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

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LANDMARKWEST! INC.

Index No.: 160565/2020

--against--

NEW YORK CITY BOARD OF STANDARDS AND APPEALS, NEW YORK CITY DEPARTMENT OF BUILDINGS, EXTELL DEVELOPMENT COMPANY AND WEST 66TH SPONSOR LLC
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PETITIONER'S REPLY AND MEMORANDUM OF LAW IN FURTHER SUPPORT OF ARTICLE 78 PROCEEDING TO REVIEW DETERMINATION OF THE BOARD OF STANDARDS AND APPEALS DENYING ITS APPEAL OF THE DEPARTMENT OF BUILDING'S ISSUANCE OF A WORK PERMIT FOR THE BENEFIT OF RESPONDENTS EXTELL DEVELOPMENT COMPANY AND WEST 66TH SPONSOR LLC DESPITE PLANS SHOWING EXCESS BUILDABLE FLOOR AREA IN VIOLATION OF THE ZONING RESOLUTION

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INTRODUCTION

Petitioner LandmarkWest!,Inc. (LW!) respectfully submits this Memorandum of Law in further support of its application for mandamus review pursuant to Article 78 of the CPLR. This Article 78 proceeding attacks the November 6, 2020 resolution ("the Resolution") of the New York City Board of Standards and Appeals (the "BSA" or the "Board") to affirm the issuance of a building permit (the "Permit") by Respondent New York City Department of Buildings ("DOB"), allowing Respondents Extell Development Company and West 66th Street Sponsor LLC (together, "Extell") to proceed with construction of a *775-foot-tall* ultra-luxury condominium tower (the "Building") at 36 West 66th Street. For the sake of brevity, the undersigned will not restate the factual background and legal arguments that are fully briefed in the original Verified Petition. The purpose of this reply memorandum is to succinctly refute Respondents' unsupported arguments, carelessly lobed in a frantic attempt to obfuscate facts and legal issues and proverbially kick the sand in the court's eyes.

REPLY ARGUMENT

1. 2-2 Split Vote Results in Denial of LW!'s appeal Due to Stalemate with BSA Unable to Make Findings of Fact or Legal Conclusions That Would Be Entitled to Deference from Court.

NYC Charter §663 and 2 RCNY §1-12.1 both specify that the majority vote of at least three members is required to grant an application or an appeal, with 2 RCNY §1-12.1 specifying further that any application that fails to receive three affirmative votes will be deemed denied. Nothing in the City Charter or the applicable regulations specifically addresses the scenario of a tie vote. Extell proposes to adopt an approach employed by a federal court in DC Circuit when reviewing a tie vote at a proceeding before FEC (Federal Election Commission), an independent regulatory agency of the United States whose purposes to enforce campaign finance law in United States federal elections. https://www.fec.gov/about/mission-and-history/, last visited Feb. 28. 2021. According to Extell's argument when a tie vote provides for a denial of an application, the opinion of those voting members who voted against an application "constitutes a controlling group for the purposes of a decision." (Extell Memo. of Law, p. 21, fn.5). Extell cites to *In re Sealed* Case (223 F.3d 775, 779 [D.C. Cir. 2009]) for a further proposition that a reviewing court owes deference to a denial of an application at an administrative

proceeding due to a tie vote, which in the federal case was a three-to-three tie.

Obviously, the fact that Extell could not find caselaw involving a tie vote at a New York state agency and had to look long and hard to find at least "something" to support its argument speaks loudly to the strength of legal support that this argument employs. Looking closely, FEC is not comparable to the BSA. Review of the cited federal caselaw reveals that FEC decides issues of presence of probable cause of conspiracy, fraud and violation of campaign finance laws. Finding of probable cause has both civil and criminal implications for individuals involved. Therefore, a tie vote results in a finding of no probable cause and termination of quasi-criminal proceedings. Courts have to defer to FEC's finding of no probable cause, and this deference is quite intuitive. Similarly, when a jury in a criminal trial fails to reach a unanimous decision as to defendant's guilt, the court has no choice but to release a defendant. That is the nature of a criminal proceeding and is an axiom of the Anglo-American jurisprudence, that failure to make a finding of guilt of a crime based on a prescribed standard results in acquittal and is owed judicial deference.

Land use decision making in New York City is a different animal, although no less political. A more careful legal

research clarifies that it is not necessary to look long and far for an answer to what type of deference is owed to a tie vote on an application before a zoning board in the State of New York. The Court of Appeals has already answered this question in *Tall Trees Constr. Corp. v Zoning Bd. of Appeals of the Town of Huntington*. 97 N.Y.2d 86, 92 (2001). This is where the Court of Appeals first promulgated a principal that tie votes at zoning boards are deemed a denial and may be reviewed on an Article 78. The Court of Appeals further faced a situation where the zoning board did not make any finding of fact in its written resolution denying a zoning variance, with the written resolution merely memorializing the fact of a stalemate. The Court of Appeals acknowledged that in the context of a tie vote, there cannot be any findings of fact issued by a zoning board:

> No factual findings, either supporting or opposing the requested variances, were provided by the Board. That, however, does not preclude judicial review of the determination. Courts have recognized that under circumstances where, as here, an application is rejected by a tie vote, "there exists and can exist no formal statement of reasons for the rejection" and, thus, an examination of the entire record, including the transcript of the meeting at which the vote was taken along with affidavits submitted in the article 78 proceeding can "provide a sufficient basis for determining whether the denial was arbitrary and capricious."

