SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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LANDMARKWEST! INC.,

Petitioner, **VERIFIED ANSWER**

-against-

NEW YORK CITY BOARD OF STANDARDS AND APPEALS, NEW YORK CITY DEPARTMENT OF BUILDINGS, EXTELL DEVELOPMENT COMPANY, AND WEST 66TH SPONSOR LLC,

Index No. 160565/2020

Respondents.

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Respondents, NEW YORK CITY BOARD OF STANDARDS AND APPEALS ("BSA") and NEW YORK CITY DEPARTMENT OF BUILDINGS ("DOB"), (collectively "City Respondents") by their attorney, JAMES E. JOHNSON, Corporation Counsel of the City of New York, as and for their answer to the Verified Petition ("Petition") allege as follows upon information and belief:[1]

1. Deny the allegations set forth in paragraph "1" of the Petition, except admit that on November 6, 2020 the BSA filed a January 28, 2020 Resolution ("BSA Resolution") affirming a DOB issuance of a permit to proceed with construction of a proposed building at 36 West 66th Street in the Special Lincoln Square District ("Special District"), respectfully refer the Court to the BSA Resolution (R. 003366 – R. 003377) for a true and

[1] Petitioner's voluminous pleading does not comply with CPLR § 3014 in that it contains paragraphs containing multiple allegations of fact and/or legal argument rather than consisting of plain and concise statements, each containing a single allegation.

complete statement of its content and meaning, and admit that Petitioner purports to proceed as set forth therein.

2. Deny the allegations set forth in paragraph "2" of the Petition, except admit that DOB issued a permit to proceed with construction of a proposed building at 36 West 66th Street ("proposed building").

3. Deny the allegations set forth in paragraph "3" of the Petition, except admit that Petitioner purports to proceed as set forth therein.

4. Deny the allegations set forth in paragraph "4" of the Petition.

5. Deny the allegations set forth in paragraph "5" of the Petition.

6. Deny the allegations set forth in paragraph "6" of the Petition.

7. Deny the allegations set forth in paragraph "7" of the Petition and respectfully refer this Court to April 4, 2019 ZD1 Zoning Diagram (R. 000025 – R. 000027) for the formulation of the proposed building as designed.

8. Deny the allegations set forth in paragraph "8" of the Petition.

9. Deny the allegations set forth in paragraph "9" of the Petition, except admit that the BSA Resolution resulted from a tie 2-to-2 vote, and respectfully refer the Court to the BSA Resolution (R. 003366 – R. 003377) and to New York City Charter § 663 for a true and complete statement of their content and meaning.

10. Deny the allegations set forth in paragraph "10" of the Petition, and respectfully refer the Court to the BSA Resolution (R. 003366 – R. 003377) for a true and complete statement of its content and meaning.

11. Deny the allegations set forth in paragraph "11" of the Petition, except admit that Petitioner purports to proceed as set forth therein.

12. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "12" of the Petition.

13. Deny the allegations set forth in paragraph "13" of the Petition, except admit that DOB is a mayoral agency of the City of New York and respectfully refer this Court to Chapter 26 of the New York City Charter § 641, *et seq.*, for a full recitation of the powers, functions and duties of DOB contained therein, and respectfully refer this Court to New York City Administrative Code § 28-104.7 for a true and complete statement of its content and meaning.

14. Deny the allegations set forth in paragraph "14" of the Petition, except admit that the BSA has authority to review the issuance of permits by DOB, and respectfully refer this Court to Chapter 27 of the New York City Charter § 659, *et seq.*, for a full recitation of the powers, functions and duties of the BSA.

15. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "15" of the Petition, except admit that BSA and DOB records reflect that Respondent West 66th Sponsor LLC is the owner of record of the property at issue herein.

16. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "16" of the Petition.

17. Deny the allegations set forth in paragraph "17" of the Petition, except admit that Petitioner purports to proceed as set forth therein.

18. Deny the allegations set forth in paragraph "18" of the Petition and respectfully refer the Court to New York City Charter § 645 for a true and complete statement of its content and meaning.

19. Deny the allegations set forth in paragraph "19" of the Petition and respectfully refer the Court to New York City Charter § 659 for a true and complete statement of its content and meaning.

20. Deny the allegations set forth in paragraph "20" of the Petition and respectfully refer the Court to New York City Charter § 659 for a true and complete statement of its content and meaning.

21. Deny the allegations set forth in paragraph "21" of the Petition and respectfully refer the Court to New York City Charter § 666 for a true and complete statement of its content and meaning.

22. Deny the allegations set forth in paragraph "22" of the Petition and respectfully refer the Court to New York City Zoning Resolution ("Zoning Resolution") § 12-10 for a true and complete statement of its content and meaning.

23. Deny the allegations set forth in paragraph "23" of the Petition, except admit that Respondents Extell Development Company and West 66th Street Sponsor LLC ("Owner Respondents") applied for an earlier permit on a portion of the site at issue in this proceeding and respectfully refer the Court to an approved October 24, 2016 ZD1 Zoning Diagram (R. 000029 – R. 000030) for a true and complete statement of its content and meaning.

24. Deny the allegations set forth in paragraph "24" of the Petition, except admit that on June 7, 2017, DOB issued a permit authorizing construction on a portion of the site at issue in this proceeding of a 27-story residential and community facility building with a total height of 292 feet on a zoning lot with 15,021 square feet of lot area (R. 000957; R. 002372) and respectfully refer the Court thereto for a true and complete statement of its content and meaning.

25. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "25" of the Petition, except admit that some of the Owner Respondent's plans for the subject building may have been dated April 15, 2015, but aver that such date is misleading because at times an owner can amend original plans and the date stays the same.

26. Deny the allegations set forth in paragraph "26" of the Petition, except deny knowledge or information sufficient to form a belief as to the truth of the allegations concerning the Attorney General and the zoning lot merger, and admit that on June 7, 2017, DOB issued a permit authorizing construction on a portion of the site at issue in this proceeding (R. 000957; R. 002372), and respectfully refer the Court thereto for a true and complete statement of its content and meaning.

27. Deny the allegations set forth in paragraph "27" of the Petition except admit that that Owner Respondents filed plans for the proposed building.

28. Deny the allegations set forth in paragraph "28" of the Petition, except admit that Owner Respondents filed a July 26, 2018 ZD1 Zoning Diagram (R. 000031 – R. 000033) for the proposed 775 foot-high residential tower-on-base building and respectfully refer the Court thereto for a true and complete statement of its content and meaning.

29. Deny the allegations set forth in paragraph "29" and footnotes"1" of the of the Petition, except admit that 10 West 66th Street Corporation and LandmarkWest filed a Zoning Challenge with DOB and that DOB denied said Zoning Challenge on November 19,

2018, and respectfully refer the Court to the Zoning Challenge with Response (R. 000040 – R. 000062) for its full content and true meaning.[2]

30. Deny the allegations set forth in paragraph "30" of the Petition, accept admit that LandmarkWest appealed the denial of the Zoning Challenge (R. 000068 – R. 000083) and respectfully refer the Court thereto for its full content and true meaning.

31. Deny the allegations set forth in paragraph "31" of the Petition, except admit that DOB issued a January 14, 2019 Notice of Intent to Revoke (R. 001041 – R. 001043) and respectfully refer the Court thereto for its full content and true meaning.

32. Deny the allegations set forth in paragraph "32" of the Petition, except admit that LandmarkWest's appeal of the denial of the Zoning Challenge became moot, and respectfully refer the Court to the January 14, 2019 Notice of Intent to Revoke (R. 001041 – R. 001043) for its full content and true meaning.

33. Deny the allegations set forth in paragraph "33" of the Petition, except admit that DOB issued a letter dated April 4, 2019 (R. 000085 – R. 000087) that advised that the January 14, 2019 Notice of Intent to Revoke was rendered moot, admit that the record contains an April 4, 2019 ZD1 Zoning Diagram (R. 000025 – R. 000027), and admit that DOB issued a building permit on April 11, 2019 (R. 000089 – R. 000090) and respectfully refer the Court thereto for true and complete statements of their full content and meaning.

34. Deny the allegations set forth in paragraph "34" of the Petition, and respectfully refer the Court to the July 26, 2018 ZD1 Zoning Diagram (R. 000031 – R. 000033) for its full content and true meaning.

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[2] City Respondents also respectfully refer the Court to a document dated December 18, 2017 written by David Karnovsky (R. 000064 – R. 000066) for its full content and true meaning.

35. Deny the allegations set forth in paragraph "35" of the Petition, and respectfully refer the Court to the April 4, 2019 ZD1 Zoning Diagram (R. 000025 – R. 000027) for its full content and true meaning.

36. Deny the allegations set forth in paragraph "36" of the Petition, except admit that Petitioner filed an appeal to the BSA on or about May 13, 2019 (R. 000297 – R. 000883) and that The City Club of New York filed an appeal to the BSA on or about May 7, 2019 (R. 000001 – R. 000297), and respectfully refer the Court thereto for their full content and true meaning.

37. Deny the allegations set forth in paragraph "37" of the Petition, except deny knowledge or information sufficient to form a belief as to the truth of the matters concerning how Petitioner received copies of the plans for the proposed building or how or whether Petitioner used said plans.

