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

LANDMARKWEST! INC., Petitioner, v. NEW YORK CITY BOARD OF STANDARDS AND APPEALS, NEW YORK CITY DEPARTMENT OF BUILDINGS, EXTELL DEVELOPMENT COMPANY, and WEST 66TH SPONSOR LLC, Respondents.	Index No. 160565/2020 IAS Part 6 Hon. Eileen A. Rakower Motion Sequence 2

EXTELL RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO RENEW

Respondent Extell Development Company and its affiliate West 66th Sponsor LLC (together, "Extell") respectfully submit this memorandum of law in opposition to motion of Petitioner, LandmarkWest! Inc., to renew its Article 78 petition that this Court denied and dismissed in its Decision and Order dated May 4, 2021.

INTRODUCTION

LandmarkWest!'s motion to renew fails to state any valid reason for this Court to revisit its sound ruling upholding a rational determination by the New York City Board of Standards and Appeals (BSA). Disgruntled about the height of Extell's building project on the Upper West Side, LandmarkWest! and other challengers have litigated numerous theories to try to convince the Department of Buildings (DOB), BSA, or the courts that the project somehow violates the zoning rules. It does not, as DOB and BSA have consistently ruled. While another challenger temporarily managed to persuade a different judge to overturn BSA's ruling on zoning issues relating to the height of Extell's building, the Appellate Division unanimously reversed, holding

that BSA's well-considered decision was rational and "entitled to deference." *City Club of N.Y. v. BSA*, --- N.Y.S.3d ----, 2021 WL 3083700, at *3 (1st Dep't July 22, 2021).

In this proceeding, LandmarkWest! belatedly challenged the project's use of *horizontal* floor area for mechanical equipment, even though its real objection was to the *height* of the building. In its motion, LandmarkWest! now openly admits (¶¶ 24-25) that the goal of its horizontal-floor-area challenge is to try to strip Extell of its vesting rights and force Extell to "redraw its plans" under new height rules that were enacted *after* Extell had completed the project's foundation and thus indisputably do not apply to the current, vested project. This remarkable and telling admission of LandmarkWest!'s true motives lays bare that LandmarkWest! claims no injury from the *horizontal* floor area it purports to challenge and instead is misusing the courts to try to cancel Extell's permit by any possible means in the hope that it can somehow force Extell to start over under different *height* rules that LandmarkWest! prefers.

In its final Decision and Order in this case, this Court recognized that BSA had considered all of LandmarkWest!'s arguments and carefully examined the plans for Extell's mechanical floors, and this Court correctly held that BSA's decision to uphold the permit was not arbitrary or capricious. The soundness of this Court's ruling has been reinforced by the Appellate Division's recent unanimous reversal of another judge's failure to accord proper deference to BSA's rulings on the project's compliance with height-related zoning regulations. *City Club*, 2021 WL 3083700, at *3.

Yet LandmarkWest! now brings a meritless renewal motion, arguing that the Court's decision was "erroneous" and decrying Extell's project as a "monstrosity" that threatens "the architectural and urban integrity of the Upper West Side neighborhood" and is a product of

"wealth and greed" (¶¶ 5, 22, 26). Setting these gratuitous bitter attacks aside, LandmarkWest! states no valid basis for renewal, instead insisting that the Court got it wrong or somehow "might not have appreciated the importance of the issues raised on this Petition" (¶ 22). As a pretext for renewal, LandmarkWest! adopts an untenable misreading of a "Flood Resiliency" amendment to the Zoning Resolution. This project is not affected by the flood resiliency issues that prompted the amendment—and more fundamentally, Extell's project vested in April 2019, more than two years *prior* to the 2021 Flood Resiliency amendment. In short, the motion fails out of the gate because the 2021 Flood Resiliency amendment does not apply to this project. Yet LandmarkWest! tries to use the 2021 Flood Resiliency amendment as an excuse to revisit its failed theory that Extell should somehow be required to cram its mechanical equipment into the smallest conceivable floor-area footprint.