Id. at 92, quoting from *Matter of Zagoreos*, 109 A.D.2d 281, 296 (2nd Dept. 1985); citing *Matter of Meyer*, 90 N.Y.2d 139, 145 (1997). The remainder of the decision in *Tall Trees* describes

what is in essence a de novo review of the entire record before a zoning board to determine that the requested variance should have been granted. The Court of Appeals engaged in a balancing test ordinarily performed by the zoning board, weighing the benefit to the applicant against the detriment to the health, safety and welfare of the neighborhood or community. *Id.* at 93-94.

In support of its arguments, each side here cites to the opinions of "their" half of the BSA Board that voted in its favor. Therefore, when reviewing the tie vote and the resulting denial flowing therefrom, this court is bound to review the entire record available and conduct an inquiry very similar to the one that the BSA conducted. Chairperson Perlmutter and Vice-Chair Chanda are not entitled to have their opinions deemed the opinion of the entire Board. The weight of their opinions is not greater than the weight to be accorded to the opinions and findings of fact and law of Commissioners Sheta and Scibetta. The arbitrary and capricious inquiry on this Article 78 proceeding must entail a determination as to which pair of BSA commissioners was arbitrary and capricious in their findings of fact and law.

2. Great Deference is Owed to Opinion of Only Engineer on the Board in his Conclusion That Overly Spread-Out Layout of Mechanical Equipment Has No Justification Rooted in Mechanical Efficiency or Structural Stability and Was Placed with Eye Towards Abusing Mechanical Equipment (ME) FAR Deduction on Floors 15, 16, 18 and 19.

Extell cites the Court of Appeals' recent decision in *Peyton v Bd. of Standards and Appeals* (2020 WL 7390864, 2020 N.Y. Slip. Op. 07662 [2020]),[1] in support of its argument that BSA has specialized expertise, is in the best position to address interpretation of the Zoning Resolution (ZR) and make factual findings, and as a result is "the ultimate administrative authority charged with enforcing the Zoning Resolution". (Extell Memo. of Law, p. 14, NYSCEF Dkt. No. 76). *Peyton* further states that

> It [BSA] 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. Accordingly, we have consistently deferred to the BSA's interpretation of the Zoning Resolution in matters relating to its expertise, "so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute."

[1] *Peyton* in turn cites to *Toys R Us* v. Silva (89 N.Y.2d 411, 418 [1996]). In *Toys*, the issue was one of abandonment—whether the former warehouse could maintain its pre-existing, non-compliant use in accordance with Article 5 of the Zoning Resolution (hereinafter interchangeable with "ZR"). The BSA meticulously delved into the actual use of the building and found that the 1,500 sq. ft. of storage in an 80,000 sq. ft. facility was, in fact, a substantial abandonment. Comparison to other storage facilities was not made.

Id. at *4. However, *Peyton* is inapposite as it entailed BSA's unanimous decision on ZR's open space exemption, as opposed to an evenly split tie vote over Extell's abuse of the mechanical equipment (hereinafter interchangeable with "ME") FAR deduction. Moreover, reviewing hidden rationale for Extell's particular arrangement of mechanical equipment requires knowledge of mechanical and structural engineering. The only commissioner with the engineering qualifications rejected Extell's expert testimony as either fabricated or contrived.

Extell argues that Chairperson's qualification as an architect matches Commissioner's Sheta's qualification as an engineer. (Extell Memo. of Law, p.29, fn. 7, NYSCEF Dkt. No.76). Review of relevant provisions of the State Education Law governing both professions reveals that architects and engineers are learned in separate fields of knowledge.[2] It is also

[2] Education Law §7301 defines the practice of architecture as:

> The practice of the profession of architecture is defined as rendering or offering to render services which require the application of the art, science, and aesthetics of design and construction of buildings, groups of buildings, including their components and appurtenances and the spaces around them wherein the safeguarding of life, health, property, and public welfare is concerned. Such services include, but are not limited to consultation, evaluation, planning, the provision of preliminary studies, designs, construction documents, construction management, and the administration of construction contracts.

Education Law §7201 defines the practice of engineering as:

> The practice of the profession of engineering is defined as performing professional service such as consultation, investigation, evaluation, planning, design or supervision of construction or operation in connection with *any utilities, structures, buildings, machines, equipment, processes, works, or projects* wherein the safeguarding of

important to note that the December 17, 2019 hearing involved the battle of engineers, not architects.

