To Be Argued By:
MIKHAIL SHEYNKER
Time Requested: 15 Minutes

New York County Clerk's Index No. 160565/20

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

LANDMARKWEST! INC.,

Petitioner-Appellant,

—against—

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

Respondents-Respondents.

CASE NOS.
2021-02808
2021-04423

REPLY BRIEF FOR PETITIONER-APPELLANT

MIKHAIL SHEYNKER
KLEIN SLOWIK PLLC
90 Broad Street, Suite 602
New York, New York 10004
(212) 564-7560
msheynker@buildinglawnyc.com

Attorneys for Petitioner-Appellant LandmarkWest! Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

Cases

Statutes

Rules

Regulations

REPLY ARGUMENT

Appellant LandmarkWest! (hereinafter interchangeably "Appellant" or "LW!") submits this legal brief in further support of the appeal of the denial and dismissal by the lower court of the Article 78 challenge to the November 6, 2020 resolution ("the Resolution") of the New York City Board of Standards and Appeals (the "BSA" or the "Board") that affirmed the issuance of a building permit (the "Permit") on April 11, 2019 by Respondent New York City Department of Buildings ("DOB") and allowed 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 in the Special Lincoln Square District.

A. DOB's Deputy Chief General Counsel did not provide accurate and complete information at BSA Hearing as to DOB's then existing policy to review ME FAR deductions based on objective standard, which requires that any ME rooms/floors/areas be minimally sized compared to the mechanical equipment installed and that any deductible access and operational areas be limited to what is necessary as per manufacturer specifications.

Looking closer at the Zoning Review Determinations (ZRD1) that Appellant has requested the Court to take judicial notice of makes it plainly clear that all the legalese and prevarications cannot hide the fact that under direct questioning, Deputy Chief General Counsel did not provide

complete material information as to the DOB's policy. The relevance of the information contained in these ZRD1s is such that its disclosure would have had a substantial impact on the discussion among BSA's members.

The ZRD1 for the project located at 275 Fourth Ave., Brooklyn, reviewed by the DOB on July 23, 2014, concerned a request to determine if floor space (not even the area of the entire floor) used for mechanical shafts including electrical service panels, conduits, risers, chases and related equipment and telecommunication equipment could be deducted from FAR calculation. The DOB (also interchangeably "the Department") granted the approval for the deduction stating on page 4 of the form:

> As per ZR 12-10, floor space devoted to mechanical equipment, as specified by ZR 12-10(8) of 'floor area,' shall not be included as 'floor area.' The Department interprets such mechanical equipment as including electrical service panels, conduits, risers, chases and related equipment. Floor space directly adjacent to mechanical equipment necessary for the purpose of access and servicing of such equipment is also be included as part of the mechanical floor area that can be deducted.

(http://a810-bisweb.nyc.gov/bisweb/BScanJobDocumentServlet?requestid=4&passjobnumber=320592596&passdocnumber=13&allbin=3424500&scancode=ES238497950, p.4)

The statement of policy of "floor space directly adjacent" and "necessary for the purpose of access and servicing" are clear indication of the adoption of the "objective standard" that was later codified in the May 2021 amendment.

The ZRD1 for the 69-storey project located at 401 9th Avenue, New York County, reviewed by the DOB on April 17, 2015, concerned a request to determine that electrical rooms and IT rooms may be fully deducted from the calculation of floor area. The Department denied the request for the following reasons:

> Electrical rooms are not deductible, rather electrical *equipment* (emphasis in original). Department practice is to limit the amount of floor area deduction within a room/closet to 100% of the area of the equipment footprint plus up to an equal amount of adjacent area for the purpose of access and maintenance. Where a great amount of adjacent space for access/maintenance is required according to Manufacturer's specifications or by electrical code, one must submit supporting documentation to establish this.

