis, to develop shelters throughout the City (A-1242–43).

[4] That entailed review of the New York State Environmental Quality Review Act (SEQRA), 6 N.Y.C.R.R. § 617 *et seq.*; the City Environmental Quality Review (CEQR), 62 R.C.N.Y. § 5-01 *et seq*; and Mayoral Exec. Ord. No. 91 of 1977; Charter Sections 203 and 204 (commonly known as Fair Share).

2. Public engagement and initial opposition to the project

Petitioners began voicing their opposition to the Westhab Shelter when the City initiated its public engagement process for the project (*see* A-481–85). At one hearing, petitioners and their representatives expressed their beliefs that the facility was an unjustified, "extraordinary expense" (A-375); the neighborhood had been singled out as "a grand social experiment" (A-386, 387); and the planned project would violate the rights of people "who work all day and pay taxes" by reducing homeowners' property values (A-403). Other representatives warned that the Westhab Shelter was "going to degrade the neighborhood where [] major hotels, and businesses, and homes exist" such that the community would cease "to be a tourist destination … because it's undesirable to be in such a neighborhood where there's 150 homeless men" (A-391).

In the weeks following that public hearing, petitioners filed a Freedom of Information Law (FOIL) request for, among other things, all communications about the proposed shelter, involving DOB, DHS, the Mayor's Office of Contract Services, and the Office

of the Mayor of the City of New York (A-524). They also demanded "internal DOB communications" and documents "sufficient to identify each public and private entity with which DOB has communicated regarding the Shelter" (A-525). The City produced thousands of pages of documents in response to those FOIL requests (A-2118–19).

B. The Building and DOB's assessment of its compliance with City and State laws

The Building was constructed in 1910 and received a permanent certificate of occupancy in 1942 (A-1464). Based on its construction using noncombustible material, including metal and stone (A-1464), the Building meets the definition of a "fireproof" structure. *See* N.Y. Multiple Dwelling Law § 4(25)(b), (26).[5] It also features fire-rated doors, corridors, and hallways, and FDNY-approved fire alarm and standpipe systems (A-2044–45).

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[5] The Building also meets the standard of a "fireproof class of construction" under the 1938 Building Code which, among other things, meant that the building was made with "incombustible material" and assemblies with high fire resistive ratings. *See* 1938 Building Code § C26-239.0 ("Class 1-Fireproof structures are those in which the walls and structural members are made of incombustible material or assemblies" that meet "minimum fire resistive rating" of between two and four hours).

The Building underwent renovations to prepare it to house the Westhab Shelter (A-2020). Certain of those alterations required the owner to apply for work permits to be approved by DOB (A-2021). DOB's review of work permit applications and the agency's eventual inspection of completed work entailed application of multiple City and State laws that govern building construction and renovation.

1. The Current Code and earlier laws that govern the Building

The laws that make up the City's Construction Codes, including the New York City Building Code, promulgated in 2008 and revised in 2014 ("Current Code"), "supplemented the prior 1968 Building Code, which is codified in Title 27 of the New York City Administrative Code … [and] remains in effect to the extent provided for by Title 28." *Picaro v. Pelham 1130 LLC*, 2016 U.S. Dist. LEXIS 46580, at *11, n. 6 (S.D.N.Y. Mar. 31, 2016). The Current Code outlines a system of progressive implementation of new requirements that may be triggered by certain renovations or alterations of existing buildings.

The law explains that "[a]t the option of the owner, and subject to applicable provisions of this code, work on prior code buildings," meaning previously-constructed buildings that comply with earlier laws, "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." BC 101.4.3. [6][7] Stated simply, it "is a general principle" that "existing buildings are exempt from the provisions of new building codes[] unless there is substantial renovation" or change in use. *Carone v. St. George Theater Restoration, Inc.*, 56 Misc. 3d 1206[A], 2017 N.Y. Slip Op. 50888[U], at *3 (Sup. Ct.,

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[6] "BC" refers to the New York City Building Code codified as Title 28 Chapter 7 of the N.Y.C. Administrative Code.

[7] Just as the Current Code "grandfathers" in certain provisions of the 1968 Code and earlier laws, the Current Code likewise makes clear that as new revisions are progressively made to the Current Code—as periodically occurs—buildings lawfully occupied when a new amendment is added "shall be permitted to continue without change, except as is otherwise specifically provided … or as is deemed necessary by the [DOB] commissioner for the general safety and welfare of the occupants and the public." N.Y.C Admin. Code § 28-102.6; *see* DOB, *Code Development*, available at https://www1.nyc.gov/site/buildings/codes/code-development.page (last visited Aug. 28, 2019) (noting that the Current Code's provisions "are consistently revised and updated").

Richmond Cnty. Jun. 27, 2017); BC 101.4.1–4.3; N.Y.C. Admin. Code § § 27-115; 27-116.

The statute enumerates 19 categories of alterations that, under specified circumstances, would require a building owner to complete renovations in accordance with the Current Code, rather than with earlier laws. *Id*. For example, whenever a building undergoes a change in use or occupancy, the building's owner must alter the fire protection system in accordance with Chapter 9 of the Current Code, "subject to special provisions for prior code buildings as set forth therein." N.Y.C Admin. Code § 28-101.4.3(2). But at the same time, the statute makes clear that if a property owner performs a substantial renovation that exceeds defined cost thresholds, as opposed to performing minor alterations on an older building, the owner must complete those renovations in accordance with the most recent code requirements. BC 901.9.4 (outlining requirements for fire protection system changes based on value of alterations).

The Current Code continues the progressive implementation approach established by and consistent with earlier laws. The

1968 Building Code sets forth specific criteria for determining which safety requirements govern alterations to buildings in existence prior to 1968. *See* N.Y.C. Admin Code §§ 27-114–123.3. With regard to then-existing multiple dwellings, it provides that, "[a]t the option of the owner, regardless of the cost of the alteration or conversion, an alteration may be made to a multiple dwelling … in accordance with all requirements of this [1968 Building] [C]ode or in accordance with all applicable laws in existence prior to December sixth, nineteen hundred sixty-eight, provided the general safety and public welfare are not thereby endangered." N.Y.C. Admin Code § 27-120. However, if the alteration "results in a change in the occupancy group classification of the building" then the building must comply with the requirements of the 1968 Building Code. N.Y.C. Admin Code § 27-118(a). If the alteration results in a change of occupancy or use of only a portion of the building, then only "the work involved in the change" need comply with the 1968 Building Code. N.Y.C. Admin Code § 27-118(b).

