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

Petitioner,

-against- Index No. 160565/2020

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

Respondents.

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CITY RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S MOTION FOR LEAVE TO RENEW

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September 24, 2021

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Respondents, NEW YORK CITY BOARD OF STANDARDS AND APPEALS ("BSA") and NEW YORK CITY DEPARTMENT OF BUILDINGS ("DOB"), ("City Respondents") by their attorney, GEORGIA M. PESTANA, Corporation Counsel of the City of New York, submits this memorandum of law in opposition to Petitioner's motion for leave to renew the Article 78 petition denied and dismissed by this Court's May 4, 2021 Decision and Order. *See* Notice of Motion.

PRELIMINARY STATEMENT

The instant proceeding involves the proposed development of a 39-story residential and community-facility building in the Special Lincoln Square District. The main issue considered by the BSA was whether the architectural and mechanical plans for the proposed building show sufficient mechanical equipment in the area identified as mechanical space to justify floor-area deductions pursuant to Zoning Resolution ("ZR") § 12-10.[1] In the prior proceedings before this Court, the City Respondents and counsel for EXTELL DEVELOPMENT COMPANY and WEST 66TH SPONSOR LLC ("Owner Respondents") established that the BSA correctly and reasonably rejected Petitioner's contention that the

[1] The BSA Resolution at issue herein is the culmination of prior proceedings that resulted in a September 17, 2019 BSA Resolution. That prior September 17, 2019 BSA Resolution related to two main issues: i) whether the floor-to-ceiling heights of floor space used for mechanical equipment in the proposed building comply with the floor area definition of ZR § 12-10 in effect before May 29, 2019; and ii) whether the proposed building complies with the applicable bulk distribution regulations for zoning lots located in the Special District in accordance with ZR § 83-34. The September 17, 2019 BSA Resolution determined that the proposed building did comply with those provisions of the ZR. While Petitioner herein did not appeal the September 17, 2019 BSA Resolution, 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 (R. 002407 – R. 002417), which, *inter alia*, voided the permit for the proposed building. The City Respondents and the Owner Respondents appealed that Decision and Order, and on July 22, 2021 the Appellate Division, First Department reversed and the proceeding was dismissed. A copy of the Appellate Division Decision and Order is annexed to the Affirmation of Pamela A. Koplik ("Koplik Aff.") filed herewith as Exhibit A.

proposed building does not contain sufficient mechanical equipment to justify the floor-area deductions taken. By Decision and Order dated May 4, 2021, for the reasons stated on the record at oral argument, this Court agreed with the Respondents, denying the petition and finding that the BSA's determination was not arbitrary and capricious. *See* Decision and Order, and the transcript upon which it was based, collectively annexed to the Koplik Aff. as Exhibit B. Now, Petitioner moves for leave to renew the petition "in light of post-judgment legislative developments." *See* Notice of Motion. As Petitioner fails to satisfy the requirements for renewal, the motion should be denied.[2] The crux of the matter is that there has been a change in the law, specifically, the definition of "floor area" in Section 12-10 of the ZR, and that change is not a mere clarification. Because there has been a change in the law and because the project was already vested pursuant to ZR § 11-33,[3] the subject amendment to the ZR § 12-10 does not apply to the proposed building.

STATUTORY FRAMEWORK

Section 2221 of the CPLR sets forth the procedure and requirements of a motion affecting a prior order, such as a motion to reargue or renew. It provides, in pertinent part, as follows:

> **Rule 2221 Motion affecting prior order**
>
> (a) A motion for leave to renew or to reargue a prior motion, for leave to appeal from, or to stay, vacate or modify, an order shall be made, on notice, to the judge who signed the order…

[2] While Petitioner does not allege that it seeks leave to *reargue* its Article 78 Petition, to the extent that its papers can be deemed to be a motion for leave to reargue, the motion should also be denied. Petitioner has not identified any "matters of fact or law allegedly overlooked or misapprehended by the court." *See* CPLR § 2221(d)(2).

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

* * *

(d) A motion for leave to reargue:

1. shall be identified specifically as such;

2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and

3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals.