38. Deny the allegations set forth in paragraph "38" of the Petition, except admit that by letter dated July 24, 2019, counsel for West 66th Sponsor LLC, one of the Owner Respondents herein, submitted its response to the appeals of Petitioner and The City Club of New York. (R. 000932 – R. 001501), aver that on July 23, 2019, DOB also submitted its response to the appeals of Petitioner and The City Club of New York (R. 000886 – R. 000931), and aver that various Public Review Sessions and Public Hearings were held by the BSA on the two appeals in August 2019 and September 2019 (transcripts for those dates are located at R. 002087 – R. 002371), and respectfully refer the Court thereto for their full content and true meaning.

39. Deny the allegations set forth in paragraph "39" of the Petition, except admit that in response to the BSA's request for simultaneous submissions, by letters dated

August 21, 2019, Petitioner and The City Club of New York submitted their statements responding to issues raised at the August 6, 2019 Public Hearing (R. 001913 – R. 002016), aver that by letter dated August 21, 2019, Owner Respondent West 66th Sponsor LLC also submitted its statement responding to issues raised at the August 6, 2019 Public Hearing (R. 001868 – 001912), aver that by letter dated August 21, 2019, DOB submitted its statement responding to issues raised at the August 6, 2019 Public Hearing (R. 001912A – R. 001917A), aver that by letter dated August 26, 2019, The City Club submitted its reply (R. 002017 – R. 002019), Landmark West submitted a Reply Statement dated August 28, 2019 (R. 002020 – R. 002022), Owner Respondent West 66th Sponsor LLC also submitted a Reply dated August 28, 2019 (R. 002048 – R. 002086) and DOB submitted a Reply dated August 28, 2019 (R. 002023 – R. 002047), and respectfully refer the Court thereto for their full content and true meaning.

40. Deny the allegations set forth in paragraph "40" and footnote "2" of the Petition, except admit that the video recording of the September 10, 2019 hearing before the BSA is available at https://www.youtube.com/user/NYCBSA/videos, and respectfully refer the Court to the transcript of the September 10, 2019 hearing (R. 002242 – R. 002348), and to *15 East 30th Street, Manhattan*, BSA Cal. No. 2016-4327-A (Sept. 20, 2017) (R. 00898 – R. 000906) for true and complete statements of their content and meaning.

41. Deny the allegations set forth in paragraph "41" and footnote "3" of the Petition, except admit that by Resolution dated September 17, 2019 and filed on October 15, 2019 ("October 15, 2019 BSA Resolution") (R. 002372 – R. 002381), the BSA affirmed the issuance of the building permit for the proposed building, but left open the question of whether the architectural plans for the proposed building show sufficient mechanical equipment in the area identified as mechanical space to justify floor are deductions, and respectfully refer the

Court thereto, and to *15 East 30th Street, Manhattan*, BSA Cal. No. 2016-4327-A (Sept. 20, 2017) (R. 00898 – R. 000906), for true and complete statements of their content and meaning.

42. Deny the allegations set forth in paragraph "42" and footnote "4" of the Petition, except admit that petitioner purports to proceed as set forth therein and admit that petitioner elected not to appeal the October 15, 2019 BSA Resolution, but that The City Club of New York commenced an Article 78 proceeding entitled *The City Club of New York v. New York City Board of Standards and Appeals, et al.* (Index No. 161071/2019), which resulted in a September 25, 2020 Decision and Order, entered as a Judgment on November 18, 2020 (R. 002407 – R. 002417), which is currently on appeal, and respectfully refer the Court thereto for a true and complete statement of its content and meaning.[3]

43. Deny the allegations set forth in paragraph "43" of the Petition, except admit that BSA requested that DOB review the mechanical equipment plans for the proposed building.

44. Deny the allegations set forth in paragraph "44" of the Petition, except admit that DOB submitted papers in further opposition to the appeal dated October 16, 2019 (R. 002418 – R. 002448), and respectfully refer the Court thereto for a true and complete statement of its content and meaning.

45. Deny the allegations set forth in paragraph "45" of the Petition, except admit that Owner Respondents submitted papers in further opposition to the appeal dated October 21, 2019 (R. 002449 – R. 002480), and that Petitioner submitted papers dated November 6, 2019 (R. 002481 – R. 002512) and November 7, 2019 (R. 002513 – R. 002516), and aver that

[3] City Respondents further aver that the September 25, 2020 Decision and Order and November 18, 2020 Judgment were wrongly decided and are currently on appeal.

DOB also submitted additional papers in opposition to the appeal dated November 4, 2019 (R. 002517 – R. 002520), and respectfully refer the Court thereto for true and complete statements of their content and meaning.

46. Deny the allegations set forth in paragraph "46" of the Petition, and respectfully refer the Court to Petitioner's November 6, 2019 (R. 002481 – R. 002512) and November 7, 2019 (R. 002513 – R. 002516) submissions for true and complete statements of their content and meaning.

47. Deny the allegations set forth in paragraph "47" of the Petition, and respectfully refer the Court to November 6, 2019 (R. 002481 – R. 002512) and November 7, 2019 (R. 002513 – R. 002516) submissions for true and complete statements of their content and meaning.

48. Deny the allegations set forth in paragraph "48" of the Petition, and respectfully refer the Court to Petitioner's November 6, 2019 (R. 002481 – R. 002512) and November 7, 2019 (R. 002513 – R. 002516) submissions for true and complete statements of their content and meaning.

49. Deny the allegations set forth in paragraph "49" of the Petition, except admit that Owner Respondents made a November 27, 2019 submission in further opposition to the appeal (R. 002521 – R. 002796), that a public hearing was held on December 17, 2019 after which the Petitioner made a December 31, 2019 submission (R. 003346 – R. 003356) and the Owner Respondents made a January 14, 2020 submission (R. 003357 – R. 003365), and aver that prior to the hearing Petitioner attempted to make a December 3, 2019 submission (a copy of which is annexed to the Petition as Exhibit "Q"), which was rejected by BSA as untimely, but

was discussed at the December 17, 2019 hearing, and respectfully refer the Court thereto for true and complete statements of their content and meaning.

50. Deny the allegations set forth in paragraph "50" and footnote "6" of the Petition, except admit that a public hearing was held before the BSA on December 17, 2019 and that the video recording of the December 17, 2019 hearing is available at https://www.youtube.com/user/NYCBSA/videos, and respectfully refer the Court to the transcript of the December 17, 2019 hearing (R. 002818 – R. 002973) for a true and complete statement of its content and meaning, and aver that Felicia Miller, Esq., who appeared for DOB at the December 17, 2019 hearing, is the *Deputy* General Counsel of DOB and the testimony attributed to her is a complete mischaracterization.

51. Deny the allegations set forth in paragraph "51" of the Petition, except admit that Luigi Russo, Vivek Patel, and Michael Parley testified on behalf of the Owner Respondents at the December 17, 2019 hearing and respectfully refer the Court to the transcript of the December 17, 2019 hearing (R. 002818 – R. 002973) for a true and complete statement of its content and meaning.

52. Deny the allegations set forth in paragraph "52" of the Petition, except admit that a hearing was held on January 28, 2020, at which a vote was taken, with two votes denying Petitioner's appeal and two votes in favor of Petitioner's appeal, and respectfully refer the Court to the transcript of the January 28, 2020 hearing (R. 003387 – R. 003403) for a true and complete statement of its content and meaning.

53. Deny the allegations set forth in paragraph "53" of the Petition, aver that the Covid19 pandemic was responsible at least in part for the delay in issuance of the written

resolution, and respectfully refer the Court to the BSA Resolution (R. 003366 – R. 003377) for a true and complete statement of its content and meaning.

54. Deny the allegations set forth in paragraph "54" of the Petition and respectfully refer the Court to the BSA Resolution (R. 003366 – R. 003377) for a true and complete statement of its content and meaning.

55. Deny the allegations set forth in paragraph "55" of the Petition and respectfully refer the Court to the BSA Resolution (R. 003366 – R. 003377) for a true and complete statement of its content and meaning.

56. Deny the allegations set forth in paragraph "56" of the Petition and respectfully refer the Court to the BSA Resolution (R. 003366 – R. 003377) for a true and complete statement of its content and meaning.

57. Deny the allegations set forth in paragraph "57" of the Petition and respectfully refer the Court to the BSA Resolution (R. 003366 – R. 003377) and to the transcript of the January 28, 2020 hearing (R. 003387 – R. 003403) for true and complete statements of their content and meaning.

58. Deny the allegations set forth in paragraph "58" and footnote "8"[4] of the Petition and respectfully refer the Court to the BSA Resolution (R. 003366 – R. 003377) and to the transcript of the January 28, 2020 hearing (R. 003387 – R. 003403) for true and complete statements of their content and meaning.

59. Deny the allegations set forth in paragraph "59" of the Petition and respectfully refer the Court to the BSA Resolution (R. 003366 – R. 003377) and to the transcript

of the January 28, 2020 hearing (R. 003387 – R. 003403) for true and complete statements of their content and meaning.

60. Deny the allegations set forth in paragraph "60" of the Petition and respectfully refer the Court to the BSA Resolution (R. 003366 – R. 003377) and to the transcript of the January 28, 2020 hearing (R. 003387 – R. 003403) for true and complete statements of their content and meaning.

61. Respond to paragraph "61" of the Petition by stating that said allegations constitute legal arguments and conclusions of law and therefore, no response is necessary, however, to the extent that a response is deemed necessary, deny the allegations, and respectfully refer the Court to CPLR § 7803 for a true and complete statement of its content and meaning.

62. Deny the allegations set forth in paragraph "62" of the Petition.

63. Deny the allegations set forth in paragraph "63" of the Petition and respectfully refer the Court to Zoning Resolution § 12-10, the transcript of the December 17, 2019 hearing (R. 002818 – R. 002973), and to the BSA Resolution (R. 003366 – R. 003377) for true and complete statements of their content and meaning.