The New York State Multiple Dwelling Law ("MDL") was the law that established requirements for multiple dwellings prior to the promulgation of the 1968 Building Code. *See generally Klupchak v. First E. Vil. Ass'n*, 140 A.D.3d 8, 12 (1st Dep't 2016). It sets forth standards for stairwells, stairs, corridors, and hallways (A-2029–98).

2. DOB's determination that the Building was not undergoing a change of use or occupancy and thus that the Current Code's grandfathering provision was applicable

As explained above, the Current Code's grandfathering provisions, in conjunction with those in the 1968 Building Code, allows buildings built prior to 1968 to remain subject to the laws applicable prior to 1968, including the MDL, which itself allowed certain preexisting buildings to remain in place. Those grandfathering provisions depend, in large part, on whether any alteration work results in a change of use or occupancy group

classification of the building as a whole.[8] The Building here was built in 1910. Thus, it was necessary for DOB to determine whether the Building would be undergoing a change in use or occupancy group classification so as to require the entire building to be altered to comply with the Current Code's requirements—requirements to which it was not previously subject.

Accordingly, DOB gathered facts to determine whether the Building's use and occupancy classifications would change as a result of the proposed renovations. DHS apprised DOB that the Westhab Shelter would function as a specialized homeless shelter for single adult men who are employed or employable (A-2042). Specifically, DHS advised DOB, based on its experience operating three other employment shelters throughout the City, that employment shelter residents were expected to remain in the same shelter and bed for more than 30 days (A-2038–39).

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[8] The Current Code also sets cost-based thresholds to determine when particular renovations of a certain value require work to be performed in accordance with newer standards (*see* BC 901.9.4). But the City established that the Building's renovations did not meet those requirements (*see* RA 169–70); and petitioners do not challenge that issue in this appeal.

In light of the data and representations DHS supplied, DOB determined that the Building, operating as an employment shelter, should be classified as an "R-2", "Class A" multiple dwelling under the City's Building Code, Housing Maintenance Code (HMC) and the MDL (A-2042). For the same reasons, DOB classified the Building within "Use Group 2" of the City Zoning Resolution (*id.*). These designations apply to multiple dwellings occupied by residents for periods of 30 days or more (*id.*).[9]

From there, DOB looked to the Building's 1942 certificate of occupancy, to determine its pre-existing classification. That certificate identified the structure as a new law tenement SRO (A-1464). Under earlier iterations of the Building Code, DOB noted, a tenement SRO would be classified as a "J-2 occupancy group" (A-2042). However, the 2008 Building Code revisions changed the names of certain occupancy groups, replacing "J-2" with the term "R-2 occupancy group" (A-2038, 2042) Therefore, DOB determined that the pre-existing occupancy group classification of the

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[9] *See* BC 310.1.2; HMC § 27-2004; MDL § 4(8); Zoning Resolution §§ 12-10, 22-10.

Building was equivalent to the R-2 occupancy group under the Current Code (A-2042).

This meant that DOB's R-2 classification of the Westhab Shelter represented a continuation—not a change—of the Building's pre-existing use group classifications (A-1464). And while the first floor had undergone a change in use, the Building as a whole would continue to be used and occupied in the manner it was as an SRO. Because DOB determined that the work would not result in a change in use or occupancy classification, the grandfathering provisions of the Current Code and the 1968 Building Code were applicable and thus, many of the Building's design features and safety protections would be governed by the MDL's requirements (A-2042–43, 2090–92). Having made that determination, DOB could then inspect the Building for compliance with those requirements.[10]

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[10] One portion of the Building—the first floor, previously used a restaurant—was undergoing a change in use of that particular space (RA.145–52). But that change did not result in an overall change to the use or occupancy classification of the Building as a whole. Accordingly, DOB determined that only the alteration work on the first floor of the Building was required to comply with the Current Code's requirements. *Id.*

C. DOB's temporary certificate of occupancy

Under the Current Code, DOB "shall issue a certificate of occupancy" for a building "in existence prior to January 1, 1938" when that "existing building is in compliance with all retroactive requirements of the 1968 building code applicable to such building and no notices of violation or other notices or orders affecting the building as they relate to the provisions of this code or the 1968 building code are pending." N.Y.C. Admin. Code § 28-118.3.4.1. The Current Code further provides that DOB may issue a temporary certificate of occupancy "provided that the subject portion or portions of the building may be occupied and maintained in a manner that will not endanger public safety, health, or welfare." N.Y.C. Admin. Code § 28-118.15.

DOB inspected the Building multiple times in 2018 (A-2042). And in late August 2018, the FDNY reviewed and approved the Westhab Shelter's Fire Protection Plan (A-1117). By that time, DOB determined that the Building's owner had resolved all but one of the previously outstanding code violations (A-2042). The remaining violation posed no safety risk (A-2046).

Finding the Building to be in substantial compliance with all applicable requirements, DOB issued a temporary certificate of occupancy (TCO) for the cellar through the fourth floors of the building on September 4, 2018 (A-118–19, 2046). DOB conditioned its issuance of the TCO on the presence of certified fire guards until the City completed installation of additional sprinklers on each floor (A-2045). DOB renewed the TCO at 90-day intervals thereafter (A-2129–30).

D. This article 78 proceeding

1. The petition

Petitioners commenced this special proceeding by order to show cause on July 3, 2018 (A-93–97). At that point, the initial phase of Building renovation remained ongoing, FDNY had yet to approve the Fire Protection Plan, and DOB had not then issued a TCO. Although petitioners sought to restrain the City from opening the Westhab Shelter, they agreed to adjourn the matter as the shelter was not then ready to open (RA 89). Petitioners amended their petition in August 2018, even though DOB had not yet issued the TCO (A-829–917).

Petitioners asserted eight causes of action, most of which addressed DHS's bid solicitation, the City's public engagement efforts, environmental review, and Fair Share analyses performed in connection with the project. *See* A-909, 910, 912, 913 915. Petitioners' sixth and seventh causes of action challenged the Westhab Shelter's projected costs and the "significant security risks" they predicted future shelter residents would pose (A-914). Its remaining claims alleged safety concerns related to work performed on the Building and its "physical layout" (A-910).

2. Evidentiary hearing and post-hearing submissions

Supreme Court held a lengthy evidentiary hearing on Oct. 4, 2018 (*see* RA 84–124). At the hearing, petitioners advised the court that "[s]afety is the main argument" in the proceeding and that they were "not going to take the time" to address their other claims (RA 132). They went on to emphasize their fire-related fears, concentrating on supposed dangers related to the Building's single point of egress and purportedly inadequate sprinkler system (RA 129–32). Petitioners conceded that the distinctions

between R-1 and R-2 groups, central to their contention that DOB misclassified the Building's use and occupancy group classifications, were not separated by "a black-and-white line" (RA 114).