LandmarkWest!'s theory is not the rule: floor area is deemed to be "used for" mechanical equipment where, as here, it "is devoted to housing the mechanical equipment of the proposed building and those floors cannot be occupied for purposes other than the housing of such equipment." Dkt. 14 at 3 (DOB statement). The 2021 Flood Resiliency amendment did not change that standard. Instead, prompted by concerns that arose in the context of *retrofitting* mechanical equipment in connection with flood recovery efforts (Dkt. 91 at 34-35), the 2021 Flood Resiliency amendment provides that owners may *also* deduct certain areas even if not themselves "used for" mechanical equipment, but then limited the scope of that allowance to the minimum needed. Here, all of the project's deducted floor area is "used for mechanical equipment" as defined by the Zoning Resolution (which definition remained untouched by the 2021 Flood Resiliency amendment). Nor was any equipment being relocated or retrofitted for flood recovery. The 2021 Flood Resiliency amendment simply does not affect the analysis.

But even if Extell's project included space addressed by the 2021 Flood Resiliency amendment, the amendment does not apply to Extell's project because the project had already vested in 2019, *two years prior* to the amendment's effective date. Recognizing these fatal facts, LandmarkWest! insists that its untenable interpretation of the 2021 Flood Resiliency amendment is only a "clarification," appearing to believe that such a characterization would somehow give it retroactive effect. LandmarkWest!'s theory fails for two reasons. First, if the amendment meant what LandmarkWest! says (that is, that all such deductions are now limited to the minimum necessary allowances), it plainly would be a *change* in law—a radical and impracticable change that would unduly restrict property owners' discretion in their arrangement of mechanical equipment and impose a costly and unworkable burden of review on DOB and BSA to pack mechanical equipment into its smallest possible arrangement. And again, such a change plainly could not apply to Extell's project retroactively. Second, even legislative amendments characterized as clarifications do not apply to vested projects absent express language providing for an amendment's retroactive application, which indisputably is not the case here.

At bottom, LandmarkWest! identifies no basis for the Court to depart from its ruling that BSA carefully considered all of LandmarkWest!'s arguments, applied its expert judgment to the facts and circumstances of Extell's project, and rationally upheld Extell's permit. Nothing about BSA's review and reasoning was arbitrary or capricious, and it remains entitled to deference.

BACKGROUND

This Court is well familiar with the facts of this case, having received more than 250 pages of briefing and pleadings, a record of more than 3400 pages, and oral argument from LandmarkWest!, the BSA, and Extell. In the interest of brevity, Extell here briefly summarizes facts discussed in greater detail in its answer and opposition to LandmarkWest!'s Article 78 petition. *See* Dkt. 73; Dkt. 76 at 4-13.

A. DOB and BSA Conduct Fact-Intensive Analysis to Determine that the Project's Mechanical Spaces Are Used for Mechanical Equipment

This action concerns a building project on Manhattan's Upper West Side, which vested in April 2019. LandmarkWest! and others who dislike the building's height have pursued challenges, arguing that the building is too tall under the zoning rules, but DOB and BSA found that Extell's building plans comply with applicable zoning rules governing the building's height, and the First Department has rejected those challenges and ruled that the BSA's determination was rational. *City Club of N.Y. v. BSA*, 2021 WL 3083700 (1st Dep't July 22, 2021). In the middle of proceedings before the BSA, LandmarkWest! belatedly raised the challenge at issue here, to the *horizontal* floor area for the project's mechanical floors, arguing that Extell excluded too much horizontal floor area as being "used for mechanical equipment." *See* Dkt. 12.

Notwithstanding the untimeliness of LandmarkWest!'s "horizontal" challenge, the BSA, a specialized agency with unique expertise in zoning matters, conducted a careful and detailed analysis of LandmarkWest!'s argument. The BSA directed DOB to re-review the building's mechanical plans, and DOB analyzed the building's mechanical equipment to verify that Extell's floor-area deductions were proper. Using the BSA's prior precedent as a "blueprint," DOB identified the following mechanical equipment on the project's four mechanical floors:

