SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

LANDMARKWEST! INC., Petitioner, v. NEW YORK CITY BOARD OF STANDARDS AND APPEALS, NEW YORK CITY DEPARTMENT OF BUILDINGS, EXTELL DEVELOPMENT COMPANY, and WEST 66TH SPONSOR LLC, Respondents.	Index No. 160565/2020 IAS Part 6 Hon. Eileen A. Rakower

EXTELL RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO ARTICLE 78 PETITION

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Respondent Extell Development Company and its affiliate West 66th Sponsor LLC (together, "Extell") respectfully submit this Memorandum of Law in opposition to the Verified Petition of LandmarkWest! Inc. ("LandmarkWest!"), which seeks to vacate a November 6, 2020 resolution issued by the New York City Board of Standards and Appeals ("BSA").

INTRODUCTION

In this Article 78 proceeding, Petitioner LandmarkWest! challenges the BSA's well-founded determination that the New York City Department of Buildings ("DOB") properly issued Extell a permit to build a residential building on Manhattan's Upper West Side. LandmarkWest! does so by relying exclusively on a theory it failed to raise in its original petition to the BSA and instead concocted at the eleventh hour in the middle of the BSA administrative proceeding below. As a threshold matter, that theory consequently was not properly preserved for Article 78 review.

But the objection is fatally flawed on the merits as well. LandmarkWest! asserts that the proposed building violates zoning regulations relating to the permitted floor area ratio, a calculation derived from dividing the total building floor area by the lot size. The Zoning Resolution defines the term "floor area" to exclude the "floor space used for mechanical equipment." LandmarkWest! contends that Extell identified too much horizontal floor space as being "used for mechanical equipment" and thus deducted too much from its "floor area" calculation. After seven months of regulatory proceedings and more than ten hours of public hearings, which included extensive expert testimony, the BSA correctly rejected LandmarkWest!'s belated and erroneous contention.

The BSA, a specialized agency with unique expertise in zoning matters, conducted a careful and detailed analysis of LandmarkWest!'s challenge. The BSA directed DOB to re-review the building's mechanical plans in a manner consistent with BSA precedent. In turn,

DOB—which had already reviewed the plans before issuing the permit—conducted the requested re-review, including by identifying and describing the building's mechanical equipment and assessing whether the number of floors devoted to mechanical equipment "is consistent with similarly sized buildings." Based on that analysis, DOB concluded that (i) the relevant floor area was devoted to mechanical equipment and could not be put to any other use, and (ii) the amount of floor area used for mechanical space was similar to the amounts used for mechanical space in similar buildings. DOB's second finding was corroborated by detailed, independent expert testimony submitted by Extell.

The BSA, after reviewing the full record, including numerous briefs and expert testimony submitted by LandmarkWest! and Extell, issued a written resolution on November 6, 2020, concluding that the proposed building has sufficient mechanical equipment to warrant the floor area deductions the DOB had approved. Thus, after considering all of the evidence and conducting many hours of public hearings, the BSA applied the standard set forth in its precedent to the facts before it, exercised its extensive subject-matter expertise, and correctly denied LandmarkWest!'s challenge.

The BSA's administrative decision-making process was sound and gave careful consideration to this issue—an issue that LandmarkWest! had not even properly raised for the BSA's consideration in the first place, but instead tacked on as an afterthought to its other challenges to Extell's building. Nevertheless, LandmarkWest! now claims that the BSA's decision was somehow arbitrary and capricious such that this Court should cast it aside. At bottom, LandmarkWest! impermissibly seeks to re-write the Zoning Resolution's term "floor space used for mechanical equipment" to instead say "the minimum conceivable amount of floor space required to be used for mechanical equipment," and then argues that Extell *could have*

devoted less floor space to mechanical equipment. The DOB and BSA both correctly rejected LandmarkWest!'s unfounded position.

Indeed, LandmarkWest!'s position ignores that the Zoning Resolution defines the phrase "used for," and that definition makes clear that "used for" does not mean "the minimum possible amount necessary for," as LandmarkWest! would prefer. Further, LandmarkWest!'s factual claim that Extell *could have* devoted less floor space to mechanical equipment is based on information that LandmarkWest! *admitted* was incomplete—a telling admission that LandmarkWest! troublingly omits from its petition. The proposed building is a 39-floor residential structure and, as such, requires extensive mechanical equipment and sufficient space to safely operate and use that equipment, including space for mechanical fans, heaters, shafts, chases, horizontal ductwork distribution, plenums, clearance, servicing and maintenance, fire department access, and proper circulation. LandmarkWest!'s failure to account for these realities and instead to fixate on trying to cram the equipment itself into a smaller portion of the floor without regard for all of these needs is improper, impractical, and unsupported by any precedent.

For these and many other reasons, LandmarkWest! does not and cannot remotely establish that the BSA's determination was irrational or unreasonable, as LandmarkWest! would be required to do in order to overcome the deference this Court rightly affords the BSA's specialized expertise in zoning matters.

In any event, the Court need not even consider LandmarkWest!'s challenge because it failed to timely raise with the BSA the issue that it raises here. When LandmarkWest! challenged DOB's decision to issue the permit to Extell, it tellingly *did not even raise* this horizontal "floor area" argument. When LandmarkWest! then appealed DOB's decision to the BSA, it again *did not even raise* this argument. On both occasions, LandmarkWest! raised only other arguments

that it has since abandoned. Ultimately, LandmarkWest! waited until halfway through the BSA's proceedings—*three months too late* under the BSA's rules—to first raise this issue in a "Hail Mary" attempt to block progress on the building. This failure to timely appeal DOB's determination to the BSA precludes Article 78 review.

In sum, there is no basis to set aside the result reached by the BSA in this matter, both because (i) LandmarkWest! did not timely raise the issue of whether DOB's floor area deductions were excessive and (ii) the BSA's findings on the merits of that issue were neither irrational nor arbitrary (and indeed were correct). The petition should be dismissed.

FACTUAL BACKGROUND

A. DOB Approval

Extell's path to approval of the building project began more than five years ago. In November 2015, Extell applied for a permit from DOB to develop a 25-floor building on certain lots on Manhattan's Upper West Side. Extell later acquired an additional parcel and the unused development rights from an adjacent parcel. Those acquisitions enabled Extell to expand the development site and, under applicable regulations, to build a larger building.

Thus, on November 17, 2017, Extell filed a Post-Approval Amendment (PAA) with DOB, seeking permission to build a 39-floor building. The proposed building, at that point, would have four floors devoted to mechanical equipment, including the 18th floor, which was proposed to be 161 feet tall. On July 26, 2018, DOB issued a foundation permit for the proposed building and approved the corresponding Zoning Diagram ("ZD1").

In September 2018, LandmarkWest! submitted a "Zoning Challenge" to DOB, arguing, among other things, that the proposed building "includes 'oversized inter-building voids' used for accessory mechanical space." Dkt. 7 at 1. LandmarkWest!'s argument challenged the *vertical height* of the mechanical space—objecting to the 18th floor of the proposed building being

161 feet tall. *Id.* at 16. LandmarkWest! did *not* assert that the amount of *horizontal* floor space allocated to mechanical equipment was excessive. *See id.*

On November 19, 2018, DOB rejected LandmarkWest!'s challenge, explaining that the "Zoning Resolution does not prescribe a height limit for building floors." *Id.* at 1. On December 19, 2018, LandmarkWest! appealed DOB's decision to the BSA. *See* Dkt. 8. In its appeal, LandmarkWest! again challenged, among other things, the *vertical* height of the project's mechanical space—i.e., DOB's "determination that the 161-foot-tall void constitutes exempt 'mechanical space' under ZR § 12-10 for the purpose of calculating 'floor area.'" *Id.* at 10. And again, LandmarkWest! did *not* assert that the amount of *horizontal* floor space allocated to mechanical equipment was excessive.

On January 14, 2019, before the BSA had an opportunity to decide LandmarkWest!'s appeal, DOB issued a Notice of Intent to Revoke Approval of Extell's building project. In its notice, DOB indicated that it intended "to revoke the approval of the Zoning Diagram" on the grounds that "the mechanical space with a floor-to-floor height of approximately 160 feet is not customarily found in connection with residential uses." Dkt. 9 at 1. DOB, however, expressly invited Extell to present "sufficient information" to "demonstrate that the approval should not be revoked." *Id.*

Accordingly, Extell submitted a letter to DOB on January 25, 2019, which explained—based on BSA and DOB precedent—why the vertical height of the challenged mechanical spaces complied with the Zoning Resolution. *See* Dkt. 37 at 113-17. Around the same time, in conjunction with comments received from the Fire Department of New York, Extell modified the building plans to, among other things, reduce the height of the 18th floor from 160 feet to 64 feet and increase the height of the 17th and 19th floors, which were also devoted to mechanical

equipment. *Compare* Dkt. 6 *with* Dkt. 10. DOB ultimately determined not to revoke its approval and on April 4, 2019, issued a PAA for the project.

B. Initial Court Challenges and Related BSA Appeals

On April 24, 2019, a different group of challengers initiated a lawsuit in New York State Court seeking an injunction to prevent the project from moving forward. *See* Compl., *City Club of N.Y. v. Extell Dev. Co.*, No. 154205/2019 (Sup. Ct. N.Y. Cty. Apr. 24, 2019). That lawsuit challenged the vertical height of the project's mechanical spaces as well as the project's compliance with "bulk distribution" requirements, also not at issue in this proceeding. *Id.* ¶¶ 2-9. On June 11, 2019, that lawsuit was dismissed for failure to exhaust administrative remedies available from the BSA. *See City Club of N.Y. v. Extell Dev. Co.*, 2019 WL 2436098, at *8 (Sup. Ct. N.Y. Cty. June 11, 2019). The challengers appealed, and the First Department unanimously dismissed their appeal on November 7, 2019. *See City Club of N.Y. v. Extell Dev. Co.*, 177 A.D.3d 422, 422-23 (1st Dep't 2019).