In response, the City provided extensive details on how it arrived at Westhab's use and occupancy group classifications, along with precise detail on how DOB determined which provisions of the MDL and Building Code would govern discrete aspects of its inspection (RA 139–53). The City also described DHS's experience operating different types of specialized facilities that informed the Westhab Shelter's "R-2" classification. The City explained that Westhab Shelter's residents, unlike residents of some other DHS facilities, would comprise "a uniquely stable population" (RA 142). This population-based assessment was consistent with DOB's classification of the three other employment shelters DHS operates (RA 205).

The City went on to explain how, because the first floor of the building had previously operated as a restaurant, the Shelter had changed the use group of the first floor only (RA 145–52).

Therefore, renovations to the first floor were required to comply with the Current Code (*id.*). The use of other floors of the Building, including their stairwells and passages, did not change or undergo substantial renovations (*id.*). Therefore, they were permitted to continue complying with provisions of the MDL and earlier laws incorporated into the 1968 and current Building Code via applicable grandfathering clauses (RA 150–53, 156).

After that hearing and with Supreme Court's permission, the City submitted a supplemental affirmation in response to new arguments raised in petitioners' reply papers (A-2089–99). The City's submission meticulously detailed how the Current Code "does not require all existing buildings to comply with current building standards" but instead, allows older buildings to adhere to selected standards in place at the time of their construction, "grandfathering" those previous standards into the Current Code and other applicable laws (A-2090–92).

The City's submission went on to address why each of the purported Building Code "violations" petitioners identified in their submissions were not violations at all. For example,

MDL § 248(4)(b), a provision "grandfathered" into the Current Code, "contemplates that some buildings may have only one means of egress" (A-2092–93). That design is permissible under the MDL § 248(4)(b) so long as "every stair hall or public hall, and every hall or passage within an apartment" is "equipped on each story with one or more automatic sprinkler heads approved by the department," which DOB determined to be the case before issuing the TCO. The City also clarified that the MDL does not preclude egress through a lobby but requires a building with that design to be constructed with "fireproof doors and assemblies with the doors self-closing separating every such stair and entrance hall from all non-fireproof parts of the tenement" such as those within the Building. MDL § 238(2)(b); A-1464, 2129–30.

The City provided additional explanations, rooted in the text of the MDL, to refute each of petitioners' objections regarding the number and design of the building's staircases, hallways, and the distance between resident rooms and the lobby exit. *See* A-2095 (explaining permissibility of single stairway, based on MDL § 248(4)(b)); *id.* (noting building's hallway width *exceeds* MDL

§ 238(2)(a)'s requirements); *id.* (citing MDL § 237(3)'s exception on prohibited winding staircases applicable to "tenement[s] … with a passenger elevator"); *id.* (explaining that MDL § 238(3) required halls over forty feet long and by four or more apartments to be fireproof, without imposing limitations on the travel distance to egress for buildings constructed before 1912).

The City further articulated, also with reference to Current Code requirements and the specific renovations the owner performed on the Building's first floor, how DOB assessed the Building's sprinkler system under Chapter 9 of the Current Code. *See* BC 901.9.1. The City explained that the unaltered portions of the Building's sprinkler system are covered by the Current Code's grandfather clause, and are therefore governed by applicable provisions of the 1968 Building Code. *See* N.Y.C. Admin. Code §§ 27-931(a); 28-101.4.3.

3. Supreme Court's denial of petitioners' application for a preliminary injunction

On December 17, 2018, Supreme Court issued an order denying the petitioners' motion for preliminary injunction (RA

229–32). The court duly considered petitioners' concerns about the Building's safety and, without making a final decision on the merits of their petition, concluded that DOB's issuance of a TCO created a presumption that the facility was safe to open (RA 231). The court added that the other harm petitioners alleged "regarding loitering and property values" was "speculative" and, since "residents would be reassigned" to other shelters if the court granted petitioners' petition, not irreparable (*id.*). Finally, considering the impact of blocking the shelter opening on the City's efforts to address the homelessness crisis and discontinue the use of commercial hotels, the court found that the balance of equities tipped in the City's favor (*id.*).

On January 29, 2019 this Court denied petitioners' application for permission to appeal Supreme Court's denial of injunctive relief, along with their request for an injunction to prevent the City from opening the Westhab Shelter (A-2124, 2125, 2127).

E. Supreme Court's decision denying the petition

On April 25, 2019 Supreme Court issued a decision and order that denied the petition and dismissed the proceeding (A-4–9). The court found that petitioners lacked standing either to challenge DHS's open-ended process for soliciting shelter proposals or to pursue their nuisance claim (A-9). The court did not address the City's arguments that petitioners lacked standing to pursue their other claims.

As to petitioners' safety-related contentions, the Court held that the City's decision to open a homeless shelter at the Building was rational, not arbitrary or capricious (A-5). Supreme Court deferred to DOB's fact-based determinations, recognizing that the agency relied on its own expertise and input from DHS's experience in operating shelters to classify the Building's use and occupancy groups (A-6). The court went on to reject all of petitioners' claims arising out of purported misclassification of the Building and application of grandfathering provisions related to those classifications (A-7).

Supreme Court declined petitioners' invitation to independently determine whether the Building's grandfathered physical design is safe, explaining that the court's role was not "to substitute" its own judgment for DOB's or undertake "an independent review of the facts" (A-7). Nevertheless, the court noted that not only did DOB issue the TCO for the Building, reflecting compliance with all applicable safety requirements, FDNY had examined and offered no objections to the Building's Fire Protection Plan, which "elaborate[d] on the infrastructure in place to prevent fires" (*id.*).

In addition, the court did "not find that DHS ignored any material facts" and concluded that the City "performed a full review in compliance with the CEQR Technical Manual," rejecting petitioners' challenges to the City's Fair Share analysis and environmental assessment of the project (A-8–9).

Supreme Court denied the petition in its entirety (A-9), and this appeal followed. However, petitioners' appellate brief only addresses the court's denial of their petition with respect to

allegations that the Building's layout made the City's location decision arbitrary and capricious (*see* App. Br. 10).

ARGUMENT

POINT I

SUPREME COURT SHOULD HAVE DISMISSED THE ENTIRE PETITION FOR LACK OF STANDING

Supreme Court correctly found that petitioners lacked standing to bring their nuisance claim or challenge DHS's process for soliciting homeless shelter proposals—a holding petitioners do not challenge in this appeal (A-9). But the court did not address the City's argument that petitioners lacked standing to pursue *any* of their claims. This Court, however, should find that petitioners lacked standing to bring any of their claims since, "in the absence of injury, there is no standing to bring an article 78 proceeding." *Matter of E. Ramapo Cent. Sch. Dist. v. King*, 29 N.Y.3d 938, 939 (2017).

