APL-2020-00161

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

Court of Appeals
State of New York

In the Matter 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,

Respondents-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;

(caption continued on inside cover)

Appellants-Respondents,

BRIEF FOR APPELLANTS

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January 7, 2021

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

Appellants-Respondents,

and

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

Respondents.

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PRELIMINARY STATEMENT

Petitioners brought this article 78 proceeding to block the City of New York from opening a specialized employment shelter for unhoused men in their neighborhood. While their real motives were plain as day, petitioners' legal claim rested on the notion that the building would be "unsafe" because the City had misclassified it. The Appellate Division, First Department, rejected that premise, finding that the City's classification determination was rational, but nonetheless remanded for a hearing on whether the building would be safe. This Court should vacate the remand order and dismiss the petition in its entirety.

This case fails at the threshold for lack of standing. Indeed, to explain away their failure to complete an administrative challenge to the temporary certificate of occupancy that authorized the building's use, petitioners themselves expressed doubt about their standing to do so. But that only confirms that this lawsuit, too, founders on standing. The analysis is simple: petitioners' conjecture that the building's use *might* cause a fire that *might* spread through their neighborhood is a far cry from the

kind of concrete injury required, especially when the temporary certificate is subject to periodic review, supported by a fire safety plan, and conditioned on round-the-clock presence of fireguards.

On the merits, petitioners fare no better. In upholding DOB's classification determination, the First Department underscored that the Department of Buildings' judgment in interpreting and applying relevant laws is entitled to deference under the New York City Charter. But the court abandoned that sound insight when later ordering an amorphous judicial hearing on building "safety." That safety assessment lies with the Department of Buildings, and the court did not dispute that the agency's determination here was rational.

What is more, the building features attacked by petitioners are legislatively authorized for a building of this kind. There is no relevance to petitioners' observations that different standards would apply to new construction today. The State Legislature and the City Council have specified with great care when older buildings must be "brought up to code," and elected not to

retroactively apply all of today's standards to this building. Neither agencies nor the courts may override that judgment.

QUESTIONS PRESENTED

1. Does petitioners' challenge to the building's use and occupancy fail at the very threshold, where their efforts to justify their failure to complete an administrative challenge only confirm they have not established an injury in fact to support standing?

2. In the alternative, did the First Department err in, after first rejecting the premise of petitioners' safety objections by finding that the Department of Buildings rationally applied state and local laws to classify the building's use and occupancy, nonetheless remanding for a hearing on the safety of legislatively authorized building features?

STATEMENT OF THE CASE

A. The tapestry of state and local laws that govern building safety

1. The limits to retroactive application of new standards to existing buildings

New York City has regulated building construction in one form or another since the 1640s. *See* Department of Buildings, Code Development, Code Revisions, available at https://perma.cc/F2YL-V5ME (captured Dec. 15, 2020). The City's first "Building Code" was published in 1899, and by State authorization, the City continues to develop and enforce its Building Code today. Exec. Law § 383(1)(c).

The Building Code and a mosaic of related laws recognize that few cities are more dynamic than New York City. Throughout our history, technological advancements and design innovations have changed the City's physical landscape. Take wood construction as an example: such construction was once commonplace but became a rarity with the advent of steel and other flame-resistant materials, only to see a modest resurgence in recent years. *See, e.g.*, N.Y. Times, *Five Stories Tall and Made*

of Wood, Jan. 17, 2020, available at https://perma.cc/L2XF-7WKE (captured Dec. 28, 2020).

Keeping pace with this changing landscape, state and local laws have repeatedly been updated to reflect emerging safety standards and to apply those standards to new construction. At the same time, however, the drafters of these laws have recognized that the City's dense architectural landscape is already populated with many buildings that were designed and constructed according to the standards of their time, and that it does not always make sense to apply today's standards to long-completed projects.

The legislative response to this reality has been to exempt prior construction from a selection of new building standards, an acknowledgment that different innovations have different impacts and impose different burdens. For example, fire-resistant stones common in older buildings offer similar levels of fire protection as contemporary, flame-resistant materials, so there is little to be gained in requiring owners to rebuild every stone building from the ground up using newer materials. But other innovations, such

as mandating automatic sprinklers in older buildings, can improve safety dramatically at relatively minimal expense. The question is whether the gains in risk mitigation outweigh the burdens.

Our laws therefore reflect a simple truth: buildings can achieve an acceptable baseline of safety in different ways. When earlier standards achieve acceptable outcomes, existing buildings are exempted from standards post-dating their construction. This balancing act—between applying some new standards retroactively and carrying over some older ones—both reflects restrained regulation and accords with the "almost-universal practice … to exempt existing property entitlements from new rules, grandfathering[1] them in" absent a countervailing public interest.[2]

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[1] The term "grandfathering" is defined in BLACK'S LAW DICTIONARY 718 (8th ed. 2004), but we note one jurisdiction's choice to describe these legislative exemptions using alternative language in light of their problematic history. *See Comstock v. Zoning Bd. of Appeals of Gloucester*, 98 Mass. App. Ct. 168, 173 n.11 (2020), *lv. denied*, 486 Mass. 1106 (Oct. 22, 2020) (explaining origin of term "grandfather clause" in post-Civil War voter suppression practices).

[2] Eduardo M. Peñalver and Lior Jacob Strahilevitz, *Judicial Takings or Due Process*?, 97 Cornell L. Rev. 305, 352 (2012).

Striking the right balance in the ever-evolving landscape of New York City is no easy task. Fortunately, we need not guess where the balance should be struck, because that work has already been done by the State Legislature and the City Council.[3] To be clear, state and local laws do not indiscriminately and perpetually exempt older buildings from safety innovations. Instead, they articulate with precision when and how existing buildings must change to achieve acceptable safety levels. *See, e.g.*, *Powers v. 31 E. 31 LLC*, 24 N.Y.3d 84, 91 (2014) (describing requirements in 1968 Building Code applying only to existing buildings over 22 feet high with roofs "flatter than 20 degrees") (cleaned up).[4]

The City's Building Code and other construction codes—a compendium promulgated in 2008 and codified at Title 28 of the Administrative Code, with the Building Code as Chapter 7—

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[3] Some legislative changes discussed in this brief were enacted by the City's former Board of Estimate, but for simplicity's sake we refer to the City Council, as the Board's successor in exercising local legislative power.