- 15th Floor: "storm water detention tank, electrical switchboard, electric unit heaters, water source heat pumps, fan units, a duct heater, an electric humidifier, energy recovery unit (water source heat pump), an emergency generator, an exterior lighting dimmer rack, intake sound attenuators, and a sheet metal plenum behind louver"
- 17th Floor: "Boilers, electric unit heaters, water source heat pumps, fan units, a 2-pipe fan coil unit, hot water expansion tanks, air separators, hot water pumps, hot water heat exchangers, an air handler unit, an air intake louver, an exhaust louver, and pipe chase containing the elevator smoke vent and the elevator shaft supply duct passing through the floor"
- 18th Floor: "water cooled direct expansion air conditioning (DX) unit, cold water pumps; cold and hot water pumps, expansion tanks, air separators, water source heat

pumps, electric unit heaters, electric panels, water cooled chillers, fan units, heat exchangers, an exhaust louver, and an intake louver"

- 19th Floor: "fire reserve storage tank, water source heat pumps, energy recovery units (water source heat pumps), fan units, an electric humidifier, electric unit heaters, an intake louver, and an exhaust louver"

Dkt. 14 at 3-4. Based on its review, DOB concluded that "**the floor space on such floors is devoted to housing the mechanical equipment of the proposed building and those floors cannot be occupied for purposes other than the housing of such equipment**." *Id.* at 3 (emphasis added). DOB also concluded upon analysis that the number of floors deducted for mechanical equipment was "consistent with similarly sized buildings." *Id.*

The BSA conducted hours of public hearings and received expert testimony. *See* Dkt. 16 at 14-16; Dkt. 18 at 6-7, 87-121. On January 28, 2020, the BSA concluded that LandmarkWest! had "not demonstrated that the architectural and mechanical plans for the New Building show insufficient mechanical equipment in the area identified as mechanical space to justify floor-area deductions." Dkt. 3 at 3. The BSA also noted that "expert testimony provided by the Owner demonstrates that other similar buildings contain 12 mechanical floors, whereas the New Building contains 4—well within the range of standard practices for constructing buildings of this scale." *Id.* at 4-5. The BSA explained that it had reviewed the record, expert testimony, and plans for the building, and found that the building's plans "demonstrate sufficient floor-based mechanical equipment." *Id.* at 4.

B. This Court Upholds the BSA's Rational and Well-Considered Determination

On December 7, 2020, LandmarkWest! brought this Article 78 challenge, arguing that the BSA's determination was arbitrary and capricious and was not entitled to deference. Dkt. 1. The Court denied LandmarkWest!'s petition on May 4, 2021. Dkt. 80. The Court found that the BSA had rationally considered LandmarkWest!'s arguments and found them unavailing: "they

went through all of the arguments and they made a determination that the permit should be upheld and it was not arbitrary, it was not capricious." Dkt. 81 at 23. The Court held that the BSA had made factual findings that the Court would not overturn: "They did look at the amount of equipment, the types of equipment. They explored the reasoning regarding exhausting certain equipment, servicing certain equipment, and it's not how many people you could fit in a room to service equipment. It could just be the size, the mere size of the equipment itself which has to be managed in a certain space to service that equipment." *Id.* Accordingly, the Court properly declined to "substitute its judgment for that of the BSA" and denied the petition. *Id.*

C. The Instant Motion to Renew

Dissatisfied with the outcome of its challenge and insisting (¶ 5) that the Court's ruling was "erroneous," LandmarkWest! now brings this motion to renew based on the Flood Resiliency amendment that was approved by the City Council on May 12, 2021. The 2021 Flood Resiliency amendment, which post-dates the vesting of Extell's project by more than two years, was intended to allow greater flexibility for homeowners taking flood resiliency measures—for example, to relocate mechanical equipment from their basement to their yard without having to sacrifice a floor-area deduction. The 2021 Flood Resiliency amendment does not state that it will apply retroactively, and its text and legislative history make clear that it is intended to *expand*, not contract, property owners' ability to deduct floor area in connection with mechanical equipment.

ARGUMENT

I. Changes to the Zoning Resolution that Post-Date the Project's Vesting Date Do Not Apply to the Project

As a threshold dispositive matter, because Extell's building project lawfully vested in April 2019, changes to the Zoning Resolution that become effective after that date do not apply

the project. *See* ZR 11-311 (where permit has lawfully vested, owner may continue construction irrespective of subsequent amendments to ZR); *see also City Club of N.Y. v. BSA*, --- N.YS.3d ----, 2021 WL 3083700, at *1 (1st Dep't July 22, 2021) ("the project vested" in April 2019).