64. Deny the allegations set forth in paragraph "64" of the Petition.

65. Deny the allegations set forth in paragraph "65" of the Petition, and respectfully refer the Court to Zoning Resolution § 12-10,[5] which specifically defines "use," and

[4] City Respondents further deny the claimed disparate treatment of private residential home construction applicants in the review of mechanical equipment FAR deductions, but aver that Petitioner lacks standing to assert any claim on behalf those other applicants.

[5] Zoning Resolution § 12-10 states as follows: A "use" is: (a) any purpose for which a ***building or other structure*** or an open tract of land may be designed, arranged, intended, maintained or occupied; or (b) any activity, occupation, business or operation carried on, or intended to be carried on, in a ***building or other structure*** or on an open tract of land (Emphasis in original).

to Zoning Resolution § 12-01(f)[6], which specifically defines the phrase "used for," and respectfully refers the Court thereto, and to the case and source cited in paragraph "65" of the Petition, for true and complete statements of their content and meaning.

66. Deny the allegations set forth in paragraph "66" and footnote "9" of the Petition and aver that since "use" is a defined term of the Zoning Resolution, the Webster dictionary definition of the term is not applicable to the instant proceeding.

67. Deny the allegations set forth in paragraph "67" of the Petition.

68. Deny the allegations set forth in paragraph "68" of the Petition.

69. Deny the allegations set forth in paragraph "69" of the Petition.

70. Respond to paragraph "70" of the Petition by stating that said allegations constitute legal arguments and conclusions of law and therefore, no response is necessary, however, to the extent that a response is deemed necessary, deny the allegations set forth in paragraph "70" of the Petition and respectfully refer the Court to *Toys "R" Us v. Silva*, 89 N.Y.2d 411 (1996) for a true and complete statement of its content and meaning.

71. Respond to paragraph "71" of the Petition by stating that said allegations constitute legal arguments and conclusions of law and therefore, no response is necessary, however, to the extent that a response is deemed necessary, deny the allegations set forth in paragraph "71" of the Petition and respectfully refer the Court to *Williams v. Williams*, 23 N.Y.2d 592 (1969) for a true and complete statement of its content and meaning.

72. Respond to paragraph "72" and footnote "10" of the Petition by stating that said allegations constitute legal arguments and conclusions of law and therefore, no response

[6] Zoning Resolution § 12-01(f) states as follows: The phrase "used for" includes "arranged for", designed for", "maintained for", "or occupied for."

is necessary, however, to the extent that a response is deemed necessary, deny the allegations set forth in paragraph "72" and footnote "10" of the Petition and respectfully refer the Court to *Matter of Benjamin Shaul*, BSA Cal. No. 67-07-A,[7] and Zoning Resolution §§ 23-692 and 33-492 for true and complete statements of their content and meaning.

73. Deny the allegations set forth in paragraph "73" of the Petition.

74. Deny the allegations set forth in paragraph "74" of the Petition, except admit that Petitioner purports to proceed as set forth therein.

75. Deny the allegations set forth in paragraph "75" of the Petition and respectfully refer the Court to Petitioner's November 6, 2019 submission (R. 002481 – R. 002512) and November 7, 2019 submission (R. 002513 – R. 002516) for true and complete statements of their content and meaning.

76. Deny the allegations set forth in paragraph "76" of the Petition and respectfully refer the Court to Petitioner's November 6, 2019 submission (R. 002481 – R. 002512), November 7, 2019 submission (R. 002513 – R. 002516), and December 31, 2019 submission (R. 003346 – R. 003356) for true and complete statements of their content and meaning.

77. Deny the allegations set forth in paragraph "77" of the Petition and respectfully refer the Court to Petitioner's November 6, 2019 submission (R. 002481 – R. 002512), November 7, 2019 submission (R. 002513 – R. 002516), and December 31, 2019 submission (R. 003346 – R. 003356) for true and complete statements of their content and meaning.

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[7] A copy of *Matter of Benjamin Shaul* case is provided for the convenience of the Court at (R. 003378 – R. 003383).

78. Deny the allegations set forth in paragraph "78" of the Petition and respectfully refer the Court to Petitioner's November 6, 2019 submission (R. 002481 – R. 002512), November 7, 2019 submission (R. 002513 – R. 002516), and December 31, 2019 submission (R. 003346 – R. 003356) for true and complete statements of their content and meaning.

79. Deny the allegations set forth in paragraph "79" of the Petition and respectfully refer the Court to Petitioner's November 6, 2019 submission (R. 002481 – R. 002512), November 7, 2019 submission (R. 002513 – R. 002516), and December 31, 2019 submission (R. 003346 – R. 003356) for true and complete statements of their content and meaning.

80. Deny the allegations set forth in paragraph "80" of the Petition and respectfully refer the Court to Owner Respondents' October 21, 2019 submission (R. 002449 – R. 002480), November 27, 2019 submission (R. 002521 – R. 002796) and January 14, 2020 submission (R. 003357 – R. 003365), and the transcript of the December 17, 2019 hearing (R. 002818 – R. 002973) for true and complete statements of their content and meaning.

81. Deny the allegations set forth in paragraph "81" of the Petition and respectfully refer the Court to the transcript of the December 17, 2019 hearing (R. 002818 – R. 002973) for a true and complete statement of Mr. Patel's testimony.

82. Deny the allegations set forth in paragraph "82" and footnote "11" of the Petition and respectfully refer the Court to the transcript of the December 17, 2019 hearing (R. 002818 – R. 002973) for a true and complete statement of Mr. Patel's testimony.

83. Deny the allegations set forth in paragraph "83" of the Petition and respectfully refer the Court to the transcript of the December 17, 2019 hearing (R. 002818 – R.

002973) and the transcript of the January 28, 2020 hearing (R. 003387 – R. 003403) for true and complete statements of their content and meaning.

84. Deny the allegations set forth in paragraph "84" of the Petition and respectfully refer the Court to the transcript of the transcript of the January 28, 2020 hearing (R. 003387 – R. 003403) for a true and complete statement of its content and meaning.

85. Deny the allegations set forth in paragraph "85" and footnote "12" of the Petition and respectfully refer the Court to the transcript of the transcript of the January 28, 2020 hearing (R. 003387 – R. 003403), the BSA Resolution (R. 003366 – R. 003377), and City Charter § 659 for true and complete statements of their content and meaning.

86. Deny the allegations set forth in paragraph "86" of the Petition and respectfully refer the Court to City Charter § 663 for a true and complete statement of its content and meaning.

87. Deny the allegations set forth in paragraph "87" of the Petition and respectfully refer the Court to City Charter § 666 and § 1-12.1 of Title 2 of the Rules of the City of New York ("RCNY") for true and complete statements of their content and meaning.

88. Respond to paragraph "88" of the Petition by stating that said allegations constitute legal arguments and conclusions of law and therefore, no response is necessary, however, to the extent that a response is deemed necessary, deny the allegations set forth in paragraph "88" of the Petition and respectfully refer the Court to 2 RCNY § 1-12.1 for a true and complete statement of its content and meaning.

89. Respond to paragraph "89" and footnote "13" of the Petition by stating that said allegations constitute legal arguments and conclusions of law and therefore, no response is necessary, however, to the extent that a response is deemed necessary, deny the allegations set

forth in paragraph "89" of the Petition and respectfully refer the Court to the numerous City Charter and RCNY sections cited in footnote "13" of the Petition for true and complete statements of their content and meaning.

90. Respond to paragraph "90" of the Petition by stating that said allegations constitute legal arguments and conclusions of law and therefore, no response is necessary, however, to the extent that a response is deemed necessary, deny the allegations set forth in paragraph "90" of the Petition and respectfully refer the Court to the BSA Resolution (R. 003366 – R. 003377) for a true and complete statement of its content and meaning.

91. Deny the allegations set forth in paragraph "91" of the Petition and respectfully refer the Court to the transcript of the December 17, 2019 hearing (R. 002818 – R. 002973) and the transcript of the January 28, 2020 hearing (R. 003387 – R. 003403) for true and complete statements of their content and meaning.

92. Deny the allegations set forth in paragraph "92" and footnote "14" of the Petition, aver that that prior plans are not part of the administrative record and any significance of same is speculative.

93. Deny the allegations set forth in paragraph "93" and footnote "15" of the Petition and respectfully refer the Court to the transcript of the December 17, 2019 hearing (R. 002818 – R. 002973) for a true and complete statement of Ms. Miller's testimony.

94. Deny the allegations set forth in paragraph "94" of the Petition.

95. Deny the allegations set forth in paragraph "95" and footnote "16" of the Petition and respectfully refer the Court to the transcript of the December 17, 2019 hearing (R. R. 002818 – R. 002973) for a true and complete statement of Ms. Miller's testimony.

96. Deny the allegations set forth in paragraph "96" of the Petition and respectfully refer the Court to the transcript of the December 17, 2019 hearing (R. 002818 – R. 002973) for a true and complete statement of Ms. Miller's testimony and to Zoning Resolution § 12-10 for a true and complete statement of its content and meaning.

97. Deny the allegations set forth in paragraph "97" of the Petition and respectfully refer the Court to the transcript of the December 17, 2019 hearing (R. 002818 – R. 002973) for a true and complete statement of Ms. Miller's testimony and to DOB's October 16, 2019 submission (R. 002418 – R. 002448) and November 4, 2019 submission (R. 002517 – R. 002520) for true and complete statements of their content and meaning.