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

illustrate this selective approach to retroactivity. The default rule is clear: the "lawful use or occupancy of any existing building … may be continued unless a retroactive change is specifically required." Admin. Code § 28-102.4; *see also* Bldg. Code § 102.6 (substantially the same).[5] Earlier iterations of local law include similar provisions. *See, e.g.*, Admin. Code § 27-111 (allowing continuation of use under the 1968 Building Code "in accordance with prior code requirements" unless otherwise specified). The upshot is that even today, many buildings in New York City are judged by decades-old standards that have been "carried into subsequent building codes." *Powers*, 24 N.Y.3d at 90.[6]

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[5] Article 315 of the law sets forth retroactive requirements that significantly advance safety, energy efficiency, and accessibility goals without imposing major structural changes. *See, e.g.,* Admin. Code § 28-315.2.1 (painting of certain exposed portions of sprinkler systems); *id.* § 28-315.9 (single-occupant toilet rooms).

[6] The City's laws are also sensitive to the reality that there are times when applying newer standards to older buildings may have the opposite of the intended effect by compromising their structural integrity or the performance of existing safety features. Under certain circumstances, therefore, an owner may be required to "submit a comparative analysis … of the relevant fire safety and structural safety provisions." Admin. Code § 28-101.4.4. In those situations, City agencies are guided by performance metrics set forth in the current Building Code itself. *See, e.g.*, Bldg. Code § 1601 (load and resistance factor design); *id.* § 2401 (tempering and visibility standards).

The State has followed a parallel path. The Multiple Dwelling Law (MDL) was enacted in 1929 to reduce "overcrowding" and facilitate "escape from fire" in multiple dwelling buildings. MDL §§ 2, 3. While the Legislature applied new standards to new construction, it took a more surgical approach to existing buildings, specifying when a new standard would apply retroactively because the risk was too high. *See generally Adler v. Deegan*, 251 N.Y. 467, 477 (1929) (describing evolution of tenement-safety legislation).

Otherwise, the Legislature left earlier standards in place, like those imposed by the MDL's predecessor, the Tenement House Law, when outcomes were considered acceptable. *Compare, e.g.*, MDL § 235 (stair and corridor width requirements for existing, non-fireproof tenements), *with* MDL § 236 (outlining stair requirements for fireproof tenements built after mid-1902). And as the Legislature has returned to the statute, it has adhered to this selective approach to retroactivity. *See, e.g.*, *Queenside Hills Realty Co. v. Saxl,* 328 U.S. 80, 82–83 (1946) (discussing MDL's retroactive "fire-proofing" amendments).

The same is true when state and local law intersect. Most relevant here, when the City revamped its construction laws in 1968, it generally left buildings that complied with the MDL untouched, subject only to enumerated exceptions. *See* Admin. Code § 27-111. That law selectively imposed emerging standards on then-existing buildings, *see, e.g.*, § 27-228.5, while the City's Housing Maintenance Code layered additional requirements atop the MDL's baseline, *see id.* §§ 27-2002, 27-2004, setting minimum standards for "new law" and "old law" tenements occupied non-transiently (defined in the statute as a period of 30 days or more), *see id.* § 27-2004(8)(a)(1), (11). As a result, to this day many buildings once classified as tenements or single room occupancy (SRO) buildings remain subject to the MDL's standards, as supplemented by select requirements of local law. *Cf. Mullen v. Zoebe*, 86 N.Y.2d 135, 139 (1995) (identifying MDL § 248 as governing standard for "fire prevention and safety provisions" in SRO).

2. Building alteration, a critical juncture for reevaluating applicable standards

As explained above, a building need not conform to new standards from cellar to roof whenever the law changes. When, on other hand, a property owner alters a building itself, some or all of the structure may need to adapt to current requirements.

But the presumption is that new standards will not apply to work on existing buildings. When owners undertake alterations, they generally need only satisfy the standards that already govern the building or the affected portion. *See* Admin. Code § 28-102.4.3; *see also Matter of Chin v. N.Y. City Bd. of Stds. & Appeals*, 97 A.D.3d 485, 487 (1st Dep't 2012) (discussing "rational policy reasons" for allowing alterations under earlier standards). There are, however, three core exceptions to this default rule.

- ***High-value renovations:*** When the value of alterations exceeds defined thresholds, measured as a percentage of the whole structure's market value, the entire affected system must be "brought up" to current standards. *See, e.g.*, Bldg. Code § 901.9.4.1 (requiring full fire protection system upgrade in multiple dwellings with four or more

units when "the value of alterations to the building equals or exceeds … 50 percent of the value of the existing building").

- ***Changes in use and occupancy.*** Each building's certificate of occupancy identifies its permissible uses and occupancy groups.[7] When alterations accompany a change in use and occupancy, the renovated portions of the building must conform to current standards. *See* Admin. Code § 28-102.4.2 (articulating general change of use requirements, subject to specific instructions on partial changes in use set forth elsewhere in the code).
- ***Critical system alterations:*** Specific alterations, including some that involve a building's systems for "fire protection," "energy efficiency," and "emergency and standby power" are generally performed under the most up-to-date standards, regardless of the building's age. *Id.*

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[7] Commercial tenancies are broken into different groups according to their business activities, *see* Bldg. Code § 302, and for residential tenancies, "use" and "occupancy" groups differ based on the number of individuals in each dwelling unit and their rate of turnover, *see id.* § 310.1.

§ 28-101.4.3. But even then, owners may perform "minor additions" and repairs required to keep existing features and systems "in good working condition," *id.* § 28-301.1, "in the same manner and arrangement as was in the existing system," Bldg. Code § 901.9.1.1.

The 1968 Building Code has a similar structure. *See* Admin. Code § 27-114. It too distinguishes between, on the one hand, significant alterations that can trigger newer standards and, on the other hand, "minor alterations" and "ordinary repair" typically performed under earlier standards. *Id.* § 27-232. For alterations to multiple dwellings built before a specified date in 1968, owners could either perform work under earlier standards or opt into the newer ones. *See id.* § 27-120. One practical consequence is that different portions or systems within the same multiple dwelling building may be subject to different standards under different iterations of the Building Code and other laws, in light of the alterations and decisions made over time.