(http://a810-bisweb.nyc.gov/bisweb/BScanJobDocumentServlet?requestid=4&passjobnumber=121187143&passdocnumber=31&allbin=1089972&scancode=ES722527867, p.4)

The Department also did not qualify IT equipment as the type of ME equipment entitled to a deduction under ZR 12-10. It is this particular question, as to what types of equipment qualified for a deduction as the mechanical equipment, that was always open to vagaries of individual interpretation by Department's plans examiners, which was intended to be standardized in the May 2021 amendment, that now includes a list of types of equipment that qualify for the deduction. However, the amount of deductible space adjacent to the equipment was consistently interpreted through the prism of the objective standard. It is this objective standard that was also codified in the May 2021

amendment and was in place years before Extell's permit was issued in April 2019. This ZRD1 concluded:

> Because the applicant proposes to fully deduct electrical rooms, which constitute a greater amount of adjacent services area than is permitted by Department practice, and to fully deduct IT rooms containing telecom equipment which are not deductible, the request is denied.

(*Id.*).

The ZRD1 for the 57-storey project located at 161 Maiden Lane, New York County, reviewed by the DOB on September 30, 2014, concerned a request to determine that the electrical risers may be excluded from floor area calculation. The Department approved the request, stating:

> Because the proposed electrical risers located with [sic] the building are minimally sized, are within a fire rated enclosure, and occupy space from floor to ceiling resulting in not [sic] usable space within such area, such risers may be excluded from floor area as 'mechanical equipment' as per ZR 12-10 'floor area', paragraph (8).

(http://a810-bisweb.nyc.gov/bisweb/BScanJobDocumentServlet?requestid=4&passjobnumber=121185680&passdocnumber=13&allbin=1090257&scancode=ES518583184, p.4)

The phrase "minimally sized" used by the Department in this ZRD1 in 2014 is a mirror image of the language codified in the May 2021 amendment. For Respondents to now argue that the objective standard did not apply in 2019 is beyond cynicism.

The ZRD1 for a 65-storey project located at 252 East 57th Street, New York County, reviewed by the DOB on March 8, 2013, concerned a request to determine that areas of the proposed new

building containing electrical and telecommunication equipment may be deducted from the sum of zoning floor area. The Department approved the request "provided that such rooms and/or closets are minimally sized in relation to the size of such equipment".

(http://a810-bisweb.nyc.gov/bisweb/BScanJobDocumentServlet?requestid=4&passjobnumber=121328321&passdocnumber=19&allbin=1090233&scancode=ES807722914, p.4)

The ZRD1 for the 19-storey project located at 36 West 38th Street New York County, reviewed by the DOB on January 15, 2014, concerned a request to determine that floor space used for mechanical equipment including electrical closets and risers can be deducted from the sum of the buildings zoning floor area as defined by ZR 12-10. The request was approved with conditions as follows:

> As per ZR 12-10, floor space devoted to mechanical equipment, as specified by ZR 12-10(8) of "floor area," shall not be included as "floor area." The Department interprets such mechanical equipment as including electrical service panels, conduits, risers, chases and related equipment. With certain exceptions, the Department limits deductible mechanical space to:
>
> (i) Floor space occupied by mechanical equipment, and
> (ii) Floor space directly adjacent to mechanical equipment necessary for the purpose of access and servicing of such equipment (one may apply a 1-to-1 ratio of equipment area to adjacent service area, or alternately may rely on a manufacturer's requirement for the area needed to access and service a particular equipment item).

(http://a810-bisweb.nyc.gov/bisweb/BScanJobDocumentServlet?requestid=4&passjobnumber=121332664&passdocnumber=08&allbin=1090634&scancode=ES168827705, p.4)

There is a clear pattern among various DOB plans examiners of adopting a very logical, objective standard to the issue of mechanical equipment (ME) floor area ratio (FAR) deductions in the years prior to the issuance of Extell's permit and in the run up to the subsequent codification of this policy in the May 2021 amendment.

This discussion is not an attempt to introduce additional information for the first time on appeal. In fact, on the motion to renew, Appellant has made a more than sufficient record of the legislative and administrative history leading up to the clarification and codification of the objective standard in the May 2021 amendments. These examples, of which Appellant asks the court to take judicial notice, simply explain what the Department of City Planning understood the DOB's policy to be, which led to the codification of the DOB's policy as to ME FAR deductions in the May 2021 amendment. There is no attempt here at retroactive application of the law -- only an effort to expose the negligence with which DOB's Deputy Chief General Counsel supplied the BSA with inaccurate and incomplete information, despite repeatedly being asked at the December 2019 hearing for examples of what policy DOB plans examiners

asked point blank if such example exist in writing, DOB's counsel said that they do not:

> COMMISSIONER CHANDA: And I'm assuming if they did find a situation where space was being used technically for mechanical, but upon review they felt it was not fully utilized accordingly, the drawings would have been revised.
>
> MS. MILLER [DOB Counsel]: Sure, that's right.
>
> COMMISSIONER CHANDA: So you may not have that review process of that document where that decision may have been made.
>
> MS. MILLER: Of Course.
>
> COMMISSIONER CHANDA: But what you have is the end result—
>
> MS. MILLER: The, the end result.
>
> COMMISSIONER CHANDA: --of that review—-
>
> MS. MILLERL: Correct.