98. Respond to paragraph "98" of the Petition by stating that said allegations constitute legal arguments and conclusions of law and therefore, no response is necessary, however, to the extent that a response is deemed necessary, deny the allegations set forth in paragraph "98" of the Petition and respectfully refer the Court to *Pell v. Board of Education*, 34 N.Y.2d 222 (1974) for a true and complete statement of its content and meaning.

99. Deny the allegations set forth in paragraph "99" of the Petition and respectfully refer the Court to the transcript of the December 17, 2019 hearing (R. 002818 – R. 002973, the transcript of the January 28, 2020 hearing (R. 003387 – R. 003403) and to *Pell v. Board of Education*, 34 N.Y.2d 222 (1974) for true and complete statements of their content and meaning.

100. Deny the allegations set forth in paragraph "100" of the Petition and respectfully refer the Court to City Charter § 643 for a true and complete statement of its content and meaning.

101. Deny the allegations set forth in the first sentence of paragraph "101" of the Petition, and respond to the remaining allegations set forth in paragraph "101" of the Petition by stating that said allegations constitute legal arguments and conclusions of law and therefore, no response is necessary, however, to the extent that a response is deemed necessary, deny those allegations and respectfully refer the Court to *Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v New York City Dept. of Health & Mental Hygiene, 110 A.D.3d 1* (2013) for a true and complete statement of its content and meaning.

102. Deny the allegations set forth in paragraph "102" of the Petition.

103. Deny the allegations set forth in paragraph "103" of the Petition.

104. Deny the allegations set forth in paragraph "104" of the Petition, aver that the Draft Bulletin never was adopted and respectfully refer the Court to same (R. 002547 – R. 002549) for a true and complete statement of its content and meaning.

105. Deny the allegations set forth in paragraph "105" of the Petition and respectfully refer the Court to *L. Jaffe, Judicial Control of Administrative Action* 375 (1965) for a true and complete statement of its content and meaning.

106. Deny the allegations set forth in paragraph "106" of the Petition concerning DOB testimony at the December 17, 2019 hearing and respectfully refer the Court to the transcript of the December 17, 2019 hearing (R. 002818 – R. 002973) for a true and complete statement of its content and meaning, and respond to the remaining allegations set forth in paragraph "106" of the Petition by stating that said allegations constitute legal arguments and conclusions of law and therefore, no response is necessary, however, to the extent that a response is deemed necessary, deny those remaining allegations.

107. Deny the allegations set forth in paragraph "107" of the Petition.

108. Deny the allegations set forth in paragraph "108" and footnote "19"[8] of the Petition and respectfully refer the Court to the transcript of the December 17, 2019 hearing (R. 002818 – R. 002973) and to the BSA Resolution (R. 003366 – R. 003377) for true and complete statements of their content and meaning.

109. Deny the allegations set forth in paragraph "109" of the Petition and respectfully refer the Court to *Matter of Benjamin Shaul*, BSA Cal. No. 67-07-A, (R. 003378 – R. 003383) for a true and complete statement of its content and meaning.

110. Respond to paragraph "110" of the Petition by stating that said allegations constitute legal arguments and conclusions of law and therefore, no response is necessary, however, to the extent that a response is deemed necessary, deny the allegations set forth in paragraph "110" of the Petition and respectfully refer the Court to *In re Charles A. Field Delivery Serv.*, 66 N.Y.2d 516 (1985) for a true and complete statement of its content and meaning.

111. Deny the allegations set forth in the first sentence of paragraph "111" of the Petition, and respond to the remaining allegations set forth in paragraph "111" of the Petition by stating that said allegations constitute legal arguments and conclusions of law and therefore, no response is necessary, however, to the extent that a response is deemed necessary, deny those allegations and respectfully refer the Court to Zoning Resolution § 12-10 and the cases cited in paragraph "111" for true and complete statements of their content and meaning.

112. Deny the allegations set forth in paragraph "112" of the Petition, except admit that Petitioner purports to proceed as set forth therein.

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[8] The Petition does not contain a footnote "17" or a footnote "18."

113. Respond to paragraph "113" of the Petition by stating that said allegations constitute legal arguments and conclusions of law and therefore, no response is necessary, however, to the extent that a response is deemed necessary, deny the allegations set forth in paragraph "113" of the Petition and respectfully refer the Court to CPLR § 7804 and the cases cited in paragraph "113" of the Petition for true and complete statements of their content and meaning.

114. Deny the allegations set forth in paragraph "114" of the Petition.

115. Respond to paragraph "115" of the Petition by stating that said allegations constitute legal arguments and conclusions of law and therefore, no response is necessary, however, to the extent that a response is deemed necessary, deny the allegations set forth in paragraph "115" of the Petition and respectfully refer the Court to CPLR § 7804 and the cases cited in paragraph "115" of the Petition for true and complete statements of their content and meaning.

116. Deny the allegations set forth in paragraph "116" of the Petition, and respectfully refer the Court to *Church of Scientology v. Tax Com. of New York*, 501 N.Y.S.2d 863 (1985) for a true and complete statement of its content and meaning.

117. Deny the allegations set forth in paragraph "117" of the Petition, except admit that Petitioner purports to proceed as set forth therein.

118. Deny the allegations set forth in the "WHEREFORE" paragraph of the Petition, except admit that Petitioner purports to proceed as set forth therein.

RELEVANT ZONING RESOLUTION PROVISION

119. Section 12-10 of the Zoning Resolution, entitled "Definitions," states, in pertinent part:

> However, the *floor area* of a *building* shall not include:
>
> * * *
>
> 8) floor space used for mechanical equipment, except that such exclusion shall not apply in R2A Districts, and in R1-2A, R2X, R3, R4, or R5 Districts, such exclusion shall be limited to 50 square feet for the first *dwelling unit*, an additional 30 square feet for the second *dwelling unit* and an additional 10 square feet for each additional *dwelling unit*. For the purposes of calculating floor space used for mechanical equipment, *building segments* on a single *zoning lot* may be considered to be separate *buildings*;

STATEMENT OF MATERIAL FACTS

120. The BSA is a local body of experts, comprised of persons with unique professional qualifications, including a planner, a registered architect, and a licensed professional engineer, all with at least ten years of experience, appointed by the Mayor for six-year terms. *See* Charter §659. The BSA is empowered to, *inter alia*, "hear and decide appeals from and review… (a) except as otherwise provided by law, any order, requirement, decision or determination of the commissioner of buildings…" *See* Charter §666(6).

121. Petitioner seeks, inter alia, the nullification and voiding of the BSA Resolution and the revoking of the permit for the proposed building, and in the alternative remanding the matter to BSA for further review, and further in the alternative, ordering a trial of issues of fact pursuant to CPLR 7804(h). See December 7, 2020 Notice of Petition (NYSCEF Doc. No. 2).

The Subject Site and Proposed Development

122. The site at issue in this proceeding ("Subject Site") is located at 36 West 66th Street a/k/a 50 West 66th Street, New York, New York, on West 66th Street between

Columbus Avenue and Central Park West in the Special Lincoln Square District ("Special District") (R. 002372). The Subject Site is comprised of six tax lots with 54,687 square feet of lot area, 35,105 square feet of which is in a C4-7 zoning district and 19,582 square feet of which is in an R8 zoning district (R. 002372).

The BSA's Authority to Act Pursuant to Zoning Resolution

123. The Zoning Resolution provides a definite set of rules and regulations setting forth how property can be used and what can be built in New York City. See generally, ZR.

124. A proposed development that complies with the zoning regulations applicable to the development site is generally permitted "as-of-right." This means that the project complies with all relevant zoning regulations (e.g., the projects comply with all applicable use and bulk regulations) and that the project does not require a zoning change or other discretionary approval.

125. Most development in New York City occurs "as-of-right." The size and scale of a proposed development have nothing to do with whether a project is permitted as-of-right; the relevant question is whether the proposed project complies with the underlying zoning requirements for the development site.

126. On June 7, 2017, DOB issued a permit to Owner Respondents authorizing construction on a portion of the Subject Site of a 27-story residential and community facility building with a total height of 292 feet on a zoning lot with 15,021 square feet of lot area (R. 000957; R. 002372).

127. On April 11, 2019, DOB issued the challenged permit to Owner Respondents authorizing construction on the Subject Site of a 39-story residential and

community facility building with a total height of 776 feet ("the proposed building") (R. 001072; R. 002372).

Petitioner and The City Club File Appeals to the BSA

128. On or about May 7, 2019, City Club filed an appeal to the BSA of the April 11, 2019 permit issuance (R. 000001 – R. 000297). City Club's appeal argued that the proposed building violated the Zoning Resolution in two ways: "(1) it is based on a methodology for calculating allowable floor space that violates the Bulk Packing Rule, ZR § 82-34, and the Split Lot Rules, ZR § 33-48 and 77-02, and (2) it claims an exemption from [Floor Area Ratio] for 196 vertical feet of purported mechanical space in the mid-section of the building that is neither 'used for mechanical equipment' nor customarily accessory to residential uses, and is therefore illegal. ZR §§ 12-10 and 22-12." R. 000268 – R. 000269.

129. On or about May 13, 2019, Petitioner filed a substantially similar appeal to the BSA of the April 11, 2019 permit issuance (R. 000298 – R. 000883).

An Amendment to the Zoning Resolution is Enacted.

130. On May 29, 2019, the New York City Council approved with modifications a citywide text amendment to the Zoning Resolution generally providing that neither mechanical spaces taller than 25 feet nor mechanical spaces within 75 feet of one another would be deducted from floor area (R. 001147 – R. 001153).