Indeed, the First Department has already confronted and decided this precise issue in connection with this very project, with respect to another amendment of the Zoning Resolution that post-dated the project's vesting date (and pre-dates the 2021 Flood Resiliency amendment LandmarkWest! cites in its renewal motion). Specifically, the First Department held: "**the project's foundation's completion prior to the effective date of ZR § 12-10's amendment permitted the project to proceed with construction as of right under ZR § 11-331**." *City Club*, 2021 WL 3083700, at *3 (emphasis added). The First Department therefore reviewed the BSA's application of ZR 12-10 as it existed "*prior to its amendment*." *Id.* (emphasis added). That principle applies with equal if not greater force here: the Flood Resiliency amendment was effective May 12, 2021, more than two years after the project vested in April 2019.

The vesting law exists for good reason: it is an elementary principle of fairness that "individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Regina Metro. Co. v. DHCR*, 35 N.Y.3d 332, 370 (2020) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994)). Accordingly, new laws do not apply retroactively without a "'clear expression'" of such intent. *Id.* The fairness and due process problems with applying a new law retroactively "are further heightened where, as here, the new statutory provisions affect contractual or property rights, matters in which predictability and stability are of prime importance" *Id.* at 382 (holding that retroactive application of amendment would violate due process).

Predictability and stability are of prime importance in matters of property rights because property owners reasonably rely on the predictability and stability of the law in developing their property—in this case, Extell has spent hundreds of millions of dollars on its building project in reasonable reliance on that predictability and stability. This Court has already carefully considered the BSA's analysis of the project's compliance with the Zoning Resolution as it existed at the project's vesting date and held that it was not arbitrary or capricious. It would violate the fundamental principles of vesting and the "deeply rooted" presumption against retroactive legislation for the Court to revisit the question based on an amendment that post-dated not only the project's vesting date, but also the BSA's ruling. *Landgraf*, 511 U.S. at 265.

II. The 2021 Flood Resiliency Amendment Does Not Have Retroactive Effect and Cannot Render the BSA's Decision Retroactively Arbitrary and Capricious

Desperate to circumvent the clear and controlling law establishing that Extell's vested project is not subject to post-vesting Zoning Resolution amendments, LandmarkWest! advances an argument that would require this Court not only to give the 2021 Flood Resiliency amendment retroactive effect, but also to conclude that the amendment somehow retroactively renders the BSA's prior decision arbitrary and capricious. LandmarkWest! is wrong on both counts.

First, the 2021 Flood Resiliency amendment cannot be applied retroactively to further restrict Extell's property rights. For starters, even where an amendment's purpose is "to clarify the preexisting intent of the legislature," that is "not an adequate basis for finding that the legislature intended the amendment to be applied retroactively." 97 N.Y. Jur. 2d Statutes § 235 (citing *Schultz Constr. v. Ross*, 76 A.D.2d 151, 154 (3d Dep't 1980), *aff'd*, 53 N.Y.2d 790 & 792 (1981)). Rather, the court must find "a clear expression" that the legislative body specifically intended the amendment to *apply retroactively*, sufficient to assure that the legislative body "has

affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Regina Metro.*, 35 N.Y.3d at 370 (quoting *Landgraf*, 511 U.S. at 272-73).

LandmarkWest! does not and cannot identify any such "clear expression" of retroactive application here. Indeed, nothing in LandmarkWest!'s proffered legislative history suggests that this *Flood Resiliency* amendment was enacted with any thought at all for potential impact—retroactive or otherwise—on property owners in Extell's position. Rather, by LandmarkWest!'s own account (¶ 5), the 2021 Flood Resiliency amendment was targeted to "Flood Hazard Areas" to "*remove zoning barriers* that hinder the reconstruction and retrofitting of buildings to resiliency standards and to help ensure that new construction will be more resilient" (quoting CPC Report; emphasis added). As to the 2021 Flood Resiliency amendment's specific changes to the definition of "floor area" in ZR 12-10, LandmarkWest! admits (¶ 12) that those changes were intended to enable homeowners to relocate their mechanical equipment "above the flood zone level." Those purposes are *prospective*, not retrospective (flood-resiliency measures, including relocating and retrofitting equipment, involve preparing for future weather events), and have nothing to do with Extell's project. Moreover, the express purpose was to *remove* zoning barriers, not to impose more restrictive zoning barriers. The CPC's report states that the goal of the 2021 Flood Resiliency amendment is to facilitate future recovery from storm-related flooding "by *reducing* regulatory obstacles." Dkt. 86 at 33 (emphasis added).

