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

New York Supreme Court
Appellate Division: First Department

In the Matter of

WEST 58TH STREET COALITION, INC., *et al.*,

Petitioners-Appellants,

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

against

THE CITY OF NEW YORK, *et al.*,

Respondents-Respondents.

App. Div. Case No. 2020-10421

NOTICE OF MOTION FOR REARGUMENT OR LEAVE TO APPEAL

PLEASE TAKE NOTICE that upon the annexed memorandum and affirmation, the municipal respondents[1] will move this Court, located at 27 Madison Avenue, New York, New York 10010, on September 28, 2020 at 10:00 a.m., or as soon thereafter as counsel can be heard, for an order:

[1] The municipal respondents are the City of New York, the Mayor, the Comptroller, the Department of Homeless Services, the Human Resources Administration, the Department of Buildings, the Commissioner of DHS and HRA, and the Deputy Commissioner of HRA.

(a) granting reargument of this Court's decision and order entered August 13, 2020 and, following reargument, affirming the order and judgment below, which denied plaintiffs-petitioners' claims;

(b) in the alternative, granting the municipal respondents leave to appeal the August 13, 2020 decision and order to the Court of Appeals; and

(c) for such other relief as the Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that answering papers, if any, must be served at least two days before the return date.

Dated: New York, New York
September 12, 2020

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Corporation Counsel
of the City of New York
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Municipal Respondents

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

New York Supreme Court
Appellate Division: First Department

In the Matter of

WEST 58TH STREET COALITION, INC., *et al.,*

Petitioners-Appellants,

App. Div. Case No. 2019-3801

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

against

THE CITY OF NEW YORK, *et al.,*

Respondents-Respondents.

MEMORANDUM IN SUPPORT OF MOTION FOR REARGUMENT OR LEAVE TO APPEAL

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September 12, 2020

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PRELIMINARY STATEMENT

Petitioners appealed to this Court to block the opening of an employment shelter for homeless men. The Court addressed two questions: whether the Department of Buildings (DOB) correctly identified the building's use category; and whether the building's temporary use would jeopardize public safety.

On the first question, the Court underscored the limits to judicial review of agency action, holding that DOB's judgment is entitled to deference because it is "empowered by the City Charter to interpret and enforce" the relevant laws. That is exactly right. But the Court overlooked this insight when confronting the second question. There, rather than defer or remand to DOB, the Court instructed the trial court to hold a hearing to adjudicate whether the building's temporary use would jeopardize public safety.

Reargument is warranted because that result conflicts with the Court's own insight about the limits of judicial review. The Charter gives DOB alone the discretion to issue a temporary certificate of occupancy upon finding that "temporary occupancy or use would not in any way jeopardize life or property." Lest there

be any doubt, the Charter is explicit that this power belongs to DOB "exclusively" and is "subject to review only by the board of standards and appeals as provided by law."

That backdrop affords three options to a court facing DOB's assessment of the safety of a building's temporary use: confirm DOB's judgment as rational; vacate it as arbitrary and capricious; or remand to DOB for elaboration. All three options honor separation-of-powers principles; but led astray by petitioners, this Court chose a fourth, transferring DOB's power to judge safety to the trial court, based on rules concerning private parties' duties under tort or contract law that have no bearing on agency action.

Reargument is warranted for that reason, and also because forcing a hearing focused on complaints about the building's permanent features misapprehends what is relevant when DOB green-lights a temporary use. Alternatively, leave to appeal should be granted because the result conflicts with settled constraints on judicial review, and threatens to embroil the judiciary in disputes about the issuance (or non-issuance) of the 1,600 or so temporary certificates of occupancy sought annually.

OVERVIEW OF THE CASE

This Court is well acquainted with this appeal. Accordingly, we briefly summarize the procedural history of this case before explaining why reargument or leave to appeal should be granted.

This litigation began in 2018 when petitioners challenged the City's decision to open the Westhab Shelter, a specialized facility for employed or employable homeless men at the site of a former single room occupancy hotel in their neighborhood (Appellants' Appendix ("A") 11–92). Shortly before the City[2] answered, DOB issued a temporary certificate of occupancy, certifying that, subject to conditions, the bottom four floors of the building could safely operate while work proceeded elsewhere (A118–19, 2045–46).

Petitioners moved for a preliminary injunction, focusing on the building's safety and homing in on permanent structural features like the stairwell (Respondents' Appendix ("RA") 129–32). In response, the City detailed DOB's rationale for classifying the

[2] We use the "City" to refer to the various municipal respondents.

building as a Class A, R-2 multiple dwelling that would be occupied in non-transient fashion—the foundation of its inspection process and approval of the temporary certificate of occupancy (RA139–53, 205). Supreme Court denied petitioners' motion (RA231), and this Court denied leave to appeal (A2127).

Then, Supreme Court denied the petition and dismissed petitioners' other claims (A4–9). Rejecting petitioners' core contention that DOB misclassified the building, the court deferred to DOB's analysis of whether the identified portion of the building would pose unreasonable risks if occupied in accordance with the temporary certificate of occupancy (A5, 7). This Court later denied petitioners' application for an injunction pending appeal.[3]

On August 13, 2020, this Court affirmed Supreme Court's decision on the pivotal question of whether DOB rationally classified this building (Decision 15–16).[4] This Court observed that DOB had undertaken a "fact-intensive inquiry," gathering its

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[3] *See* June 11, 2019 order attached as Exhibit B to the Affirmation of Barbara Graves-Poller (Graves-Poller Aff.), dated September 12, 2020.

[4] "Decision" refers to this Court's decision and order annexed as Graves-Poller Aff., Exhibit A.

own information about "the Building's history, construction, design features, its planned future use … as well as the proposed alterations" (*id*. at 6–7). The decision further noted that DOB relied on other City data, which indicated that residents would remain in the shelter for "well above 30 days" (*id*. at 6).

From there, however, the Court opined that the temporary certificate of occupancy did not "reflect[] DOB's assessment that the temporary occupancy of the Building will not endanger public safety, health or welfare" (*id*. at 20). The decision pinpointed two issues of concern: the "single, narrow, winding stairway, which leads to the lobby and not directly to the street" and a condition of the temporary certificate of occupancy that required the presence of two fire guards until the building was "fully sprinklered" (*id*. at 19). The Court found that petitioners' "competing evidence" necessitated a "hearing on whether the Building's use is consistent with general safety and welfare standards" (*id*. at 19).

Petitioners served notice of entry by regular mail on August 13, 2020, and this motion is made within 35 days thereafter.

REASONS TO GRANT REARGUMENT

This Court should grant reargument to reconcile the competing views of judicial review of agency action reflected in the same opinion, and to clarify the distinction between the fact-finding directed by the Court and the narrower focus of the safety inquiry contemplated by governing laws. *See* CPLR 2221(d)(2).

A. By directing the trial court to conduct de novo review of safety, the Court failed to consistently apply its core insight that this power has been delegatedto DOB.

As the Court recognized when upholding DOB's classification of the building, it is black-letter law that a court "may not substitute [its] judgment in place of the judgment of the properly delegated administrative officials" (Decision 12) (cleaned up).[5] Indeed, to draw a contrast with the concurrence about courts' role "in reviewing agency determinations," the majority emphasized that "DOB is empowered by the City Charter to

[5] We use "(cleaned up)" here to note when quotation marks, citations, and other alterations have been omitted.

interpret and enforce the Building Code, the Multiple Dwelling Law and Zoning Resolution" (*id.* at 15 (citing City Charter § 643)).