3. The Department of Buildings' role in enforcing state and local laws governing building safety in New York City

The City Charter empowers the Department of Buildings (DOB) to "enforce, with respect to buildings and structures, such provisions of the building code, zoning resolution, multiple dwelling law … and other laws, rules and regulations as may govern the construction, alteration, maintenance [and] safety … of buildings or structures in the city." City Charter § 643. That broader power includes several more specific ones, including the power to "examine and approve or disapprove plans for the construction or alteration of any building," *id.* § 645(b)(1), and to issue temporary and final certificates of occupancy, *id.* § 645(b)(3). In these situations and several others, the powers described in the Charter belong to DOB "exclusively, subject to review only by the board of standards and appeals" (BSA). *Id.* § 645(b); *see also id.* § 666(6)(a) (describing BSA's review powers).

No building can be used without DOB's authorization in the form of a final or temporary certificate of occupancy. Admin. Code § 28-118.1. And when a building's use or occupancy diverges from

what its existing certificate of occupancy allows, an owner must obtain a new or amended certificate of occupancy. *Id.* § 28-118.3.1.

The nature of DOB's authority differs depending on whether an owner is seeking a final or temporary certificate of occupancy. On the one hand, DOB has a mandatory duty to issue a final certificate of occupancy under specified circumstances. The agency "shall" issue such a certificate when a "building or structure" substantially "conforms to the requirements of all laws, rules, regulations and orders applicable to it." City Charter § 645(b)(3)(d); *see also* Admin. Code § 28-118.6. For buildings constructed before 1938, DOB inspects their compliance "with all retroactive requirements of the 1968 building code applicable to such building." Admin. Code § 28-118.3.4.1. If a building substantially complies with the applicable standards, the owner is "entitled" a certificate of occupancy. *Id.* § 28-118.5.

On the other hand, DOB's power to issue a temporary certificate of occupancy is discretionary. When an entire building is not yet compliant with applicable standards, DOB "may" issue a temporary certificate of occupancy "for any part of such building

or structure," so long as it finds "that such temporary occupancy or use would not in any way jeopardize life or property." City Charter § 645(b)(3)(f); *see also* Admin. Code § 28-118.15 (allowing DOB to issue a temporary certificate of occupancy when it finds that the "subject portion … may be occupied and maintained in a manner that will not endanger public safety, health, or welfare"). In practice, DOB authorizes temporary use for 90-day intervals when a building as a whole is free of hazardous violations and the area that will be temporarily used substantially complies with applicable standards. *See* DOB, Temporary, Amended and Final Certificates of Occupancy, available at https://perma.cc/2JWB-PW3B (captured Dec. 14, 2020).

B. DOB's determination that the Westhab Shelter could begin operating in code compliant portions of an existing building

1. The Westhab Shelter, a specialized facility for workers and job-seekers experiencing homelessness

The City has a moral and legal obligation to supply emergency shelter to tens of thousands of people experiencing homelessness each day. *See Callahan v. Carey*, 307 A.D.2d 150,

153 (1st Dep't 2003) (describing consent decree outlining municipal shelter obligations). These days, the City shelters around 54,000 New Yorkers each night, including nearly 18,000 children. *See* Department of Homeless Services, Daily Report, available at https://perma.cc/96NZ-KH57 (captured Dec. 14, 2020).

In 2017—before the COVID-19 pandemic exacerbated housing instability and increased demands on the City's already-strained shelter system—the City published *Turning the Tide*, a comprehensive plan for addressing the homelessness crisis (A-1120–1247). The Department of Homeless Services (DHS) is tasked with maintaining sufficient capacity to satisfy the City's unprecedented demand for emergency shelter (A-1125–26).

Turning the Tide detailed the pressing need to increase and diversify DHS's resources in each borough (A-1131, 1216–18). One prominent problem involved the system's inability to connect each person with an appropriate bed in a City shelter, requiring DHS to rent commercial hotel rooms to fill the gap (A-1216–17). Not only is the practice inefficient, it is also suboptimal for the people

served, as hotels sometimes lack the on-site, supportive services that promote long-term housing stability (A-1217, 1220–21).

The report also elaborated on DHS's efforts to align the complementary services nonprofit organizations can provide with the needs of distinct populations within the shelter system, such as homeless students and domestic violence survivors (A-1140, 1141, 1222–23). As the report explained, the City has also developed "drop-in" centers and "safe haven" facilities in underserved areas to serve the high-needs, street homeless population (A-1142).

The facility at the heart of this litigation—the Westhab Shelter slated to operate at 158 West 58th Street in Manhattan—is another type of population-specific, resource-intensive facility. With a focus on long-term, gainful employment, it will serve around 140 employed and job-seeking men (A-2019–20). A nonprofit organization will deliver job skills services on site and, with DHS oversight, handle day-to-day operations (A-2018).

2. DOB's fact-specific application of state and local laws to the building

The Westhab Shelter will be located at 158 West 58th Street, the site of the former Park Savoy Hotel, which was approved for use as a single room occupancy tenement some 80 years ago (A-2018). To meet Westhab's operational needs, the building's owner needed to renovate the property. The work fell into three buckets: (i) significant first floor alterations that accompanied a change in use to that specific space; (ii) maintenance and minor alterations in other areas of the building; and (iii) approval for long-completed work performed while the property operated as a single room occupancy. As part of that process, DOB undertook a fact-based analysis of how state and local laws applied to the building.

For years, the building housed a restaurant on its first floor while functioning as a single room occupancy on the upper stories (A-2020). The owner needed to transform the first floor into a lobby space suitable for the Westhab Shelter's residents and staff. To that end, the owner had to secure a DOB-issued work permit to remove the remaining restaurant hardware and alter impacted systems, including the first floor's sprinklers (*id.*).