Tellingly, and in stark contrast to the 2021 Flood Resiliency amendment, other legislation the City Council approved the very same day expressly provides for potential retroactive application. *See* Dkt. 87 at 1118 (new section 25-435.1 of administrative code "is retroactive to and deemed to have been in effect as of July 1, 2020"), 1121 (new section 25-467.4 of

administrative code "shall be retroactive to and deemed to have been in full force and effect as of June 30, 2021" if it becomes law after that date). The 2021 Flood Resiliency amendment does not contain any such language. Notably, even these laws with express retroactivity provisions did *not* reach back more than *two years* to April 2019 when Extell's project vested. LandmarkWest!'s own cited authority reinforces that, on the facts presented here, the 2021 Flood Resiliency amendment does not warrant retroactive application. *See, e.g.*, *In re Gleason (Michael Vee, Ltd.)*, 96 N.Y.2d 117, 122 (2001) ("Amendments are presumed to have prospective application unless the Legislature's preference for retroactivity is explicitly stated or clearly indicated."); *Town of Cortlandt v. N.Y.S. Bd. of Real Prop. Servs*., 36 A.D.3d 823, 826 (2d Dep't 2007) (recognizing "fundamental canon of statutory construction that retroactive operation is not favored by courts and statutes will not be given such construction unless the language expressly or by necessary implication requires it").

Second, the *May 2021* Flood Resiliency amendment cannot retroactively render the BSA's *January 2020* resolution arbitrary and capricious. It is a "fundamental principle of Article 78 review" that judicial review of administrative decisions is confined to what was before the agency. *Rizzo v. DHCR*, 6 N.Y.3d 104, 110 (2005) ("'the admission of subsequent events which occurred after the final agency order would defeat finality and could subject an otherwise final order to endless recurring review'"); *see also Waverly Place Assocs. v. DHCR*, 292 A.D.2d 211, 212 (1st Dep't 2002) (refusing to remand to agency to apply amendment that "did not become effective until after DHCR issued the determination now under review"). Accordingly, a court may not consider "events that took place after the agency made its determination." *Id.* This Court rightly determined that the BSA's January 2020 decision was not arbitrary or capricious. Dkt. 81 at 23. That determination cannot be affected by a Zoning Resolution amendment enacted well

over a year *after* the BSA made its determination and therefore plainly was not before the agency when the administrative determination was rendered. LandmarkWest! cites no authority granting leave to renew judicial review of a rational agency determination where, as here, the renewal request is based on an amendment enacted *after* the determination. *Cf. 620 W. 182nd St. Heights Assocs. v. Dep't of Hous. Pres. & Dev. of City of N.Y.*, 149 A.D.3d 558, 559 (1st Dep't 2017) (denying renewal for "change in circumstances after the agency's determination"); *Matter of W. Vill. Houses Tenants' Ass'n v. BSA*, 302 A.D.2d 230, 231 (1st Dep't 2003) (motion to renew should have been denied because new document "did not come into existence until after the Board's determination").

III. By LandmarkWest!'s Own Characterization of the 2021 Flood Resiliency Amendment, It Does Not Meet the Requirements for Renewal

In addition to the foregoing failures, LandmarkWest!'s motion to renew fails on its own terms as well. Specifically, by insisting (*e.g.*, ¶ 7) that the 2021 Flood Resiliency amendment is *not* a "change in law," LandmarkWest! establishes that its motion to renew is improper because renewal requires, as relevant here, "a *change in the law* that would change the prior determination." CPLR 2221(e) (emphasis added). The First Department has made clear that an intervening event that "merely clarifies existing law does *not* afford a basis for renewal attributed to a change in the law." *D'Alessandro v. Carro*, 123 A.D.3d 1, 7 (1st Dep't 2014) (emphasis added) (citing *Philips Int'l Invs. v. Pektor*, 117 A.D.3d 1, 4 (1st Dep't 2014)); *see also N.Y.C. Asbestos Litig.*, 2020 WL 1065949, at *3 (Sup. Ct. N.Y. Cty. Mar. 5, 2020) ("intervening decision providing clarification of existing law does not create a basis for renewal"); *Liporace v. Niemark & Niemark, LLP*, 2017 WL 4890713, at *1 (Sup. Ct. N.Y. Cty. Oct. 25, 2017) (same).