To establish standing, petitioners needed to show that they would "'actually be harmed by the challenged administrative action," in a manner "distinct from that of the general public" and that their injuries "fall within the zone of interests or concerns

sought to be promoted or protected by the statutory provision under which the agency has acted." *Roberts v. Health & Hosps. Corp.*, 87 A.D.3d 311, 318 (1st Dep't 2011). As the City explained in its cross-motion to deny the petition (RA 45–46), petitioners fail to satisfy that standard for multiple reasons.

First, petitioners allege to have been injured by DOB's issuance of a TCO premised on purported misclassifications of the Building's use and occupancy groups (*see* App. Br. 3, 7–10, 30, 36–41). Even if petitioners were correct, the supposedly erroneous issuance of a TCO does not constitute a direct harm to petitioners, much less harm different from any injury that would be suffered by the public at large. *See Bloomfield v. Cannavo*, 123 A.D.3d 603, 604 (1st Dep't 2014).

Second, petitioners' assertions about how the Building's design—indisputably permissible under the Current Code for certain buildings—*might* impact a fire *if* one occurred amount to pure speculation. *See, e.g.,* A-2048 (consultant's affidavit forecasting that "until the residents safely exited the stairwell" during a hypothetical fire, "it would be difficult for the firefighters

to attach a hose to the water supply contained in the standpipe"); A-2086 (petitioner expressing concern "that any fire would spread … causing neighboring buildings" to "catch fire"). Those conjectural fears are insufficient to confer standing. *See Matter of Christian v. City of N.Y.*, 139 A.D.3d 457, 458 (1st Dep't 2016) (dismissing article 78 petition for lack of standing where "[t]he safety-related harm" alleged was "too speculative to show injury in fact"); *Tappan Cleaners v. Zoning Bd. of Appeals of Vil. of Irvington*, 57 A.D.3d 683, 684 (2d Dep't 2008) (noting that the potential for "safety issues" and reduction of property values is insufficient to constitute injury in fact). Indeed, petitioners fail to identify any "concrete injury" they have "suffered at this juncture." *E. Ramapo Cent. Sch. Dist.*, 29 N.Y.3d at 939.

Third, petitioners also alleged that they would face "security risks" and economic harm if the Westhab Shelter begins operations. *See* A-855 (recounting one resident's "harrowing tale of being the victim of an indecent assault by a homeless individual who fled into Central Park"); A-913 (alleging that the shelter will result in "excessive and disproportionate" costs). Even if their

dubious projections were accurate, those injuries do not fall within the zone of interests or concerns to be protected under the Current Code and related laws. *See Bloomfield*, 123 A.D.3d at 604.

For all of these reasons, Supreme Court should have dismissed the entire petition for lack of standing.

POINT II

SUPREME COURT CORRECTLY DENIED THE PETITION

While petitioners originally raised a host of objections to the opening of the Westhab Shelter, the sole argument they press on appeal is that DOB arbitrarily applied grandfathering provisions of the Current Code to the Building (App. Br. at 30). Notably, petitioners do not contend that DOB failed to inspect the Building or that the agency improperly applied the legal provisions that it determined to be applicable.

But as the City's filings before Supreme Court meticulously detailed, and as that court correctly concluded, DOB, with input from DHS, rationally determined that there was no change in use or occupancy that would bar application of the grandfathering provision (A-5–6). That determination was based on DOB's fact-

specific assessment of the Building's history, construction, design features, its planned future use and occupancy, as well as the proposed alterations. While Petitioners and their consultants disagree with DOB's conclusion, Supreme Court properly deferred to the agency's rational, fact-based findings.

Petitioners also erroneously assert that to determine whether grandfathering provisions applied, Supreme Court should have independently assessed the Building's safety and evaluated the opinions of petitioners' consultants, eschewing notions of agency deference and rational basis review. But Supreme Court rightly declined to substitute its judgment for that of the expert agency. Finally, Appellant's last-ditch argument that the Building's owner elected to opt out of any grandfathering fails because, as Supreme Court noted, the document Petitioners rely on applied only to the work on the Building's first floor.

A. DOB rationally determined that there was no "change in use" barring the application of the Current Code's grandfathering provisions.

It is well settled that reviewing courts may not disturb an agency's determination unless it is arbitrary and capricious,

affected by error of law, or an abuse of discretion. C.P.L.R. 7803(3); *Matter of Save America's Clocks, Inc. v. City of N.Y.*, 33 N.Y.3d 198, 207 (2019). An agency determination is arbitrary if it lacks "sound basis in reason" and is taken "without regard to facts." *Pell v. Board. of Educ. of Union Free School Dist. No. 1*, 34 N.Y.2d 222, 231 (1974). Under this "extremely deferential" standard, an agency's fact-based determination can be disturbed only if it has "*no rational basis*." *Matter of Beck-Nichols v. Bianco*, 20 N.Y.3d 540, 559 (2013) (emphasis in original).

Accordingly, it is a cardinal principle that a court may not "substitute [its] judgment in place of the judgment of the properly delegated administrative officials." *Save America's Clocks,* 33 N.Y.3d at 210. Rather, a court should uphold a rational administrative determination "even if the court concludes that it would have reached a different result than the one reached by the agency." *Id.* at 207. Deference is particularly due to an agency's factually detailed application of statutes it administers. *See Matter of Gorelik v. N.Y. City Dep't of Bldgs.*, 128 A.D.3d 624, 625 (1st Dep't 2015).

Here, DOB administers the statutes at issue—the Current Code, 1968 Building Code, MDL, and Zoning Resolution—and the agency used its expertise to issue a TCO for the cellar and first four floors of the Building after making fact-based determinations that certain code provisions were applicable and that the designated portions of the Building complied with them. Indeed, the TCO reflected DOB's historical understanding and interpretation of Building Code revisions and grandfathering clauses (A-2038–39, 2042–43); input from DHS's experience in working with homeless populations (A-2038–39); and FDNY's No Objection Letter, issued after that agency assessed the facts set forth in the shelter's Fire Protection Plan (A-1117). Accordingly, the TCO offers a paradigmatic example of an agency's "evaluation of factual data and inferences to be drawn therefrom" that merits judicial deference. *Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 459 (1980); *see also Matter of Mech. Contrs. Ass'n of N.Y. v. N.Y. City Dep't of Bldgs.*, 128 A.D.3d 565, 566 (1st Dep't 2015).

Properly applying this deferential scope of review, Supreme Court rightly found that DOB acted rationally when determining

that the Building underwent no change in use or occupancy and that the Current Code's grandfathering provisions should apply.