That insight is undeniably correct. The Charter empowers DOB to enforce laws concerning "use, occupancy, [and] safety," City Charter § 643. And it also specifically delegates to DOB and its officials the discretion to "issue a temporary certificate of occupancy for any part of [a] building or structure provided that such temporary occupancy or use would not in any way jeopardize life or property." *Id.* § 645(b)(3)(f); *see also* Admin. Code § 28-118.15 (substantially the same). This power is entrusted to DOB "exclusively, subject to review only by the board of standards and appeals as provided by law." City Charter § 645(b)(3)(f).[6]

The Court's insight about the respective roles of DOB and the reviewing court was the key to its ruling that DOB properly classified the building. But respectfully, the Court neglected to

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[6] Petitioners presumably understood this when they began a challenge to a temporary certificate of occupancy for this building before the Board of Standards and Appeals, though they never brought the matter to an end (*see* Exhibit C). But at oral argument in this appeal, appellants made no mention of that challenge and claimed they may not even have standing to bring one. *See* Oral Argument Video, https://tinyurl.com/y3tklyx6 (around 1:33:00).

apply that same insight to the next part of its analysis: whether the building's temporary use would jeopardize public safety. There is no dispute that DOB "issued a temporary certificate of occupancy" here, "conditioned" on safety-related measures like maintenance of "two certified fire guards" and "installation of additional sprinklers on each floor" (Decision 8). That step, by definition, depends on DOB's judgment that the "temporary occupancy or use would not in any way jeopardize life or property," City Charter § 645(b)(3)(f)—a judgment that the Charter vests in DOB "exclusively," *id.* § 645(b)(3).

The upshot is that DOB's judgment cannot be disturbed "unless it is arbitrary and capricious, affected by an error of law, or an abuse of discretion" (Decision 11). Insofar as the Court believed that the issuance of the temporary certificate of occupancy did not adequately reflect "DOB's assessment that the temporary occupancy of the Building will not endanger public safety, health or welfare" (*id.* at 20), then the appropriate remedy would be to remit the matter for DOB to expound upon its deliberative process—*not* to remand to the lower court for de novo

fact-finding. *See, e.g.*, *Matter of O'Donnell v. Erie Cnty.*, 35 N.Y.3d 14, 22–23 (2020) (remitting to agency "to develop a record" and "clarify its determination"); *see also Matter of 60 E. 12th St. Tenants' Ass'n v. N.Y. State Div. of Hous. & Comm'y Renewal*, 134 A.D.3d 586, 588 (1st Dep't 2015) (describing remand to agency "charged with the responsibility over the subject matter" as "in keeping with the deferential standard"), *aff'd*, 28 N.Y.3d 962 (2016).

A court's function is limited to ensuring that an agency can articulate a rational basis for its determination. *See Matter of Adirondack Wild Friends of the Forest Preserve v. N.Y. State Adirondack Park Agency*, 34 N.Y.3d 184, 191 (2019); *Testwell, Inc. v. N.Y. City Dep't of Bldgs.*, 80 A.D.3d 266, 276 (1st Dep't 2010) (according "great weight and judicial deference" since "agency's determination involves factual evaluation within an area of the agency's expertise"). A contrary approach would "be inconsistent with sound principles of administrative review." *Capers v. Giuliani,* 253 A.D.2d 630, 633 (1st Dep't 1998). That is especially true where, as here, the delegated power is discretionary. *See id.*;

see also Charter § 645(b)(3)(f) (providing DOB "*may* … issue a temporary certificate of occupancy") (emphasis added).

This Court relied on *Board of Managers of Loft Space Condominium v. SDS Leonard, LLC*, 142 A.D.3d 881 (1st Dep't 2016) to reach the result here (Decision 20). But the decision in that private contract action simply held that a temporary certificate of occupancy was not within the narrow universe of conclusive documentation warranting dismissal of a breach of contract action under CPLR 3211(a)(7), because the plaintiff could still show that property was "hazardous or dangerous" within the meaning of the parties' contract. 142 A.D.3d at 882.

That decision and others address private parties' rights under tort or contract law notwithstanding issuance of a temporary certificate of occupancy. But it is entirely different to *invalidate* a temporary certificate on article 78 review. If there is competing evidence that leaves "room for choice," "neither the weight which might be accorded nor the choice which might be made by a court are germane" to such review. *300 Gramatan Ave. Assoc. v. State Div. of Hum. Rts.*, 45 N.Y.2d 176, 180 (1978).

There may be rare situations where an agency has acted so egregiously that deference must give way. *See, e.g.*, *303 W. 42nd St. Corp. v. Klein*, 46 N.Y.2d 686, 690 (1979) (directing hearing based on prima facie showing of unconstitutional discrimination). But no such circumstances are present here, and the Court did not suggest otherwise. Instead, the Court's ruling, as it now stands, asks the lower court to rethink DOB's determination simply because a judge may view the facts differently.

B. By directing a hearing on the safety of permanent features, the Court overlooked the narrow scope of the temporary use inquiry.

This Court's ruling rests on City Charter and Administrative Code provisions that direct DOB to assess whether the building's "temporary occupancy or use" would "in any way jeopardize life or property." Charter § 645(b)(3)(f); *see also* Admin. Code § 28-118.15 (substantially the same). But questions about whether the building's permanent, structural features make it suitable for use as permitted by law, as a facility for the homeless, far exceed the scope of the inquiry those provisions authorize. This Court overlooked the narrow focus of the temporary use and occupancy

assessment and remanded this case for judicial fact-finding on permanent features of the building, ones entirely unrelated to temporary use.

When DOB analyzes public safety and welfare under the Charter and Administrative Code provisions this Court cited, the agency evaluates the circumstances that require a special allowance for temporary use before a final certificate of occupancy issues. That focus makes perfect sense in the context of the broader regulatory scheme. For a final certificate of occupancy, the only question is whether the building "conforms to the requirements of all laws, rules, regulations and orders," Charter § 645(b)(3)(d), because that compliance alone establishes safety. *Cf. Lyons v. Prince*, 281 N.Y. 557, 564–565 (1939) (noting inability to impose "higher standards and additional requirements … for the protection of the public health and safety"). So it is logical for the temporary certificate inquiry to narrow in on the safety implications of the deviations required for "temporary use or occupancy."

Here, as the Court noted (Decision 8), the temporary certificate of occupancy approved the use of the four lower floors while renovations above continued, conditioned on the presence of two certified fire guards until the owner completed all remaining sprinkler installation (A1118–19). But petitioners have never argued that the ongoing renovations created a safety problem, nor do they dispute that the specified conditions improved the safety situation in the short term. Instead, petitioners' complaints target permanent, structural features of the building, like the single means of egress (A2083) and the width of its stairwell (A2079).

Similarly, this Court's decision describes the building's single means of egress as the "main danger" (Decision 8, 19). But the law *allows* for permanent occupancy even when there is a single means of egress. *See* MDL § 248(4)(b) (describing distinct fire safety requirements of buildings with a single means of egress). It makes little sense to hold an evidentiary hearing on the "safety" of that feature when, even if the feature remains entirely unchanged, DOB would be required to issue a final certificate of occupancy once renovations elsewhere are complete and the

building is otherwise up to code. *See* Charter § 645(b)(3)(d) (confirming final certificate must issue when building "conforms to the requirements of all laws, rules, regulations and orders").

The Court's ruling contemplates a hearing on a permanent (and legal) feature of the building, when the governing laws tell us to focus on the "temporary occupancy or use." The Court should grant reargument to address why the temporary occupancy analysis does not support additional fact-finding on whether permanent features make the building safe for use as a homeless shelter.