Meanwhile, on May 7, 2019, those challengers also appealed DOB's decision to the BSA, raising the same issues they were unsuccessfully raising in court. Shortly thereafter, on May 13, 2019, LandmarkWest! filed its own appeal to the BSA, raising the identical issues as the other challengers (vertical height of mechanical spaces and compliance with "bulk distribution" requirements). *See* Dkt. 11 at 1-2, 16 (arguing that certain floors containing mechanical equipment were too tall). Once again, LandmarkWest! did *not* raise the issue of whether the amount of horizontal floor space allocated to mechanical equipment was excessive.

On August 6, 2019, the BSA held a hearing on LandmarkWest! and the other challengers' appeals, both of which concerned the two issues that had been featured in the challengers' objections to date: the vertical height of the mechanical spaces and the project's compliance with "bulk distribution" requirements. During that three-and-a-half-hour hearing,

LandmarkWest! raised—for the first time—the question of whether the *horizontal* floor space of the project's mechanical spaces was too large. *See* Dkt. 52 at 50-58. Following that hearing, on August 21, 2019, LandmarkWest! submitted a brief to the BSA devoted solely to its newly raised "Horizontal Challenge," and claimed that the "entire 'height' issue"—on which LandmarkWest!'s briefing and argument had previously focused—was "a giant red-herring, a thinly-veiled misdirection argued to steer people away from the true nature of the floor deductions." Dkt. 12 at 1.[1]

To try to support its argument regarding its new Horizontal Challenge, LandmarkWest! relied on the BSA's 2017 "*Sky House*" decision, *15 East 30th Street*, BSA Cal. No. 2016-4327-A (attached as Exhibit 1 to Extell's Answer). *See* Dkt. 12 at 1-2. According to LandmarkWest!, the *Sky House* decision "recognized the need to evaluate" whether the "floor space used for mechanical equipment" was "excessive or irregular" *Id.*

The BSA continued its hearing to September 10, 2019. During the continued hearing, which lasted for more than three hours, the BSA's General Counsel explained, over repeated interruptions from LandmarkWest!'s counsel, that LandmarkWest! had failed to timely commence the Horizontal Challenge under the BSA's regulations, which require that an applicant appeal a DOB determination to the BSA within 30 days. *See* Dkt. 52 at 180-91. At the end of that session, the BSA closed the proceedings and indicated that it would provide a decision on the issues raised in the challengers' appeals the following week. *Id.* at 261:16-18.

On September 17, 2019, the BSA announced its decision, which unanimously rejected the challengers' appeals attacking both the vertical height of the mechanical spaces and the

[1] This statement confirms that LandmarkWest!'s repeated references to the vertical height of the proposed building (*e.g.*, ¶¶ 2, 6-8) are irrelevant to this proceeding.

project's compliance with "bulk distribution" requirements.[2] After announcing that decision, the BSA, on its own motion, decided to re-open the proceedings to address LandmarkWest!'s belatedly raised Horizontal Challenge. *See* Dkt. 54 at 4:1-12. To that end, the BSA instructed DOB to "review the mechanical drawings in the same way that the *Sky House* mechanical drawings were reviewed," with the "same depth." *Id.* at 1:4-20. The BSA explained that such a review should address whether "the amount of mechanical equipment that's shown on the drawings" was "the amount that you would normally associate with a building of this size." *Id.* at 5:10-17.

In response to the BSA's instruction, DOB clarified that it had already reviewed the plans "and found them sufficient and went through the proposed equipment" (*id.* at 8:1-13), but committed to provide the BSA with further analysis consistent with what DOB had provided to the BSA in *Sky House* (*id.* at 8:15-20).

The BSA's written resolution memorializing their unanimous decision announced at the September 17, 2019, hearing explained with respect to LandmarkWest!'s late-raised Horizontal Challenge that "a timely third issue *has not been presented*" but that the BSA would nevertheless proceed to analyze and address the issue anyway, "on its own initiative." Dkt. 13 at 2 n.1 (emphasis added).

C. The BSA's Review of the Project's Floor-Area Deductions

On October 16, 2019, DOB submitted a brief to the BSA reflecting the analysis the BSA had requested at the September 17, 2019 hearing. In the brief, DOB provided a "description and analysis of the mechanical equipment in the Proposed Building to verify that the mechanical

[2] While LandmarkWest! did not challenge this unanimous BSA ruling, another challenger (The City Club of New York) brought an Article 78 petition to challenge the BSA's decision. The New York State Supreme Court (Engoron, J.) granted City Club's petition in a decision and order that is currently pending on appeal to the First Department.

equipment was properly deducted from floor area and that the Permit was properly issued." Dkt. 14 at 2. DOB listed the mechanical equipment for each of the four mechanical floors, and stated the following:

> Using the *15 East 30th Street* case as a blueprint, a description of the mechanical equipment included in the Proposed Building includes . . .
>
> - **The 15th Floor**: A storm water detention tank, electrical switchboard, electric unit heaters, water source heat pumps, fan units, a duct heater, an electric humidifier, energy recovery unit (water source heat pump), an emergency generator, an exterior lighting dimmer rack, intake sound attenuators, and a sheet metal plenum behind louver;
>
> - **The 17th Floor**: Boilers, electric unit heaters, water source heat pumps, fan units, a 2-pipe fan coil unit, hot water expansion tanks, air separators, hot water pumps, hot water heat exchangers, an air handler unit, an air intake louver, an exhaust louver, and pipe chase containing the elevator smoke vent and the elevator shaft supply duct passing through the floor;
>
> - **The 18th Floor**: A water-cooled direct expansion air conditioning (DX) unit, cold water pumps; cold and hot water pumps, expansion tanks, air separators, water source heat pumps, electric unit heaters, electric panels, water cooled chillers, fan units, heat exchangers, an exhaust louver, and an intake louver;
>
> - **The 19th Floor**: A fire reserve storage tank, water source heat pumps, energy recovery units (water source heat pumps), fan units, an electric humidifier, electric unit heaters, an intake louver, and an exhaust louver.

Id. at 3-4. Based on its review, DOB concluded that "the floor space on such floors is devoted to housing the mechanical equipment of the Proposed Building and those floors cannot be occupied for purposes other than the housing of such equipment." *Id.* at 3.

Additionally, as directed by the BSA, DOB compared "the amount of floors deducted with similarly situated buildings." *Id.* DOB concluded that "the amount of stories devoted

entirely to mechanical equipment is consistent with similarly sized buildings." *Id.* Expert testimony further corroborated DOB's findings. Michael Parley, a pre-eminent zoning expert, concluded that the project's percentage of mechanical floor space (13.45%) was well within the percentage range of mechanical floor space in similar buildings (*i.e.*, buildings between 665 and 880 feet tall), which ranged from 13.45% to 21.60%, with an average of 16.87%. Dkt. 18 at 6-7. Moreover, Mr. Parley concluded that the number of "full 'interstitial' mechanical floors" for the project (four) was also "entirely within the spectrum of the number of such floors in other tall buildings," which ranged from two to twelve. *Id.* at 7.

LandmarkWest! submitted expert testimony from Michael Ambrosino, an engineer. LandmarkWest! admitted that Mr. Ambrosino had performed only "a partial analysis." Dkt. 16 at 4. Nevertheless, based on this partial analysis, LandmarkWest! represented to the BSA that the mechanical equipment on the relevant floors required only 18% to 28% of the floor space on those floors. *Id.* at 5. Citing a DOB draft bulletin, LandmarkWest! claimed that if Extell "cannot show that the mechanical equipment and requisite areas occupy at least 90% of the floor area," floor-area deductions for mechanical equipment were improper. *Id.* at 6.

In its November 27, 2019 submission, Extell responded and explained that Mr. Ambrosino's admittedly incomplete analysis was replete with errors and severely understated the size and scope of the project's mechanical program. Dkt. 18 at 11. In particular, Extell observed, based on expert affidavits, that Mr. Ambrosino's analysis ignored a significant amount of mechanical equipment included in the project plans. Indeed, his analysis was "based on the HVAC mechanical ductwork plans alone" and therefore completely ignored "*all* of the equipment shown on the three other sets of mechanical plans for each floor, i.e., HVAC mechanical piping, fire protection and plumbing." *Id.* And even with respect to the HVAC

mechanical ductwork plans, he failed "to account for various forms of equipment" that were "clearly shown," including "mechanical fans, heaters, shafts, chases, horizontal ductwork distribution and plenums. *Id.* Further, Mr. Ambrosino overstated the amount of total floor area on each of the relevant floors—the denominator for his percentage calculations—by approximately 10%, because he improperly included "the area of the building core, structure and curtain wall." *Id.*

On December 17, 2019, the BSA held a three-and-a-half-hour hearing on LandmarkWest!'s untimely raised Horizontal Challenge. The hearing included presentations from attorneys for DOB, LandmarkWest!, and Extell, as well as extensive expert testimony. Mr. Ambrosino testified on behalf of LandmarkWest!; Vivek Patel, the project's mechanical engineer, testified on behalf of Extell; and Mr. Parley and Luigi Russo, the project's architect of record, addressed questions from the Commissioners. Moreover, Mr. Ambrosino, Mr. Parley, Mr. Russo, and Igor Bienstock (Mr. Patel's colleague) submitted written testimony. *See* Dkt. 16 at 14-16 (Ambrosino); Dkt. 18 at 87-96 (Bienstock), 97-105 (Russo), 106-21 (Parley).