As described above, at pp. 9–13, the Current Code, in conjunction with the 1968 Building Code, allows certain work on buildings built prior to 1968 to comply with the laws applicable prior to 1968, including the MDL (A-2043, 2090-91). *See* N.Y.C. Admin. Code §§ 27-120; BC 101.4.3. The Building here, built in 1910, meets that criterion. Such grandfathering, however, does not apply when proposed alterations would result in a change in use or occupancy group classifications. *See* N.Y.C. Admin. Code § 27-118. Thus, it was necessary for DOB to determine whether the Building would be undergoing a change in these classifications.

As detailed in the affidavit of DOB Manhattan Deputy Borough Commissioner Rodney Gittens, DOB determined that the Building, operating as the Westhab Shelter, would be categorized as a "Class A" Multiple Dwelling within the R-2 occupancy group classification (A-2042–43). These designations apply to multiple dwellings that are to be occupied by residents for stretches of 30

days or more (A-2042).[11] DOB determined that these "non-transient" designations were appropriate after learning from DHS that, in DHS's experience, employment shelter residents were expected to remain at the shelter and in the same bed for significantly longer than thirty days (A-2038–39; A-2042).

Having designated the Westhab Shelter as a Class A Multiple Dwelling within the R-2 occupancy group classification, DOB concluded that this reflected a continuation—not a change—of the Building's pre-existing use and occupancy group classifications because, as discussed above at pp. 13–16, the Building had long operated as an MDL, Class A SRO, which under current terminology is also classified within the R-2 group. Thus, with no change in use and occupancy, the grandfathering provisions remained applicable. And after conducting multiple inspections and receiving the FDNY's approval of the Westhab Shelter's Fire Protection Plan, DOB issued the TCO, signifying

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[11] *See* BC 310.1.2; HMC § 27-2004; MDL § 4(8); Zoning Resolution §§ 10-12, 22-10.

that the identified area complied with all applicable code provisions and, therefore, was fit for occupancy.

The Petitioners contend that DOB should have classified the Building as a Class B Multiple Dwelling with an R-1 occupancy group classification, a "transient" use designation that would represent a change in use and, thus, render many of the grandfathering provisions inapplicable (App. Br. 8–9, 36–41). But they fail to establish that DOB's decision-making on this issue, which required its expertise and application of the laws it administers to a particular factual scenario, was irrational.

Petitioners make much of the fact 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* App. Br. 37–39), despite their acknowledgement that the relevant statute provides "a guidepost" for DOB's classification rather than "a black-and-white line" (RA 114). Yet, the very law petitioners cite also states that R-1 facilities function as places where residents generally live "for a period less than one month." BC 310.1.1(1). As previously noted, DHS represented to DOB, with supporting data,

that residents in employment shelters like Westhab would be expected to remain there for periods longer than 30 days, making the R-1 classification inappropriate (A-2038-39, A-2042).

Petitioners' argument rests on a fundamental misperception that all homeless shelters are alike and that, regardless of what the facts show, they are fundamentally "transient" in nature—a notion they referred to as "common sense" during argument before Supreme Court (RA 113, 114). But all shelters are not the same; and the facts about this particular shelter led DOB to rationally conclude that R-2 was the appropriate classification. The City Charter empowers DOB, the agency with relevant expertise and a bird's eye view of City-wide building classifications, to make fact-based distinctions of precisely this kind. *See* City Charter § 643.[12]

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[12] It is also worth noting that the Current Code categorizes as non-transient, or R-2, certain multiple dwellings that resemble others classified as transient, or R-1. "Student apartments" and "adult homes or enriched housing with 16 or fewer occupants," for example, appear as examples of non-transient facilities. N.Y.C. Admin. Code § 38-301.1.1. However, the Current Code lists within the transient occupancy group "college or school student dormitories" and other "adult homes or enriched housing with 16 or fewer occupants," multiple dwellings that may well appear indistinguishable to neighbors. BC 301.1.1.

DOB's determination was also consistent with language in the MDL, which list a variety of dwellings, including "flat houses," "apartment hotels," and "bachelor apartments," where single adult men historically received food and laundry services within the "Class A" category. MDL § 4.[13] The thread connecting those different types of dwellings is "occupancy of a dwelling unit by the same natural person or family for thirty consecutive days or more," the critical factor DOB considered when classifying the Building. *Id.*

Doggedly clinging to their assumption that all homeless shelters are indistinguishable, Petitioners cite their own consultants for the proposition that "transient homeless shelters are regularly classified as R-1 under the current Code" (App. Br. at 39). But Westhab is an *employment* shelter. Petitioners cite no proof that DOB classified other employment shelters within the R-1 occupancy group or that DHS deviated from any previous

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[13] *See generally Cincinnati, H. & D. R. Co. v. Ives*, ___Misc 3d___, 3 N.Y.S. 895, 897 (Spec. Term. 1889) (describing former bachelor apartment hotel at 281 Fifth Avenue where defendant received meals and laundry services).

estimates for the anticipated length of residents' stays in employment shelters. *Cf. Terrace Ct., LLC v. N.Y. State Div. of Hous. & Community Renewal*, 18 N.Y.3d 446, 453 (2012) (finding agency action "unreasonable as a matter of law in the absence of an explanation by the agency regarding its departure from precedent"). As the City explained during the evidentiary hearing, the opposite is true. DHS operates three specialized employment shelters throughout the City, all classified within the R-2 occupancy group (RA 205).

Similarly, petitioners mistakenly rely on *Chelsea Business. & Property. Owners' Association, LLC v. City of N.Y.,* 2011 N.Y. Slip Op. 50059[U] (Sup Ct. N.Y. Cnty. June 8, 2011), to argue that the Westhab Shelter should be classified as a "transient hotel" or "community facility" (App. Br. 40). But that case did not involve an employment shelter. Petitioners gloss over the significant differences between the treatment shelter at issue in that case, a larger facility equipped to serve individuals seeking clinical services, and the Westhab Shelter, which is expected to serve "a uniquely stable population" (RA 142). *See Chelsea Bus. & Prop.*

Owners' Ass'n 2011 N.Y. Slip Op. 50059[U], at *2. The fact-specific use group classification discussed in that case suggests no error in DOB's classification of the Westhab Shelter classifications. On the contrary, this Court's holding in that proceeding underscores the fact that a development might arguably fit into more than one use (or occupancy) group and that a reviewing court should defer to DOB's classification. *See Matter of Chelsea Bus. & Prop. Owners' Ass'n, LLC v. City of N.Y.,* 107 A.D.3d 414, 415 (1st Dep't 2013).