Among Extell's more arcane arguments is that LW! misquoted Commissioner Sheta's statement that he is not a structural engineer who could evaluate Extell's presented structural "concerns" as wholly fictitious. (Extell Memo. of Law, p.29, fn. 7, NYSCEF Dkt. No.76, referring to Jan. 28, 2020 Hr. Tr., 10:14 ["I'm not a structural engineer"], NYSCEF Dkt. No. 70).[3] In fact, Extell cites to a transcript of the January 28, 2020 hearing, which contains numerous errors in transcription. Review of the video recording of the hearing supports LW!'s representation as to the exact wording of Commissioner Sheta's statements.(https://www.youtube.com/watch?v=MgHGgYIkmTs&t=1648s, time code 19:40). Moreover, according to his LinkedIn page, Commissioner Sheta possesses a Ph.D. in structural engineering. https://www.linkedin.com/in/nasr-sheta-ph-d-pe-42514656, last visited March 2, 2021. And not to add cream to butter, but the transcript of the December 17, 2019 hearing specifically reflects Commissioner Sheta's statement:

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life, health and property is concerned, when such service or work requires the application of engineering principles and data. (emphasis added).

Architects may not claim to be engineers and vice versa. (Education Law 7208(i); 7306(e).

[3] Citations to the hearing transcript give the page number of the transcript page originally set by the reporter, as opposed to the pagination embedded by the NYSCEF system, which is usually a page ahead.

> I, I'm coming from structural background. Sometimes I design reinforced concrete slabs. In this work, that long direction of the slab should have the lighter reinforcement. That shorter should have the heavier reinforcement. Sometimes, looking at some drawings by others, I can see that, the engineer put the heavier reinforcement in the long and the lighter in the short. And, and I think about the reason for that and I, I could like guess that it might be this or that. The,[sic] if you look at the concepts that you just put in front of us, do you think it could be a good reason for going that route rather than the other?

(Dec. 17, 2019 Hr. Tr., 31:1-8, NYSCEF Dkt. 63; https://www.youtube.com/watch?v=7ZpbkkkqgjE&t=8682s, time stamp 39:15). This is where Commissioner Sheta sets out what he later revealed at the January 28, 2020 meeting to be the "fake" structural reason he invented as a trap for Extell's engineer Patel, addressed in greater detail in the Petition, ¶¶82-84. (NYSCEF Dkt. No. 1; Jan. 28, 2020 Hr. Tr., 9:16-23; 10, 11:1-3).

Commissioner Sheta was also sufficiently versed in thermodynamics to make quick work of Extell's feigned argument that ductwork could not be routed twelve to twenty feet above ground level to free up space below due to alleged inefficiencies in air, water, steam or electric transmission. (https://www.youtube.com/watch?v=MgHGgYIkmTs&t=1648s, time code 18:30; Jan. 28, 2020 Hr. Tr., 10: 2-4, NYSCEF Dkt. No. 70).

Nor was Extell engineer's argument that the mechanical equipment could not be grouped together due to vague structural considerations any more persuasive. (*Id.*, 10: 5-11).

The DOB did not even review as part of its plan examination any of the engineering considerations that were presented to the BSA. DOB's review was comprised of only looking at the composite plans for each floor and visually determining whether the floor looks like 100% ME. This, for lack of a better word, visual test does not do justice to the purpose of ZR's strict FAR limitations. Even Chairperson in her written resolution reluctantly admitted that relying solely on composite plans showing various ductwork overlaying mechanical equipment below is misleading.[4]

For comparison, the court may consider the building where it is located, at the address 71 Thomas Street. Three lower floors in this building are used as "spill-over" courthouse space. The layout is hardly optimal for court use, as it

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[4] "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." (Nov. 6, 2020 BSA Resolution, p. 4, NYSCEF DKT No. 3). Nonetheless, the Chairperson then went on to conclude that

> 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.

Id. Given that Chairperson ignored manufacture specifications, all stated on the plans, as to the amount of "clearance and service areas," it is not evident from the language of Chairperson's self-labeled resolution how the operating area requirements were dialed into this analysis.

features mostly office rooms that were adopted to court use. Court rooms feature no windows and look like basement space. The HVAC and heating systems are horrible and spread through the entire building. Each floor has a mechanical room from which ductwork runs. Each room has a hanging ceiling with square Styrofoam inserts that harken back to the 1970s, if not earlier. If one were to climb a ladder and remove one of those suspended squares, one would see a web of mechanical ductwork. The whole purpose of such hanging double ceilings is to hide from view the mechanical network. According to Extell's position, all rooms in the chambers and the courtrooms would count only as ME space.