The owner also needed to perform routine maintenance on the second through fourth floors, such as repainting walls and repairing existing fixtures that had fallen into disrepair (*id.*). Those steps did not require a DOB-issued work permit (A-2021). The fifth through ninth floors also required minor bathroom alterations and work on various elevator components before those areas could be used (A-2020). The owner deferred seeking a DOB-issued work permit for those tasks to concentrate on renovating the lower portion of the building for initial shelter use (*id.*).

In addition, several details listed in the building's 1942 certificate of occupancy were inaccurate due to renovations performed while the building operated as a single room occupancy (A-2021). It showed, for example, that each upper floor contained two kitchens (A-189); but, in fact, no cooking facilities remain in the building's dwelling areas. It also indicated that the second through ninth floors contained 13 rooms, even though some of those had been combined in years past (A-189, 2021). The building's owner did not perform any additional alterations in

connection with this past work, but DOB had to inspect and approve it before a new certificate of occupancy could issue.

To move the work permits, inspections, and potential work approvals forward, DOB first determined which standards governed each part of the building. That analysis began with the agency's review of details about the building's construction and historical use. DOB confirmed that the building was erected in 1910 and received a final certificate of occupancy in 1942, as a new law tenement, single room occupancy (A-189). DOB found that the Housing Maintenance Code's category of "Class A" multiple dwellings included tenements generally occupied for 30 days or more, like single room occupancies. Admin. Code § 27-2004(8)(a)(1). The agency also determined that the 1968 Building Code classified tenement single room occupancies as "J-2" structures—the equivalent of "R-2" today (A-2042).

DOB further noted that the existing certificate of occupancy categorized the building as "fireproof" under the 1938 Building Code since it was constructed using "incombustible material" and assemblies with high fire resistive ratings (A-189). *See* Admin.

Code § C26-239.0. The agency also confirmed that the building features fire-rated doors and corridors, as well as fire alarm and standpipe systems approved by the FDNY (A-189, 2044–45).

From there, DOB looked forward to evaluate how the proposed preparatory work impacted the applicable code provisions. Starting with the first of the three types of renovations that may trigger a requirement to comply with up-to-date standards—high-value renovations—DOB determined that the value of the alterations fell far short of the valuation thresholds that require whole system upgrades (RA-2096–97). That finding is undisputed here.

The second category of renovations triggering up-to-date standards—those accompanying a change in use and occupancy—has instead been the focus in this litigation. In that regard, DOB found that the first floor's transformation from a restaurant into a lobby clearly constituted a change in use of that space (RA-145–52, 2021). Accordingly, DOB required the building's owner to alter the affected first floor systems, including its sprinklers, under the most up-to-date requirements (RA-145–52, 2021).

Since, however, the upper floors would still serve as dwelling units, those areas would only undergo a change in use and occupancy if the shelter would operate in a way that departed from the classifications listed on the building's existing certificate of occupancy. Absent such a change, the owner could perform maintenance and minor alterations in those areas under the 1968 Building Code, including provisions for pre-1968 structures that conform to the MDL. *See* Admin. Code § 28-102.4.1.

DHS's input about the Westhab Shelter's future use laid the foundation for DOB's use and occupancy determination. By the time DOB reviewed the building's renovation plans, DHS had accumulated operational data from three other employment shelters (A-2038–39). DHS observed that employment shelter residents constituted "a uniquely stable population" that typically remains in the same shelter and bed for more than 30 days (RA-142). In this way, employment shelters are occupied differently from other specialized sites such as the drop-in centers, respite facilities, and transitional shelters DHS oversees. *See generally* A-1142 (describing brief services, respite facilities). This same

population-specific data determined how the agency classified three other structures that housed employment shelters (RA-205).

Accordingly, DOB concluded that the building may remain classified as a non-transient, "Class A" multiple dwelling (A-2042). *See* Bldg. Code § 310.1.2; Hous. Maint. Code § 27-2004; MDL § 4(8). DOB noted that the 1968 Building Code classified tenement single room occupancies as non-transient structures (A-2038, 2042–43). DOB applied the same reasoning, rooted in the anticipated length of residents' stays, to classify the building within "Use Group 2" of the City's Zoning Resolution, a designation applicable to multiple dwellings occupied for periods of 30 days or more (A-2043). *See* Zoning Resolution §§ 12-10, 22-10. The agency, therefore, concluded that the shelter would continue rather than change the classifications listed on the building's existing certificate of occupancy (A-2042–43).

The practical effect of that continuation was that the work performed on the building's second through ninth floors could be completed under MDL standards carried into the 1968 Building Code and current Building Code; and unaltered features that

conformed to those laws could remain unchanged (A-2038–39). Specifically, the MDL's requirements governed the building's stairwell configuration, corridor design, means of egress, and upper floor sprinkler work (A-2042–43, 2090–98). Once the first floor alterations were complete and the owner finished work elsewhere under preexisting standards, DOB would be obligated to issue a new certificate of occupancy bearing the "R-2" occupancy classification, corresponding to the non-transient, residential use authorized in 1942. *See* Admin. Code § 28-118.3.4.1; *see also* A-2042 (explaining renaming of "J-2" designation).

That final certificate of occupancy has not been issued, and this litigation has frustrated the shelter's opening. The building's potential use has so far been authorized under a temporary certificate of occupancy, as we explain immediately below.

3. DOB's decision to allow temporary use of the building's lower floors, subject to specified conditions to ensure safety

DOB inspected the building multiple times after ascertaining the applicable standards (A-2042). The building's owner also submitted a fire protection plan to FDNY, as required

(A-1094–1116). *See* Admin. Code § 28-109.1. That document included annotated floor maps and detailed how residents would exit the building if a fire occurred (A-1103–1114). It also described the mechanical features in place to mitigate fire risks, identifying sprinkler placement and evacuation routes for each floor (*id.*).

In August 2018, FDNY reviewed and approved that plan (A-1117). By that time, the building's owner had resolved all but one of the previously outstanding code violations (A-2042). The remaining violation, related to past work performed on the upper floors without a valid permit, posed no safety risk (A-2046).