131. There was no dispute before the BSA concerning vesting pursuant to Zoning Resolution § 11-33 (R. 002373).[9]

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[9] Pursuant to Zoning Resolution 11-33, if the foundation of a project is completed prior to the effective date of an amendment of the Zoning Resolution, the construction may continue pursuant to a previously lawfully issued permit.

Responses To The Appeals

132. By Notices dated July 8, 2019, the BSA scheduled a public hearing on the Appeals (R. 000884 – R. 000885).

133. By letter dated July 23, 2019, DOB submitted its response to the appeals of Petitioner and The City Club (R. 000886 – R. 000931). DOB argued, *inter alia*, that the proposed building satisfies both the ZR § 82-34 Bulk Distribution and ZR § 82-36 Tower Coverage requirements, and thus that the proposed building's mechanical space complies with the Zoning Resolution. (R. 000886 – R. 000931).

134. By letter dated July 24, 2019, counsel for West 66th Sponsor LLC, one of the Owner Respondents herein, submitted its response to the appeals of Petitioner and The City Club. (R. 000932 – R. 001501). West 66th Sponsor LLC argued, *inter alia*, that DOB correctly applied the bulk distribution rule of the Special District to the zoning lot, that the Zoning Resolution in effect at the time the building permit was issued did not regulate the floor-to ceiling height of mechanical spaces, and that the Project was vested under the prior regulations. (R. 000932 – R. 001501).

135. On or about August 2, 2019, The City Club submitted a "Reply Statement" (R. 001503 – R. 001798).

136. By letter dated August 5, 2019, counsel for West 66th Sponsor LLC submitted a response to The City Club's "Reply Statement" particularly objecting to the last minute inclusion of the allegation that the project did not vest before the May 29, 2019 text amendment to the Zoning Resolution (R. 001799 – R. 001808).[10]

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[10] By letter dated August 5, 2019 City Club's counsel responded to counsel for West 66th Sponsor LLC's August 5, 2019 response, and by letter dated August 6, 2017, counsel for West

BSA Public Review Sessions and Public Hearings in August 2019

137. On August 5, 2019, the first Public Review Session was held at the BSA where the Board members shared their notes on the application (R. 002087 – R. 002101).

138. The Public Hearing was commenced on the next day, August 6, 2019 (R. 002102 – R. 002233). At the Public Hearing, Petitioner and The City Club presented their applications and responded to questions from the BSA. Petitioner also submitted written testimony in support of its appeal. (R. 001818 – R. 001819). At the Hearing the Owner Respondents' counsel presented its opposition to Petitioner's and The City Club's appeals and responded to questions from the BSA. Several individuals and elected officials spoke in support of the appeal (R. 002185 – R. 002200, R. 002203 – R. 002216). A couple of representatives of Congregation Habonim spoke in opposition to the appeal and in support of the proposed building. (R. 002200-R. 002203). Written testimony was also submitted regarding Petitioner's and The City Club's appeals (R. 001820 – R. 001867).

139. At the hearing, the BSA asked for additional simultaneous submissions on the bulk packing distribution issue (R. 002223 – R. 002231). By letters dated August 21, 2019, Petitioner and The City Club submitted their statements responding to issues raised at the August 6, 2019 Public Hearing (R. 001913 – R. 002016). By letter dated August 21, 2019, Owner Respondent West 66th Sponsor LLC also submitted its statement responding to issues raised at the August 6, 2019 Public Hearing (R. 001868 – 001912). By letter dated August 21,

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66th Sponsor LLC *in another litigation* objected to some of the statements made by The City Club's counsel in the City Club's earlier submission. (R. 001809 – R. 001816).

2019, DOB submitted its statement responding to issues raised at the August 6, 2019 Public Hearing (R. 001912A – R. 001917A).

140. By letter dated August 26, 2019, The City Club submitted its reply (R. 002017 – R. 002019. Petitioner submitted a Reply Statement dated August 28, 2019 (R. 002020 – R. 002022). Owner Respondent West 66th Sponsor LLC also submitted a Reply dated August 28, 2019 (R. 002048 – R. 002086) and DOB submitted a Reply dated August 28, 2019 (R. 002023 – R. 002047).

141. On August 9, 2019, the second Public Review Session was held at the BSA where the Board members shared their thoughts (R. 002234 – R. 002241).

142. On August 10, 2019, the BSA held another Public Hearing (R. 002242 – R. 002348). Several individuals and elected officials, including New York State Assembly Member Richard Gottfried, New York State Senator Brad Holyman, New York City Council Member Helen Rosenthal, and a representative of New York State Assembly Member Linda Rosenthal, spoke in support of the appeal (R. 002290 – R. 002337).

BSA Public Review Session and Public Hearing in September 2019

143. On September 16, 2019 the third Public Review Session was held at the BSA where the Board members shared their thoughts; unlike previous Public Review Sessions, the appeals of Petitioner and The City Club were discussed separately (R. 002349 – R. 002363).

144. After considering the submissions and testimony before it, by unanimous vote, with one recusal, on September 17, 2019, the BSA denied each appeal separately. (R. 002364 – R. 002371). However, the BSA reserved for subsequent determination the issue of whether the floor area deducted for mechanical equipment is substantiated by the plans submitted to DOB (R. 002382 – R. 002406). Petitioner requested an opportunity to create a

record before the BSA on that issue to enable the BSA to make a determination and the BSA set forth a schedule to address that additional issue (R. 002382 – R. 002406).

The October 15, 2019 BSA Resolution

145. The BSA Resolution, adopted on September 17, 2019 and filed on October 15, 2019, sets forth the BSA's rationale and reasoning for denial of the appeals ("October 15, 2019 BSA Resolution") (R. 002372 – R. 002381).

146. In reaching its determination in the October 15, 2019 BSA Resolution, the BSA thoroughly addressed and rejected each argument raised by Petitioner and The City Club, as set forth below.

Height of Mechanical Spaces

147. In finding that the Zoning Resolution in effect prior to the May 29, 2019 text amendment to the Zoning Resolution did not regulate the floor-to-ceiling height of the floor space used for mechanical equipment, the BSA stated as follows:

> WHEREAS, the Board considered this exact issue in *15 East 30th Street* and determined that, "based upon its review of the record, the definition of 'floor area' set forth in ZR § 12-10 and the Zoning Resolution as a whole, the Board finds that the Zoning Resolution does not control the floor-to-ceiling height of floor space used for mechanical equipment"; and
>
> WHEREAS, in *15 East 30th Street*, DOB presented testimony that "the Zoning Resolution does not regulate the floor-to-ceiling height of a building's mechanical spaces," and the Department of City Planning ("DCP") also submitted testimony stating that "there are no regulations in the Zoning Resolution controlling the height of mechanical floors;"
>
> WHEREAS, Appellants present no persuasive reason for the Board to depart from its prior

consideration of this issue, and the record further supports the Board's interpretation of the floor-area definition in *15 East 30th Street*; and

WHEREAS, the record reflects no evidence characterizing the Residential Tower Mechanical Voids Text Amendment, CPC Report No. N 190230 ZRY (April 10, 2019), as a mere clarification rather than a change in law, as asserted by Appellants; and

WHEREAS, instead, the accompanying report states that "[t]he [Zoning] Resolution does not specifically identify a limit to the height of such [mechanical] spaces," while the text amendment itself explicitly limits the height of mechanical spaces that are exempt from floor-area calculations, *see* CPC Report No. N 190230 ZRY (April 10, 2019); and

WHEREAS, the Residential Tower Mechanical Voids Text Amendment's attendant environmental review also characterizes the "No-Action Scenario" as allowing the development of buildings with mechanical spaces ranging from 80 to 90 feet in height, while the "With-Action Scenario" would limit mechanical spaces to heights from 10 to 25 feet; and

WHEREAS, lastly, DCP's *Residential Mechanical Voids Findings: Building Permits Issued b/w 2007 and 2017 R6 through R10 Districts* (Feb. 2019) ("*Residential Mechanical Voids Findings*"), about mechanical spaces' floor-to-ceiling heights, which Appellants assert is a study of typical floor-to-ceiling heights for mechanical spaces, is not relevant to the Board's decision in *15 East 30th Street* because *Residential Mechanical Voids Findings* studies floor-to-ceiling heights, while *15 East 30th Street* determined such floor-to ceiling heights were not regulated to qualify as floor-area-exempted "floor space used for mechanical equipment," ZR § 12-10; and

WHEREAS, accordingly, based on the foregoing, the Board finds that Appellants have not substantiated a basis to warrant departure from its

> decision in *15 East 30th Street* in that the Zoning Resolution in effect prior to May 29, 2019, did not regulate the floor-to-ceiling heights of "floor space used for mechanical equipment" in exempting such mechanical space from floor-area calculations, ZR § 12-10;

(R. 002373 – R. 002374).