Petitioners also cite DSS requirements for "temporary" emergency housing to supposedly demonstrate why DOB should have classified the Building differently (App. Br. 38). But the regulation they point to has no bearing on DOB's use and occupancy categories. Nothing in the regulation suggests that DOB's definition of "transient" dwelling, for purposes of use and occupancy classifications, is coterminous with DSS's definition of "temporary," which describes homeless shelter eligibility. The DSS regulation they cite merely describes in general terms "the requirements with which an individual or family who applies for

temporary housing must comply in order to be eligible for temporary housing assistance." 18 N.Y.C.R.R. § 352.

Ultimately, petitioners offer no justification for this Court to disturb DOB's rational classification of the Building.

B. Appellant's argument that Supreme Court should have conducted a free-standing public safety inquiry is fundamentally flawed.

Petitioners contend that in order to justify the application of the Current Code's grandfathering provisions, DOB had to rebut, in court, petitioners' consultants' opinions that the Building was unsafe; and, by extension, Supreme Court needed to independently decide whose opinions were more persuasive. Those propositions grossly miss the mark. The safety concerns that petitioners' consultants raise largely boil down to the view that only compliance with the Current Code can guarantee safety. But the Legislature has already determined that grandfathering is permissible for older buildings when there is no change in use and occupancy, rendering Appellant's argument nothing more than a policy disagreement with the Legislature's judgment.

That grandfathering of altered buildings is allowed only when general safety and public welfare are not endangered does not empower dissatisfied community members to force a court to engage in rudderless, independent "safety" adjudications—assessments that would require courts to impermissibly substitute their judgment for that of the legislatively designated agency.

1. The Legislature—not DOB or Supreme Court—determines when and how existing buildings conform to new laws.

Petitioners insist that particular design features permitted under the MDL and grandfathered into the Current Code are categorically unsafe. But the grandfathering provisions that allow older buildings to remain in compliance with these prior requirements entail the opposite legislative judgment—that these design features in older buildings need not be changed every time new provisions are created that impose different requirements for new buildings. Thus, petitioners challenge not the interpretation of any language within the Current Code or other statutory text; they contest the concept of grandfathering itself in an effort to drive the Westhab Shelter out of their immediate vicinity.

For example, throughout their appellate brief, petitioners posit that having a single means of egress—as the Building does—is "illegal" and "dangerous." *See, e.g.*, App. Br. 2–4, 17. They recount their consultants' opinions that a single egress "is simply too dangerous" or "unsuitable" (*id.* at 3, 7) to remain in place. Yet, petitioners cannot deny that the Current Code allows certain older buildings to continue lawfully operating with a single means of egress.

Contrary to the petitioners' implicit contention that Current Code grandfathering is invalid, this Court has often recognized and applied these grandfathering principles to various buildings. *See, e.g., Isaacs v. W. 34th Apts. Corp.*, 36 A.D.3d 414, 416 (1st Dep't 2007) ("the Building Code does not apply since the building pre-dated its effective date"), *lv. denied*, 8 N.Y.3d 810 (2007); *Bruno v. N.Y. City Hous. Auth.*, 21 A.D.3d 760, 761 (1st Dep't 2005) (new requirement "was enacted 16 years after the certificate of occupancy for the apartment building in this case was issued, and that the building was in compliance with the statutory requirements then existing"); *Sanchez v. Biordi*, 259 A.D.2d 434,

434 (1st Dep't 1999) (Building Code "section was enacted after the certificate of occupancy for the building was issued"). And in so doing, this Court has not engaged in the free-standing 'public welfare and safety' inquiry that the petitioners demanded Supreme Court perform.

Petitioners fail to acknowledge that grandfathering provisions in the Current Code, the 1968 Building Code, and the MDL reflect the Legislature's careful assessment of the costs and benefits of progressive change. As the Court of Appeals explained in *Powers v. 31 E. 31 LLC*, 24 N.Y.3d 84 (2014), new versions of these laws do not blindly "grandfather" preexisting requirements. Rather, the law requires "existing buildings to conform to the new standards under certain circumstances." *Id.* at 91. The Current Code accomplishes this nuanced goal by selectively allowing certain preexisting features to remain while requiring buildings to conform to new standards under specified conditions.

For example, the Current Code enumerates 19 categories of alterations that, under identified circumstances, would require a building owner to complete renovations in accordance with the

Current Code, rather than with the earlier law. N.Y.C. Admin Code § 28-101.4.3(2). The Current Code also establishes cost thresholds for renovations that will require a building's entire fire protection system to be brought up to the most recent standards. BC 901.9.4.1–901.9.4.3. At the same time, the Current Code is sensitive to the fact that certain provisions in earlier laws might impose a higher safety standard on older buildings than would be achieved by certain new standards that could potentially be applied. *See* N.Y.C. Admin Code § 28-101.4.4.[14]

Consequently, the resulting law carefully balances the burdens property owners face in implementing new requirements with both the effectiveness of preexisting precautions and the incremental improvement expected from new safety features. *See* N.Y.C. Admin. Code § 27-102 (noting "current scientific and engineering knowledge, experience and techniques" considered in

[14] Specifically, if the owner of an existing building elects to be governed by the Current Code when the 1968 Building Code might otherwise apply, the owner "shall submit a comparative analysis … of the relevant fire safety and structural safety provisions under the 1968 Code and [Current] [C]ode, demonstrating that the alteration does not result in a reduction to the fire and life safety of the building." N.Y.C. Admin Code 28-101.4.4.

developing the Building Code to promote "public safety, health and welfare … with due regard for building construction and maintenance costs"); *see also* Shavell, Steven, *On Optimal Legal Change, Past Behavior, and Grandfathering*, 37 J. Legal Stud. 37, 39–40 (2008) (analyzing cost benefit analysis central to drafting grandfathering provisions governing safety requirements).

Petitioners ignore the fact that the Current Code already sets forth specific requirements for when particular grandfathered design features may safely remain in place; and it conditions TCOs on DOB's analysis of public safety concerns related to temporary use of a portion of the building while other renovations continue. *See* N.Y.C. Charter § 645(f). It does not authorize DOB to second-guess the Legislature's decision to allow grandfathering of legally existing design features. Therefore, petitioners' core contention that "a building will *not* be eligible for the protections of the Grandfathering Provision" unless DOB (or Supreme Court) conducts an independent assessment of "general safety and public welfare" (*see* App. Br. 30) has it backwards. The Current Code already reflects legislative determinations regarding when

particular safety precautions, such as a one-floor upgrade to a sprinkler system or a whole-building system replacement, are required based on the Legislature's balancing of public safety implications and associated transition costs. N.Y.C. Admin. Code §§ 28-118.3.4.1, 28-118.15

By intimating that DOB or Supreme Court needed to independently assess the safety of the standards the Legislature chose to make subject to the relevant grandfathering provisions, petitioners urge a reading of those laws that is inconsistent with DOB's conferred authority and Supreme Court's limited review. Decades ago in In *Lyons v. Prince*, 281 N.Y. 557 (1939), the Court of Appeals expressly rejected petitioners' argument that DOB needed to independently asses safety standards the Legislature put in place. The *Lyons* court made clear that administrative agencies lack "power to decide whether higher standards and additional requirements should be exacted for the protection of the public health and safety." *Id*. at 564–565.