REASONS TO GRANT LEAVE

Absent reargument, this Court should grant the City leave to appeal because the existing ruling conflicts with Court of Appeals precedent and raises a novel issue of significant public concern. *See* 22 NYCRR § 500.22(b)(4). The ruling departs from the Court of Appeals' instruction that a reviewing court must defer to an agency's rational decision-making. Indeed, that Court, has never ordered a de novo trial under CPLR 7804(h) just because affiants disagree with an agency's rational decision. *See*

generally Matter of Madison Cnty. Indus. Dev. Agency v. State of N.Y. Auths. Budget Off., 33 N.Y.3d 131, 135 (2019). This departure threatens to open the gates to litigation over the nearly 1,600 temporary certificates of occupancy DOB issues in New York City each year, requiring courts to consider holding evidentiary hearings whenever a neighbor can find a putative expert who disagrees with the agency. And the Court's ruling also risks imposing more rigorous standards on buildings that shelter the homeless, a stigmatized group with profound unmet needs, when similarly classified buildings would be subject to no such scrutiny.

Before these things come to pass, the Court of Appeals should have an opportunity to weigh in.

CONCLUSION

This Court should grant reargument, and upon reargument, affirm the order below. In the alternative, this Court should grant leave to appeal to the Court of Appeals.

Dated: New York, New York
September 12, 2020

Respectfully submitted,

JAMES E. JOHNSON
Corporation Counsel
of the City of New York
Attorney for the
Municipal Respondents

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

New York Supreme Court
Appellate Division: First Department

In the Matter of

WEST 58TH STREET COALITION, INC., et al.,

Petitioners-Appellants,

App. Div.
Case No.
2020-10421

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

against

THE CITY OF NEW YORK, et al.,

Respondents-Respondents.

AFFIRMATION IN SUPPORT OF MOTION FOR REARGUMENT OR LEAVE TO APPEAL

BARBARA GRAVES-POLLER, an attorney admitted to practice in the courts of this state, affirms under the penalties of perjury as follows.

1. I am an Assistant Corporation Counsel in the office of James E. Johnson, Corporation Counsel of the City of New York, counsel for respondents in this case. I submit this affirmation in support of respondents' motion for reargument or, in the alternative, for leave to appeal to the Court of Appeals.

2. Attached here as Exhibit A is a true and correct copy of this Court's August 13, 2020 decision and order, with notice of entry served by first class mail on that date.

3. Attached here as Exhibit B is a true and correct copy of this Court's June 11, 2019 order, denying petitioners' motion for preliminary injunctive relief pending resolution of this appeal.

4. Attached here as Exhibit C is a true and correct copy of petitioners' March 3, 2019 submission to the New York City Board of Standards and Appeals (BSA Calendar 2018-153-A), discussing petitioners' then-pending administrative challenge to the temporary certificate of occupancy at issue in this case.

5. The New York City Department of Buildings advised me that it issued 1,629, 1,581, and 1,584 temporary certificates of occupancy in 2017, 2018, and 2019, respectively.

Dated: New York, New York
September 12, 2020

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Exhibit A

AP

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

----------X

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.

----------X

NOTICE OF ENTRY

Index No.: 156196/2018

PLEASE TAKE NOTICE that the within is a true copy of the Order of the Appellate Division, First Department, duly entered in the office of the Clerk of the Court on August 13, 2020.

Dated: Uniondale, New York
August 13, 2020

Yours, etc.,

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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Dianne T. Renwick
Jeffrey K. Oing
Anil C. Singh, JJ.

10421
Index 156196/18

In re West 58th Street Coalition, Inc., et al.,
Petitioners-Appellants,

-against-

City of New York, et al.,
Respondents-Respondents.

Petitioners appeal from the judgment of the Supreme Court, New York County (Alexander M. Tisch, J.), entered April 29, 2019, denying the petition to annul a determination of respondents to open a shelter at 158 West 58th Street in Manhattan, and dismissing the proceeding brought pursuant to CPLR article 78.

Rivkin Radler LLP, New York (Jeremy B. Honig and Cheryl F. Korman of counsel), for appellants.

Georgia M. Pestana, Acting Corporation Counsel, New York (Barbara Graves-Poller and Aaron Bloom of counsel), for respondents.

SINGH, J.

We are asked to decide whether respondents properly permitted the opening of an employment shelter for homeless men in midtown Manhattan. We find that respondents rationally determined that the subject building is a Class A multiple dwelling in the "R-2" occupancy group which represents a continuation of a preexisting use group classification and is grandfathered from compliance with the current New York City Building Code (Administrative Code of City of N.Y. [Building Code] § 310.1). However, we conclude that petitioners have rebutted the presumption that the building as currently configured will not endanger the general safety and welfare of the public. Accordingly, we remand this matter to Supreme Court for further proceedings.

The Park Savoy Hotel

The building, formerly known as the Park Savoy Hotel located at 158 West 58th Street in Manhattan (the building), was constructed in 1910 and is nine stories tall, with a penthouse and cellar. In 1942, the Building received a permanent certificate of occupancy (CO) as a new law tenement, single room occupancy (SRO). The CO specified use of the first floor for one apartment and two doctor's offices, the second to ninth floors for 13 SRO rooms with two kitchens on each floor, and the

penthouse for one SRO room.

In violation of the CO, the Building was used as a hotel on the upper floors, with restaurants on the ground floor, from 1994 until 2014. In January 2014, the owner, respondent New Hampton, LLC filed an alteration plan with respondent New York City Department of Buildings (DOB) to convert the Building from an SRO to "transient hotel with commercial first floor." DOB rejected the plan in November 2016, and New Hampton withdrew the application in June 2018.

The Employment Shelter

Thereafter, New Hampton decided to seek permission to use the Building as a shelter. The City referred New Hampton to respondent Westhab, Inc., a nonprofit provider of housing and services for the homeless. On May 1, 2017, Westhab submitted a proposal to respondent Department of Homeless Services (DHS) to operate a shelter in the Building for 150 employed or job-seeking men. In addition to rooms, the shelter would provide residents with food, laundry services, employment services, and housing placement support.

On February 2, 2018, the City published a notice of its intention to enter into a contract with Westhab. The City held public hearings to inform the community of its plans and to hear their input. At the hearings, petitioners expressed their

opposition to the creation of a shelter in their neighborhood. They felt that the neighborhood had been singled out as "a grand social experiment"; the planned project would violate the rights of people "who work all day and pay their taxes" by reducing homeowners' property values; and that the City was putting them "in danger because you're going to put 150 people in a small area, which will increase crime and the threat of crime and danger."[1]

The New York City Building Code

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1 Specifically, petitioners noted that "the prevailing wisdom is [ ] that no neighborhood will take a shelter." They also stated that "it's inevitable that the men will be loitering on the block and blocking entrances to residential buildings and small businesses," and "[w]e deserve better than to be getting picked in a grand social experiment to make a cheap political point." They added that "it's going to degrade the neighborhood . . . and the City is going to lose money because it's undesirable to be in such a neighborhood where there's 150 homeless men." One petitioner also cried stating "I am deeply concerned for the safety of [my] three year old daughter as there are no background checks to weed out the criminals from the 150 men that would likely loiter all throughout the street . . . can I hold you responsible if one of those men harass[es] my daughter? Who will be held accountable when our store gets shoplifted . . . and when my mother-in-law gets thrown to the ground." Another noted that often the homeless population are "people with mental health issues, drug and alcohol issues who are urinating and defecating" on the street, and recounted a situation in which a homeless man in the neighborhood urinated on her and her dog. Petitioners also stated that the City is putting them "in danger because you're going to put 150 people in a small area, which will increase crime and the threat of crime and danger . . . We already have our fair share of mentally ill homeless people just creating havoc, and who are violent in their speech, and it's just scary."

The current New York City Building Code promulgated in 2008 and revised in 2014 (the current Code) supplemented the prior 1968 Building Code (the prior Code). Existing buildings are generally exempt from the provisions of the current Code unless there is substantial renovation or change in use (Administrative Code [Building Code] § 27-120).