In September 2018, DOB found that the building's cellar and first four floors substantially complied with all relevant standards and issued a temporary certificate of occupancy, which allowed those portions of the building to be occupied for 90 days (A-2042). Since the building's owner had not finished replacing sprinklers on the upper floors, DOB conditioned the approved temporary use on the presence of two certified fire guards, trained watchpersons who must remain on-site at all hours of the day until the work is complete (A-2045). *See also* Bldg. Code § 3303.3 (describing

qualifications for certified watchpersons). DOB has continued to review and renew the temporary certificate of occupancy at 90-day intervals (A-2129–30). The shelter, however, has not opened, due in large part to the effect this litigation has had on State approvals.

C. Petitioners' claim that the City arbitrarily allowed the Westhab Shelter to open in an "unsafe" building

As part of the collaborative process outlined in *Turning the Tide*, the City communicated with local elected officials and engaged community members about the Westhab Shelter's development (A-2024–25). Petitioners vehemently opposed the project during public hearings (A-2024). For instance, they complained that the shelter would exacerbate problems caused by "scary" homeless people already in the neighborhood "who are violent in their speech," and expressed concern over the shelter housing "criminals" (A-855).

As the planning process moved forward, petitioners submitted Freedom of Information Law requests for material concerning the selection and inspection processes, and they

received scores of documents in response (A-524–25, 2118–19). Petitioners then commenced this litigation and sought preliminary injunctive relief to block the shelter from opening (A-78, 82–88). At the outset, their claims took aim at the City's selection process and project analysis, including the environmental review (A-82–88). But over time, petitioners winnowed their case to claims centered on alleged safety concerns, homing in on the building's unaltered "physical layout" (A-84). Two affiants disagreed with the City's decision to allow a shelter to operate in the building, claiming it would violate current building standards (A-148–73).[8]

When petitioners initiated this proceeding, the building's owner had not applied for or received a temporary certificate of occupancy, and the first floor renovations were incomplete (RA-172–73). Petitioners' amended petition, filed after DOB issued a temporary certificate of occupancy, relied on the same affidavits

[8] Petitioners annexed a total of five affidavits to their petition, but three of them concerned aspects of the City's project review process and "anticipated security needs" unrelated to the building's configuration (*see* A-98–174).

and continued to allege that the City located the shelter within a structure that "violated" current standards (A-857–863). The petition did not address the scope of the authorized temporary use or the specific risk mitigation conditions DOB included in the temporary certificate of occupancy, like the presence of fireguards.

Supreme Court, New York County, conducted a lengthy hearing to address petitioners' application for injunctive relief (*see* RA-84–124). The crux of petitioners' argument was that DOB should have applied the more stringent fire safety requirements that govern transient, or "R-1" structures, rather than those that apply to "R-2" buildings where non-transient residents are presumed to be more familiar with a building's layout (*see* RA-195). Petitioners maintained that the MDL is "totally irrelevant" to this litigation and simply "doesn't apply" (RA-196).

The City countered petitioners' assertions with precise details on how DOB applied state and local laws to the building (RA-139–53). The City explained that DOB's choice to classify the building's future use and occupancy applied DHS's input to definitions in the current Building Code and other laws. And it

further demonstrated why the building's permanent physical configuration, including its MDL-compliant stairway, corridors, and means of egress did not "violate" the current Building Code but, rather, reflected that law's provisions carrying over earlier standards for existing structures (A-2090–95).

Supreme Court denied petitioners' application for injunctive relief shortly thereafter (RA-229–32). Later, the court denied the petition (A-4–9). After rejecting a series of claims petitioners have since abandoned, the court turned to petitioners' remaining claim based on the building's alleged safety hazards. There, the court concluded that the City's "decision to open a homeless shelter at the premises ha[d] a rational basis" (A-5), deferring to DOB's fact-based application of state and local laws and rejecting petitioners' contention that the agency issued the temporary certificate of occupancy by applying the incorrect standards (A-6, 7).

On appeal, the First Department agreed that DOB rationally applied state and local laws in classifying the building's use and

occupancy (RA-239).[9] The court explained that DOB's classification decision "involved specialized knowledge" and that the record was "replete with factual data that DHS used" to estimate the length of future residents' stays (RA-249–50). The court rejected "petitioners' contention that all shelters are alike and are fundamentally transient," citing provisions in the current Building Code and other laws supporting DOB's interpretation of non-transient use as stays of 30 days or more (RA-250, 252). Applying the 1968 Building Code, the court also rejected petitioners' contention that the owner opted to apply the most up-to-date standards throughout the entire building (RA-254).

But after concluding that DOB acted rationally in classifying the building (thus identifying the applicable building standards), the First Department nonetheless remanded the matter for a hearing pursuant to CPLR 7804(h) (*id.*). The court believed that the record contained "competing evidence" such that, as

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[9] One justice concurred in the remand but wrote separately to explain why, in his view, DOB's interpretation of the "R-1" classification focused incorrectly on the length of residents' stays rather than the number of occupants in each dwelling unit (RA-259–64).

petitioners maintained, the building's "use" might threaten general safety and welfare "even if the Building is properly grandfathered" (RA256). The court directed Supreme Court to hold an evidentiary hearing on whether the building's "current configuration" poses risks that violate the standards referenced in City Charter § 645(b)(3)(f) and Administrative Code § 28-118.15 (RA-257)—provisions governing temporary certificates of occupancy.

JURISDICTIONAL STATEMENT

The Court has jurisdiction to hear this appeal because by order dated October 27, 2020, the First Department granted the City's motion for leave to appeal from the court's order on the merits rendered on August 13, 2020. *See* CPLR 5602(b)(1). The City's leave motion was timely because it was made within 30 days of service of the court's order on the merits with notice of its entry. *See* CPLR 5513(b).

ARGUMENT

POINT I

PETITIONERS' CHALLENGE TO THE BUILDING'S SAFETY FAILS ON THRESHOLD GROUNDS

Before a party can challenge a presumptively valid administrative act, it must first establish its standing. *Soc'y of Plastics Indus., Inc. v. Cnty. of Suffolk*, 77 N.Y.2d 761, 769 (1991). While our law reflects a reluctance to impose "insuperable" barriers to the courts, *Save the Pine Bush, Inc. v. Common Council of City of Albany*, 13 N.Y.3d 297, 306 (2009), standing is no mere technicality. *See Ass'n for a Better Long Isl., Inc. v. New York State Dep't of Envtl. Conservation*, 23 N.Y.3d 1, 6 (2014) (warning of "the danger of making these barriers too low"). Standing is a cornerstone of our judicial system: it enables sound judicial review by ensuring that issues are crystallized by concrete controversies; it promotes judicial economy by discouraging lawsuits motivated by abstract disagreements; and it safeguards the separation of powers by limiting judicial incursion into political domains. *See generally Soc'y of Plastics*, 77 N.Y.2d at 769.