During the hearing, DOB reiterated that it "reviewed the approved mechanical drawings, just as it had done in the *Sky House* case, and concluded that the space as shown on the approved mechanical plans cannot realistically be occupied for purposes other than housing such equipment," and "as such is properly exempt from floor area." Dkt. 63 at 51:15-19. DOB explained that, to determine whether floor area is properly deducted, DOB typically considers whether "the room contains so much equipment and associated room to maneuver around it, and to be able to operate the equipment," such that "other uses can't be occupied in the space." *Id.* at 55:3-9. DOB emphasized that if it sees "a single piece of equipment" in a large space, DOB "will question it," "reject if it was obvious," and "give pushback and ask for more." *Id.* In essence,

DOB asks: "Is it going to become some other use, or is this a mechanical space?" *Id.* at 62:17-21. DOB explained that it does not apply rigid "quantitative criteria" to analyze floor area used for mechanical equipment because it is "too difficult to articulate how much mechanical equipment is acceptable in all buildings throughout the city, given the differing needs of every building." *Id.* at 54:8-12, 57:5-12.

LandmarkWest! did not show—or even suggest—that the floor space Extell had identified as being used for mechanical equipment would be used for anything other than mechanical equipment. Moreover, DOB confirmed that there were "many flaws" with the analysis submitted by LandmarkWest!'s proffered expert, Mr. Ambrosino. *Id.* at 52:16-53:8. Further, DOB emphatically stated that the years-old draft DOB bulletin LandmarkWest! had relied upon was merely a 2013 "draft" and had "never been issued." *Id.* at 53:14-17.[3] Indeed, DOB stated in no uncertain terms that DOB does *not* apply "the 90 percent coverage standard mentioned in the draft bulletin" as a minimum requirement. *Id.* at 54:4-7.

D. The November 6, 2020 Resolution

On January 28, 2020, the BSA publicly announced its decision rejecting LandmarkWest!'s untimely raised Horizontal Challenge. The BSA memorialized its decision and reasoning in a resolution dated November 6, 2020. Dkt. 3.

The BSA concluded that LandmarkWest! had "not demonstrated that the architectural and mechanical plans for the New Building show insufficient mechanical equipment in the area identified as mechanical space to justify floor-area deductions." Dkt. 3 at 3. The BSA explained

[3] The draft bulletin was never issued or adopted for good reason. Mr. Parley, who was involved in reviewing it, explained in an affidavit in the record before the BSA that stakeholders identified a litany of concerns with the draft bulletin's proposed methodology, including because it failed to adequately account for circulation space, and that the DOB never adopted the draft for these and other reasons. *See* Dkt. 18 at 113-20.

that, consistent with precedent, it "reviewed the record in its entirety, including expert testimony and plans for the New Building." *Id.* at 4. Based on that review, the BSA found that the building's plans "demonstrate sufficient floor-based mechanical equipment":

> Much of this equipment sits directly on the floor or directly on pads—indisputably representing "floor space used for mechanical equipment"—and because of the nature of mechanical equipment, these pieces require clearance and service areas that further justify the New Building's floor-area deductions.

Id. As further support for its conclusion, the BSA noted that "expert testimony provided by the Owner demonstrates that other similar buildings contain 12 mechanical floors, whereas the New Building contains 4—well within the range of standard practices for constructing buildings of this scale." *Id.* at 4-5.

In sum, the BSA reviewed DOB's determination of the Horizontal Challenge *de novo* and concluded that DOB "acted reasonably in reviewing and approving the New Building's mechanical plans." *Id.* at 3-4.

LEGAL STANDARD

"It is well established that a Court's function in an Article 78 proceeding is to determine, upon the proof before the Administrative Agency, whether the determination had a rational basis in the record or was arbitrary and capricious." *Lee v. Chin*, 1 Misc. 3d 901(A), 2003 WL 22888395, at *13 (Sup. Ct. N.Y. Cty. Oct. 29, 2003); *see also HLV Assocs. v. Aponte*, 223 A.D.2d 362, 363 (1st Dep't 1996) (same). An "administrative agency's interpretation of the statute it is charged with implementing is entitled to varying degrees of deference depending upon the extent to which the interpretation relies on the special competence the agency is presumed to have developed in its administration of the statute." *N.Y. City Council v. City of N.Y.*, 4 A.D.3d 85, 96 (1st Dep't 2004) (quoting *Matter of Gruber*, 89 N.Y.2d 225, 231 (1996)).

Indeed, "the Court '*must* defer to an administrative agency's rational interpretation of its own regulations.'" *Andryeyeva v. N.Y. Health Care, Inc.*, 33 N.Y.3d 152, 175 (2019) (quoting *Peckham v. Calogero*, 12 N.Y.3d 424, 431 (2009)); *see also In the Matter of Tenants United Fighting for the Lower East Side v. CPC*, --- N.Y.S.3d ---, 2021 WL 558730, at *1 (1st Dep't Feb. 16, 2021) (noting that the "court should have deferred to CPC's reasonable interpretation of the ZR").

"The BSA is the 'ultimate administrative authority charged with enforcing the Zoning Resolution.'" *Peyton v. BSA*, --- N.Y.3d ----, 2020 WL 7390864, at *4 (Dec. 17, 2020) (quoting *Toys R Us v. Silva*, 89 N.Y.2d 411, 418 (1996)). "It is comprised of experts in land use and planning, who not only possess technical knowledge of New York City's reticulated zoning regulations and their operation in practice, but also are uniquely equipped to assess the practical implications of zoning determinations affecting the City's eight million residents." *Id.* (internal quotation marks omitted). For this reason, the Court of Appeals has "consistently deferred to the BSA's interpretation of the Zoning Resolution in matters relating to its expertise." *Id.*; *see also N.Y. Botanical Gardens v. BSA*, 91 N.Y.2d 413, 418-19 (1998) (Court of Appeals has "frequently recognized" that the BSA's "interpretation of the Zoning Resolution is entitled to deference").

Such "deference is appropriate where the question is one of specific application of a broad statutory term." *Peyton*, 2020 WL 7390864, at *4 (quoting *O'Brien v. Spitzer*, 7 N.Y.3d 239, 242 (2006)); *N.Y. Botanical Gardens*, 91 N.Y.2d at 419 ("when applying its special expertise in a particular field to interpret statutory language, an agency's rational construction is entitled to deference"). Under such circumstances, as long as the BSA's "interpretation is neither 'irrational, unreasonable nor inconsistent with the governing statute,' it will be upheld." *N.Y.*

Botanical Gardens, 91 N.Y.2d at 419 (quoting *Trump-Equitable Fifth Ave Co. v. Gliedman*, 62 N.Y.2d 539, 545 (1984)). Accordingly, "the court may not substitute its judgment for that of the zoning board, 'even if the court might have decided the matter differently.'" *Lee*, 2003 WL 22888395, at *13 (quoting *Toys R Us*, 89 N.Y.2d at 419).

ARGUMENT

LandmarkWest!'s petition fails for two fundamental reasons. *First*, LandmarkWest! failed to *timely* appeal DOB's horizontal floor space determination to the BSA, and therefore failed to preserve this issue for Article 78 review. Indeed, as the BSA repeatedly recognized, LandmarkWest!'s challenge to the horizontal floor space determination missed the 30-day statutory deadline set by the applicable regulations by at least three months.

Second, the BSA's decision to deny LandmarkWest!'s appeal was neither arbitrary nor capricious. To the contrary, the BSA utilized its substantial subject-matter expertise to apply its reasonable, practical, and correct interpretation of the Zoning Resolution to the particular facts of this case, and is thus entitled to deference. In contrast, LandmarkWest!'s proposed interpretation disregards critical defined terms (such as the phrase "used for" that appears in "used for mechanical equipment"); is irreconcilable with the statutory language (because it improperly injects additional language into the text and relies on an invented definition of "used for"); and impermissibly imposes additional burdens by subjecting property owners to requirements that have no basis in the text of the applicable regulations, in derogation of owners' property rights.

Finally, LandmarkWest! is not entitled to a trial pursuant to CPLR 7804(h) because it fails to raise any issues of fact that bear on whether the BSA acted arbitrarily or capriciously. Instead, LandmarkWest! merely seeks a do-over of the full and fair administrative process that lasted for the better part of 2019. In other words, after failing to timely commence the Horizontal Challenge with the BSA and nevertheless obtaining a thorough review of the Horizontal

Challenge that rationally rejected its arguments, LandmarkWest! now seeks to restart the entire administrative process that began nearly two years ago. Simply put, this is not the "rare" case where an Article 78 trial is appropriate. 4F N.Y. Prac., Commercial Litig. in N.Y. State Courts § 143:6 (5th ed. 2020).

I. LandmarkWest!'s Failure to Timely Appeal DOB's Determination to the BSA Precludes Article 78 Review

LandmarkWest! did not timely raise its challenge to the project's horizontal floor area and is therefore precluded from seeking this Article 78 review. "Failure to timely file or perfect an administrative appeal," by law, "precludes review pursuant to CPLR article 78." *Shahid v. City of N.Y.*, 144 A.D.3d 1163, 1164 (2d Dep't 2016); *see also Lutz v. Superintendent Demars of Altona Corr. Facility*, 117 A.D.3d 1354, 1354-55 (3d Dep't 2014) (dismissing Article 78 petition, where appeal to administrative agency was properly rejected as untimely); *St. Mary's Hosp. of Troy v. Axelrod*, 108 A.D.2d 1068, 1070 (3d Dep't 1985) (same). Thus, where "administrative review of the merits" of an "agency's determination" is "time-barred," an Article 78 challenge to that determination "must fail." *McGirr v. Div. of Veterans Affairs*, 43 N.Y.2d 635, 639 (1978).