The statute enumerates 19 categories of alterations that, under specific circumstances, require a building owner to complete renovations in accordance with the current Code, rather than earlier laws. The current Code also contains grandfathering provisions which allow buildings built prior to 2008 to remain subject to the laws applicable prior to 2008, including the Multiple Dwelling Law (Administrative Code [Building Code] §§ 28-102.4, 27-103). The applicability of the grandfathering provisions depends largely on whether any alteration work results in a change of use or occupancy group classification of a building (Administrative Code [Building Code] § 28-101.4.3[2] [whenever a building undergoes a change in use or occupancy, the building's owner must alter the fire protection system in accordance with the current Code, subject to special provisions for prior code buildings as set forth therein]). The current Code changed the names of certain occupancy groups, replacing "J-2" with the "R-2" occupancy group.

DOB's Assessment of the Building

DOB identified that under the prior Code, the Building was a tenement SRO and therefore in the "J-2" occupancy group. DOB determined that the preexisting occupancy group classification of the Building was equivalent to the "R-2" occupancy group under the current Code, as a Class A multiple dwelling nontransient "apartment hotel" (Administrative Code [Building Code] § 28-310.1.2; Multiple Dwelling Law § 4[8][a]).

DOB gathered facts to determine whether the Building's use and occupancy class would change as a result of the proposed renovations. Relying on the data DHS supplied that residents would remain in the shelter for, on average, well above 30 days, DOB determined that the Building should be classified as an "R-2" "Class A" multiple dwelling under the current Code and the Multiple Dwelling Law. DOB also classified the Building within "Use Group 2" of the Zoning Resolution (Zoning Resolution §§ 12-10, 22-10).

DOB explained that it arrived at the "R-2" classification by analyzing three other employment shelters throughout the City and concluded that the residents at these shelters were unlike residents of other DHS facilities, in part due to Westhab's residents' "unique stability" and "non-transient nature." This fact-intensive inquiry also required DOB to make a specific

assessment of the Building's history, construction, design features, its planned future use and occupancy, as well as the proposed alterations.

In December 2017, New Hampton filed another alteration plan with DOB to amend the Building's number of dwelling units and change its use and occupancy to "R-2 residential: apartment houses." On April 6, 2018, DOB approved New Hampton's plan to maintain the existing single egress from the Building, through the lobby, in conformity with Multiple Dwelling Law §§ 4 and 248. On April 24, 2018, DOB approved Westhab's December 2017 alteration plan. A work permit was issued in May 2018. That same month, DHS issued a "Negative Declaration," stating that the shelter would not generate any significant adverse environmental impact, and the City issued a "Fair Share" statement, finding that the shelter would not significantly alter the concentration of similar facilities or otherwise adversely affect the area.

Petitioners' Article 78 Challenge

On July 2, 2018, petitioners, a number of neighborhood residents and organizations, commenced this article 78 proceeding in Supreme Court. Petitioners argued that, as a shelter, the Building should have been classified in the "R-1" occupancy group under the current Code; that alterations to the Building had been performed illegally and were improperly approved by respondents;

and that the Building was dangerous and a fire trap. In support of the petition, petitioners submitted, among other things, five expert affidavits.[2]

While the proceeding was pending, on September 4, 2018, DOB issued a temporary certificate of occupancy (TCO) for the Building's cellar through fourth floors. DOB conditioned the TCO on New Hampton maintaining two certified fire guards, pending installation of additional sprinklers on each floor and confirming that the building was constructed of fireproof, noncombustible materials. DOB renewed the TCO at 90-day intervals.

Both the City of New York and Westhab served answers denying the petition's material allegations and asserting affirmative defenses. In support of its answer, the City submitted three

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[2] In brief, the experts discussed as follows: (1) Geoffrey K. Clark, an environmental geologist, asserted that the City's environmental review was deficient; (2) Robert Mascali, a former DHS Deputy Commissioner, asserted that the City's Fair Share analysis was deficient; (3) Paul G. Babaktitis, a private investigator and former New York City Police sergeant, mainly discussed anticipated security needs of the shelter; (4) Robert G. Kruper, a fire safety consultant and former captain in the FDNY, averred that the subject building was in violation of the Building and Fire Codes by only having one means of egress, was a potential fire trap, and that the subject building should have been classified as an "R-1" structure due to its transient nature; (5) Robert Skallerup, former Manhattan Borough Commissioner for DOB and a former DHS Deputy Commissioner, concurred with Kruper's findings.

expert affidavits.[3] Westhab also submitted one expert affidavit detailing Westhab's fire safety and security plans. Supreme Court denied the petition in its entirety and dismissed the proceeding. The court found that there was a rational basis for respondents' decision to open a shelter in the Building and to classify it as an "R-2" under the applicable laws, on the basis that the residents were nontransient and would stay on average for more than 30 days.

Further, since a partial TCO was issued, the court concluded that the Building was safe to be inhabited. The court reasoned that although "respondents did not submit any affirmative evidence from a City representative specifically stating that the building and proposed plans would not 'endanger' 'the general safety and public welfare,' it is not required to do so," under the plain reading of the applicable statutes regarding the issuance of a TCO.

Supreme Court rejected petitioners' core argument that the

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3 In brief, the experts discussed as follows: (1) Donald E. Ehrenbeck, an urban planner, described the environmental review performed by the City; (2) Jackie Bray, DHS First Deputy Commissioner, among other things, discussed the City's Fair Share analysis; (3) Rodney F. Gittens, an architect and DOB's Manhattan Deputy Borough Commissioner, asserted that, because it was not being used transiently, the Building was properly classified as "R-2," and, moreover, it was grandfathered in under the 1968 Code and thus did not need to comply with current Code requirements for more than one means of egress.

Building violated the current Code and was unsafe, and its arguments that the City's fair share and environmental reviews were deficient.[4] The court noted that it was obligated to defer to the City's and its agencies' determinations "even if it were inclined to reach a different result." This appeal ensued.

Discussion

Standing

As a threshold matter, we find that respondents' argument that petitioners lack standing to challenge the opening of the shelter in the Building is without merit. Here, since petitioners live within a few blocks of the proposed shelter, they have standing to raise the safety-based objections concerning it (*see Matter of Committee to Preserve Brighton Beach & Manhattan Beach v Planning Commn. of City of N.Y.*, 259 AD2d 26, 32-33 [1st Dept 1999] [individuals living in close proximity to a public park had standing to challenge agency decision to grant concession for operation of private recreation center there]; *see Matter of Manupella v Troy City Zoning Bd. of Appeals*, 272 AD2d 761, 761-762 [3d Dept 2000] [persons living within 714 feet had standing to raise claims that proposed homeless shelter would adversely impact neighborhood health and safety with increased

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[4]Petitioners limit their appeal to the contention that the Building violates applicable codes and is otherwise unsafe.

crime, disruptive conduct, "risk of fire," and decreased real estate values]).

Grandfathering

Petitioners contend that DOB's determination that the current Code's grandfathering provisions should apply to the Building is arbitrary and capricious. We disagree.

It is well settled that reviewing courts may not disturb an agency's determination unless it is arbitrary and capricious, affected by an error of law, or an abuse of discretion (CPLR 7803[3]). In the seminal case of *Kurcsics v Merchants Mut. Ins. Co.* (49 NY2d 451 [1980]), the Court of Appeals explained that

> "[w]here the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute. If its interpretation is not irrational or unreasonable, it will be upheld. 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. If the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight" (*id.* at 459 [internal citations omitted]).