(e) A motion for leave to renew:

1. shall be identified specifically as such;

2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and

3. shall contain reasonable justification for the failure to present such facts on the prior motion.

(f) A combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought. The court, in determining a combined motion for leave to reargue and leave to renew, shall decide each part of the motion as if it were separately made. If a motion for leave to reargue or leave to renew is granted, the court may adhere to the determination on the original motion or may alter that determination.

Section 12-10 of the ZR, entitled "Definitions," formerly stated, in pertinent part:

However, the *floor area* of a *building* shall not include:

* * *

8) floor space used for mechanical equipment….

Section 12-10 of the ZR was amended in pertinent part as follows (with underlined words being added and strike throughs being deleted):

> However, the *floor area* of a *building* shall not include:
>
> * * *
>
> (8) floor space used for accessory mechanical equipment, including equipment serving the mechanical, electrical, or plumbing systems of *buildings* as well as fire protection systems, and power systems such as solar energy systems, generators, fuel cells, and energy storage systems. Such exclusion shall also include the minimum necessary floor space to provide for necessary maintenance and access to such equipment.

See March 17, 2021 City Planning Commission Report for Application #N 210095 ZRY annexed to the Koplik Aff. as Exhibit C at pp 73-74.

ARGUMENT

THE INSTANT MOTION FOR LEAVE TO RENEW SHOULD BE DENIED BECAUSE PETITIONER HAS NOT DEMONSTRATED THAT THERE HAS BEEN A CHANGE IN THE LAW WHICH WOULD CHANGE THE COURT'S DECISION AND ORDER.

To be granted leave to renew, a movant must submit "new facts not offered on the prior motion that would change the prior determination" or "demonstrate that there has been a change in the law that would change the prior determination." CPLR 2221(e)(2). Petitioner has done neither. Petitioner devotes an excessive amount of pages to asserting that there was a *clarification* in the law as opposed to a change in the law, and asserts that such a clarification in

the law supports a motion for leave to renew.[4] *See* August 6, 2021 Affirmation of Mikhael Sheynker ("Sheynker Aff.") at ¶¶ 2-19. However, petitioner is incorrect in its characterization of the ZR amendment at issue as a mere clarification.

The first sentence of the amendment is admittedly a clarification in the law. The first sentence adds a phrase modifying the term mechanical equipment in the definition of floor space to exclude "floor space used for accessory mechanical equipment, including equipment serving the mechanical, electrical, or plumbing systems of *buildings* as well as fire protection systems, and power systems such as solar energy systems, generators, fuel cells, and energy storage systems." Section 12-10 of the ZR (newly inserted words underlined).

However the next phrase of the amendment, which states "[s]uch exclusion shall also include the minimum necessary floor space to provide for necessary maintenance and access to such equipment"(*Id*.) is a clear change in the law, especially with the addition of the words "minimum necessary." No such minimum requirement was contained within the ZR prior to the amendment. While the BSA (and DOB) did consider and include floor space necessary to maintain and access such equipment in its evaluation of the floor area deductions for the proposed building, it cannot be said that such analysis included the evaluation of the *minimum necessary* floor space. Notably the phrase "minimum necessary" is wholly absent from the BSA Resolution at issue. Therefore, that phrase of the subject amendment must be seen as a change in the law; and because the project for the proposed building had already vested Pursuant to ZR 11-33, the change in the law does not apply to the proposed building permit and does not impact this Court's review of the BSA determination at issue.\

[4] City Respondents generally do not take issue with the notion that a motion for leave to renew can be supported upon a clarification in the law. Notably, however, most caselaw on this point seems to refer to a clarification in the decisional law, not in statutory or regulatory law. *See*, *e.g*. *Dinallo v. DAL Elec*., 60 A.D.3d 620 (2d Dept. 2009); *Roundabout Theatre Co. v. Tishman Realty & Constr. Co.*, 302 A.D.2d 272 (1st Dept. 2003).

As set forth in City Respondent's Memorandum of Law in Opposition to the Petition (Dkt. 72), 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 ZR. 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). *See* composite drawings annexed to DOB's October 16, 2019 Submission (R. 002418 – R. 002448) and Owner Respondents' October 21, 2019 Submission (R. 002449 – R. 002480). 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 Respondent 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). 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 area identified as mechanical space to justify floor area deductions.