That threshold ground for denying an Article 78 challenge applies even if the administrative agency proceeded to consider the untimely appeal. A filing that commences an appeal with an administrative agency is "analogous to a notice of appeal, the timely filing of which is jurisdictional and cannot be waived." *Liebman v. Shaw*, 223 A.D.2d 471, 471 (1st Dep't 1996). Accordingly, once a petitioner fails to timely file an appeal with an administrative agency, that petitioner has failed to properly preserve the issue for Article 78 review—regardless of whether the agency dismisses the appeal as untimely. *Cf. Miskiewicz v. Hartley Rest. Corp.*, 58

N.Y.2d 963, 965 (1983) (reversing Appellate Division, where "notice of appeal to the Appellate Division was not timely and therefore that court was without jurisdiction").

Here, LandmarkWest!'s Horizontal Challenge to the BSA was time-barred, and, as a result, LandmarkWest!'s instant Article 78 challenge must fail. Under the BSA's rules, a party must file an appeal application "within thirty (30) days" from the date of the "agency final determination." BSA Rule § 1-06.3. LandmarkWest! asserts that its appeal to the BSA challenged the DOB's April 11, 2019 reissuance of the permit (Dkt. 11 at 1, 6), but LandmarkWest! failed to timely commence the Horizontal Challenge with the BSA (or even DOB) until August 2019—*three months* too late under the BSA's rules. *See* Dkt. 52 at 50-58. The BSA repeatedly and correctly recognized that the newly raised challenge was untimely. *See* Dkt. 3 at 2 ("a timely third issue had *not* been presented" regarding horizontal floor space) (emphasis added); Dkt. 13 at 2 n.1 (same).[4] Accordingly, because LandmarkWest! failed to timely appeal to the BSA, it failed to preserve the issue for judicial review and therefore cannot challenge the BSA's determination with respect to the Horizontal Challenge through an Article 78 proceeding.

That outcome is unaffected by the BSA's decision to review the untimely raised Horizontal Challenge *sua sponte*. *See* Dkt. 52 at 261:16-18 (closing LandmarkWest!'s appeal); Dkt. 54 at 4:1-12 (re-opening appeal on BSA's own motion solely for purposes of considering

[4] Whether LandmarkWest! timely filed *an* appeal to the BSA on May 13, 2019 is not dispositive. Instead, the issue is whether LandmarkWest! timely appealed to the BSA *on the ground raised here*. Indeed, the City Charter makes clear that an appeal to the BSA *is limited to the specific issues raised by the appellant in its notice of appeal*. *See* N.Y.C. Charter § 669 (appeal of DOB determination "may be taken within such time as shall be prescribed by the BSA by general rule, by filing with the officer from whom the appeal is taken and with the [BSA] a notice of appeal, *specifying the grounds thereof*") (emphasis added). LandmarkWest! did not raise the Horizontal Challenge with the BSA in its May 2019 filing. Thus, the Horizontal Challenge was outside of the scope of that appeal and could only be raised in a subsequent appeal to the BSA. Indeed, as LandmarkWest! acknowledges, when the BSA decided to consider the Horizontal Challenge, it assigned a new calendar number to that challenge. *See* Pet. ¶ 42.

Horizontal Challenge). LandmarkWest! failed to timely commence the Horizontal Challenge, and thus had no *right* to have the BSA consider it, through *sua sponte* review or otherwise. LandmarkWest! cannot be heard to complain that the BSA—which had no obligation to even consider the Horizontal Challenge—declined to decide the issue in LandmarkWest!'s favor. *Cf. Miskiewicz*, 58 N.Y.2d at 965; *Pomygalski v. Eagle Lake Farms, Inc.*, 192 A.D.2d 810, 812 (3d Dep't 1993) ("Finally, we find that defendants' motion for reconsideration was essentially one for reargument addressed to the court's discretion and, if denied, is not appealable.").

II. The BSA's Rejection of LandmarkWest!'s Challenge to the Project's Horizontal Floor Space Used for Mechanical Equipment Was Not Arbitrary or Capricious

A. The BSA's Interpretation of ZR 12-10 Is Not Arbitrary or Capricious

LandmarkWest! claims (¶¶ 63-74) that the BSA erred as a matter of law in interpreting ZR 12-10, which provides that for purposes of FAR calculations, "floor space used for mechanical equipment" is excluded from the "floor area" component of that ratio. LandmarkWest! claims (¶ 63) that the phrase "floor space used for mechanical equipment" means floor space "*required to be used*" for mechanical equipment—or, in other words, "*the minimum conceivable amount of* floor space *required to be* used for mechanical equipment." The BSA rejected LandmarkWest!'s contention and concluded that the regulations refer to floor space *used* for mechanical equipment—that is, floor space "devoted to housing the mechanical equipment," as opposed to floor space being used for some other use in the building. Dkt. 3 at 4-5, 7. In addition to being decidedly correct, the BSA's interpretation is rational and entitled to deference—all that is required for the Court to deny this Article 78 challenge.

1. The BSA's Interpretation Is Entitled to Deference

The BSA's interpretation of the relevant statutory language is entitled to deference for at least four reasons. *First*, the "BSA and DOB are responsible for administering and enforcing the

zoning resolution," including ZR 12-10, and BSA's interpretation "must therefore be 'given great weight and judicial deference, so long as the interpretation is neither irrational, unreasonable, nor inconsistent with the governing statute.'" *Appelbaum v. Deutsch*, 66 N.Y.2d 975, 977 (1985) (quoting *Trump-Equitable Fifth Ave.*, 62 N.Y.2d at 545).

Second, far from being irrational, unreasonable, or inconsistent with the governing statute, the BSA's interpretation is correct and, at an absolute minimum, a reasonable interpretation of an ambiguous provision. "When a statute is ambiguous and requires interpretation, the construction given to the statute by an administrative agency responsible for its administration should be upheld by the courts." *Better World Real Estate Grp. v. N.Y. City Dep't of Fin.*, 122 A.D.3d 27, 35 (2d Dep't 2014) (citing *Robins v. Blaney*, 59 N.Y.2d 393, 399 (1983)). While Extell submits that the BSA's interpretation of ZR 12-10 is consistent with the provision's clear language (Part II.A.2 below), even if the provision were ambiguous, the BSA's interpretation is at a minimum still entitled to deference as it is plainly reasonable.

Third, in interpreting ZR 12-10, the BSA necessarily and properly relied on its expertise. *See N.Y. Botanical Gardens*, 91 N.Y.2d at 419 ("when applying its special expertise in a particular field to interpret statutory language, an agency's rational construction is entitled to deference"). ZR 12-10 sets forth the definition of "floor area" in a 15-part definition that contains 14 independent exceptions. That definition and its exceptions, in turn, incorporate dozens of defined terms. *Cf. Peyton*, 2020 WL 7390864, at *5 ("complex set of cross-references and interlocking provisions" in ZR 12-10 definition "comprises no less than 13 defined terms, many of which cross-reference other defined terms," which "counsels deference"). Thus, as the Court of Appeals has recognized, ZR 12-10 "is part of an intricate statutory edifice with which the BSA is most familiar." *Id.*

Even the undefined terms of ZR 12-10—such as the term "mechanical equipment"—are technical and call for the BSA's expertise regarding, among other things, what constitutes "mechanical equipment" sufficient to qualify for exclusion from "floor area" for purposes of calculating floor area ratios. *Cf. Queens Neighborhood United v. DOB*, 62 Misc. 3d 1210(A), 2019 WL 302167, at *4 (Sup. Ct. N.Y. Cty. Jan. 23, 2019) (BSA's "expertise" implicated on question of "whether an establishment's 'floor area' for the purposes of determining its classification should include subterranean space"). Contrary to LandmarkWest!'s apparent suggestion (¶¶ 70-74), this is *not* a case where the agency's determination did "not depend in the slightest on the knowledge and understanding of the practices unique" to the agency or the agency's "evaluation of factual data." *Raganella v. N.Y. City Council Serv. Comm'n*, 66 A.D.3d 441, 446 (1st Dep't 2009).

Fourth, the BSA's position is based on its "practical construction" of ZR 12-10. As "a general rule, 'the practical construction of the statute by the agency charged with implementing it, if not unreasonable, is entitled to deference by the courts.'" *Vill. of Scarsdale v. Jorling*, 91 N.Y.2d 507, 516 (1998) (quoting *Harris & Assocs. v. deLeon*, 84 N.Y.2d 698, 706 (1994)). The BSA is the agency "responsible for the sound and practical administration" of the Zoning Resolution. *McKernan v. City of N.Y. Civil Serv. Comm'n*, 127 Misc. 2d 946, 952 (Sup. Ct. N.Y. Cty. 1985). It is therefore in the best position "to strike a policy balance" with respect to which, and how much, mechanical equipment should be considered in excluding a space from floor area. *Hatanaka v. Lynch*, 304 A.D.2d 325, 326 (1st Dep't 2003) (reversing court that "improperly substituted its judgment for that of the agency").[5]

[5] Citing no authority, LandmarkWest! suggests (¶¶ 11, 89) that the BSA's decision should be afforded "no deference" because it was the result of a split vote. LandmarkWest! is wrong. The BSA's ruling was indisputably a valid and binding final determination. BSA Rules Sections 1-11.5, 1-12.1, 1-

Accordingly, the BSA's interpretation of ZR 12-10 is entitled to deference and "must be upheld if reasonable." *P'ship 92 LP v. State Div. of Hous. & Cmty. Renewal*, 46 A.D.3d 425, 429 (1st Dep't 2007).