It is axiomatic that we defer to an agency's fact-based application of a statute in its specialized area of expertise (*see Matter of Mech. Constrs. Ass'n. of N.Y. v N.Y. City Dept. of Bldgs.*, 128 AD3d 565, 566 [1st Dept 2015] [DOB's determination

was rationally based and entitled to deference]; *Matter of Lite View, LLC v New York State Div. of Hous. & Community Renewal*, 97 AD3d 105, 108 [1st Dept 2012] [applications to reduce or alter dwelling space pursuant to the Rent Stabilization Code are fact-specific and the court appropriately deferred to the Department of Housing and Community Renewal's determination]).

Moreover, we may not "substitute [our] judgment in place of the judgment of the properly delegated administrative officials" (*Matter of Save America's Clocks, Inc. v City of New York*, 33 NY3d 198, 210 [2019][internal quotations marks omitted]). Accordingly, if we find that the determination is supported by a rational basis, we must sustain the agency determination even if the Court concludes that it would have reached a different result (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]).

We reject petitioners' argument, adopted by the concurrence, that DOB's determination is rooted in the misapplication of pure questions of law. The determination involved specialized "knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom" (*Kurcsics*, 49 NY2d at 459 [1980]). Based on the finding that the Building would be used as a nontransient employment shelter, DOB rationally determined that the Building would be classified as a Class A Multiple Dwelling under the

Housing Maintenance Code (Administrative Code [Housing Maintenance Code] § 27-2004[a][8][a]; Multiple Dwelling Law §4[8]) and is thus properly classified as "R-2" under the current Code (Administrative Code [Building Code] § 28-310.1.2) as an "apartment hotel (nontransient)". This classification represents a continuation of the Building's classification under the prior Code, which in turn was a new law tenement SRO, and a Class A Multiple Dwelling "apartment hotel," under the 1942 CO (*see* Multiple Dwelling Law § 4[8][a]). The decision is based on DHS's factual determination that the Building residents, on average, will be occupying the units for more than 30 days, and are thus nontransient.

Petitioners assert that DOB's finding is inconsistent with the function of a shelter as a short-term housing solution. However, the record is replete with factual data that DHS used in reaching its conclusion. For example, in her affidavit, the First Deputy Commissioner for DHS, Jacqueline Bray, states that the single adult men usually stay more than 30 days because DHS must conduct several assessments of each client to determine the most appropriate pathway to permanent housing; develop a housing plan; permit the client to complete several programs in job training and skill development; and take time to get housing vouchers and rental assistance.

Moreover, as explained by DOB's Deputy Borough Commissioner Rodney Gittens, the Building was previously used as an SRO hotel. When the current Code came into effect, permanent residential SROs became classified as "apartment hotels - non transient" (Administrative Code [Housing Maintenance Code] § 27-2004[a][8][a] [defining "apartment hotels" where residents stay 30 days or more as Class A Dwellings]).

In stark contrast, petitioners point to no countervailing evidence regarding the average length of stay in the employment shelter. Petitioners note that the current Code expressly includes "Homeless Shelters" in occupancy group "R-1." We reject petitioners' contention that all shelters are alike and are fundamentally transient. Given the shelter's transitional purpose, supportive housing for employed men, or men seeking employment, DHS rationally concluded, based on its experience with three other similar employment shelters, that residents would remain in the Building for more than 30 days as their "non-transient" or "permanent" residence.

Contrary to the concurrence's contention, DOB did not read the word "transient", mentioned in section 28-310.1.1 (1), into sections (2) and (3) as part of its determination. Rather, it determined that the use of the Building was nontransient and classified the Westhab shelter as a nontransient apartment hotel

(Administrative Code [Building Code] § 28-310.1.2).

We note that the current Code also defines "transient" as "[o]ccupancy of a dwelling unit or sleeping unit for not more than 30 days" (Administrative Code [Building Code] § 28-310.2). Additionally, the current Code expressly states that its provisions are to be read in conjunction with the Multiple Dwelling Law and the Housing Maintenance Code, which describe "permanent residence" as including "apartment hotels," "flat houses" and "bachelor apartments," where single adult men historically received food and laundry services within the "Class A" category (Multiple Dwelling Law § 4[8][a]["permanent residence purposes" "shall consist of occupancy of a dwelling unit by the same natural person or family for [30] consecutive days"]; Administrative Code [Housing Maintenance Code] § 27-2004[a][8][a] ["permanent residence purposes" shall consist of occupancy of a dwelling unit by the same natural person or family for [30] consecutive days or more]). In sum, the statutory scheme, when read in its entirety, supports the DOB classification of the Building as nontransient.

The concurrence misconstrues our role in reviewing agency determinations. DOB is empowered by the City Charter to interpret and enforce the Building Code, the Multiple Dwelling Law and Zoning Resolution (*see* New York City Charter § 643). DOB

rationally designated the Building as "R-2" based on its factual assessment of its nontransient use. In contrast to the concurrence, we decline to substitute our own judgment for that of DOB (*Matter of Save America's Clocks*, 33 NY3d at 210).

Accordingly, we find that DOB rationally concluded that the Building falls in the "R-2" group and is nontransient apartment hotel as its residents will have stays of more than 30 days, on average.

New Hampton's Alteration Plan

Petitioners' argument that in filing the alteration plan for the Building, New Hampton elected to have the Building governed by the current Code is without merit.

The alteration plan states that work will be performed in conformity with the current Code. However, only the work to be done on the first floor is to conform with the current Code, as that work — converting the first floor from a restaurant to offices and recreational space — constituted a change in use requiring adherence to current Code specifications. However, the remainder of the work to be performed in the Building, which simply consisted of painting and the replacement of fixtures, did not require a work permit and was not a change in use.

The election provision to which petitioners refer provides that, "[a]t the option of the owner, . . . an alteration may be

made to a multiple dwelling . . . in accordance with" current or prior Code provisions (Administrative Code § 27-120). By its plain language, the election provision applies to work actually performed - alterations "made" – and not to plans for work. Moreover, a related section provides that work done to only a part of a building – "a space in a building" may be done in compliance with the current Code, while "the remaining portion of the building shall be altered to such an extent as may be necessary to protect the safety and welfare of the occupants" (Administrative Code § 27-118[b]). In short, New Hampton was free to elect to conform to the current Code only for that portion of the work as effected a change in use, while performing work on the remainder of the Building under the prior Code.

The Fire Code & Zoning Resolution

We reject petitioners' contention that section 405 of the Fire Code contemplates that homeless shelters will be classified as "R-1" dwellings (*see* Administrative Code [Fire Code] §§ 29-405.1, 405.4). The Fire Code does not independently designate homeless shelters as "R-1" structures, but instead uses them as an example by referencing the Building Code's classification scheme found in Administrative Code § 28-310.1. As discussed above, DOB rationally classified the Building as an "R-2" dwelling, and the Fire Code's references to the "R-1" group does

not alter this analysis. Moreover, the Fire Department, which is entrusted with interpretation of the Fire Code, approved of the Building's fire protection plan, thereby concurring with DOB's classification of the structure as within the "R-2" group.

Similarly, petitioners' argument that the Building's classification under the Zoning Resolution indicates a change in "Use Group," from "Use Group 2" (residences) to "Use Group 3" (certain types of community facilities) or "5" (hotels primarily used for transient occupancy) is unavailing. First, the Zoning Resolution's use groups dictate only where different types of structures are permitted as-of-right. A structure's classification within a given use group does not control its classification under the Building Code, and vice versa. Hence, even if the Building's change in use from new law tenement SRO to homeless shelter had effected a change in "Use Group" under the Zoning Resolution, this would have no impact on its classification under the Building Code.

Moreover, petitioners' Zoning Resolution "Use Group" contention rests on the same faulty premise as their Building Code arguments: that the Building will be a "transient" residence, and thus definitionally excluded from Zoning Resolution "Use Group 2." In fact, respondents determined that the Building will be a nontransient facility.