Bulk Distribution

148. In finding that Petitioner and City Club have failed to demonstrate that the proposed building's zoning lot does not comply with the bulk distribution regulations applicable in the Special District under Zoning Resolution § 82-34, the BSA found as follows:

> WHEREAS, the subject zoning lot is wholly located within the Special District, which was established and designed to "conserve [this area's] status as…a cosmopolitan residential community," ZR § 82-00(a) and "to promote the most desirable use of land in this area and thus to conserve the value of land and buildings, and thereby protect the City's tax revenues," ZR § 82-00(f); and
>
> WHEREAS, because the subject zoning lot is partially located in a R8 zoning district and partially located in a C4-7 zoning district, the Zoning Resolution treats the subject site as a zoning lot divided by a district boundary; and
>
> WHEREAS, the Zoning Resolution contains special provisions for zoning lots divided by district boundaries,[2] *see* ZR § 77-00, and "[w]henever a *zoning lot* is divided by a boundary between two or more districts and such *zoning lot* did not exist on December 15, 1961, or any applicable subsequent amendment thereto, each portion of such *zoning lot* shall be regulated by all the provisions applicable to the district in which such portion of the *zoning lot* is located," ZR § 77-02; and
>
> WHEREAS, there is no dispute that the Zoning Resolution's split-lot provisions apply "on a

regulation-by-regulation basis," *Beekman Hill Ass'n v. Chin*, 274 A.D.2d 161 (1st Dep't 2000); and

WHEREAS, however, Appellants contend that the New Building's zoning lot does not comply with the Zoning Resolution's split-lot provisions with respect to the Special District's bulk-distribution regulations, see ZR § 82-34; and

WHEREAS, more specifically, Appellants contend that the Special District's bulk distribution regulations and tower regulations, ZR §§ 82-34 and 82-36, are intended to operate together – always, and only, together – such that the Special District's bulk distribution regulations do not constitute "provisions applicable to the [R8] district in which…such portion of the zoning lot is located," ZR 77-02; and

WHEREAS, there is no dispute that the New Building is located on a split lot for purposes of the tower-coverage regulations and that the New Building complies with the Special District's applicable tower-coverage regulations, *see* ZR 82-36; and

[2] Such zoning lots are commonly called "split lots."

WHEREAS, Appellants, the Owner, and DOB vigorously dispute whether the Special District's bulk-distribution regulations apply to the R8 portion of the subject site, *see* ZR § 82-34; and

WHEREAS, the Zoning Resolution provides that "[w]ithin the Special District, at least 60 percent of the total *floor area* permitted on a *zoning lot* shall be within *stories* located partially or entirely below a height of 150 feet from *curb level*," ZR § 82-34, and

WHEREAS, from this provision, it is clear that the bulk-distribution regulations apply "[w]ithin the Special District" – in other words, throughout the Special District without qualification or regard to

> subdistrict, street frontage, or underlying zoning district; and
>
> WHEREAS, nothing about the text of the Special District's bulk-distribution regulations evinces an intent to link inextricably these bulk-distribution regulations with tower-coverage regulations; and
>
> WHEREAS, nowhere in the text of this first sentence is there a cross-referenced citation to the Special District's tower-coverage regulations or to the bulk distribution or tower-coverage regulations found at ZR §§ 23-65, 33-45 or 35-64, *see* ZR § 82-34;
>
> WHEREAS, in comparison, the text of the second sentence contains provisions applicable to a specifically defined area ("along Broadway"), ZR § 82-34, and the Special District's tower-coverage regulations contain similarly delineated areas ("Subdistrict A" and "Block 3"), ZR § 82-36; and
>
> WHEREAS, on the other hand, the Special District's bulk-distribution regulations applicable to the New Building contain no such qualification – providing only the blanket applicability of "[w]ithin the Special District," ZR § 82-34; and
>
> WHEREAS, there is no basis to import the qualifications suggested by Appellants into the Special District's bulk-distribution regulations where the text describes other regulations as applicable in specifically defined areas ("along Broadway," "Subdistrict A," and "Block 3") in other instances, ZR §§ 82-34 and 82-36;

(R. 002374).

149. The BSA further stated in rejecting some of Petitioner and City Club arguments as follows:

> WHEREAS, the Board has considered evidence presented by Appellants but finds it unconvincing at best: for instance, *Regulating Residential Towers and Plazas: Issues and options*, DCP No. 89-46

(Nov. 1989) ("*Regulating Residential Towers and Plazas*") and the timing of an unrelated same-day text amendment to ZR§ 23-651 provide no support for Appellants' assertion that the Special District's bulk-distribution regulations always and only apply together with the Special District's tower-coverage regulations; DCP's *Regulating Residential Towers and Plazas* says no such thing, and the timing of unrelated text amendments provides no guidance whatsoever; and if anything, DCP's *Regulating Residential Towers and Plazas* reflects that the City rejected an outright height limitation of 275 feet within the Special District, favoring the more flexible bulk controls set forth in ZR § 82-00.

WHEREAS, while the Board has heard and considered all of Appellants' arguments, Appellants have presented no persuasive basis to find the applicability of the Special District's bulk-distribution regulations unclear, so the Board declines Appellants' invitation to delve further into the legislative history "in strictly applying and interpreting the provision of "the Special District's bulk distribution regulations in this appeal, ZR § 77-11; and

WHEREAS, Appellants contend that this literal interpretation ("[w]ithin the Special District" means "throughout the Special District") leads to absurd results that gut the purported purpose of the Special District's bulk-distribution – to whit, reducing the height of buildings; and

WHEREAS, however, nothing in the record indicates that this literal interpretation reflects a mistake or scrivener's error in drafting the 1994 text amendment to the Special District's bulk-distribution regulations; and

WHEREAS, the record instead reflects testimony and credible evidence in the form of architectural diagrams and examples of buildings in the vicinity indicating that such a result is not absurd and that, instead, the Special District's bulk-distribution regulations do operate to reduce the height of

buildings in the Special District—only not to the extent Appellants wish; and

WHEREAS, at hearing, the Board examined a number of examples of buildings in the Special District constructed before and after the enactment of the Special District's bulk-distribution regulations in 1994, finding the pre-1994 buildings generally exceeded the heights of post-1994 buildings on similarly sized zoning lots; and

WHEREAS, the Board also compared buildings constructed inside and outside the Special District, finding that post-1994 buildings outside the Special District generally exceeded the heights of post-1994 buildings inside the Special District on similarly sized zoning lots; and

WHEREAS, this discrepancy in building height before and after the enactment of the Special District's bulk-distribution regulations and this discrepancy inside and outside the Special District both lend credence to DOB and the Owner's assertion that the Special District's bulk-distribution regulations—as interpreted herein—do operate to reduce the height of buildings in the Special District; and

WHEREAS, at hearing, the Board further noted that floor plates the size of those in the New Building—a recent architectural development that results in less floor area being used per floor and that allows for taller towers in zoning districts without height limits—could not have been anticipated in 1994 when the City amended the Special District's bulk-distribution regulations, but the Board also observed that Appellants' height concerns in this appeal appear focused not on the Special District's bulk-distribution regulations but rather on the height of mechanical spaces in the New Building—a separate issue settled in *15 East 30th Street* and addressed above; and

WHEREAS**,** accordingly, the Board finds that Appellants have failed to demonstrate that the Zoning Resolution treats the New Building's zoning

> lot as a split lot with respect to the Special District's bulk-distribution regulations and that Appellants have failed to demonstrate that the New Building's zoning lot does not comply with the bulk-distribution regulations applicable in the Special District under ZR § 82-34;

(R. 002375).

<u>The Conclusion of the October 15, 2019 BSA Resolution</u>

150. After considering the arguments on appeal, but finding them unpersuasive, the BSA concluded in its October 15, 2019 BSA Resolution as follows:

> WHEREAS, in response to concerns from Appellants and the community regarding the height of development within the City, the Board notes that, while it has the power "to hear and decide appeals from and to review interpretations of this Resolution" under ZR § 72-01(a), the Board does not have the power to zone, *see* City Charter § 666; and
>
> WHEREAS, accordingly, insofar as Appellants or members of the community take issue with provisions of the Zoning Resolution—or absence thereof—as enacted, that grievance falls outside the scope of the Board's authority to review this appeal; and
>
> WHEREAS, based on the foregoing, the Board finds that Appellants have not substantiated a basis to warrant departure from its decision in *15 East 30th Street* in that the Zoning Resolution in effect prior to May 29, 2019, did not regulate the floor-to-ceiling heights of "floor space used for mechanical equipment" in exempting such mechanical space from floor-area calculations, ZR § 12-10, and the Board finds that Appellants have failed to demonstrate that the Zoning Resolution treats the New Building's zoning lot as a split lot with respect to the Special District's bulk-distribution regulations and that Appellants have failed to demonstrate that the New Building's zoning lot

> does not comply with bulk-distribution regulations applicable in the Special District under ZR § 82-34.
>
> *Therefore, it is Resolved,* that the building permit issued by the Department of Buildings on June 7, 2017, as amended and reissued April 11, 2019, under New Building Application No 121190200, shall be and hereby is *upheld* and that this appeal shall be and hereby is *denied*.

(R. 002381).

The October 15, 2019 BSA Resolution's Reservation of Determination

151. The BSA reserved for subsequent determination the issue of whether the floor area deducted for mechanical equipment is substantiated by the plans submitted to DOB and whether that floor area will actually be used for mechanical equipment. Petitioner requested an opportunity to create a record before the BSA on that issue to enable the BSA to make a determination. The City Club chose not to pursue the reserved issue and to proceed otherwise.[11] It is the BSA Resolution resulting from the further proceedings before BSA on the reserved issue that is the subject of the instant Article 78 Proceeding.

152. The October 15, 2019 BSA Resolution speaks to the further proceedings before it, and states at footnote 1, in relevant part:

> There is no dispute that vesting under ZR § 11-33 is not before the Board in this appeal. On the other hand, as discussed at hearing, a timely third issue has not been presented by Appellants regarding whether the amount of floor space used for mechanical equipment in the New Building is excessive or irregular, and Appellants' discussion of mechanical space in the New Building in their initial filings instead center on the volume and floor-to-ceiling heights of mechanical spaces. However, based on the lack of clarity about LW

[11] See paragraph 153 below.