2. The BSA's Interpretation Is Correct

The BSA's interpretation of ZR 12-10 is eminently reasonable, comports with the regulation's plain language, and contrary to LandmarkWest!'s contention, does not produce absurd results. The BSA interprets the phrase "used for mechanical equipment" to refer to floor space "devoted to housing the mechanical equipment," as opposed to floor space that is being used for some other use. Dkt. 3 at 4-5, 7 (setting forth DOB position and ruling it reasonable). That interpretation is also reflected in the BSA's prior *Sky House* decision, which explained that floor space is "used for mechanical equipment" when "there is no reason to suspect that floor spaces designated as being used for mechanical equipment on the approved plans will not be put to such use." Extell Answer Ex. 1 at 3-4, *15 East 30th Street*, BSA Cal. No. 2016-4327-A.

LandmarkWest! *admits* (¶ 73) that "a common sense reading of the word 'used' must mean 'actually used.'" But LandmarkWest! goes on to contend (¶¶ 63, 67) that for purposes of ZR 12-10, the phrase "floor space used for mechanical equipment" really means "floor space *required to be* used for mechanical equipment"—or the "space necessary for the equipment to do its job." In other words, LandmarkWest! seeks to re-write ZR 12-10 from "floor space used for

12.9. The BSA commissioners who rejected LandmarkWest!'s argument "constitute a controlling group for purposes of the decision," and "their rationale necessarily states the agency's reasons for acting as it did." *Fed. Election Comm'n v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) (discussing tie in FEC context where, as here, tie results in denial). As courts have found in analogous cases, such agency decisions are entitled to the same deference as any other. *See In re Sealed Cases*, 223 F.3d 775, 779 (D.C. Cir. 2000) ("we owe deference to [an FEC] legal interpretation supporting a negative probable cause determination that prevails on a 3–3 deadlock").

mechanical equipment" to "the minimum conceivable amount of floor space required to be used for mechanical equipment."

LandmarkWest!'s interpretation is untenable under New York law because it would improperly inject into the statute additional language the legislature did not include. *See People v. Buyund*, 179 A.D.3d 161, 169 (2d Dep't 2019) ("a court cannot amend a statute by inserting words that are not there," nor "read into a statute a provision which the Legislature did not see fit to enact") (quoting *Chem. Specialties Mfrs. Ass'n v. Jorling*, 85 N.Y.2d 392, 394 (1995)). Not only does LandmarkWest!'s interpretation improperly inject language into the statute, but it also does so in a manner that imposes additional burdens on regulated entities. Thus, LandmarkWest! disregards the well-settled principle that zoning ordinances "are in derogation of common law rights and, accordingly, must be strictly construed so as not to place any greater [influence] upon the free use of land than is absolutely required." *Exxon Corp. v. BSA*, 128 A.D.2d 289, 295-96 (1st Dep't 1987); *see also, e.g.*, *Allen v. Adami*, 39 N.Y.2d 275, 277 (1976) (zoning regulations "are in derogation of the common law" and any ambiguity "must be resolved in favor of the property owner").

Worse, LandmarkWest!'s interpretation *directly conflicts* with other provisions of the Zoning Resolution. LandmarkWest! falsely asserts (¶ 65) that the term "use" is not defined in the Zoning Resolution—even though LandmarkWest! itself recently told the BSA the exact opposite: that the "statute provides a definition of 'use.'" Dkt. 11 at 17. In fact, ZR 12-01 expressly defines the phrase "used for"—which occurs in the phrase at issue here—to include "arranged for," "designed for," "intended for," "maintained for," or "occupied for." The invented phrase that LandmarkWest! self-servingly seeks to inject into "used for" as it appears in ZR 12-10—"required for"—is conspicuously absent from the definition. This definition makes

even clearer that a space *designed for* or *intended for* mechanical equipment is "used for" mechanical equipment and may be deducted from the calculation of floor area ratio, regardless of whether that space is the minimum conceivable amount of space *required for* mechanical equipment. That definition is thus even more expansive than the one the BSA employed in approving the calculations on the factual record's evidencing that the space at issue is being actually used for mechanical equipment.

Yet LandmarkWest!—having apparently overlooked that the Zoning Resolution expressly defines "used for"—wrongly criticizes the BSA's decision (¶¶ 64, 68-71) as potentially allowing an applicant to exclude from floor area all floor space that the applicant *claims* will be used for mechanical equipment, even if the applicant does not *require* that amount of space. LandmarkWest! contends that the BSA's interpretation could lead to absurd results, such as an applicant excluding "a room the size of the main hall at Grand Central Terminal" from "floor area" merely because that room purportedly contained "an air handler the size of a footlocker."

LandmarkWest!'s fanciful "absurdity" argument, however, ignores the record. The BSA explained that the process for determining whether floor space is "used for mechanical equipment," set forth in the *Sky House* decision, involves (among other things) reviewing a building's mechanical drawings and considering whether (i) there is any "reason to suspect that floor spaces designated as being used for mechanical equipment on the approved plans will not be put to such use" and (ii) the amount of proposed mechanical equipment "is customarily found in connection with" similar buildings. Extell Answer Ex. 1 at 4-5, *15 East 30th Street*, BSA Cal. No. 2016-4327-A; *see also* Dkt. 54 at 1:4-20 (BSA instructing DOB to "review the mechanical drawings in the same way that the *Sky House* mechanical drawings were reviewed").

The DOB and BSA's process thus protects against the "absurd results" LandmarkWest! claims to fear. DOB and the BSA can—and do—scrutinize whether an applicant will actually put space to a claimed use, or in fact mislabel a space and in fact try to put that space to use for another purpose. *See, e.g.*, *9th & 10th St. LLC v. BSA.*, 10 N.Y.3d 264, 267-70 (2008) (affirming DOB and BSA's denial of permit where applicant failed to show that "it could actually use the building" for the claimed use). Indeed, DOB specifically examined whether the space at issue was "going to become some other use, or is this a mechanical space," and reviewed the project plans to determine whether the space could "realistically be occupied for purposes other than housing such equipment." Dkt. 63 at 51:15-19, 62:17-21. DOB specifically stated that it would *not* allow an applicant to designate a large area containing "a single piece of equipment" as "floor space used for mechanical equipment," and that DOB would question a design that doesn't make sense, "give pushback and ask for more," and potentially "reject it." *Id.* at 51:15-19, 55:3-9, 62:17-21.

In contrast to the BSA's and DOB's reasonable approach, LandmarkWest!'s proposed interpretation would effectively appoint DOB the mechanical engineer of each project, requiring it to engage in a burdensome analysis of how mechanical equipment should be laid out for each project to minimize floor-area deductions. In addition to imposing significant costs on regulators and property owners alike, such an interpretation would, as Commissioner Chanda observed, have wide-ranging implications, including by limiting developers' energy choices in significant ways. *See* Dkt. 70 at 4:10-5:20. Indeed, as DOB explained, "every building" has "differing needs" (Dkt. 63 at 54:8-12), depending on, among other things, "the design of the building and

different energy efficiency goals of different applicants" (Dkt. 14 at 3).[6] Even within the same building, LandmarkWest!'s own expert recognized, "if you give this building to five engineers, you're going to get back five different designs." Dkt. 63 at 26:13-15. Yet LandmarkWest!'s proposed interpretation would assume those differences away, restrict the choices of both developers and consumers, and effectively implement legislation requiring that developers myopically focus on minimizing horizontal space devoted to mechanical equipment. There is no basis for such a restriction in the Zoning Resolution.

In short, the BSA implemented an interpretation of ZR 12-10 that comports with the plain language of the regulation, avoids absurd results, and provides a practicable framework to DOB for reviewing the thousands of permit applications it receives each year. This Court should defer to that correct interpretation and should not cast it aside.

B. The BSA Did Not Apply ZR 12-10 Arbitrarily or Capriciously

LandmarkWest! contends (¶¶ 75-85) that the BSA gave insufficient weight to the testimony of its proffered expert, Mr. Ambrosino, which purportedly showed that the project contains "far greater" space for mechanical equipment than he believed was necessary. LandmarkWest!'s argument fails for at least five reasons.

First, it is premised on an incorrect standard. As explained above, the applicable standard under ZR 12-10 is whether the floor area designated by the applicant is devoted to mechanical equipment as opposed to some other use. The standard is *not* whether the applicant has

[6] Even similarly sized buildings may have significantly different needs. As Mr. Parley's analysis demonstrates, buildings similar to the proposed building included between two and twelve floors for mechanical equipment, and allocated between 13.45% and 21.6% of floor space to mechanical equipment. Dkt. 18 at 6-8. Mr. Bienstock, the project's engineer, described to the BSA in detail the array of factors driving the needs of the proposed building. *See* Dkt. 18 at 90-95. For example, he explained that the proposed building's layout takes into account "the need for that equipment to be located in proximity to the areas it serves or in proximity to other types of equipment," in addition to "other factors related to operational and energy efficiency specific to the characteristics of [the] building." *Id.* at 94.

designated the *minimum conceivable* amount of floor space required for the mechanical equipment. Accordingly, even if Mr. Ambrosino's analysis were otherwise valid (it is not), it would not be determinative.

Second, the BSA's factual determination that the building project contains sufficient mechanical equipment to justify the corresponding floor-area deductions is entitled to deference. As the Court of Appeals recently reiterated, "deference is appropriate where the question is one of specific application of a broad statutory term." *Peyton*, 2020 WL 7390864, at *4. In reaching its decision, the BSA applied the term "used for mechanical equipment" from ZR 12-10 to the facts before it, including by reviewing "expert testimony and plans for the New Building." Dkt. 3 at 4.

Third, the BSA had ample "rational basis" for its determination. *See Lee*, 2003 WL 2288395, at *13 ("if there is a rational basis for the administrative determination, there can be no judicial interference"). An administrative decision is supported by a "rational basis" if it is "consistent" with the agency's "own rules and precedents." *Peckham*, 12 N.Y.3d at 431. Here, the BSA expressly followed its own precedent from the *Sky House* case. *See* Dkt. 3 at 4 (noting that BSA conducted its review "consistent with" the *Sky House* decision).