LandmarkWest!'s contention (¶ 4) that it is somehow "axiomatic" that renewal lies from a mere clarification, as distinct from a change, is wrong and unsupported by its cited authority:

In *Roundabout Theatre Co. v. Tishman Realty & Const.*, 302 A.D.2d 272, 272-73 (1st Dep't 2003), renewal was based on an intervening Court of Appeals case that was a *change* in the law—deciding "novel issues" and reversing several Appellate Division rulings. *See 532 Madison Ave. Gourmet Foods v. Finlandia Ctr.*, 96 N.Y.2d 280, 286 (2001). The court's passing reference in *Roundabout* to "an intervening clarification," 302 A.D.2d at 273, was not drawing any legal distinction between a clarification and a change, did not purport to expand the scope of CPLR 2221(e), and pre-dates the First Department's more recent decisions in *D'Alessandro* and *Philips* that squarely address the issue.

LandmarkWest! insists (¶ 20) that the 2021 Flood Resiliency amendment's change "adds nothing" and is the equivalent of saying "that 'blue' sky is 'blue.'" By LandmarkWest!'s own lights, then, the 2021 Flood Resiliency amendment provides no basis for renewal: the First Department has made clear that a new source of legal authority that "did no more than restate" existing law, "albeit more clearly," is "not a sufficient basis for renewal." *Philips Int'l Invs., v. Pektor*, 117 A.D.3d 1, 4, 7 (1st Dep't 2014) (affirming denial of renewal motion premised on Court of Appeals decision that "merely clarified existing law").

IV. The Terms of the 2021 Flood Resiliency Amendment Do Not Apply, But Even If They Did, They Would Not Affect the Outcome in Any Event

Given the 2021 Flood Resiliency amendment's clear inapplicability to Extell's 2019-vested project, this Court need not reach questions concerning interpretation of the amendment's various parts. LandmarkWest!'s interpretation, however, is incorrect, constituting yet another fatal flaw in its motion. *Cf. DeRaffele Mfg. v. Kaloakas Mgmt.*, 48 A.D.3d 807, 809 (2d Dep't 2008) (motion to renew properly denied where alleged change of law would not have altered prior determination).

The 2021 Flood Resiliency amendment *revised* one sentence and *added* one sentence in the definition of "floor area" pertaining to floor-area deductions for use of mechanical equipment. In the sentence that was *revised*, the pre-amendment Zoning Resolution provided that "floor space used for mechanical equipment" could be excluded from "floor area." In turn, the Zoning Resolution broadly defined "used for" as follows: "The phrase 'used for' includes 'arranged for,' designed for,' 'intended for,' 'maintained for,' or 'occupied for.'" ZR 12-01(f); *see also* ZR 12-10 (broadly defining "use"). That broad definition of "used for" remains intact and *was not revised at all* in the 2021 Flood Resiliency amendment.

This exclusion of "floor space used for mechanical equipment" was the basis for DOB's and BSA's exclusion of Extell's four mechanical floors from the "floor area" of the project here. Consistent with the Zoning Resolution's broad definitions of "use" and "used for," DOB concluded, and the BSA affirmed, that the floor space of the project's four mechanical floors here was "used for mechanical equipment." As DOB properly found, the project's mechanical floors here are "devoted to housing the mechanical equipment of the proposed building and those floors cannot be occupied for purposes other than the housing of such equipment." Dkt. 14 at 3.

In the 2021 Flood Resiliency amendment, this language was revised to "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." The additional words indisputably do not alter the analysis of whether Extell's floor space is used for mechanical equipment. LandmarkWest! does not contend otherwise. No restrictive language was added to this portion of the provision in the 2021 Flood Resiliency amendment. Accordingly, Extell's four mechanical floors would still qualify as "used for accessory mechanical equipment" under the amended provision.