(R. 3707: 11-23). In fact the written trail of these review processes do exist in a recorded written form. These examples were not provided, and they were not favorable to developer's arguments—just as unfavorable was the pending administrative and legislative history developed in the lead up to May 2021 Amendment on this particular issue. Most relevant information

The reason for such unusually lacking response is unknown. Appellants ask the Court to take judicial notice of these examples to underscore that had the DOB disclosed to the BSA that such information was available in a written form, the BSA members would have requested and received materials of far

greater quality and veracity to analyze the definition of the phrase "used for mechanical equipment."

This is not a case of conflicting interpretations. Appellant cannot be blamed for not supplying this evidence at the BSA. The legislative and administrative history was only published in the adopted form in March 2021, but the DOB would have been privy to it, especially someone as high up as DOB's Deputy Chief General Counsel. (R. 4441). The DOB withheld this probative information, hiding behind evasive and conclusory prevarications that lacked any detail. BSA members should be able to rely on DOB's General Counsel's averments just as the Court is entitled to rely on attorneys as officers of the court. The DOB must not be allowed to withhold accurate information at an administrative hearing.

B. DOB acted arbitrarily and capriciously in failing to analyze ME FAR deductions under the "objective" standard and in failing to provide complete and accurate information as to its practice and policy with regard to reviewing ME FAR deductions

The colloquy between Chairperson Perlmutter and LW!'s counsel, Mr. Stuart Klein, at the September 17, 2019 hearing makes it expressly clear that BSA was trying 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:

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:

> Well it's not-- 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[1].

CHAIR PERLMUTTER:

> Right. Mechanical drawings do that. You know?

[MR. KLEIN:

> Right.]

[1] The transcription of BSA hearings that the City produced as part of its record production in the Article 78 proceeding 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:

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:

-- 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.

(R.3977-3978). Therefore, Respondents cannot now argue that the objective standard, which requires review of the footprint of the equipment and manufacturing specifications for the amount of

space needed to operate, access and service the equipment, was satisfied by a simple comparison to buildings of similar size. That was never a standard for ME FAR deductions.

C. Sanctity of FAR calculations go to the heart of Zoning Resolution—without compliance, Zoning Resolution regulations fail.

The legislative purpose behind the ZR'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 ZR is particularly acute in New York City, where space is limited and the population dense.

Schemes to defy the strict terms of the zoning regulations cannot be defied as they are 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").

Here, Extell artificially and unnecessarily increased the height of the floors designated ostensibly for mechanical use, creating ME voids, and coupled it with liberally and unnecessarily spreading out mechanical HVAC equipment. The intent behind this was not merely to raise luxury apartments ever higher. This could be done without FAR ME deductions, but Extell decided to game the ME deduction anyway. To allow for more buildable luxury apartment space than what would otherwise be allowed. To be plainly clear, there is nothing wrong with either the words "luxury" or "apartments". This is America, after all, and because this is America, things have to be done in compliance with the law. Regrettably, there was no good faith compliance here.

D. Extell's argument that LW! failed to timely raise challenge to ME 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 issues 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. (R. 366).

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. 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. (R. 356).[2] Further, Commissioners Sheta and Scibetta specifically opined that LW! timely raised this issue (R.3632:6-9; 3635: 10-13). 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.[3]

---

[2] 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 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.

[3] 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.

E. Respondents' arguments as to retroactive application of May 2021 amendments and vesting of Extell's 2019 permit are irrelevant and are introduced to deflect Court's attention from Respondents' inability to address substance and merits of objective standard for "floor space used for mechanical equipment"

Appellant does not advocate retroactive application of the law. Appellant humbly argues that a codification/clarification of DOB's existing practice or policy does not effect a change in the law. A prime example of this is a codification of a common-law duty of care owed by property owners and contractors to workers in the context of accidents at a construction site under Labor Law §200. This codification simply funneled all the prior precedent on the subject through the prism of a statutory cause of action, with no substantive change in the law. *E.g., Zavesky v DeCato Bros., Inc.*, 223 A.D.2d 642, 643 (2nd Dept. 1996).