Every petitioner must therefore show that, without judicial intervention, it will likely suffer an "injury in fact"—a harm that is both "direct and immediate." *Matter of Acevedo v. N.Y. State Dep't of Motor Vehs.*, 29 N.Y.3d 202, 218 (2017) (cleaned up). As the phrase suggests, the harm must be more than "conjectural," "tenuous," or "ephemeral." *Matter of Mental Hygiene Legal Servs. v. Daniels*, 33 N.Y.3d 44, 50 (2019). And the injury "must fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted," *N.Y. State Ass'n of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 209 (2004)—here, the Building Code and similar laws.

The First Department did not engage with these basic principles. Rather, the court apparently assumed that petitioners had standing to challenge DOB's determinations simply because they "live within a few blocks of the proposed shelter" (RA-247). And the court made no attempt to ascertain whether petitioners' concerns fall within the zone of interests protected by the relevant provisions of the Building Code and similar laws, which are geared toward ensuring building safety for residents and other

users. However relaxed standing requirements may be, petitioners' professed concerns do not cross the threshold.

To petitioners' credit, they acknowledged doubts about their standing when this case was argued in the First Department. Then, petitioners were asked about the undisputed fact that they had commenced, but not completed, an administrative appeal to the BSA concerning the temporary certificate of occupancy (*see supra* at p.14 (outlining BSA's review powers)). No doubt aware that the doctrine of exhaustion of administrative remedies generally requires a party "to exhaust all possibilities of obtaining relief through administrative channels before appealing to the courts," *YMCA v. Rochester Pure Waters Dist.*, 37 N.Y.2d 371, 375 (1975) (cleaned up), petitioners tried to explain away any problem by pointing to another: they claimed that they might not have standing to pursue such an administrative challenge. Oral Argument Video, at 1:33:00, available at https://tinyurl.com/y3tklyx6. But if petitioners lack standing to complete the administrative process, they do not have standing to bring this lawsuit either.

Indeed, many of the "safety" issues petitioners raised at the outset of this litigation concerned stereotypical assumptions about the anticipated behavior of the Westhab Shelter's residents, not the safety of the building itself. Petitioners insisted that opening the shelter would increase the number of "mentally ill homeless people just creating havoc" (A-855). Their petition recounted one individual's "harrowing tale of being the victim of an indecent assault by a homeless individual," an unfortunate experience entirely unrelated to the shelter (*id.*). Their "experts" also expressed the view that "[h]omeless shelters have a negative impact on the community" (A-134).[10] None of petitioners assertions in this vein—some of which are not just misguided, but deeply offensive—fall within the zone of interests protected by state and local laws governing building safety. *See N.Y. State Ass'n of Nurse Anesthetists*, 2 N.Y.3d at 211.

Even when petitioners raised concerns about the building itself, they still made no credible claim that if the building were

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[10] As the First Department noted, petitioners comments during the project's public comment period were much the same (*see* RA-241 n.1).

used, it would cause them a direct and immediate injury. Their supposed concern about the risk of a fire someday occurring and then spreading to their property is the definition of speculative. Indeed, when petitioners first brought this lawsuit, the empty building had not been issued a temporary certificate of occupancy, and the shelter's use, which purportedly creates a risk of "immediate" harm, was not even possible.

When petitioners later amended their petition, their safety complaints targeted the building's permanent features—the stairway, corridors, and means of egress. But those features had been present for decades while the building operated as a single room occupancy servicing a large number of residents in rooms near functioning kitchens, without the benefit of the building's recent sprinkler improvements. Petitioners insisted that these permanent features now make the building a "fire trap," but did not identify a single fire that erupted during its past.

Petitioners also failed to grapple with how the temporary certificate of occupancy *enhances* the building's safety profile. The certificate followed an FDNY-approved fire protection plan that

specified evacuation routes and features mitigating fire risks. DOB's inspections of the parts of the building that would be used showed those parts substantially complied with all requirements. And DOB conditioned the temporary use on the presence of two fireguards, trained watchpersons who would monitor the facility at all times.

On this record, petitioners' assertion that a fire *might* erupt is purely conjectural, especially considering that the temporary certificate of occupancy is, by definition, time-limited and subject to regular review at 90-day intervals. But the court below appears to have been led astray by the attenuated and hyperbolic predictions of fire risks. What petitioners offered was, at best, misdirection and, at worst, unvarnished antipathy towards the New Yorkers who will use the shelter. Their "experts" described fires in buildings bearing no resemblance to the building or its planned use. *See, e.g.,* A-517 (describing fatalities at Deutsche Bank building lacking a standpipe); A-2078 (discussing tragedy at two-story nightclub). Some of the claimed risks could only arise if

shelter residents violated anti-smoking measures and prohibitions on cooking appliances in rooms (A-173, 205, 1469, RA-419).

But even setting all that to one side, petitioners have no standing to complain about any fire risk; to support a "direct" injury, petitioners must show that the challenged features, coupled with mitigation measures, presents a risk of such magnitude that it would likely spread to their properties. But rather than establish a risk to themselves, petitioners instead alleged risks to the residents of the shelter. *See, e.g.,* A-171 (forecasting that "if the fire breaks out between the rooms on the end of the corridor and the stair tower exit located in the middle, residents will be trapped"). Aside from being misguided, these allegations cannot confer standing on petitioners. While the residents and other intended users of the shelter may fall within the statutory zone of interests, petitioners do not. And in any case, petitioners can only conjecture that a fire *might* erupt and that it *might* affect their homes—the kind of "two layers of speculation" that this Court has rejected before. *Nurse Anesthetists*, 2 N.Y.3d at 213.