Reasonable minds can differ over how property owners should conform to new public health and safety standards. But it

is the province of the Legislature to make those decisions. DOB lacks authority to second-guess statutes that allow certain older buildings to maintain a single means of egress, for example, so long as the enumerated hallways and passages are equipped with automatic sprinklers, *see* MDL 248(4)(b), or laws that require sprinklers in individual rooms only of non-fireproof buildings but not the Building, a fireproof structure. *See* MDL 248(5).

DOB carefully inspected and assessed the Building's compliance with the laws the Legislature deemed applicable, and, finding such compliance, issued a TCO for a portion of the Building that could be occupied while renovations continued. Supreme Court correctly deferred to DOB's conclusion, which was based on its careful inspection of the Building and its fact-driven determination of which provisions were applicable. *See Gorelik*, 128 A.D.3d at 624.

2. None of the grandfathering provisions DOB applied required Supreme Court to depart from its rational basis review.

Petitioners insist that because DOB found various grandfathering provisions applicable, they were "entitled to a trial

to determine the factual issue of whether the Building endangered the general safety and public welfare by virtue of the Building's failure to meet the current day Code" (App. Br. 7). But nothing about those provisions required Supreme Court to weigh conflicting expert opinions regarding general public safety concerns.

For one thing, petitioners have not posed any questions "of pure statutory reading and analysis" regarding the grandfathering provisions DOB considered. *See Kurcsics*, 49 N.Y.2d at 459. On the contrary, their challenge to DOB's application of those provisions takes aim at the type of administrative decision-making that is subject to rational basis review. *See Feigenbaum v. Silva*, 274 A.D.2d 132, 136 (1st Dep't 2000) (reversing grant of article 78 petition where DOB's application of the law "involve[d] knowledge and understanding of underlying operational practices"). And while expert affidavits may "raise questions as to common-law negligence," *Burke v. Canyon Rd. Rest.*, 60 A.D.3d 558, 559 (1st Dep't 2009), the opinions of petitioners' consultants are misplaced in this

proceedings where the relevant inquiry is whether DOB made a rational determination—a highly deferential standard that those contrary opinions are inadequate to overcome. *See Flacke*, 69 N.Y.2d at 363.

Not surprisingly, petitioners exclusively cite cases involving private parties' contract or tort claims, not article 78 challenges of administrative action, to support their position. *See Bd. of Mgrs. of Loft Space Condo. v. SDS Leonard, LLC*, 142 A.D.3d 881, 882 (1st Dep't 2016) (breach of contract claim alleging that condominium contained "items that are hazardous, dangerous, and/or" unlawful "at the time of sale"); *Slomin v. Skaarland Constr. Corp.*, 207 A.D.2d 639, 641 (3d Dep't 1994) (denying summary judgment for defendant home builders in post-closing negligence action where plaintiff attempted to modify a light fixture); *Cirino by Gkanios v. Greek Orthodox Cmty., Inc.*, 193 A.D.2d 576, 576 (2d Dep't 1993) (holding certificate of occupancy did not preclude finding of negligence based on existing building code violations); *Bd. of Mgrs. of Olive Park Condo. v. Maspeth Props. LLC*, 2014 N.Y. Slip Op. 33012(U) (Sup. Ct. N.Y. Cnty. Oct. 27, 2014) (finding

code compliance not dispositive of claim that construction deviated from offering plan).

For petitioners to prevail in this proceeding, they needed to demonstrate DOB's inability to justify the TCO, not simply that their affiants disagreed with the agency's rationale for finding the Building complied with the relevant laws. *Cf. Matter of Gerson v. N.Y. City Campaign Fin. Bd.*, 171 A.D.3d 648 (1st Dep't 2019) (finding that "informal rule" underlying agency's determination was "so lacking in reason for its promulgation that it is essentially arbitrary"). Petitioners might have shown that DOB acted arbitrarily if their affiants established that DOB never inspected the Building or omitted a critical step in the review process. *Cf. Rebirth of Bergen St. Block Ass'n v. City of N.Y.*, 2017 N.Y. Misc. LEXIS 1008, at *3 (Kings Cnty. Sup. Ct. Mar. 28, 2017) (petitioners submitted "unrefuted evidence" that the City had not conducted an appropriate Fair Share assessment); *Lee v. N.Y. City Dep't of Hous. Preserv. & Dev.*, 162 Misc.2d 901, 909 (Sup. Ct. N.Y. Cnty. 1994) (granting article 78 petition where municipality "attempted to purchase a parcel of land without first obtaining a

mandated permit"). But that was not what petitioners' consultants averred.

Petitioners' opinion-laden affidavits failed to identify any omissions in DOB's well-documented decision-making processes. Instead, they focused on the affiants' disagreement with the agency's determinations than with substantiated facts. Robert Skallerup, for example, opined that the Building's sprinkler system suffers from "a critical omission" since "fires are most likely to start" in "the tenant (occupant) rooms (A-173). Yet, he articulated no basis for his conclusion and took no note of the fact that DHS prohibits smoking, bars electrical devices that pose fire risks from rooms, and approved rooms designed without kitchens (RA 205). Similarly, John Bongiorno based his affidavit on a single photograph and his understanding "that the building … is a nine-story building that has only one means of egress" (A-2083), never accounting for its fireproof construction, fire rated doors and hallways or inspecting the Building itself.

And while petitioners repeatedly refer to Robert Kruper's purported expertise, his affidavit was riddled with irrelevant

conclusions and inaccuracies. Kruper reported that he "researched the use and occupancy group of several other homeless shelters," finding that "each building ha[d] an R-1 building classification" (A-152); but he failed to explain either how he selected those shelters or whether any of them provided employment services like those planned for the Westhab Shelter.[15] Kruper also grossly overstated the similarities between the building involved in the Happyland Social Club arson tragedy, which featured "combustible interior finish[ings]" but lacked fire-rated hallways and doors, and the Building (A-2079). [16]

In any event, the City had no reason to offer counter-expressions of opinion when the detailed record in this proceeding speaks for itself. DOB issued a TCO (A-1118–19). Under the City

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[15] And in a linguistic sleight of hand, petitioners' cite that statement to argue that their consultants "have not found a single traditional transient homeless shelter with an R-2 (or J-2) occupancy group in all of Manhattan" (App. Br. 39).