> Appellant's ability to procure a final determination from DOB, testimony corroborated by DOB that a subsequent final determination would be refused, and Appellants' requests to proceed separately, the Board finds it appropriate to address this third issue, regarding (3) whether the architectural and mechanical plans for the New Building show sufficient mechanical equipment in the area identified as mechanical space to justify floor-area deductions, in a subsequent decision.
>
> * * *
>
> Accordingly, on September 17, 2019, the Board reopened the appeal filed by LW Appellant under BSA Calendar No. 2019-94-A to receive additional testimony only with respect to this third issue, which is not decided herein and is set for a continued hearing on December 17, 2019

(R. 002373).

<u>The City Club's Article 78 Proceeding</u>

153. In November 2019, the City Club of New York commenced an Article 78 proceeding appealing the October 15, 2019 BSA Resolution entitled *The City Club of New York v. New York City Board of Standards and Appeals, et al.* (Index No. 161071/2019). Petitioner did not appeal the October 15, 2019 BSA Resolution.[12]

<u>The Initial Submissions Regarding the Reserved Issue</u>

154. In response to the request of BSA, DOB performed a review of the plans submitted for the proposed building and by letter dated October 16, 2019, DOB submitted papers in further opposition to the administrative appeal (R. 002418 – R. 002448). That submission

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[12] The City Club of New York's Article 78 proceeding eventually resulted in a September 25, 2020 Decision and Order, entered as a Judgment on November 18, 2020 (R. 002407 – R. 002417), which, *inter alia*, voided the permit for the proposed building. City Respondents filed a Notice of Appeal on December 4, 2020. Owner Respondents also filed a Notice of Appeal.

argued, *inter alia*, that i) the total number of floors devoted to mechanical equipment and deducted from floor area for the proposed building is appropriate; and ii) the stories devoted entirely to mechanical equipment contain sufficient mechanical equipment to be deducted from floor area for the proposed building. Further, that submission attached the plans as requested by the Board.

155. By letter dated October 21, 2019, Owner Respondents made a submission to clarify and supplement the plans provided by DOB to BSA (R. 002449 – R. 002480).

156. Petitioner submitted papers in further support of its appeal dated November 6, 2019 (R. 002481 – R. 002512) and November 7, 2019 (R. 002513 – R. 002516). DOB also submitted additional papers in opposition to the appeal dated November 4, 2019 (R. 002517 – R. 002520).

157. The Owner Respondents submitted papers in opposition to the appeal dated November 27, 2019 (R. 002521 – R. 002796).

BSA Public Review Session and Public Hearing in December 2019

158. On December 16, 2019, the fourth Public Review Session was held at the BSA where the Board members discussed the remaining issues in Petitioner's appeal (R. 002797 – R. 002817).

159. The Public Hearing was held the next day on December 17, 2019 (R. 002818 – R. 002973). At the Public Hearing, Petitioner's counsel submitted their case, including providing testimony from a engineer, Michael Ambrosino, and responded to questions from the BSA. DOB's counsel presented its opposition to Petitioner's appeal and also responded to questions from the BSA. The Owner Respondents' counsel presented its opposition to Petitioner's appeal, including providing testimony from an engineer, Vivek Patel, from the firm

that designed the proposed building, and Luigi Russo, the architect of record for the project, and responded to questions from the BSA.

160. Several individuals and elected officials spoke at the Public Hearing. (R. 002933 – R. 002951). Written testimony was also submitted from elected officials and individuals (R. 002974 – R. 003345).

161. By letter dated December 31, 2019, Petitioner made a post-hearing submission to the BSA in further support of its appeal (R. 003346 – R. 003356). By letter dated January 14, 2020, the Owner Respondents made a post-hearing submission to the BSA in further opposition to appeal (R. 003357 – R. 003365).

BSA Public Review Session and Public Hearing in January 2020

162. On January 27, 2020 the fifth Public Review Session was held at the BSA where the Board members held off on commenting until the Public Hearing the next day (R. 003384 – R. 003386).

163. After considering the submissions and testimony before it, on January 28, 2020 by a tie vote of 2 to 2, with one recusal, Petitioner's appeal to the BSA was denied. (R. 003387 – R. 003403).

The Challenged BSA Resolution

164. The BSA Resolution, adopted on January 28, 2020 and filed on November 6, 2020, sets forth the BSA's rationale and reasoning for denial of the appeals (R. 003366 – R. 003377).

165. In reaching its determination in the BSA Resolution, the BSA thoroughly addressed and rejected each argument raised by Petitioner, as set forth below.

166. The BSA Resolution first lays out the reserved issue for determination and its authority to consider same as follows:

> [A]s discussed at [a prior] hearing, a timely third issue had not been presented by Appellants regarding whether the amount of floor space used for mechanical equipment in the New Building would be excessive or irregular, and Appellants' discussion of mechanical space in the New Building in their initial filings instead centered on the volume and floor-to-ceiling heights of mechanical spaces. However, based on the lack of clarity about LW Appellant's ability to procure a final determination from DOB, testimony corroborated by DOB that a subsequent final determination would be refused, and Appellants' requests to proceed separately, the Board found it appropriate to address this third issue, regarding (3) whether the architectural and mechanical plans for the New Building show sufficient mechanical equipment in the area identified as mechanical space to justify floor-area deductions, in continued hearings.
>
> The Board also notes its wide discretion to consider interpretive appeals based on the totality of the circumstances. Here, the final determination that forms the basis for DOB's final determination is the Permit—not a specific written determination. As noted above, the Board also heard testimony from DOB that Appellant might be forever foreclosed from receiving a final determination on this third issue. The Board further notes that this third issue is directly related to the two issues already decided, as presaged by the Board's consideration of *15 East 30th Street*. As the Board's consideration of this third issue is at its discretion, the Board also notes that Appellant raised this issue early in the hearing process—mollifying any concern that consideration of this issue might amount to a fishing expedition, especially given that courts (at their own discretion) routinely allow petitioners to amend petitions. Lastly, the Board notes that the City Charter, the Zoning Resolution, and the Board's rules are silent to this specific issue, and nothing in the record

> indicates the Owner has been prejudiced by such review.
>
> * * *
>
> Because this is an appeal for interpretation, the Board "may make such . . . determination as in its opinion should have been made in the premises in strictly applying and interpreting the provisions of" the Zoning Resolution, Z.R. § 72-11. 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.

(R. 003367 – R. 003368)

167. In finding that Petitioner did not demonstrate that the architectural and mechanical plans for the proposed building show insufficient mechanical equipment in the area identified as mechanical space to justify floor area deductions, the BSA Resolution stated in pertinent part:

> The Zoning Resolution defines "floor area" as "the sum of the gross areas of the several floors of a *building* or *buildings*, measured from the exterior faces of exterior walls or from the center lines of walls separating two *buildings*." Z.R. § 12-10 (emphasis in original indicating defined terms). However, the Zoning Resolution also provides for certain deductions from floor area. At issue in this appeal is the following deduction: "the *floor area* of a *building* shall not include . . . floor space used for mechanical equipment." *Id.*
>
> More particularly, the Board has considered whether the architectural and mechanical plans for the New Building show sufficient mechanical equipment in the area identified as mechanical space to justify floor-area deductions. Appellant disputes these deductions, but the Board is ultimately unpersuaded.

Notably, consistent with its decision in *15 East 30th Street*, the Board has reviewed the record in its entirety, including expert testimony and plans for the New Building. This independent review reveals that the composite mechanical plans prepared by the Owner and submitted by DOB are overinclusive in the impression they impart about the amount of mechanical equipment within the New Building. For instance, because of the three-dimensional nature of the mechanical floors, much of the ductwork depicted in the composite plans' flattened view might have no relation to "floor space"—where, for instance, a duct is situated immediately adjacent to a ceiling.

However, the New Building's mechanical plans do 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.

Furthermore, the Board notes that DOB's mechanical engineers have reviewed the New Building's drawings. Although the exact scope of this review is unclear from the record with respect to the Zoning Resolution, it is apparent from the mechanical plans themselves that this lack of clarity in DOB's procedures is an insufficient basis upon which to grant this appeal. (To do otherwise would be to venture into speculation that DOB is not performing its function in administering and enforcing the Zoning Resolution and—more importantly—would fall outside the ambit of this interpretive appeal, in which the Board strictly interprets and applies zoning provisions.)

Under DOB's current practices, it is clear that DOB has acted reasonably in reviewing and approving the New Building's mechanical plans. Notably, 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. The Owner's reliance on DOB's practices is similarly reasonable and reflected in the mechanical drawings showing sufficient mechanical equipment to justify the New Building's floor-area deductions.
>
> Accordingly, with respect to this specific case, the Board finds that Appellant has 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.

(R. 003369 – R. 003370).

168. The BSA Resolution also, contrary to Petitioner's assertion herein (Petition at ¶ 10), specifically addressed the opinions of the two Commissioners that voted in favor of Petitioner's appeal, as follows:

> The Board's Rules provide that all types of applications—including interpretive appeals—must receive a "concurring vote of at least three (3) commissioners" to be granted. *See* Rules § 1-11.5; *see also id.* § 1-12.5. However, if an interpretive appeal "fails to receive the requisite three (3) votes," it is "deemed a denial." *Id.* Here, two commissioners voted to grant this interpretive appeal, and two commissioners voted to deny this interpretive appeal. Accordingly, this interpretive appeal has not garnered the three affirmative votes necessary to grant, and the Board's decision is deemed a denial.
>
> In reaching its decision denying this interpretive appeal, the Board has considered but ultimately declines to follow the alternate positions of the two commissioners that would grant this appeal. As explained at hearing, the commissioners in favor of this interpretive appeal find Appellant's testimony and evidence credible and DOB and the Owner's unpersuasive.