The 2021 Flood Resiliency amendment also *added* a new, separate sentence to the Zoning Resolution: "Such exclusion *shall* ***also*** *include* the minimum necessary floor space to provide for necessary maintenance and access to such equipment" (emphasis added). As LandmarkWest!'s own account of the legislative history states (¶ 13), this identification of a *second* category of floor space for deduction arose from circumstances where owners in flood areas were "trying to reconfigure and relocate building systems"—placing the mechanical equipment away from the flood risk, which "can pose difficulties" in determining floor-area deductions for "space used to access the equipment" (quoting DCP *Community Outreach Summary*). As the City Planning Commission Report explained, the rules "in some situations, made it difficult to retrofit buildings in the floodplain by moving mechanical equipment from below-grade locations, where they are fully exempted from floor area calculations, to upper areas, where they may not be exempted." Dkt. 91 at 34-35. The second amendment provided for deductions in such situations, and the City Council then restricted those deductions to the minimum necessary for such areas.

Of course, Extell did not rely on this second, newly added category for its floor-area calculations, not only because Extell was not retrofitting or relocating equipment for flood resiliency, but also because the newly added sentence was not even part of the applicable Zoning Resolution. The project's floor-area deductions here were based solely on "floor space used for mechanical equipment" because each of the four floors being used in the project for mechanical equipment are dedicated mechanical floors that do not serve any other use. To be sure, dedicated floor space "used for" mechanical equipment also includes necessary clearance for the equipment, to facilitate servicing, and to provide access. That was certainly the case for the mechanical floors of Extell's project. However, the dedicated floor space "used for" mechanical

equipment that serves these functions is not and never has been constrained to the "minimum necessary" area to do so. That was true under the Zoning Resolution as it applied to Extell's project as of the time of vesting, and (although inapplicable to this Article 78) it remains true under the 2021 Flood Resiliency amendment as well. *None* of Extell's floor-area deduction was claimed under 2021 Flood Resiliency amendment's newly added category, and thus the new "minimum necessary" restriction would not come into play even if the 2021 Flood Resiliency amendment had provided for retroactive application to Extell's project (it does not).

But in its motion to renew, LandmarkWest! uses a loose mix-and-match approach, latching onto the words "minimum necessary" that describe the newly added *second* category of excludable floor area and inappropriately reading those words backward into the *preceding* sentence that broadly permits exclusion for "floor space used for accessory mechanical equipment." That is not what the 2021 Flood Resiliency amendment says. And for good reason: it would be impracticably burdensome and contrary to sound mechanical engineering practice to require property owners to cram their mechanical equipment into the "minimum necessary" space—particularly in a building like Extell's where entire floors are devoted to mechanical equipment and, as DOB found, "cannot be occupied for purposes other than the housing of such equipment." Dkt. 14 at 3.

LandmarkWest!'s attempt to impose a "minimum necessary" requirement even where floor space is being "used for" accessory mechanical equipment does not appear anywhere in the statute that was in effect at the time of vesting or even in the amended statute, and therefore would run afoul of the well-settled principle that a court "cannot amend a statute by inserting words that are not there." *People v. Buyund*, 179 A.D.3d 161, 169 (2d Dep't 2019) (quoting *Chem. Specialties Mfrs. Ass'n v. Jorling*, 85 N.Y.2d 392, 394 (1995); *see also Flores v. Lower E.*

Side Serv. Ctr., 4 N.Y.3d 363, 369 (2005) (refusing to "presume that the Legislature meant to impose a restriction it failed to include in the statute" where "it is evident that the Legislature knows how to impose such a limitation when it intends to do so"). LandmarkWest!'s untenable interpretation is also contrary to the express purpose of the 2021 Flood Resiliency amendment. A court "must consider the spirit and purpose of the act and the objects to be accomplished." *People v. Thomas*, 33 N.Y.3d 1, 6 (2019). The purpose of the 2021 Flood Resiliency amendment was to *expand*, not limit, the available floor-space exclusions related to mechanical equipment, to allow *greater* flexibility for homeowners taking flood resiliency measures—for example, to relocate mechanical equipment from their basement to their yard without having to sacrifice a floor-area deduction.