[16] *See* Richard W. Bukowski & Robert C. Spetzler, National Institute of Standards & Tech, Analysis of the Happyland Social Club Fire with Hazard I, 4 J. Fire Prot. Engr. 117, 117–31 (1992) (concluding that a "second means of egress *might* have reduced the toll, but probably would not have eliminated all of the fatalities" due to other conditions within the nightclub) (emphasis added).

Charter and the Current Code, a TCO indicates code compliance and further reflects DOB's assessment that "such temporary occupancy or use" identified in the TCO "would not in any way jeopardize life or property." N.Y.C. Charter § 645(f); § 28-118.15 (TCO may issue only if the identified portion of the building "may be occupied and maintained in a manner that will not endanger public safety, health, or welfare").

The Current Code and all of the other laws that DOB applied to inspect the Building set standards to make buildings reasonably safe for their occupants and the public at large. *See* N.Y.C. Admin. Code §§ 27-102, 28-101.2; MDL § 2. And the City articulated in great detail DOB's rationale for finding the identified portion of the building was compliant with those laws (A-2089–99; RA 135–89). Not only that, the City established that FDNY reviewed and approved the Building's Fire Projection plan (A-1117). This record supplied more than enough evidence to satisfy the deferential, article 78 standard.

3. Supreme Court carefully reviewed the detailed and highly-technical record before denying the petition.

While Supreme Court rightly refused to indulge petitioner's request that it conduct a de novo public safety assessment, substituting its judgment for that of DOB and of the Legislature, its evaluation of DOB's determination was anything but the "perfunctory review" (App. Br. 36) petitioners accuse the court of undertaking. Among other things, the extensive record the parties developed included DOB's denial of an incomplete work permit application and refusal approve applications for other work that fell short of governing requirements (A-936–37, 954–58). All of this reflected DOB's vigilance in reviewing work performed on the Building. The record also established that by removing the restaurant facilities on the first floor (A-2020), reducing the number of lawful occupants identified on the TCO (A-1464, 2021), and installing certified fire guards (A-2129), the Building had enhanced its safety profile from the decades when it operated without incident as an SRO—an extended time during which

petitioners never voiced the safety concerns they raise in this proceeding (RA 173).

Beyond that, Supreme Court conducted a lengthy evidentiary hearing and considered post-hearing submissions that detailed how the Current Code, the 1968 Building Code, the MDL and other laws governed alterations performed on different floors of the Building (A-2090–95). Among other things, the court asked the City to explain its analysis of work performed on the Building's sprinkler system and clarify at oral argument whether apartments in the Building would contain passages that, under the relevant MDL provisions, required additional sprinklers (RA 137). The court also inquired into FDNY's process for issuing a No Objection Letter (RA 164).

What petitioners decry as a "perfunctory review" is actually Supreme Court's refusal to turn this article 78 "rational basis" proceeding into a *de novo* safety and public welfare review in which the court would determine whether it agreed with the opinions of petitioners' consultants or with DOB. Supreme Court rightly refused to engage in such an endeavor, which runs counter

to the principles of article 78 review and would have the court substitute its judgment for that of the legislatively-designated agency and, ultimately, that of the Legislature itself.

C. The Building's owner never elected to opt out of the Current Code's grandfathering provisions.

Petitioners further propose that by completing an application for a building permit, the owner elected to comply with all requirements set forth in the Current Code (App. Br. 41). Supreme Court properly rejected this argument (*see* A-6).

At the evidentiary hearing, the City explained that while the work permit application noted that work would be performed throughout the building, the work requiring a permit concerned only the "Alt-1"[17] renovations to replace "[r]estaurant facilities … with office and recreational space on the first floor" (A-2020). The Building's owner performed no cellar renovations (*id.*). The Building's second through fourth floors only required "a fresh

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[17] *See* DOB, *How to Obtain a Permit*, available at https://www1.nyc.gov/site/buildings/business/how-to-obtain-a-permit.page (last visited Aug. 28, 2019) (describing "Alt-1" renovations as "major alterations that will change use, egress or occupancy").

coat of paint, better emergency exit signage, and the in-kind replacement of sinks, shower heads, and toilets"—changes that did not require a work permit at all. (*id.*). And because first floor alterations *did* constitute a change from a restaurant facility to shelter use, DOB required those renovations—including newly-installed sprinklers—to adhere to the Current Code's standards (A-2045; RA 147).

DOB's explanation comports with the article 4 of the 1968 Building Code, which specifies when alterations of an existing building require the entire structure to conform to the current Building Code's requirements. When "the alteration of a space in a building involves a change in the occupancy or use thereof," which in this case involved changing the first floor's restaurant into shelter space, "the alteration work involved in the change shall … comply with the requirements of this code and the remaining portion of the building shall be altered" only to the extent "necessary to protect the safety and welfare of the occupants." N.Y.C. Admin. Code § 27-118(b).

Although petitioners focus on the owner's indication that work would be performed throughout the Building as proof that the owner elected to be governed by the Current Code, the owner submitted that application with plans outlining the specific work to be performed (*see* A-563). Taken in context, those plans, as well as the estimated cost of the alterations (*see* RA 169–70), belie any contention that the owner wished to undertake the gut renovation required to add exits, widen hallways or reconfigure the Building in other ways to conform to newer standards outlined in the Current Code.

* * *

The issue this appeal presents is simple: Did petitioners, community members who have experienced no actual harm, identify any arbitrary and capricious conduct by the City and its agencies? The answer is a resounding "no." Neither petitioners' unsubstantiated fears nor the concurring opinions of their consultants can rewrite laws. The extensive record, which Supreme Court carefully reviewed, demonstrates that DOB—the agency with legislatively-conferred authority to enforce these very

laws—employed its expertise to engage in a fact-driven application of statutes specifically designed to protect public health and safety. Petitioners have failed to show why the City, which has a legal and moral obligation to supply housing on demand, cannot begin operating the Westhab Shelter at the Building.

CONCLUSION

For the foregoing reasons, this Court should affirm Supreme Court's denial of the petition.

Dated: New York, NY
August 30, 2019

Respectfully submitted,

ZACHARY W. CARTER
Corporation Counsel
of the City of New York
Attorney for Respondents

By: _____
BARBARA GRAVES-POLLER
Assistant Corporation Counsel

100 Church Street
New York, NY 10007
212-356-2275
bgraves@law.nyc.gov

AARON BLOOM
BARBARA GRAVES-POLLER
of Counsel