3. DOB's Reliance on Comparison of ME FAR Deductions Claimed by Developers of Structures of Similar Size Failed to Consider That Extell Was Choosing Not to Use Entire Available Space in Attempt to Abuse Zoning Resolution Definition of Floor Area

The importance of considering operating specifications of mechanical equipment and of evaluating its spatial arrangement on a floor labeled as 100% ME FAR EXEMPT is that it allows the DOB to weed out developer's conscious election to leave some space unused, the so-called "white space". The reason why a developer would thinly "spread" mechanical units is to exempt as much square footage as possible from "Floor Area" and corresponding bulk limits, so that the corresponding amount of space would then become available to be constructed at a higher

elevation as luxury residential housing, which commands a much higher price per square foot than, for example, office or storage space on same floor as mechanical equipment. From a business standpoint, this desire is understandable and natural, but this business rationale cuts against urban density control mechanism set up by the Zoning Resolution.

Comparison to another part of ZR 12-10 that contains exclusion from floor area definition "space used for accessory off-street parking provided in any story". The Zoning Resolution then sets the numerical limits for amounts of excludable area from 100-to-300 square feet based on the zoning district and types buildings for which parking is built. The reason that the ZR is able to set specific numbers excludable for parking purposes is because sizes and shapes of most vehicles are common knowledge.

A similar observation can be made from the definition of excludable floor area used for mechanical equipment:

> 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*** (emphasis in original)

The ZR sets express numerical limits on amount of ME FAR deduction of 50+30+10 SF per residential unit for lower density zoning districts, which ordinarily house smaller residential and community facility structures, while placing no express limitations on amounts of excludable space. The reason for this is evident: just as with automobiles, mechanical units placed in simple structures are uniform and straightforward. The mechanical systems in more sophisticated developments are more diverse and harder to size with the same ruler. That is why the ZR includes only one qualifier for exclusion of ME FAR: floor space must be *used* for mechanical equipment. It is this flexibility that has been historically abused by high-rise developers in New York City. Extell is not in fact doing anything special by abusing this flexibility; it uses the same scheme that the other developers use, which is why mere comparison to other similarly sized developments is not a proper litmus test here.

While the ZR allows for flexibility, it is not a free for all. Extell attempts to explain that as long as it does not use the "white space" for anything non-mechanical, it still gets the deduction, but this logic is deceptive. For ME FAR deduction to be triggered, the area has to be in fact objectively "used" for mechanical equipment; it has to be serving the purpose of supporting the mechanical use. This is where review of

manufacturing specifications is absolutely indispensable. The ZR allows for flexibility in its language so that the DOB could analyze the mechanical systems proposed for each complex project with the corresponding spatial operating requirements. The DOB does not have an option not to do this analysis and allow a developer to claim as much space as it wants as deductible. Otherwise, the DOB might as well allow an owner to exclude, for example, an off-street parking space sufficient to house a semi-trailer while the owner is allowed to park only a passenger SUV. Ambrosino's alternative ME layout sheds a light on a roach infested ME floor plans. Once roaches scatter, a lot of space is sitting unused, the "white space".

Extell marshals 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," citing in support *Exxon Corp. v. BSA* (128 A.D.2d 289, 295-96 [1st Dept 1987]) in an attempt to convince the court that any ambiguity in the definition of the word "used" for ME deductions should interpreted strictly in favor of property owner. In *Exxon*, the First Department rejected the BSA's reading of the definition of "accessory use" in the ZR to allow convenience stores as accessory use to gas stations. In doing so, the First Department also opined that "the Board [BSA]

violated the well-established principle of statutory construction that a statute must be viewed as a whole, and, to that end, all of its parts, should, if possible, be harmonized to achieve the legislative purpose." *Id.* at 295.

The legislative purpose behind the Zoning Resolution's definition of floor area and definitions of exemptions from floor area present a careful balance that the City Planning Commission and the City Council have struck to enable development, while concurrently controlling urban density. Allowable floor area is a matter of great significance in the world of building construction in New York City. The bulk and size of permissible development in particular neighborhoods or districts, without a doubt, goes to the heart of the purposes of zoning regulation. *See generally* Zoning Resolution Art. I. Ch. 1, §11-10, entitled "Establishment and Scope of Control, Establishment of Districts and Incorporation of Maps," and ZR §§11-11, 11-111, 11-113 (Dec. 5, 1961), which provide that for all new and existing use of land governed by the Zoning Resolution in all districts, any buildings or other structures must be constructed or developed , or enlarged, altered, converted, reconstructed, or relocated, "only in accordance with the use, bulk and all other applicable regulations of this Resolution"; *Municipal Art Soc. v New York City*, 137 Misc. 2d 832, 837-38 (Sup. Ct., N.Y. Co.1987)("Zoning is a vital tool for

maintaining a civilized form of existence for the benefit and welfare of an entire community . . . and is designed to preserve the character of zoned areas from encroachments of uses which devaluate living conditions . . . with its goal being to provide for the development of a balanced, cohesive community which will make efficient use of [a] town's available land"; "Increasing the bulk of a project imposes a certain burden on the local community . . . Zoning benefits are not cash items"; they are not for sale; City was not free to agree to vary zoning by giving developer a bonus 20% increase in floor area ratio (FAR), or bulk, for Coliseum property in exchange for cash in the form of $40 million in subway stations improvements)(internal quotation marks and citations omitted; emphasis supplied). The concern about imposing burdens by building bigger developments than permitted by the Zoning Resolution is particularly acute in New York City, where space is so limited and the populations so dense.