In sum, we find that DOB's factual assessment that the Building will continue to fall within the Zoning Resolution "Use Group 2" is rational and is entitled to deference (*see* New York City Zoning Resolution §§ 12-10, 22-12; *Matter of Chelsea Bus. & Prop. Owners' Assn., LLC v City of New York*, 107 AD3d 414, 415 [1st Dept 2013]).

General Safety and Public Welfare Considerations

Finally, petitioners argue that even if the Building is properly grandfathered, their expert affidavits rebut the presumption that its use is consistent with general safety and public welfare.

The main danger identified by petitioners' experts is that the nine-story building has only a single, narrow, winding stairway, which leads to the lobby, and not directly to the street. Petitioners maintain that, in the event of a fire, the narrow stairwell will quickly be overwhelmed by the 150 descending residents, who will impede the entry of firefighters and their equipment, with potentially tragic results.

Respondents counter that the Building is constructed of fireproof materials, has fireproof interior doors, is partially sprinklered, has a standpipe riser and hose system on each floor, and contains smoke and heat detectors wired to an alarm system. They also argue that the Fire Department examined the fire safety

plan and raised no objections. Moreover, the TCO directs that, until the Building is fully sprinklered, New Hampton must maintain at least two certified fire guards on the premises at all times, supporting that there is a detailed fire safety plan approved by the Fire Department in place for the Building.

Further, respondents argue that the issuance of the TCO itself signifies DOB's determination that occupancy will "not in any way jeopardize life or property" (New York City Charter § 645[f]) or "endanger public health, safety, or welfare" (Administrative Code § 28-118.15).

On balance, we find that the competing evidence raises a question of fact which requires a hearing before Supreme Court pursuant to CPLR 7804(h).

We do not agree that the issuance of the TCO reflects DOB's assessment that the temporary occupancy of the Building will not endanger public safety, health or welfare. The TCO "merely creates a rebuttable presumption that a building complies with New York City law" which has been rebutted by petitioners' expert affidavits (*Board of Mgrs. of Loft Space Condominium v SDS Leonard, LLC*, 142 AD3d 881, 882 [1st Dept 2016]). Therefore, the matter is remanded to Supreme Court for further proceedings.

Accordingly, the judgment of the Supreme Court, New York County (Alexander M. Tisch, J.), entered April 29, 2019, denying

the petition to annul a determination of respondents to open a shelter at 158 West 58th Street in Manhattan, and dismissing the proceeding brought pursuant to CPLR article 78, should be modified on the law and the facts, to direct a hearing on whether the Building's use is consistent with general safety and welfare standards, and otherwise affirmed, without costs.

All concur except Oing, J. who concurs in a separate Opinion.

OING, J. (concurring)

The relevant facts are more fully set forth in Justice Singh's writing. While I agree with the decision to remand this proceeding for further consideration of the fire safety issues, and that ultimately the R-2 designation for this building is the correct designation, I write separately because I do not interpret section 310.1.1 as limiting the R-1 designation to occupancies being "transiently" occupied for "a period of less than one month" as set forth in section 310.1.1(1) (*see* Administrative Code of City of NY §§ 28-310.1.1[2] and [3]).

As the record demonstrates, DOB, in reliance on Administrative Code § 28-310.1.1(1), based its R-2 designation for the building on DHS's claim that "the Building is being renovated for use as a homeless shelter for up to 140 single adult men who are employed or actively seeking employment" and who will be "stay[ing] at the shelter for 30 days or more." The R-2 classification applies to occupancies "for permanent resident purposes", i.e., "occupancy . . . for thirty consecutive days or more" (Multiple Dwelling Law § 4[8][a]; Administrative Code § 27-2004[a][8][a]). The majority finds this determination to be rational given that the residents of the shelter will, on average, stay for more than 30 days.

The principle is well settled that "[s]tatutes should be

interpreted in a manner designed to effectuate the legislature's intent, construing clear and unambiguous statutory language so as to give effect to the plain meaning of the words used" (*Matter of Luongo v Records Access Officer, Civilian Complaint Review Bd.*, 150 AD3d 13, 19 [1st Dept 2017], *lv denied* 30 NY3d 908 [2017] [internal quotation marks omitted]). "Where . . . the question is one of pure statutory interpretation, we need not accord any deference to the agency's determination and can undertake its function of statutory construction" (*Matter of DeVera v Elia*, 32 NY3d 423, 434 [2018] [internal quotation marks omitted]). For the reasons that follow, I find that DOB's interpretation of section 310.1's subdivisions cannot be sustained.

Group R-1 occupancy includes the following:

> "1. Residential buildings or spaces occupied, as a rule, transiently, for a period less than one month, as the more or less temporary abode of individuals or families who are lodged with or without meals, including, but not limited to, the following:
>
> "Class B multiple dwellings as defined in Section 27-2004 of the *New York City Housing Maintenance Code* and Section 4 of the New York State Multiple Dwelling Law, where not classified in Group I-1.
>
> "Club houses.
>
> "Hotels (transient)
>
> "Motels (transient)
>
> "Rooming houses (boarding houses--transient)

"Settlement houses

"Vacation timeshares

"2. College or school student dormitories, except for student apartments classified as an R-2 occupancy

"3. Congregate living units owned and operated by a government agency or not-for-profit organization, where the number of occupants in the dwelling unit exceeds the limitations of a family as defined, including, but not limited to, the following:

"Adult homes or enriched housing with 16 or fewer occupants requiring supervised care within the same building on a 24-hour basis

"Fraternity and sorority houses

"Homeless shelters"

(Administrative Code § 28-310.1.1[1]-[3]).

Clearly, Group R-1 comprises three separate categories of residential occupancies. Categories 2 and 3 do not contain the term "transiently" or the phrase "less than one month" (Administrative Code § 28-310.1.1[2] and [3]). Therefore, the "transient" occupancy as it is defined in section 310.1.1(1) is limited to category 1, and should not be read into categories 2 and 3. Indeed, if the municipality intended to apply this temporal limitation to category 2 (college or school student dormitories) and category 3 (congregate living units), the R-1 classification would not have needed three separate categories of residential occupancies. Nor would reading the phrase

"transiently, for a period less than one month" into either category statutorily proper. Pursuant to the antecedent rule of statutory construction, "[r]elative or qualifying words or clauses in a statute ordinarily are to be applied to the words or phrases immediately preceding, and are not to be construed as extending to others more remote" (McKinney's Cons Laws of NY, Book 1, Statutes § 254; *see Matter of T-Mobile Northeast, LLC v DeBellis*, 32 NY3d 594, 608 [2018]).

The shelter at issue clearly does not fall within R-1's category 1 because DOB and DHS have determined based on their review of the facts that the shelter will not be occupied transiently. This determination is entitled to deference. That said, petitioners advance a plausible argument that the shelter is, in fact, a homeless shelter, and, as such, should be classified as R-1 because category 3 clearly lists "homeless shelters." The argument is unavailing.

A "homeless shelter" can only be classified as an R-1 congregate living unit if it fell within that category's definition, i.e., "[c]ongregate living units owned and operated by a government agency or not-for-profit organization, *where the number of occupants in the dwelling unit exceeds the limitations of a family as defined*" (Administrative Code § 28-310.1.1[3] [emphasis added]). Thus, whether a "homeless shelter" should be

given a R-1 classification depends on the number of occupants in the dwelling unit. As is relevant to the issue herein, "family" is defined as "*[n]ot more than three unrelated persons* occupying a dwelling unit in a congregate housing or shared living arrangement . . . ." (Administrative Code § 28-310.2 [Definitions]).