Moreover, the fact that parts of the 2021 Flood Resiliency amendment have been described in non-binding commentary as a "clarification" would mean that they should be construed narrowly—and certainly not as a departure from the BSA's prior rational interpretation. *See Mayblum v. Chu*, 67 N.Y.2d 1008, 1010 (1986) (where purpose of amendment was to "clarify" prior law, court should not read amendment as "change in judicial construction").

LandmarkWest!'s radical interpretation would in fact render the 2021 Flood Resiliency amendment not a mere "clarification," but a major—and impracticable—change in the law. *Cf. Mayer v. City Rent Agency*, 46 N.Y.2d 139, 149 (1978) (statute could not be deemed "clarification" by mere say-so); *Roosevelt Raceway v. Monaghan*, 9 N.Y.2d 293, 304-05 (1961) ("clarification" by legislature could not change original interpretation of statute: "The Legislature has no power to declare, retroactively, that an existing statute shall receive a given

construction when such a construction is contrary to that which the statute would ordinarily have received.").

Reinterpreting the Zoning Resolution to require mechanical equipment to be crammed into the smallest possible area would also violate the longstanding rule that because "zoning ordinances are in derogation of common-law rights," they "must be strictly construed so as not to place any greater interference upon the free use land than is absolutely required." *Exxon Corp. v. BSA*, 128 A.D.2d 289, 295-96 (1st Dep't 1987). As the Court of Appeals had made clear: "Any ambiguity in the language used in such regulations must be resolved in favor of the property owner." *Allen v. Adami*, 39 N.Y.2d 275, 277 (1976).

Nor does the 2021 Flood Resiliency amendment provide any basis for the Court to depart from the settled standards for Article 78 review: "the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious." *Hodge v. N.Y.C. Transit Auth.*, 2019 WL 1091253, at *2 (Sup. Ct. N.Y. Cty. Mar. 7, 2019). ZR 12-10 in particular contains a "complex set of cross-references and interlocking provisions" that "counsels deference" to the BSA. *Peyton v. BSA,* 36 N.Y.3d 271, 280-81 (2020). And this case in particular "entails an evaluation of factual data and inferences, and involves knowledge and understanding of underlying operational practices," requiring deference to the BSA's decision as long as it was "rational." *City Club of N.Y. v. BSA*, --- N.Y.S.3d ----, 2021 WL 3083700, at *3 (1st Dep't 2021). Nothing in the May 2021 Flood Resiliency amendment changes the Court's sound conclusion that there was a rational basis for the BSA's decision. As the Court rightly held, the BSA's January 2020 decision was not arbitrary or capricious.

* * *

In sum, this proceeding does not call for the Court to construe the specific terms of the 2021 Flood Resiliency amendment because that amendment does not apply to this project and was not part of the BSA decision under review in this Article 78 proceeding. The 2021 Flood Resiliency amendment was not part of the record before the BSA, not part of the BSA's or this Court's reasoning, and not enacted until two years *after* Extell's project vested. Unless an amendment expressly provides for retroactive application (regardless of whether it is characterized as a change or a clarification), it does not and cannot apply retroactively to a vested project. The First Department's recent decision affirming the BSA's analysis of this project based on the regulations in place at the time that it vested in 2019—and not based on subsequent amendments from 2020—further confirms that LandmarkWest!'s motion to renew lacks merit.

CONCLUSION

For these reasons, Extell respectfully requests that the Court deny LandmarkWest!'s motion to renew.

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Respectfully submitted,

/s/ Jason Cyrulnik
Jason Cyrulnik
Paul Fattaruso
Adina Levine
CYRULNIK FATTARUSO LLP
55 Broadway, Third Floor
New York, NY 10006
646 844 2466
jcyrulnik@cf-llp.com
pfattaruso@cf-llp.com
alevine@cf-llp.com

Counsel for Respondents Extell Development Company and West 66th Sponsor LLC

WORD COUNT CERTIFICATION

Pursuant to 22 NYCRR § 202.8-b, counsel certifies that, as calculated by the processing system used to prepare this brief, the number of words in the brief, exclusive of the caption, signature block, and this certification, is 5,692.