Schemes to defy the strict terms of the zoning regulations cannot be defied as they are so important to protect our ability to co-exist in the limited space of New York City's neighborhoods and to preserve urban life with adequate open space. Design professionals who submit plans containing false FAR information routinely receive lifetime bans from filing plans with the DOB. *See e.g.*, *Scarano v City of New York*, 86

A.D.3d 444, 445 (1st Dept. 2011)(". . .petitioner's actions in submitting misleading photographs, falsely certifying that all objections had been resolved, and claiming entitlement to extra floor area resulting from a nonexistent community facility are supported by substantial evidence and warrant the finding that DOB can no longer rely on him to submit honest paperwork. Thus, there was a basis for prohibiting him from submitting further documents to DOB").

4. Ambrosino's Alternative Layout Analysis is Complete[5] and Accurate

[5] Extell argues in its memorandum of law that Michael Ambrosino's analysis was "admittedly incomplete": "Further, LandmarkWest!'s factual claim that Extell *could have* devoted less floor space to mechanical equipment is based on information that Landmark West admitted was incomplete—a telling admission that LandmwarkWest! Omits from its petition." (Extell Memo of Law, p. 3, NYSCEF Docket 76). "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." (*Id.* at 28). Extell is basing this untruth on LW!'s November 6, 2019 submission, annexed to the Petition as Exhibit N. Extell in fact took the undersigned's word out of context and mischaracterized its meaning. The relevant sentence in the November 6, 2019 statement states that Ambrosino's supplied "partial analysis—based on information supplied to date—explaining the extent of unjustified mechanical FAR deductions…" This is a reference to Extell's failure to submit ME plans for prior versions of its project, despite numerous requests from both LW! and Commissioner Scibetta. Commissioner Scibetta asked to see ME plans before change in floor configurations (Sept. 17, 2019 Hearing Tr., Dkt. No. 54, 10:8-15; Dec. 17, 2019 Hearing Tr.12:12-13) (https://www.youtube.com/watch?v=7ZpbkkkqgjE&t=8696s, time stamp 18:01; Dec. 16, 2019 Exec. Session Hr. Tr., 13:21-23; 14:1-11, NYSCEF Dkt. No.62; https://www.youtube.com/watch?v=ULkvXludblU, time stamp 22:56). While Extell argues that LW! misstated what version of prior ME plans Scibetta and Sheta asked for, the fact remains that Extell provided neither of the two available prior plan versions, and when Commissioner Scibetta pressed for these plans with Mr. David Karnovsky, Extell's counsel at the time, he high-handedly responded:

> Commissioner Scibetta: Can we have submission of the mechanical plans? Or the prior mechanical plans?
> Mr. Karnovsky: Well, direct your request to the Chair, because, uh, at this point, you know, we have been here since May, and now—

(Dec. 17, 2019 Hr. Tr., 85:22-23, 86:1-3, NYSCEF Dkt. No.63). What followed was a colloquy between Chairperson and Vice-Chair on one hand and

At the December 17, 2019 hearing, Michael Ambrosino, P.E. presented the board with one possible re-arrangement of the mechanical equipment layout as any astute engineer would position ME on a floor if mechanical engineering were the only consideration.(https://www.youtube.com/watch?v=7ZpbkkkqgjE&t=8696s, starting time stamp 19:00). Ambrosino used original design drawings; he color coded them; he then took the exact equipment, its size and service area and repositioned it on a floor, and decided if it was a reasonable use of the space. What he did not do was check for code conformance of the systems, their energy efficiency or performance. He did not look at changing the type or size of the systems. (Dec. 17, 2019 Hr. Tr., 14:12-16, NYSCEF Dkt. 63). He did not move equipment from floor to floor, leaving them on their respective floors to retain Extell's design concept. (*Id.*, 14:6-11). He left completely intact the claimed ME FAR deductions corresponding to the equipment he did not concentrate on: the sprinkler, electrical and plumbing systems. He did not calculate the exact ME FAR deductions that should have been claimed, because that was not the ultimate goal of the review. (*Id.*). What Ambrosino did was create a way for

Commissioners Scibetta and Sheta on the other arguing over the need to review prior versions of the ME plans. (*Id.* at 86-88). At that point, Chairperson quelled the riot, so to speak, and ignored the request of the other half of the Board for production of all ME plans for prior versions of the projects.