Petitioners' mere proximity to the building is no substitute for a showing of direct and immediate harm. Courts may assume proximity-based standing in land use disputes over a new development's environmental impact. *See Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals*, 69 N.Y.2d 406, 414 (1987). A similar logic extends to a petitioner's standing to challenge zoning changes since zoning laws intend to shape community characteristics. *See, e.g.*, *Better Long Isl.*, 23 N.Y.3d at 6. But petitioners' complaints about a small number of the building's long-standing features fall into an entirely different category of claims. The law has never allowed one neighbor to haul another into court over long-standing building features that, on their own, have no direct impact on neighboring properties.

Nor should that be the law, lest the courts be embroiled in neighbor-against-neighbor disputes premised on abstract (and pretextual) disputes about every renovation. At the very least, parties should first establish, as they must in all other contexts, a direct and immediate injury. *Cf. Matter of Christian v. City of N.Y.*, 139 A.D.3d 457, 458 (1st Dep't 2016) (dismissing challenge

to rule where "safety-related harm" was "too speculative"); *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 insufficient to constitute injury in fact). Because petitioners have not made such a showing, this case falters at the starting gate.

POINT II

THE FIRST DEPARTMENT ERRED BY ORDERING JUDICIAL FACT-FINDING INTO A RATIONAL ADMINISTRATIVE DETERMINATION

The merits offer no safer terrain for petitioners. The First Department addressed two questions: (i) whether DOB rationally classified the building's use and occupancy; and (ii) whether the building's temporary use would jeopardize public safety. On the first question, the court underscored the limits to judicial review, holding that DOB's judgment is entitled to deference because it is "empowered by the City Charter to interpret and enforce" the relevant laws (RA-252). That is exactly right.

But the First Department overlooked this insight when confronting the second question. There, rather than defer to DOB,

the court instructed the trial court to hold a free-floating evidentiary hearing on the building's safety. In taking that step, the court sharply departed from settled principles of article 78 review and misapprehended the inquiry that governs the issuance of a temporary certificate of occupancy. DOB rationally determined that issuance of a temporary certificate of occupancy would not jeopardize safety. That is the end of the inquiry.

A. DOB rationally authorized the building's temporary use and occupancy.

Administrative determinations must be upheld if they are not arbitrary and capricious. *See* CPLR 7803(3). Under this "extremely deferential" standard, a determination can be disturbed only if it has "*no rational basis*." *Matter of Beck-Nichols v. Bianco*, 20 N.Y.3d 540, 559 (2013). By setting the bar at rationality, the standard affords agencies great breathing room, accommodating their legislatively conferred mandates and the fact that "[t]he problems of government are practical ones and may justify, if they do not require, rough accommodations." *Heller v. Doe*, 509 U.S. 312, 321 (1993) (discussing rational-basis review in

equal protection case). Once a rational basis is identified, the judicial inquiry is over; it is the role of agencies, not the courts, to "weigh the desirability of any action." *Friends of P.S. 163, Inc. v. Jewish Home Lifecare*, 30 N.Y.3d 416, 430 (2017). That is doubly true when an agency has discretion to reach different results.

In directing an evidentiary hearing on building safety, the First Department pointed to the standards governing temporary certificates of occupancy (RA-257 (citing Charter § 645(b)(3)(f); Admin. Code § 28-118.15)). To be sure, DOB has discretion to grant—or deny—a temporary certificate of occupancy depending on whether it finds a temporary 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 it beggars belief to suggest, as petitioners do, that there was no rational basis for the DOB to find no such risk under the circumstances here.

As the First Department itself recognized, the temporary certificate of occupancy followed DOB's "specific assessment of the building's history, construction, design features, its planned future use and occupancy, as well as the proposed alterations" (RA-243–

44)—precisely the type of administrative decision-making entitled to deference. *See Matter of Peyton v. N.Y. City Bd. of Stds. and Appeals*, 2020 N.Y. Slip Op. 07662, at *3 (Dec. 17, 2020). On-the-ground inspections had also confirmed the owner had remedied all outstanding violations, save one that presented no safety risk. And FDNY had already reviewed and approved a fire protection plan specifying evacuation routes and fire mitigation features.

While that is enough to sustain the agency's determination, DOB was also careful to condition the temporary certificate of occupancy on requirements that would improve the building's safety profile while in use. Because the owner had not finished replacing sprinklers in the building's upper floors—areas that would not be eligible for temporary use regardless—DOB required the owner to engage two certified fireguards to stand watch around the clock. In a case where petitioners' entire argument reduces to speculation about fire risks, this precautionary measure by itself is enough to reject any claim of irrationality.

Since petitioners never argued on appeal that DOB neglected to discharge its duties with respect to the temporary

certificate of occupancy process, and the record itself reflects the agency's careful analysis of the facts at hand, the First Department had every reason to conclude that DOB conducted the appropriate safety analysis. *See Altamore v. Barrios-Paoli,* 90 N.Y.2d 378, 386 (1997) (finding conclusory assertions inadequate to overcome presumption of administrative regularity). And it bears repeating, the building's temporary use is subject to review at 90-day intervals, enabling the agency to regularly reassess the situation if appropriate. DOB's determination easily satisfies the rational basis test. If the First Department had faithfully applied its own insight into the limits of judicial review, it would have dismissed the petition in its entirety.

B. In remanding for a hearing on safety, the First Department made two core errors.

1. The first error: the court misconceived the temporary certificate of occupancy as a rebuttable "presumption."

Rather than defer to DOB after concluding the agency's classification decisions were rational, the First Department claimed that "competing evidence" counseled in favor of

remanding for an evidentiary hearing on the building's safety (RA-257). To get there, the court treated DOB's issuance of a temporary certificate of occupancy—an act that, by definition, embodied the agency's safety determination—as "merely creat[ing] a rebuttable presumption" that is subject to plenary court review upon a proper showing (RA-257).

But the scope of judicial review in this article 78 proceeding extends no further than the question of whether DOB's issuance of the temporary certificate of occupancy was irrational or contrary to law. The First Department mistakenly imported the idea of a "rebuttable presumption" from private contract cases into the vastly different territory of article 78 review.