Respondents' further attempted distraction with a discussion centered on vesting in land use cases and their argument that the First Department in a related appeal has determined that Extell's project vested in May 2019, is irrelevant. T*he City Club of N.Y. v BSA et al.*, 198 A.D.3d 1, 3 (1st Dept 2021)("BSA rationally relied on its precedent [see 15 East 30th Street, BSA Cal. No. 2016-4327-A [Sept. 20, 2017]] in ruling that when this project vested ZR § 12-10 did not control or regulate the height of the mechanical floor area). The First

Department expressly stated that: "We note that petitioner[4] has challenged the amount of the project's floor space used for mechanical equipment as excessive or irregular in a separate proceeding. The merits of that challenge are not before us, and we offer no opinion thereon." *Id.* at 3.

F. Extell erroneously evokes "abuse of discretion" standard of appellate review of lower court's denial of motion for leave to renew.

The lower court denied Appellant's motion for leave to renew pursuant to CPLR 2221(e) after holding detailed oral argument, addressing the merits of the argument and referencing the reasons set forth on the record in oral argument as the basis for the denial of the motion. (R.32-56). At the conclusion of oral argument, the lower court stated:

> Thank you, everybody. This did give me clarity and I appreciate all of your arguments, and I am going to abide by my original decision. So the motion to renew is denied.

(R. 56). This is tantamount to granting the motion to renew and adhering to the prior determination, which, as to the part of the decision to adhere to the prior determination, falls under the same appellate standard of review as the denial of the main Article 78 petition. *C.f. Price v Palagonia*, 212 A.D.2d 765, 766 (2nd Dept. 1995)(denial of motion to reargue is appealable where court addresses merits and adhered to prior determination).

[4] The First Department apparently confused LW! with the petitioner in that case, the City Club of New York, and did not realize that proceeding was not brought by the City Club. Hence the reference to "petitioner".

G. Extell erroneously argues that motion to renew based on change in law pursuant to CPLR 2221(e)(2) does not lie where predicate amendment is clarification.

Extell is also misguided in arguing that Appellant's motion to renew was not predicated on the change in law as this term is contemplated in CPLR 2221(e)(2). At the same time, it argues that the May 2021 amendment was a change in the law that could not have retroactive effect. This argument is baseless. It has long been established that the term "change in the law" for the purposes of a motion to renew covers a clarification or codification. *See Dinallo v DAL Electric*, 60 A.D.3d 620, 621 (2nd Dept. 2009); *Roundabout Theatre Co., Inc. v. Tishman Relaty & Constr. Co., Inc.*, 302 A.D.2d 272, 272 (1st Dept. 2003) (motion to renew properly based on intervening clarification of law).

CONCLUSION

As a romantic deflection, Appellant would like to remind this Court of one pronounced example of an intersection between architecture and urban planning on one hand and the law on the other. The New York County Court Building at 60 Centre Street runs a broad set of steps sweeping up from Foley Square to a massive Corinthian colonnade covering most of the front of the courthouse, topped by an elaborate 140-foot-long (43 m) triangular pediment of thirteen figures carved in bas relief from granite. The pediment and acroteria by Frederick Wallen Allen include three statues: *Law*, *Truth*, and *Equity*. A frieze

bears the inscription "The true administration of justice is the firmest pillar of good government". This is the statement that should govern the Court's determination of this appeal. At the end of the day, the purpose of judicial inquiry is to arrive at the truth.

Dated: March 11, 2022

Respectfully submitted,

MIKHAIL SHEYNKER
KLEIN SLOWIK PLLC
90 Broad Street, Suite 602
New York, New York 10004
(212) 564-7560
msheynker@buildinglawnyc.com

Attorneys for Petitioner-Appellant LandmarkWest! Inc.

PRINTING SPECIFICATION STATEMENT

This computer generated brief was prepared using a monospaced typeface.

Name of typeface: Courier New

Point size: 12 Points

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, printing specification statement, or any authorized addendum is 4,373.