professional reviewers to look at the ME plans in a different way to decide what is a reasonable deduction. For the appropriate service area necessary for the equipment, Ambrosino used the figures provided on Extell's own plans (service area zones marked blue surrounding the equipment). Because of the never-ending height of the mechanical floors, he did not concern the review with the ductwork and piping because there was plenty of space to run both at elevation. (Dec. 17, 2019 Hr. Tr., 14:5-20, 15:1-9, NYSCEF Dkt. 63). When questioned by Chairperson regarding any loss in mechanical efficiency when elevating horizontal distribution ductwork, Ambrosino explained:

> . . . And I think within a room that we've left, there's plenty of height, whatever height they pick, to do that with. We didn't change that. I'm saying when we move equipment out of space, and the only thing left is horizontal distribution, there's no reason horizontal distribution has to be at six feet or ten feet. It could be at 20 feet, which makes the space underneath it very usable.

Id., 16:13-18). He then proceeded with examples of use of excessive space on the 19th floor. *Id.*, 17:22-23; 18:1-9; 20:6-18). When asked to address the affidavit of Extell's expert, Mr. Bienstock, about various other plumbing and electrical equipment on the ME floors, Ambrosino made it clear that all that equipment was left completely untouched in the alternative layout. What he did was reposition small units of equipment that were taking up disproportionate amount of space. (*Id.*, 20:12-18;

21:8-14). When discussing with Commissioner Sheta any thermodynamic losses in horizontal transmission, Ambrosino pointed out that any inefficiencies could be easily solved by switching 12-by-10 ductwork to 12-by-12, exposing Extell's feigned concerns as lacking in substance. (*Id.*, 24:19-23). On the 19th floor, Ambrosino moved and grouped together every tank, every VFD, every electric panel, every pump and the chiller plant, for a very efficient pumping plant, freeing up close to 3,000 square feet of space. (*Id.* 27: 8-22). Ambrosino asserted that this "[c]ould be usable space, could be unusable space, but it doesn't have to be mechanical space". (*Id.*, 27:23-28:1). This would make the entire system as even more efficient. (*Id.*, 28:2-8). And the released space could be used for storage to the condo owners, a paint shop, offices. (*Id.*, 28:13-18). When questioned about the reason for Extell's inefficient use of space, Ambrosino said that there must have been some sort of a reason behind Extell's design principle, but it was not based on the engineering or design needs. (*Id.*, 30: 12-22).

5. Extell's Argument That LW! Failed to Timely Raise Challenge to Mechanical Equipment FAR Deductions Before the BSA is Belied by Record before BSA and BSA's Decision to Bifurcate and Continue LW!'s Appeal Has Not Been Challenged by Extell via Article 78 and is Now Unpreserved for Review

In an Article 78, petitioner ordinarily challenges determination of an administrative agency. This is what LW! has done here. Now, Extell argues that the December 17, 2019 hearing and January 28, 2021 meeting and its culmination in a tie vote should never have occurred because ostensibly LW! did not raise the present issue on appeal to the BSA. Implicit in this argument is that the BSA erred by considering appropriateness of ME FAR deductions. At the September 17, 2019 hearing, the BSA determined to bifurcate LW!'s appeal; denied the challenge to the Permit based on the "packing the bulk" arguments and excessive floor height of the mechanical voids; and set up a continued hearing on LW!'s challenge to the ME FAR deductions. This determination was memorialized in a written resolution, dated October 15, 2019. (Exhibit K to Petition, NYSCEF Dkt. No. 13, 53, p. 2, fn1). The colloquy between Chairperson Perlmutter and LW!'s counsel, Mr. Stuart Klein, makes it expressly clear that BSA was to consider not only whether the amount of the claimed deductions was congruent with what is typical for the size of the building but also what Mr. Klein pressed as the detailed look at the actual pieces of mechanical equipment

planned for placement and the manufacturer's cut slips, containing spatial requirements for optimal operation and servicing of the mechanical equipment (Tr. Sept. 17 Hearing, NYSCEF Dkt. No. 54 at 5:18-22; 6:1-16; see also https://www.youtube.com/watch?v=mDkhklPyhZc,starting time stamp 7:48):

CHAIR PERLMUTTER:

> . . . The question before us is when you look at the, the, the planning of the floor of each mechanical floor, is the amount of mechanical equipment that's shown on the drawings, the amount that is that you would normally associate with a building of this size. That, that's what we're talking about and that's what we've looked at with *Sky House* and it was actually not the Board so much that looked at those drawings. We, we looked at them, but it was the Department of Buildings' engineers who reviewed them and ca- [sic], and concluded in a letter that the amount of mechanical equipment that was in those spaces was reasonable for a building of that type.

MR. KLEIN:

> It's not, it's not it, it obviously, the size of the building and the requirements of the building are dialed into the equation but also the equipment itself because what the Buildings Department refers to is the manufacturing cut slips for the items to determine how much this is [sic] [unintelligible voice] ~~around~~ [sic][surround] and [~~and~~] is necessary ~~preventing~~ [sic] [for venting] ~~the~~ [sic] [and] service and things like that[6].