The court cited *Board of Managers of Loft Space Condominium v. SDS Leonard, LLC*, 142 A.D.3d 881 (1st Dep't 2016), but that case did not involve an attempt to annul a duly issued certificate of occupancy and thereby block occupation or use of a building. It instead addressed residents' claim that building owners were contractually required to cure a dangerous or hazardous condition on the premises. 142 A.D.3d at 882. The court

held that the fact that the building had a temporary certificate of occupancy did not conclusively resolve that contractual claim.

Even assuming that case was rightly decided as a matter of contract law, it has absolutely nothing to say about article 78 review of agency action. *See Matter of Infante v. Dignan*, 12 N.Y.3d 336, 340 (2009) (finding "common-law presumption" had "no role to play" in rational basis review). An article 78 court has no basis to engage in de novo review of the agency's determination upon *any* evidentiary showing by the petitioner.

Under article 78, the question is whether the agency's decision was rational, not whether a challenger can muster evidence to show that a different decision could have been reached. Thus, "[a]n agency's decision to rely on the conclusions of its experts, rather than the conflicting conclusions of challengers' experts, does not render its determination arbitrary, capricious, or lacking in a rational basis." *C.F. v. N.Y. City Dep't of Health & Mental Hygiene*, 2020 N.Y. Slip Op. 07867, at *6 (2d Dep't Dec. 23, 2020). The First Department erred in remanding for an evidentiary hearing on what it saw as "competing evidence,"

especially given that it had already concluded that DOB rationally applied the relevant laws to classify the building's use and occupancy.

2. The second error: the court overlooked that state and local laws already endorse the safety of the challenged features.

Petitioners complain about the alleged safety implications of the building's permanent features, including its stairway, corridors, and means of egress. But these features are legislatively authorized on a permanent basis. And there is nothing special about the building's temporary use, as compared to its intended permanent use as a shelter, when it comes to these features. The building's stairway, corridors, and means of egress exist and will be used now as they will exist and be used in the future.

The First Department, however, failed to recognize that petitioners' complaints are directed to the *very nature* of these features. To reject those complaints, the court only had to look to the applicable laws that authorize such features, which reflect a legislative judgment that the features offer acceptable safety outcomes. There simply is no place for a judicial hearing on

whether these features are unsafe under the circumstances that legislative bodies have authorized them.

When DOB exercises its discretion to grant a temporary certificate of occupancy, the agency must find that temporary use of the relevant parts of a building would not "in any way jeopardize life or property." Charter § 645(b)(3)(f); *see also* Admin. Code § 28-118.15 (substantially the same). That inquiry is focused on the nature of the "temporary occupancy or use," particularly the circumstances that require a special allowance before a final certificate of occupancy issues. And for the reasons explained above, it was entirely rational for DOB to find that the temporary use of parts of the building while others were renovated did not endanger safety. The temporary certificate of occupancy offered no occasion for the court to reexamine the inherent safety of permanent building features that are plainly lawful under governing statute, and would exist and be used as they would under the building's permanent intended use.

In fact, DOB lacks discretion to independently evaluate a lawful structural design even when reviewing an application for a

final certificate of occupancy. The only question then is whether the building substantially "conforms to the requirements of all laws, rules, regulations and orders applicable to it." City Charter § 645(b)(3)(d). At that point, the question of whether a code-compliant building is safe answers itself: the applicable state and local laws tell us the answer is yes. After all, it is generally "the function of the Legislature," not enforcement agencies, "to determine what standards of safety should be required for multiple dwellings." *Lyons v. Prince,* 281 N.Y. 557, 563 (1939) (holding that agency could not impose higher safety standards on lodging houses, structures to similar SROs, than those that had been legislatively created).

It makes no sense to suggest that part of a building is unsafe for temporary use based on the very nature of lawful features that would pose no obstacle to the issuance of a final certificate of occupancy. And all of the features challenged by petitioners fall into that category. So once the First Department found that DOB properly classified the building, all it had to do was to map each challenged feature onto the laws that apply by virtue of that

classification. The task is an easy one, because petitioners do not dispute that, if the building was properly classified, the features are lawful.

Indeed, without exception, each aspect of the building that the First Department flagged for investigation on remand complies with requirements of the MDL that have been carried into the present day for buildings of this kind. *See* Admin. Code §§ 28-102.2, 28-102.4.3. The MDL allows certain tenements constructed with non-combustible materials and other specified fire-safety features in place, like the building in this case, to maintain a single means of egress that exits into a lobby. *See* MDL §§ 238(2)(b), 248(4)(b). The MDL also permits buildings of this age and "fireproof" construction to maintain curved staircases and hallways configured like the ones that petitioners have challenged. *See* A-2095 (outlining compliance with MDL §§ 237(3), 238, 248(4)(b)).

The bottom line is that neither DOB nor a reviewing court has the power to conclude that features that legislative bodies have deemed adequate to ensure safety are instead inherently

unsafe. And the mistaken view that a property's lawful features may endanger the public "even if the Building is properly grandfathered" (RA-256) threatens to embroil the City (and the courts) in litigation concerning the thousands of temporary certificates of occupancy DOB grants each year.[11]

The First Department's order remanding for an amorphous safety inquiry signals that simply by locating a putative expert who disagrees with DOB, dissatisfied neighbors can compel judicial second-guessing of lawful structural elements that have remained unaltered for years or, as in this matter, for over a century. Particularly in light of petitioners' manifest hostility towards people experiencing homelessness—a stigmatized population—the court should have been wary of eschewing settled administrative law principles and subjecting this property's use to a bespoke analysis unsupported by law.

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[11] *See* NYC Open Data, available at https://perma.cc/B5WU-L6UT (captured Dec. 14, 2020) (documenting DOB's receipt of 11,000-12,000 TCO applications annually between 2017–2019).

CONCLUSION

This Court should modify the First Department's order by (a) vacating the instruction remanding the proceeding for an evidentiary hearing, and (b) either dismissing the petition due to its threshold defects or, in the alternative, denying it on the merits.

Dated: New York, NY
January 7, 2021

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word 2010, and according to that software, it contains 8,819 words, not including the table of contents, the table of cases and authorities, the statement of questions presented, this certificate, and the cover.

BARBARA GRAVES-POLLER