Specifically, the BSA reviewed the project's "architectural and mechanical plans" and found "sufficient floor-based mechanical equipment" to demonstrate that the space was in fact devoted to housing mechanical equipment and not some other use. *See* Dkt. 3 at 4; *see also* Dkt. 14 at 3-4 (listing mechanical equipment by floor). That finding was supported by the BSA's observation that, "because of the nature of mechanical equipment, these pieces require clearance and service areas that further justify the New Building's floor-area deductions." Dkt. 3 at 4. Further, the BSA credited the expert testimony in the record demonstrating that "other similar

buildings contain 12 mechanical floors," whereas Extell's project "contains 4—well within the range of standard practices for constructing buildings of this scale." Dkt. 3 at 4-5; *cf. N.Y. Botanical Gardens*, 91 N.Y.2d at 421 (owner's evidence indicating that it was "commonplace for stations affiliated with educational institutions to operate on the scale of" the owner's station provided "a substantial basis for the BSA's determination").

Fourth, the BSA was not required to credit Mr. Ambrosino's testimony. "The courts may not weigh the evidence or reject the choice made by" an administrative agency "where the evidence is conflicting and room for choice exists." *Berenhaus v. Ward*, 760 N.Y.2d 436, 444 (1987) (quoting *Stork Rest. v. Boland*, 282 N.Y. 256, 267 (1940)); *see also Lindemann v. Am. Horse Shows Ass'n, Inc.*, 222 A.D.2d 248, 250 (1st Dep't 1995) ("It is axiomatic that the court may *not* weigh the evidence, choose between conflicting proof, or substitute its assessment of the evidence or credibility of the witnesses for that of the administrative judge or hearing panel.").

Here, the BSA had ample ground *not* to credit Mr. Ambrosino's testimony. As LandmarkWest! acknowledges (¶ 80), another expert witness, Mr. Patel, testified that Mr. Ambrosino's analysis badly understated "the amount and types of mechanical equipment on the floor" because it was "based on the HVAC mechanical ductwork plans alone" and omitted "all the equipment shown on the other three sets of mechanical plans (HVAC mechanical piping, fire protection, and plumbing)," as well as "pieces of equipment shown on the HVAC mechanical drawings." Mr. Bienstock came to a similar conclusion in written testimony submitted to the BSA. *See* Dkt. 18 at 87-88. LandmarkWest! does not (because it cannot) dispute that Mr. Ambrosino understated the amount of mechanical equipment in the proposed building, including in the areas referenced in the petition (*see* ¶¶ 76-78). Indeed, DOB observed that Mr. Ambrosino "only focused on one set of plans, the HVAC set, and did not show the

mechanical piping, plumbing or sprinkler standpipe plans." Dkt. 63 at 52:21-53:8. Thus, it was reasonable for the BSA not to adopt Mr. Ambrosino's position—especially given LandmarkWest!'s own admission to the BSA that Mr. Ambrosino's analysis was based on incomplete information. *See* Dkt. 16 at 4.

Similarly, the BSA reasonably chose not to adopt Mr. Ambrosino's "alternative layout" of the mechanical equipment, which Mr. Bienstock explained was "based on the false premise that having equipment occupy the minimum amount of floor space on a floor equates to mechanical efficiency." Dkt. 18 at 89. Mr. Bienstock further explained that when "designing a full building," there are "a host of considerations an engineer must take into account, including accessibility, constructability, and proximity of equipment and systems to the occupied spaces they served," as well as "the effect of location on individual system parameters, such as voltage drops and operating pressures," "the required separation between specific systems," and "proximity to exterior walls for air intake and exhaust." *Id.* Mr. Ambrosino failed to properly consider these factors, and thus proposed an unrealistic and inoperable floor plan that, among other failures, did not provide space "for the necessary piping and ductwork distribution that connects to the HVAC equipment," "space to access the valves and gauges attached to the distribution," space "for walking aisles," or "adequate means to access equipment." *Id.* The BSA properly and reasonably recognized this complexity. *See* Dkt. 3 at 4 ("because of the nature of mechanical equipment, these pieces require clearance and service areas that further justify the New Building's floor-area deductions").

The BSA also had significant reasons to credit Mr. Bienstock instead of Mr. Ambrosino. In his sworn affidavit, Mr. Ambrosino blatantly misrepresented that DOB's 2013 draft bulletin

had been "approved." *See* Dkt. 18 at 10. In contrast, LandmarkWest!'s own expert characterized Extell's mechanical engineers as "reputable" and "good engineers." Dkt. 63 at 32:15-17.

Fifth, contrary to LandmarkWest!'s contention (¶ 85), the BSA's determination is not rendered arbitrary or capricious by virtue of a dissent from a BSA commissioner who is also a professional engineer.[7] While Commissioner Sheta apparently believed the layout of the project's mechanical equipment could have been more efficient (Dkt. 3 at 5), the premise of that view—that an applicant may only deduct floor space to the extent that such space is the minimum conceivable amount of space *required* to be used for mechanical equipment—is inconsistent with the BSA's reasonable interpretation of ZR 12-10. Neither the BSA nor the Court is required to defer to Commissioner Sheta's interpretation of the meaning of the phrase "floor space used for mechanical equipment." Moreover, the record is clear that the BSA fully and fairly considered Commissioner Sheta's views but ultimately rejected them. *See* Dkt. 3 at 5 (summarizing dissenting views and noting that "the Board has considered but ultimately declines to follow the alternate positions of the two commissioners that would grant this appeal").

[7] LandmarkWest!'s argument that Commissioner Sheta's viewpoint was particularly compelling is based, at least in part, on its mistaken view that his "specialty is structural engineering." Pet. ¶ 84. During the January 28, 2020 hearing, however, Commissioner Sheta stated—in no uncertain terms—"I'm *not* a structural engineer." Dkt. 70 at 10:12-18 (emphasis added). LandmarkWest! blatantly misquotes Commissioner Sheta as supposedly boasting that he was "a very talented structural engineer" (Pet. ¶ 84); in reality, Commissioner Sheta stated the opposite—emphasizing that he is "not a structural engineer" at all and that he only "worked *with* a very talented structural engineer." Dkt. 70 at 10:12:18 (emphasis added). Even if (contrary to fact) he had a specialty in structural engineering, moreover, Commissioner Sheta would still not have been better positioned to evaluate the building's mechanical spaces than his colleagues, including Commissioner Perlmutter, who is a registered architect. In any event, LandmarkWest!'s allegations (¶¶ 81-84) regarding Commissioner Sheta's supposed "evisceration" of Mr. Patel's testimony are meritless. *See* Extell Answer ¶¶ 81-84.

C. The BSA's Issuance of a Resolution Was Not Only Proper, but Required, and Does Not Warrant Reversal

LandmarkWest! oddly claims (¶¶ 86-90) that the BSA's chair somehow "usurped power" by issuing the November 6, 2020, resolution. LandmarkWest!'s argument is both inscrutable and unfounded. The BSA's regulations *require* the BSA to issue a resolution memorializing its decision, including in the event of a tie vote. *See* BSA Rule 1-12.1 (if an application "fails to receive three (3) affirmative votes, the action will be deemed denied," and "a final determination of the Board *will be* in the form of a written resolution," which "will set forth the Board's findings and conclusions") (emphasis added); BSA Rule 1-12.9 ("The determination of the Board *in each case will be* incorporated in a resolution formally adopted and filed at the Board's office.") (emphasis added). Thus, the BSA properly followed its own regulations in issuing the November 6, 2020, resolution. Moreover, even if the BSA were not authorized to issue that resolution (it was), that would not be a basis for setting aside the BSA's decision at the January 2020 hearing and would simply mean that the final resolution of this issue was pronounced in January 2020, rendering LandmarkWest!'s instant petition untimely by more than 9 months. *See* N.Y.C. Admin. Code § 25-207 ("Such petition must be presented to a justice of the supreme court or at a special term of the supreme court within thirty days after the filing of the decision in the office of the board."); *Astoria Landing, Inc. v. BSA*, 132 A.D.3d 986, 986-87 (2d Dep't 2015) (dismissing Article 78 petition as untimely, where petition was filed more than 30 days after relevant BSA determination); *W. Flushing Civic Ass'n, Inc. v. BSA*, 273 A.D.2d 17, 18 (1st Dep't 2000) (same).

D. The BSA's Supposed Refusal to Compel Extell to Produce Outdated Mechanical Plans Does Not Warrant Reversal

LandmarkWest! claims (¶ 91) that the BSA erred in its *sua sponte* review because it did not compel Extell to provide "a complete set" of outdated and superseded "mechanical plans for

the initial project that did not involve use of mechanical voids in an attempt to elevate residential floors" (i.e., the 25-floor building that Extell initially planned to build in 2016 before acquiring additional lots and property rights). This argument fails for at least two reasons.