> One commissioner expresses concern that DOB has not provided adequate explanation on its procedures for determining whether certain mechanical equipment is sufficient to allow mechanical-equipment deductions from floor area under the Zoning Resolution; rather, it seems that there may be no procedure in place for analyzing mechanical equipment under the Zoning Resolution. Further, said commissioner expressed fairness concerns in the disparate scrutiny DOB appears to apply to small projects, such as single-family residences, versus tall towers, like the New Building. Next, this commissioner notes the conflicting expert testimony in the record about the location of mechanical equipment and the absence—in his view—of any adequate justification for the placement of mechanical equipment (structural or otherwise) that would lead to the conclusion that the New Building's mechanical equipment could be justified. Accordingly, this commissioner would grant this appeal.
>
> The second commissioner expresses similar concerns, finding that the New Building's floor-area deductions cannot be justified. In interpreting the words "floor space used for mechanical equipment," Z.R. § 12-10 ("floor area" definition), this commissioner would note that the space is what the mechanical equipment reasonably requires, that the space is exclusively devoted to housing mechanical equipment, that the space has no other use, and that the space cannot be realistically occupied for purposes other than housing the servicing of said equipment. This commissioner views this as DOB's position, citing disparate scrutiny DOB applies to single-family residences as opposed to residential towers. Additionally, the commissioner expressed constitutional concerns and the absence in the record of prior mechanical plans.

(R. 003370 – R. 003371).

169. After detailing the arguments set forth by Petitioner, DOB and the Owner, the BSA Resolution concluded as follows:

> The Board has considered all of the arguments on appeal but finds them ultimately unpersuasive. In response to community concerns expressed with the review of mechanical plans, the Board notes that nothing herein shall be interpreted as preventing or delaying DOB's issuance of appropriate guidance on standards clarifying when "floor space" is "used for mechanical equipment." Z.R. § 12-10. It is clear from this appeal that, going forward, DOB should improve its analytical methods in reviewing these floor-area deductions to further incorporate its technical expertise in mechanical engineering into its zoning review to confirm whether a building complies with all applicable zoning regulations.
>
> Based on the foregoing, the Board finds that Appellant has failed to demonstrate 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.
>
> *Therefore, it is Resolved,* that the building permit issued by the Department of Buildings on June 7, 2017, as amended and reissued April 11, 2019, under New Building Application No 121190200, shall be and hereby is *upheld* and that this appeal shall be and hereby is *denied.*

(R. 003376 – R. 003377).

The Instant Article 78 Proceeding

170. Petitioner commenced this proceeding by Notice of Petition dated December 7, 2020, and Verified Petition sworn to on December 7, 2020. The Petition raises two causes of action: i) the first cause of action alleges that the BSA Resolution is arbitrary and capricious because (a) the BSA allegedly erred in misreading the word "use" concerning the mechanical equipment deductions; (b) the plans do not show sufficient mechanical equipment to justify the floor-area deductions; (c) the BSA Chair allegedly "usurped power" not granted by the City Charter and the RCNY; (d) the BSA allegedly erred by not compelling Owner

Respondents to produce mechanical plans submitted in an earlier application; (e) the DOB allegedly does not review mechanical equipment plans for accuracy of floor-area deductions on large-scale construction projects; and (f) the DOB allegedly failed to adopt policy or regulations to effectuate proper calculations of floor-area deductions; and ii) the second cause of action alleges in the alternative that the Court should order a trial on alleged issues of fact.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

171. The BSA's decision to uphold DOB's issuance of the building permit for the proposed building was rational and lawful, supported by the record as a whole and in accordance with the provisions of the Zoning Resolution.

172. The BSA correctly and reasonably rejected Petitioner's contention that the proposed building does not contain sufficient mechanical equipment to justify the floor-area deductions taken. The BSA correctly reasoned that the proposed building's architectural and mechanical plans do demonstrate sufficient floor-based mechanical equipment, stating, in relevant part:

> 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.

(R. 003369).

173. The BSA further noted that DOB's mechanical engineers reviewed the proposed building's drawings and appropriately deemed DOB's review reasonable (R. 003369). The BSA also correctly pointed out that expert testimony provided by the Owner demonstrates that the number of floors of mechanical equipment is well within the range of standard practices

for construction of buildings of this scale (R. 003369 – R. 003370). Finally, the BSA appropriately noted that the Owner Respondent's reliance on DOB's practices regarding the justifications for floor-area deductions for mechanical equipment to be reasonable in the instant case (R. 003370).

174. After considering all of the arguments on appeal, but finding them unpersuasive, the BSA correctly found that Petitioner failed to demonstrate that the architectural and mechanical plans for the proposed building show insufficient mechanical equipment in the areas identified as mechanical space to justify floor area deductions.

175. Moreover, Petitioner's new allegations concerning the BSA's review that (i) the BSA allegedly erred in misreading the word "use" concerning the mechanical equipment deductions; (ii) the BSA Chair allegedly "usurped power" not granted by the City Charter and the RCNY; and (iii) that the BSA allegedly erred by not compelling Owner Respondents to produce mechanical plans submitted in an earlier application are without merit and cannot serve as a basis to invalidate the BSA Resolution.

176. First, contrary to Petitioner's allegations "use" and "used for" are clearly defined in the Zoning Resolution and the BSA properly applied the Zoning Resolution definition. See Zoning Resolution §§ 12-10 and 12-01(f). Thus, Petitioner's erroneous arguments that the term "use" must be interpreted according to the "commonly accepted meaning" of such words (Petition at ¶¶ 65-73) and that "use" only means "actual use" (Petition at ¶ 73) falls flat.

177. Second, contrary to Petitioner's allegations, the notion that the BSA Chair "usurped power not granted by law" is similarly without merit (Petition at ¶¶ 89-90). Petitioner seemingly argues that the BSA is without authority to issue a written resolution

denying an appeal when there is a tie vote. Such a proposition is nonsensical and, contrary to Petitioner's implication, is not supported by Charter § 663 and 2 RCNY § 1-12.1.

178. Lastly, BSA's rejection of Petitioner's request for a comparison of mechanical plans submitted by Owner Respondents to DOB in earlier applications with the mechanical plans for the proposed building at issue herein was proper. The implication that a comparison of the current mechanical plans with earlier mechanical plans "could reveal reasons for a particular layout that were divorced from the requirement for the equipment" (Petition at ¶ 92) is a speculative fishing expedition. Petitioner fails to point to any authority requiring or even advising the BSA to engage in such a review. Furthermore, the Board was reasonable in determining that the evidence in the record was sufficient to determine the issue at hand.

179. Based upon the foregoing, Petitioner's First Cause of Action alleging that the BSA Resolution is arbitrary and capricious is without merit and must be dismissed.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

180. Petitioner's request for an order for the BSA to revoke the permit for the proposed building is not an available or appropriate remedy and must be denied. *See* Notice of Petition at subsection "a." Such a request is in the nature of mandamus to compel and is not available here, where the revocation of the permit is a discretionary act. Mandamus is an extraordinary remedy used to compel performance by an administrative body or officer of a duty positively required by law. This remedy is available only where there is a clear and absolute right to the relief sought, and the body or officer whose duty it is to enforce such right has refused to perform such duty. Further, this remedy is only available to compel an act that is ministerial and non-discretionary, premised upon specific statutory authority mandating performance in a

specified manner. The courts will not interfere with the details of municipal administration and will not review the exercise of discretion by public officials in the enforcement of the laws.

181. It is clear that such relief is not available where, as here, Petitioner seeks to compel performance of an act that is solely in the discretion of DOB, with review oversight by the BSA. See Charter § 666.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

182. Petitioner's Second Cause of Action, which is pled in the alternative, for a trial of issues of fact pursuant to CPLR § 7804(h), is without merit and must be denied.

183. Tellingly, Petitioner's fail to set forth any specific facts regarding the design of the mechanical space for the proposed building that is missing from the factual administrative record before the Court. If the Court determines that it is unable to make a determination as to the reasonableness of the BSA Resolution based on the administrative record before the Board, the appropriate course is not to conduct an evidentiary hearing, but to remand the matter to the Board so that the administrative record may be expanded.

WHEREFORE, City Respondents respectfully request that this Court deny the relief sought in the Petition, dismiss the proceeding, and uphold the BSA Resolution in its entirety.

Dated: New York, New York
February 16, 2021

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By:___________/s/____________________

Pamela A. Koplik

VERIFICATION

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

KURT M. STEINHOUSE, an attorney duly admitted to practice law in the Courts of the State of New York, affirms, pursuant to CPLR 2106, as follows:

I am the General Counsel of the New York City Board of Standards and Appeals, a respondent in the instant proceeding.

I have read the foregoing Answer in *LandmarkWest! Inc. v. New York City Board of Standards and Appeals, New York City Department of Buildings, Extell Development Company and West 66th Sponsor LLC*, Index No. 160565/2020, and, upon information and belief, believe the contents thereof to be true. The source of my information and the basis for my belief as to all matters are as follows: information obtained from the books and records of the Board of Standards and Appeals and other departments of the City government, and from statements made to me by certain employees of the City of New York.

KURT M. STEINHOUSE

February 16, 2021