Here, respondents have represented that the number of occupants in the dwelling units will not exceed the limitations of a family as defined. Specifically, Westhab's proposal to DHS provides that "[t]he building consists of 87 individual rooms and bathrooms" and "[t]he 87 rooms will have a total of 150 beds (singles rooms/doubles/triples)." In addition, Jackie Bray, First Deputy Commissioner for DHS, represents "[t]he Shelter will house 140 residents in 87 rooms" and "[t]here will be two clients housed in each room." Based on these representations, the shelter, even if deemed a homeless shelter, does not fall within the purview of R-1's category 3 for congregate living units.

To conclude, I, respectfully, do not agree that the contemplated term of occupancy of the clients at this particular shelter is the determinative factor that excludes the building from an R-1 classification. I do find, however, that this particular shelter cannot be considered a R-1 congregate living unit for the above-noted reasons. Accordingly, under the factual

circumstances of this particular "employment" shelter, DOB's R-2 designation for this building is proper.

Judgment, Supreme Court, New York County (Alexander M. Tisch, J.), entered April 29, 2019, modified, on the law and the facts, to direct a hearing on whether the Building's use is consistent with general safety and welfare standards, and otherwise affirmed, without costs.

Opinion by Singh, J. All concur except Oing, J. Who concurs in a separate Opinion.

Friedman, J.P., Renwick, Oing, Singh, JJ.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 13, 2020

CLERK

Exhibit B

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on June 11, 2019.

Present - Hon. Judith J. Gische, Justice Presiding,
Troy K. Webber
Marcy L. Kahn
Cynthia S. Kern, Justices.

----------X
In the Matter of the Application of,

West 58th Street Coalition, Inc., 152 W. 58 St. Owners Corp., Suzanne Silverstein, Carroll Thompson, Xianghong Di (Stella) Lee, Doru Iliesiu, and Elizabeth Evans-Iliesiu,
Petitioner-Appellants,

M-2406
Index No. 156196/18

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

-against-

The City of New York, Bill DeBlasio, etc., et al.,
Defendants-Respondents.
----------X

An appeal having been taken from an order of the Supreme Court, New York County, entered on or about April 29, 2019, which denied and dismissed the petition in this Article 78 proceeding,

And plaintiffs-appellants having moved for an order granting a preliminary appellate injunction enjoining the opening of a homeless shelter at the subject premises pending hearing and determination of the appeal,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is denied and the interim relief granted by an order of a Justice of this Court, dated May 8, 2019, is hereby vacated.

ENTERED:

CLERK

Exhibit C

NYC
Board of Standards and Appeals

BSA SUBMISSION NOTICE

Date: 3/1/2019

Examiner's Name: Veronica Chuah

BSA Calendar #: 2018-153-A

Electronic Submission: ■ Email ☐ CD

Subject Property/
Address: 158 West 58th Street, Manhattan

Applicant Name West 58th Street Coalition, Inc., et al.

Submitted by (Full Name): Andrew Bernstein

A) The material I am submitting is for a case currently **IN HEARING,** scheduled for _____.
The reason I am submitting this material:

- ○ Response to issues/questions raised by the Board at prior hearing
- ○ Response to request made by Examiner
- ○ Other: _____

Brief Description of submitted material: _____

List of items that are being voided/superseded: _____

B) The material I am submitting is for a **PENDING** case. The reason I am submitting this material:

- ◉ Response to BSA Notice of Comments
- ○ Response to request made by Examiner
- ○ Dismissal Warning Letter

Brief Description of submitted material: Letter responding to Notice of Comments and supporting exhibits

List of items that are being voided/superseded: _____

MASTER CASE FILE INSTRUCTIONS

- ***Bind** one set of new materials in the master case file*
- *Keep master case file in reverse chronological order (all new materials on top)*
- *Be sure to VOID any superseded materials (no stapling!)*
- *Handwritten revisions to any material are unacceptable*

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March 1, 2019

VIA ELECTRONIC MAIL
VIA HAND DELIVERY

Carlo Costanza
Executive Director
Board of Standards and Appeals
250 Broadway, 29th Floor
New York, NY 10007
c/o Veronica Chuah, Examiner

Re: 2018-153-A Notice of Comments Response

Dear Mr. Costanza:

This letter is submitted in response to your Notice of Comments for the above-referenced application. I respond to your comments point-by-point below.

1. In Section B, the zoning map number should be 8C.

   Thank you. Zoning Map 8C is attached as Exhibit A to this letter.

2. The accompanying letter dated October 4, 2018 to the commissioners does not appear to have been electronically submitted.

   The letter was submitted as Item 00 in our electronic filing. It is reattached here and resubmitted electronically as Exhibit B to this letter.

3. Discuss whether a temporary certificate of occupancy is a final agency determination in accordance with Section 1-06.1(a) of the Board's Rules of Practice and Procedure.

   The issuance of a temporary certificate of occupancy ("TCO") is a final agency determination under Section 1-06.1(a), which provides that appeals to the BSA may be had of final "orders, requirements, and decisions" by DOB and other agencies. That is because a TCO—which certifies that occupancy of a building in its present condition will not "jeopardize life, health or property"—allows residents to immediately occupy the building at issue. Multiple Dwelling Law § 301. TCOs, moreover, can be (and routinely are) renewed for up to two years. *Id.*. Thus, as the Second Department has explained, a building is "completed" not upon issuance of a

"permanent certificate of occupancy," but rather with the issuance of a TCO. *Ardor Mgmt. Corp. v. Div. of Housing and Comm'y Renewal*, 104 A.D.2d 984, 986-88 (2d Dep't 1984) (discussing date of completion under the Emergency Tenant Protection Act).

The inability to appeal a TCO to the BSA would leave litigants challenging the conditions in a building without remedy for years, despite the actual occupancy of the building and in the face of severe building safety issues and code violations. The First Department has therefore not hesitated to suggest that TCOs may be challenged in administrative proceedings such as the one here. *Frank B. Hall and Co. of New York, Inc. v. Orient Overseas Assoc.*, 65 A.D.2d 424, 429 (1st Dep't 1978), *aff'd*, 48 N.Y.2d 958 (1979) (noting that the plaintiff had made "no administrative attempt to challenge the TCO and PCO under discussion").

New York courts, moreover, have long instructed that DOB's decisions regarding a TCO are challengeable in an Article 78 proceeding, the basic requirement for which is a final agency determination. *See, e.g.*, *Assn. of Commercial Prop. Owners, Inc. v. New York City Loft Bd.*, 118 A.D.2d 312, 317–18 (1st Dep't 1986) (denial of TCO renewal "would be reviewable in an article 78 proceeding"), *aff'd*, 71 N.Y.2d 915 (1988).[1] The issuance of a TCO is necessarily also a final determination for the purposes of Section 1-06.1(a) of the Board's Rules of Practice and Procedure.

4. Discuss whether Appellant is permitted to bring an application for modification or revocation of a certificate of occupancy under Section 1-06.1(e) of the Board's Rules of Practice and Procedure as well as Sections 645 and 666 of the New York City Charter.

Appellants do not believe Section 1-06.1(e) is applicable to this appeal. Section 1-06.1(e) authorizes BSA to hear applications "filed by the Department of Buildings or the Fire Department" for the "modification or revocation of a certificate of occupancy." This appeal, in contrast, is not filed by DOB or FDNY but instead by private parties.

Appellants therefore make this application under Section 1-06.1(a), for the reasons explained above, as well as under Section 1-06.1(g), which authorizes BSA to hear "appeals of any other matter within the Board's jurisdiction not otherwise described by these Rules."