First, LandmarkWest! does not point to anything in the record reflecting any purported request for Extell to produce the outdated and superseded mechanical plans for the initial project, and thus its allegation "lacking any specificity" and "unaccompanied by supporting 'affidavits or other written proof,'" does not comport with CPLR 7804(d). *Miller v. McMahon*, 240 A.D.2d 806, 808 (3d Dep't 1997). Based on Extell's independent review of the record, Commissioner Scibetta requested that Extell and Owner produce "plans for the mechanical rooms prior to the addition to of the new floor." Dkt. 54 at 9:8-12:8. But as the subsequent exchange made clear, Mr. Scibetta was referring to mechanical plans for the proposed building reflected in the July 2018 ZD1 (under his mistaken belief that those plans included only three floors of mechanical space (*see* footnote 8 below)), not the long-outdated mechanical plans for the initial project as LandmarkWest! now seemingly contends. *See id.* Indeed, when Commissioner Chanda began discussing the initial project, Commissioner Perlmutter and DOB's attorney clarified that the BSA was discussing only the mechanical plans for the proposed building reflected in the July 2018 ZD1. *See id.* Accordingly, because this issue was not raised with the BSA, it cannot be considered for the first time here. *See Ferrer v. N.Y. State Div. of Human Rights*, 82 A.D.3d 431, 431 (1st Dep't 2011) ("A claim not raised before an administrative agency may not be raised for the first time in an article 78 proceeding.").[8]

[8] To the extent that LandmarkWest! intended to refer to the mechanical plans for the proposed building reflected in the July 2018 ZD1, the BSA properly declined to compel Extell to produce those plans. Commissioner Scibetta's request for those plans was premised on his mistaken view that, between the July 2018 ZD1 and the April 2019 ZD1, Extell "changed" the "mechanical plans to create four floors instead of the three floors" that were previously devoted to mechanical equipment. Dkt. 62 at 12:22-14:4.

Second, even if LandmarkWest! had properly raised and preserved this issue, it would not have been unreasonable or irrational for the BSA to decline to compel Extell to produce the outdated mechanical plans for the initial project. *See N.Y. Botanical Gardens*, 91 N.Y.2d at 418-19 (BSA determination "will be upheld" if "neither 'irrational, unreasonable nor inconsistent with the governing statute'"). The outdated mechanical plans for the initial project—a building less than half of the height of the current project and located on a considerably smaller lot—are irrelevant. Under ZR 12-10, the relevant inquiry is whether the planned space in the *current* project will be devoted to housing mechanical equipment (as opposed to some other use) and whether the amount of space allocated to mechanical equipment in the current project is within the typical range for *similar* buildings. The superseded mechanical plans for a *different* building have no bearing on either of those issues. *Cf. William Israel's Farm Co-op v. BSA*, 22 Misc. 3d 1105(A), 2004 WL 5659503, at *6 (Sup. Ct. N.Y. Cty. Nov. 15, 2004) (BSA's failure to consider irrelevant evidence "does not in any way render its determination irrational").

E. The BSA's Determination Was Consistent with Its Precedent

LandmarkWest! erroneously contends (¶¶ 109-10) that the BSA's determination was arbitrary and capricious because it somehow departed from prior BSA precedent. According to LandmarkWest! (¶ 110), the BSA's "*Benjamin Shaul*" decision (*515 East 5th Street*, BSA Cal. No. 67-07-A) stands for the proposition that the BSA must compel DOB "to abandon its tradition of violating the ZR when such a violation is discovered by the BSA." In LandmarkWest!'s view

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If Commissioner Scibetta's premise were correct, then it is possible that the July 2018 plans might arguably indicate that a fourth floor of mechanical equipment was superfluous. But as the Chair correctly observed, "It's the same number of mechanical floors" in both plans. *Id.* at 13:5-7. Even if Commissioner Scibetta's premise had been correct (it was not, as LandmarkWest! recognizes (¶¶ 34-35)), the July 2018 plans are irrelevant because the inquiry is whether the planned space in the *current* project will be devoted to housing mechanical equipment (as opposed to some other use) and whether the amount of space allocated to mechanical equipment in the current project is within the typical range for similar buildings.

(¶¶ 107-08), the BSA discovered an instance of DOB's "tradition of violating the ZR" in this case and failed to compel DOB to abandon that "tradition" when it upheld DOB's decision based on a "faulty comparison" between "the amount of the mechanical deduction used in this project" and the amount used in "similarly sized towers." This imaginative argument fails on the law and the facts.

Unlike in *Benjamin Shaul*, DOB here did not misinterpret the Zoning Resolution or otherwise act improperly. The BSA thus had no occasion to compel DOB to abandon any purported "tradition of violating the ZR" as LandmarkWest! suggests. *Cf. Iskalo 5000 Main LLC v. Town of Amherst Indus. Dev. Agency*, 147 A.D.3d 1414, 1416 (4th Dep't 2017) (not arbitrary or capricious for agency to not follow inapplicable precedent). DOB's methodology for reviewing mechanical plans to determine whether floor space is "used for mechanical equipment" does not violate the Zoning Resolution or any other statute or law. As DOB explained during the December 17, 2019 hearing, it reviews mechanical plans to determine whether an area "contains so much equipment and associated room to maneuver around it, and to be able to operate the equipment" such that "other uses can't be occupied in the space." Dkt. 63 at 55:3-9; *see also* Dkt. 54 at 8:1-13 ("The department did review the mechanical plans and found them sufficient and went through the proposed equipment."). It further explained that its inquiry focuses on whether the space is "going to become some other use" or is instead "a mechanical space." Dkt. 63 at 62:17-21. There is nothing improper about this type of fact-specific analysis. *Cf. 9th & 10th St. LLC v. BSA*, 10 N.Y.3d 264, 269-70 (2008) (upholding DOB and BSA determination that proposed building would not be used for a claimed purpose).[9]

[9] Thus, LandmarkWest!'s claim (¶ 100) that DOB's supposed failure to sufficiently review mechanical plans "constitutes a dereliction of duties under the City Charter" fails, as do LandmarkWest!'s

And the BSA did not uphold DOB's determination simply on the basis that it was consistent with prior DOB determinations. Rather, in addition to finding that the project's floor space allocated to mechanical equipment is "well within the range of standard practices for constructing buildings of this scale," the BSA also found that the project's "mechanical plans do demonstrate sufficient floor-based mechanical equipment," that much of the mechanical equipment "sits directly on the floor or directly on pad," and that "because of the nature of mechanical equipment, these pieces require clearance and service areas that further justify" the project's floor-area deductions. Dkt. 3 at 4. Nor should LandmarkWest! be heard to criticize the DOB and BSA's comparison to mechanical spaces in other buildings as perpetuating some "tradition of violating the ZR" given LandmarkWest!'s own acknowledgment: "We know that, in the past, the DOB required applicants to justify their mechanical exemptions and questioned the validity of these statements." Dkt. 7 at 16.

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accusations regarding DOB's supposed admissions at the December 17, 2019 hearing (¶ 93), which are baseless and unsupported by the record. *See* Extell Answer ¶¶ 93, 100.

LandmarkWest!'s bald contention (¶ 98) that DOB's "findings regarding floor-area deductions" are somehow "arbitrary and capricious" fares no better. The BSA specifically directed DOB to "review the mechanical drawings in the same way that the *Sky House* mechanical drawings were reviewed," with the "same depth." Dkt. 54 at 1:4-20. Pursuant to that direction, DOB performed a detailed analysis of the mechanical equipment in the mechanical drawings. *See* Dkt. 14 at 3-4. Based on the specific equipment included in those drawings on four identified floors, DOB concluded that "the floor space on such floors is devoted to housing the mechanical equipment of the Proposed Building and those floors cannot be occupied for purposes other than the housing of such equipment." *Id.* at 3. Thus, as in the *Sky House* case, "there is no reason to suspect that floor spaces designated as being used for mechanical equipment on the approved plans will not be put to such use." Extell Answer Ex. 1 at 4, *15 East 30th Street*, BSA Cal. No. 2016-4327-A. Also consistent with *Sky House*, DOB assessed whether the "amount of stories devoted entirely to mechanical equipment in the Proposed Building is consistent with similarly sized buildings"—and found that it was. Dkt. 14 at 3. That finding was corroborated by testimony provided by Mr. Parley, whose expert analysis demonstrated "that the amount of mechanical space and number of full mechanical floors in the Building are comparable to that found in similar tall buildings and are in no sense atypical." Dkt. 18 at 5-7. Therefore, it cannot be said that DOB lacked a "rational basis" for reaching the decision it ultimately reached. *See Peckham*, 12 N.Y.3d at 431.

For these reasons, LandmarkWest! has no valid basis to claim any "departure" from the BSA's precedent in *Benjamin Shaul*, let alone in a manner that was arbitrary or capricious.

F. LandmarkWest!'s Remaining Critiques of the BSA's Determination Are Baseless

LandmarkWest! raises two additional arguments, both of which relate to supposed DOB policies and both of which are utterly meritless.[10]

First, LandmarkWest! claims (¶ 93 n.15) that it understood DOB to indicate during the December 17, 2019 hearing that it "generally reviews only smaller private residential homes for abuse of mechanical FAR deduction, as opposed to plans for larger buildings," and from that extrapolates (¶ 101) that DOB has adopted a policy "favoring luxury developments," which according to LandmarkWest! "bespeaks of a broad-based public policy determination and constitutes an act legislative in nature," which "is well beyond any authority delegated to the DOB under the City Charter and constitutes violation [sic] of the principle of separation of powers." LandmarkWest! declares (at ¶ 58 n.8) that as "a matter of public policy and simple morality, this is, frankly, disgusting."

But LandmarkWest!'s abusive language and broad "public policy" indictment of DOB are wholly unsupportable, and its accusation that DOB scrutinizes only "smaller private residential homes" is simply baseless. At no point in the December 17, 2019 hearing did DOB

[10] To the extent LandmarkWest! somehow seeks to overturn a DOB determination, such a request is improper and must fail. The BSA "is vested with exclusive authority to determine appeals from DOB decisions." *Beekman Hill Ass'n, Inc. v. Chin*, 274 A.D.2d 161, 165 (1st Dep't 2000). Accordingly, the "administrative agency whose decision making would be ripe for judicial review here is the BSA, not the DOB." *Queens Neighborhood United v. DOB*, 62 Misc. 3d 1210(A), 2019 WL 302167, at *3 (Sup. Ct. N.Y. Cty. Jan. 23, 2019). The BSA's determination is based on its independent review of the record, including expert testimony that was not presented to DOB when it decided to issue the permit nearly two years ago. *See* Dkt. 3 at 3-4 ("The Board has reviewed and considered—but need not follow—DOB's interpretation of the Zoning Resolution in rendering the Board's own decision in this appeal, and the standard of review in this appeal is de novo.").

say that it "generally reviews only smaller private residential homes for abuse of mechanical FAR deduction." Instead, *a BSA Commissioner* stated that *the BSA* sometimes sees, in the "context of houses," an occasional "impossible to believe mechanical deduction" that it scrutinizes. Dkt. 63 at 64:5-16. DOB explained that *for any building*, it would "reject" proposed deductions if it was "obvious" that the space would not be used for mechanical equipment. *Id.* 55:3-9. Indeed, in their verified answer, DOB and the BSA expressly deny LandmarkWest!'s unfounded claims of "disparate treatment of private residential home construction applicants." Dkt. 30 at 13 n.4.