[6] The transcription of BSA hearings that the City produced as part of its record production contains numerous transcription errors. No court reporter or transcriber was present at any of the hearings, and the transcription was made based on video recordings. Apparently, the transcription was done in haste and without editing. These errors are especially galling in transcription of statements made by Commissioner Sheta, who speaks English with a pronounced accent. LW!'s quotations from the transcript were checked against the corresponding time stamps in applicable recordings and corrections appear in square brackets.

CHAIR PERLMUTTER:

Right. Mechanical drawings do that. You know?

MR. KLEIN:

Right.

CHAIR PERLMUTTER:

The mechanical engineer knows that the workers have to get around.

MR. KLEIN:

Well, they don't do that here. That's the problem.

CHAIR PERLMUTTER:

Right?

MR. KLEIN:

Yeah.

CHAIR PERLMUTTER:

So, the workers have to get around and to work and there needs to be room, to replace equipment –

MR. KLEIN:

Sure.

CHAIR PERLMUTTER:

So, the workers have to get around and to work and there needs to be room, to replace equipment –

MR. KLEIN:

Sure.

CHAIR PERLMUTTER:

-- and that kind of stuff, right?

> And they show ductwork, they show all of that on the –
>
> MR. KLEIN:
>
> Yes.
>
> CHAIR PERLMUTTER:
>
> -- mechanical drawings. So that, that should be adequate.

Extell did not challenge in court via Article 78 the BSA's decision to review the mechanical equipment noted on the ME plans and the appropriateness of the amount of floor area claimed to be necessary for its placement and thus deducted from FAR calculations, noted in both the October 15, 2019 resolution or the subsequently issued November 6, 2020 resolution. Therefore, Extell is barred from now arguing that the BSA erred by considering this question or that LW! is precluded from challenging BSA's denial of the bifurcated portion of its appeal.

In any event, the issues of excessive ME FAR deductions were raised in LW!'s initial submission. (Ex. A to Petition, LW! Statement of Fact, dated May 13, 2019, p. 18 [24 of 199 NYSCEF pagination], NYCEF Dkt. Nos.11;32).[7] of to the BSA and

[7] LW!'s original Statement of Facts contains the following argument on page 18: "In addition to arguing that these supposed mechanical spaces are not accessory uses, the Owner claims that they are permissible as "space used for mechanical equipment," as provided for in ZR § 12-10. As already stated, that section excludes such space from the definition of "floor area" for the

Commissioners Sheta and Scibetta specifically opined that LW! timely raised this issue (Dec. 16, 2019 Exec. Session Hr. Tr., 9:6-9; 12:10-13; https://www.youtube.com/watch?v=ULkvXludblU, time stamp 15:25). Nor does the record before the BSA support a finding of undue prejudice to Extell or the DOB due to consideration of these issues, as required by the City Charter §666(8). Extell received a full and fair opportunity to prepare its argument and present supporting witnesses and could show no prejudice.[8]

purposes of calculating FAR, the basic measure of bulk in the Zoning Resolution. To qualify for the exclusion, however, the space must actually be "used for mechanical equipment. ZR § 12-10 (emphasis added). And while the emphasis of the argument at that time concerned excessive clearance above the equipment, LW! argued that Extell "remain[ed] silent on the nature of the mechanical equipment or its operational characteristics that could clarify its spatial requirements and describe how the cavernous volumetric cubic footage is tied to the optimal technical exploitation of the subject equipment." Since LW! raised the issue of "spatial requirements", that necessarily entailed both the height, width and depth of the surrounding service areas and put Extell on fair notice that the claimed FAR deductions were going to be contested.

[8] Extell's reliance on *Liebman v Shaw* (223 A.D.2d 471[1st Dep. 1996]) for the proposition that "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." First, there is no quarrel that LW! timely commenced its appeal. The scope of the appeal is a separate issue and was not at issue in *Liebman*. Second, by the very language of the decision, *Liebman* applies only to NYC Tax Appeals Tribunal, or any other administrative body that administers "highly judicial nature of proceedings." *Id.* BSA's hearings are not "highly judicial" in nature. The level of misstatements in Extell's counsel's memorandum is quite surprising for a firm that bills itself as possessing top legal talent from throughout the country.

6. *Extell Presents Twisted Reading of Word "Used" in Definition of Mechanical Equipment FAR Deduction*

Extell argues that LW! misrepresented to the court that ZR §12-10 does not contain an applicable definition of the word "use" in an attempt to seduce the court into considering the dictionary definition of the word to "use". (Extell Memo. of Law, p. 22, NYSCEF Dkt. 76).[9] Extell even cites to LW!'s quotation of the definition of the word "use" in its initial May 13, 2019 Statement of Facts, submitted on appeal to the BSA. (NYSCEF Dkt. 11, p. 17; Dkt., 32, p.24). However, the ZR §12-10 contains a definition of the word "use" as a noun, not as a verb.[10] The distinction is very important. The word "use" as a noun concerns what use a building or a tract of land can be put to in a particular zoning district and is not divorceable from its purpose:

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.