Contrary to Petitioner's assertions in its motion for leave to renew, the newly inserted words in the recent ZR amendment do not change the analysis for the instant case because of the project's vesting. Moreover, a proper reading of the amended definition of Floor Area in § 12-10 of ZR must still turn on the ZRs' definition of "use" and "used for," which Petitioner improperly abandons for a dictionary definition of the term "use." *See* Sheynker Aff. at ¶¶ 8, 16, and fn. 3. The amended definition reads in part, "the *floor area* of a *building* shall not include" …"(8) floor space **used for** accessory mechanical equipment (emphasis supplied)" and then qualifies that such mechanical equipment includes various types ("including equipment serving the mechanical, electrical, or plumbing systems of *buildings* as well as fire protection systems, and power systems such as solar energy systems, generators, fuel cells, and energy storage systems. Such exclusion shall also include the minimum necessary floor space to provide for necessary maintenance and access to such equipment.") ZR § 12-10.

Petitioner's erroneous argument that ZR amendment "contains a clarification that establishes the BSA's denial of the appeal was a result of a gross misreading of the word 'use" in paragraph (8) of the definition of Floor area" (Sheynker Aff. at ¶ 8) is astounding in completely ignoring the ZRs' definitions of the terms "use" and "used for." ZR § 12-10 defines "use" 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)

ZR § 12-01(f) states as follows: The phrase "used for" includes "arranged for", "designed for", "maintained for", "or occupied for." In light of the ZRs definitions of "use" and "used for," which have remained unchanged and were not amended, the design of a space for mechanical equipment or the intention for the space to be used for mechanical equipment constitutes mechanical space "use" to justify the floor-area exemptions.

Moreover, while the second sentence of the subject ZR amendment would change the analysis because it adds the requirement to only include the "minimum necessary floor space to provide for necessary maintenance and access to such equipment" in floor area deductions, such amendment was made subsequent to the project's vesting and therefore is inapplicable to the instant case.[5] *See* ZR 11-33.

Petitioner includes materials to assert that the subject amendment to the ZR was a mere clarification including: i) a March 5, 2021 Department of City Planning's ("DCP") Notice of Completion of the Final Environmental Impact Statement (Sheynker Aff., Exhibit D); ii) a DCP Community Outreach Summary (Sheynker Aff., Exhibit E); and iii) an April 27, 2021 City Council Transcript of the Minutes of the Committee on Land Use (Sheynker Aff., Exhibit F). But cherry picking isolated descriptions of the amendment to the ZR as a "mere clarification" does not change the fact that the amendment was much more than a clarification. The new requirement in ZR § 12-10 that the definition of the floor area of a building shall not include "the minimum necessary floor space to provide for necessary maintenance and access to such equipment" is a minimum requirement that did not previously exist in the ZR at the time that the project at issue vested.

[5] There was no dispute before the BSA concerning vesting pursuant to ZR § 11-33 (R. 002373). Notably, the Appellate Division Decision and Order in *The City Club of New York v. New York City Board of Standards and Appeals, et al.* (Index No. 161071/2019) explicitly noted that the project had vested. *See* Exhibit A to Koplik Aff. at p. 2 and 6-7.

Nevertheless, these documents provide nothing in analyzing whether or not the ZR in the instant case was correctly applied by the BSA to uphold the issuance of the building permit for the proposed building. As already established in prior proceedings before this Court, the ZR was properly applied, and this proper application cannot be revisited with a post-vesting change in the ZR.

CONCLUSION

For the reasons set forth above, City Respondents respectfully request that the Court deny the instant motion in its entirety, and grant such other and further relief as the Court deems just and proper.

Dated: New York, New York
September 24, 2021

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CERTIFICATION UNDER UNIFORM CIVIL RULE 202.8-b

According to Microsoft Word, the portions of the City Respondents' Memorandum of Law that must be included in a word count contain 2885 words, and comply with Uniform Civil Rule 202.8-b.

Dated: New York, NY
September 24, 2021

Respectfully submitted,

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By: _____/s/_____
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