Second, LandmarkWest! contends (¶ 103) that "DOB has refused to establish a concrete set of criteria to compute FAR deductions for mechanical space as required by the ZR." But as explained above (Part II.E), DOB *has* established criteria for determining whether floor space can be deducted as used for mechanical equipment. Although DOB has not adopted rigid "quantitative criteria," it is not required to do so. *Cf. Org. to Assure Servs. for Exceptional Students, Inc. v. Ambach*, 56 N.Y.2d 518, 521-22 (1982) (denying Article 78 petition where agency was not required to promulgate regulations).

Further, DOB's decision not to adopt rigid quantitative criteria is plainly rational. *Cf. Fernandez v. Brock*, 840 F.2d 622, 631-34 (9th Cir. 1988) (agency's rational decision not to promulgate regulations not arbitrary or capricious). As DOB explained, it is "too difficult to articulate how much mechanical equipment is acceptable in all buildings throughout the city, given the differing needs of every building." Dkt. 63 at 54:8-12. DOB's fact-specific approach therefore cannot be characterized as arbitrary or capricious. Instead, it reflects a carefully considered approach to practically reviewing proposed plans and applying the zoning regulations to them.

LandmarkWest!'s allegation (¶ 106) that DOB applies the standards in DOB's 2013 *draft* bulletin "in some cases, but not others, without rationale and at DOB's whim" has no basis in the record. DOB explained at the December 17, 2019 hearing that "the 90 percent coverage standard mentioned in the draft bulletin *has not been applied* by [DOB] as a minimum requirement." Dkt. 63 at 54:4-7 (emphasis added). Thus, LandmarkWest!'s unmoored attacks on the DOB, to the extent they are even relevant to Extell's project at all, fall flat.

III. Petitioner's Demand for a Trial Should Be Rejected

LandmarkWest! baselessly demands a trial pursuant to CPLR 7804(h), which provides that if a "a triable issue of fact is raised" in an Article 78 proceeding, "it shall be tried forthwith." An "issue of fact" for purposes of CPLR 7804(h) is an issue that bears on whether the administrative agency's actions were arbitrary or capricious. *Rogan v. Nassau Cty. Civil Servs. Comm'n*, 91 A.D.3d 658, 659 (2d Dep't 2012) ("Contrary to the petitioner's further contention, the Supreme Court correctly determined that no trial was necessary pursuant to CPLR 7804(h), as there were no disputed facts that needed to be tried in order for the Supreme Court to determine whether the underlying administrative determination was irrational or arbitrary and capricious."); *Hamm v. D'Ambrose*, 58 A.D.2d 540, 541 (1st Dep't 1977) (denying request for trial under CPLR 7804(h), where a trial would tell the court "nothing" that it did "not already know that would bear on the exercise of the court's limited power of review" under Article 78); *Pantelidis v. BSA*, No. 102563/03, 2003 WL 25780830, at *1 (Sup. Ct. N.Y. Cty. Sept. 19, 2003) (ordering CPLR 7804(h) trial to make a factual finding that could be "used to assist the Court in determining whether or not the BSA decision was arbitrary and capricious"), *aff'd*, 13 A.D.3d 242 (1st Dep't 2004).

LandmarkWest! fails to identify a single "issue of fact" that bears on whether the BSA's actions were arbitrary or capricious. Instead, LandmarkWest! asserts (¶ 112) that a trial is

necessary because it could not "get a fair hearing before BSA and DOB." That contention is completely without merit and in fact turns the procedural history of this challenge on its head. As explained above, LandmarkWest! failed to timely raise its months-late concocted theory challenging the horizontal floor space of the project's mechanical spaces. *Notwithstanding that clear timeliness failure*, the BSA—"on its own initiative"—undertook to address the issue anyway.

In fact, the BSA held a three-and-a-half-hour public hearing, where LandmarkWest!'s counsel and expert spoke at length in support of LandmarkWest!'s position—in addition to the six-plus hours of public hearings the BSA already conducted, where LandmarkWest! had full opportunity to explain at length why it believed that DOB had erred in issuing the permit. Moreover, after those hearings, the BSA publicly announced its decision, and each BSA Commissioner explained his or her vote in detail. *See* Dkt. 70. Consistent with its regulations, the BSA then memorialized its reasoning in a written and publicly available resolution. The resolution (i) indicated that the BSA had "reviewed the record in its entirety, including expert testimony and plans for the New Building"; (ii) included a summary of the arguments made by LandmarkWest!, Extell, and DOB; and (iii) expressly noted that the BSA had "considered all" of those arguments. Dkt. 3 at 4, 6-11.

Despite the BSA's thorough and fair review of LandmarkWest!'s arguments, LandmarkWest! now contends (¶ 114) that the BSA's proceedings were unfair because the BSA Chair purportedly "refused to exercise her administrative powers" to compel production of irrelevant documents and "to call the principal of Extell as a witness to testify concerning true

reasons behind Extell's layout of mechanical equipment in the most inefficient and space-consuming way."[11]

Even if the BSA had erred in those respects (it plainly did not), LandmarkWest!'s complaints do not raise any issue of fact that bears on whether the BSA's decision was arbitrary or capricious, because the question of whether an agency action is arbitrary and capricious depends *solely* on "the grounds presented by the agency *at the time of its determination*." *Matter of Van Antwerp v. Board of Educ. for Liverpool Cent. School Dist.*, 247 A.D.2d 676, 678-79 (3d Dep't 1998) (emphasis added); *see also Holy Spirit Ass'n for Unification of World Christianity v. Tax Comm'n of City of N.Y.*, 62 A.D.2d 188, 193 (1st Dep't 1978) (in CPLR 7804(h) trial, "all that need be developed upon judicial inquiry is the basis upon which the several administrative agencies acted, at the time they acted"). Evaluating whether the BSA should have compelled parties to produce certain evidence would shed no light on the basis or rationale for the BSA's decision in the November 6, 2020, resolution. *Cf. ADC Contracting & Constr. Corp. v. N.Y.C. Dep't of Design & Constr.*, 25 A.D.3d 488, 488-89 (1st Dep't 2006) (CPLR 7804(h) trial appropriate, where there was "little information indicating what was presented" to the agency and the agency "did not set forth [its] findings of fact or explain [its] reasoning").

LandmarkWest!'s claim (¶ 116) that if it is "allowed to call its own witnesses, and use subpoena power to compel DOB witnesses to appear, they will be able to demonstrate the validity of its claims, and the invalidity of the Building Permit, to the Court's satisfaction" fails for the same reason—it seeks a trial on "the invalidity of the Building Permit," not on the

[11] Any subpoena directed toward Extell's principal would plainly be improper, given that "senior executives cannot be subpoenaed to testify in order to harass a corporation." *Daou v. Huffington*, No. 651997/10, 2013 WL 6162980, at *6-8 (Sup. Ct. N.Y. Cty. Feb. 14, 2013) (granting motion to quash deposition subpoena served on CEO, where proponent of discovery failed to demonstrate that it could not obtain information from another source at the company).

question of whether the BSA's decision was arbitrary and capricious. The Court already has a full record on which to determine whether the BSA's decision was arbitrary and capricious.

Tellingly, LandmarkWest!'s counsel made a remarkably similar baseless CPLR 7804(h) trial request in another case, which the court correctly denied. *Bibi Lieberman 1999 Revocable Tr. v. City of N.Y.*, 43 Misc. 3d 1216(A), 2014 WL 1612400, at *10 (Sup. Ct. Kings Cty. Apr. 21, 2014). As reflected in the decision, counsel's argument was copy-and-paste identical to LandmarkWest!'s position here. In the instant Petition, LandmarkWest! alleges (¶ 116):

> It is respectfully submitted that, if Petitioners allowed to call its own witnesses [sic], and use subpoena power to compel DOB witnesses to appear, they will be able to demonstrate the validity of its claims, and the invalidity of the Building Permit, to the Court's satisfaction.

In the *Bibi Lieberman* case, the court stated, in uncannily similar terms:

> They [petitioners] contend that if they are allowed to call their own witnesses and use the subpoena power to compel DOB witnesses to appear, they will be able to demonstrate the validity of their claims and the invalidity of Durzieh's permit.

Bibi Lieberman, 2014 WL 1612400, at *10. The court in *Bibi Lieberman* properly rejected the CPLR 7804(h) trial request because the BSA had "already made a full, independent review of the record before it and rendered its July 23, 2013 BSA Resolution after holding a public hearing" and there were "no disputed issues of fact which need to be tried in order for this court to determine the issue of whether the July 23, 2013 BSA Resolution was irrational or arbitrary and capricious." *Id.* Here too, LandmarkWest!'s recycled CPLR 7804(h) trial request fails to raise any issue of fact that bears on whether the BSA's determination was arbitrary or capricious.

CONCLUSION

For the reasons set forth above, Extell respectfully requests that the Court dismiss LandmarkWest!'s Petition.

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Respectfully submitted,

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