[9] Extell also argues in its brief that the ZR defines the phrase "used for" (Extell Memo. of Law, p.3, NYSCEF Dkt. 76), but that is patently false. This verbal phrase is not separately defined anywhere in ZR §12-10.

[10] What is remarkable is that Extell is implicitly admitting that LW!'s original BSA submission discussed subject issues.

(emphasis in original). This definition is then tied to the ZR's Appendix A (Index of Uses), which sets out a table of use groups and the corresponding zoning districts in which each "use" is available. For easier reference, let us take as an example bicycle manufacture use, Use Group 17, which is allowed only in Manufacturing districts (M1, M2, M3). This is not the word "use" in the sense of a verb to use, and does not assist in interpreting the verbal phrase "used for". However, were the court to be persuaded to accept Extell's invitation to adopt this definition to include terms "arranged for," "designed," "intended," "maintained" or "occupied", one would have no choice but to consider (a) operating specifications of the mechanical equipment ("designed", "maintained", "occupied") and (b) owner's rationale for equipment's particular arrangement ("intended", "intended to be carried on"). Either way, Extell's chicanery with FAR ME designation does not pass muster. This is not a matter of ambiguity and differing interpretations. There is nothing ambiguous about the definition of deductible space. Especially if you consider the fact the thinly spread mechanical equipment was coupled with the cavernous vertical space, the "voids", it becomes obvious to anyone concerned that Extell does not intend to use floors designated for mechanical use just to house the equipment. Instead, Extell used this ME layout as a springboard to elevate ultra-luxury apartments to seventh

heaven, all without even having to count against the FAR allowance.

Commissioner Scibetta formulated the best reading of the word use: ". . . mechanical space that does not count towards floor area applies when the space is what the equipment reasonably requires, that the space is exclusively devoted to housing the mechanical equipment used for the service of the building, that the space has no other use, that the mechanical plans cannot realistically be occupied for purposes other than housing the [sic] servicing of said equipment." (Jan. 28, 2020 Hr. Tr., 11: 18-22, NYSCEF Dkt. No. 70).

Extell is wrong in relying on Chairperson Perlmutter's conclusion "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." (Extell Memo. of Law, p. 18, citing to NYSCEF Dkt. No. 3 at 4-5,7). The sinister implication in Extell's argument is that regardless of intentional non-use of space still available after placement of mechanical equipment, the ZR entitles a developer to deduct floor area for the mechanical equipment and ductwork placed unnecessarily and purposefully in mind to "eat up" as much space as possible in an attempt to finagle an FAR deduction to which it would otherwise not be entitled. This is the equivalent of

routing a business trip from New York to Florida through California and taking a tax deduction on the entire amount as necessary for the business expense. Going along with this ruse subverts ZR's strict floor arear regulations. This is no "use" of floor area, but its abject "abuse." Extell here acted in bad faith from the beginning of this project to extract buildable floor area to which it was not otherwise eligible under the ZR.

Commissioner Scibetta was rightfully indignant that the DOB adopted plain reading of the definition of floor area and applied it to analyzing plans on small-to-medium-sized developments, but then ignored it on high-rise developments. (*Id.*, 11:23, 12:1-6). The law must apply equally to all or to none if we are to avoid turning the world of real estate development in NYC into an Orwellian pig farm. For now, high-end developers get fed and low-end small timers get slaughtered, all based on the same principles of presumably equally applied regulations for FAR calculations.

7. *Chairperson Erred in Deciding That Faulting DOB with Dereliction of Its Duty by Not Enforcing ME FAR Deductions Is Outside "the ambit of this interpretive appeal, in which the Board strictly interprets and applies zoning provisions."*[11]

Section 666(6)(a) of the City Charter appoints the BSA as the only governmental body reviewing decisions of, among others, the commissioner for the Department of Buildings. Therefore, if the BSA abdicates its responsibility to review and correct DOB's clear failure to vet claims of ME FAR Deductions on large-scale projects, the floor area regulations in this City have bleak future. If the DOB cannot be challenged for its rubber-stamping of ME deductions for developers on Manhattan, where would the BSA then draw the line in the sand as to when to step in and enforce the ZR. There is plenty of case law bestowing deference to government body's exercise of administrative discretion, but utter lack of enforcement is simply not good government. *See* Verified Petition, ¶¶108-110. It is no government at all, the administrative "white space."

[11] (Nov. 6, 2020 Res., Ex. A to Petition, NYSCEF Dkt. No. 3, p.4).

CONCLUSION

Accordingly, petitioner requests that the Court grant its Article 78 application and reject Respondents' spurious arguments.

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