This appeal is authorized by Section 1-06.1(g) because it is within the BSA's jurisdiction under Sections 645 and 666 of the City Charter. Section 645(b)

[1] Appellants here have in fact properly brought such an Article 78 challenge, and are pursuing this parallel appeal in an abundance of caution.

authorizes the Commissioner to issue certificates of occupancy, provided that the building conforms to the requirements of all applicable laws, and, with respect to a "temporary certificate of occupancy" specifically, provided that such occupancy or use "would not in any way jeopardize life or property." Section 645(b)(3)(f). Section 645(b) further provides that such determinations, including those regarding the issuance of a temporary certificate of occupancy—exactly the DOB determination that Appellants are challenged in this appeal—shall be "subject to review . . . by the board of standards and appeals."

Section 666 of the City Charter, for its part, provides that the BSA shall have the power to decide appeals of, and review, "any order, requirement, decision, or determination of the commissioner of buildings" or certain delegates. *See also Perrotta v. City of New York,* 107 A.D.2d 320, 323 (1st Dep't 1985), *aff'd,* 66 N.Y.2d 859 (1985) (the "New York Charter . . . expressly provides that the Board of Standards and Appeals shall have jurisdiction over appeals from determinations made by the Commissioner of the Buildings Department"). The TCO here bears the signatures of Commissioner Chandler and the Manhattan Borough Commissioner, and is therefore just such an order.

For all of these reasons, Appellants are permitted to bring this application pursuant to the Board's Rules of Practice and Procedure and the City Charter.[2]

5. The Statement of Facts is a legal petition that includes many facts that are beyond the Board's purview. Submit a revised Statement of Facts that includes a list of issues that form the basis of this appeal and are within the Board's jurisdiction. Provide a 3–5 sentence summary of Appellant's position for each issue. For example, based on DOB records, it appears that recent job filings seem to suggest the site is under construction and may be addressing some of the concerns raised by the appellant. Discuss.

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[2] To the extent Comment 4 is directed in part at whether Appellants, as private parties, are permitted to challenge the issuance of the TCO, that issue is resolved by the Court of Appeals' directive that "[i]f the municipality fails to enforce its zoning laws, . . . and a person is thereby aggrieved, it may seek relief in its own right." *Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals*, 69 N.Y.2d 406, 412–13 (1987); *accord, e.g., 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 hotel to homeless shelter would have negative impact on safety and increase risk of fire); *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]").

A revised Statement of Facts is attached as Exhibit C to this letter. Also attached to this letter as Exhibits F–Q are documents referenced in the Statement of Facts.[3] See the answer to question 7 below for more details on the site status and the fact that construction, to the extent it is ongoing, will not resolve Appellants' concerns.

6. Affirm that this application was filed within 30 days from date of determination of temporary certificate of occupancy.

I affirm that this application was filed within 30 days from the date of determination of the temporary certificate of occupancy. Specifically, the TCO was issued on September 4, 2018 (see Item 3 in our initial submission). The day of the determination does not count towards the 30-day count, *see* N.Y. Gen. Construction L. § 20, and September 2018 was a 30-day month. Therefore, this application—filed on October 4, 2018 (as evidenced by the date stamps on the application)—was filed within 30 days of the date of the determination. The TCO was renewed on November 30, 2018 and again on February 21, 2019, in materially identical form, and both are attached as Exhibit D to this letter. Appellants maintain their challenge with respect to the renewed TCOs and any subsequent renewals that may be issued.

7. Clarify the site status. Indicate the progress of construction. Specify if the site is currently used, if so in what capacity.

The site is not currently occupied or being used.

DOB has issued a TCO for Floors 1–4 of the building, and all anticipated construction is complete on those floors. Moreover, by virtue of DOB's issuance of a TCO for Floors 1–4, those floors have been designated by the Owner and DOB as ready for immediate occupancy. The New York City Department of Homeless Services ("DHS") has represented that it plans to move people into Floors 1–4 as

[3] The documents are as follows:

- Exhibit F is a copy of Respondents' Opposition Brief in the Article 78 proceeding.
- Exhibit G is a copy of a Masonry Violation issued to the building.
- Exhibit H is a copy of the Affidavit of Robert G. Kruper.
- Exhibit I is a copy of the Supplemental Affidavit of Robert G. Kruper.
- Exhibit J is a copy of the Affidavit of John Bongiorno.
- Exhibit K is a copy of the Affidavit of Robert Skallerup.
- Exhibit L is a copy of the Affidavit of Robert Mascali.
- Exhibit M is a copy of the CCD1 for this building.
- Exhibit N is a copy of the Affidavit of Paul G. Babakitis.
- Exhibit O is a photograph of the obstruction in the building's lobby.
- Exhibit P is a copy of the Supplemental Affidavit of Paul G. Babakitis.
- Exhibit Q is a copy of the Affidavit of Rodney F. Gittens.

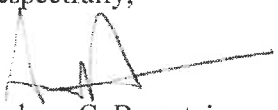
soon as the New York State Office of Temporary and Disability Assistance ("OTDA") certifies the facility. DHS has formally requested that OTDA issue such certification. While Appellants have opposed its issuance at this time, DHS has stated that it expects to receive the certification shortly.

As to Floors 5–9 of the building, no TCO has been issued for those floors, and Appellants understand that those floors are not ready for occupancy at this time. However, the Owner and the City plan to occupy Floors 1–4 without regard for the status of Floors 5–9. Moreover, and in any event, the Owner and the City have represented that the construction they are doing on Floors 5–9—focused on the elevators—will not address the structural site-safety concerns Appellants have raised, including the single, narrow, winding stairway as the sole means of egress from the building, the obstructed egress pathway through the lobby, the existence of stair winders, narrow, dead-end hallways, lack of sprinklers in most residential rooms, and improper use and occupancy designations.

8. Provide proof of service of initial filing.

As indicated in my colleague Lauren Kobrick's Affirmation of Service filed with the BSA on October 11, 2018 and attached as Exhibit E to this letter, the filing was served by Federal Express upon those parties for whom we were instructed by the BSA to provide service. BSA's receipt of the Affirmation of Service was confirmed via a telephone call from Ms. Kobrick after our receipt of the Notice of Comments.

Respectfully,



Andrew C. Bernstein
Akiva Shapiro

cc: Gale Brewer, Manhattan Borough President and Chair of Manhattan Borough Board
Vikki Barbero, Chair, Community Board 5
Mona Sehgal, General Counsel, DOB
Mark Davis, Counsel, DOB
Christopher Holme, Zoning Division
Anita Laremont, General Counsel, City Planning
Martin Rebholz, Borough Commissioner, DOB
Rashid Kearns, Borough Director, DOB
Kathleen Schmid, New York City Law Department
Nathan Ferst, Attorney for New Hampton, LLC

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New York, New York 10007
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Fax: (646) 500-6271
www.nyc.gov/bsa

CERTIFICATION

APPEALS APPLICATIONS

I, Andrew Bernstein, am the

[Circle one] APPLICANT / PROPERTY OWNER / PREPARER OF A DOCUMENT ACCOMPANYING an Appeals application filed under BSA Cal. No. 2018-153-A and I understand that to "knowingly make or allow to be made a material false statement in any certificate, professional certification, form, signed statement, application or report that is either submitted directly to the board of standards and appeals or that is generated with the intent that the Board rely on its assertions" is a violation of New York City Charter § 670 and may subject me to a civil penalty of up to $15,000 for each such false statement and that the Board may dismiss any application in connection with a final determination of such violation.

SIGNATURE

3/1/19

DATE

Subscribed and sworn to before me this

1st day of March, 2019

NOTARY PUBLIC

MARY ANN LYNCH
Notary Public, State of New York
No. 01LY4826838
Qualified in Nassau County
Certificate Filed in New York County
Commission Expires May 31, 2022

MARYANN LYNCH NOTARY PUBLIC STATE OF NEW YORK

A Cases