To be argued by:
PHILIP W. YOUNG
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New York Supreme Court
Appellate Division: First Department

In the Matter of the Application of

LANDMARKWEST! INC.,

Petitioner-Appellant,

For a Judgment Pursuant to Article 78 of the New York Civil Practice Law and Rules,

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

BRIEF FOR CITY RESPONDENTS

HON. SYLVIA O. HINDS-RADIX
Corporation Counsel
of the City of New York
Attorney for City Respondents
100 Church Street
New York, New York 10007
(212) 356-2375 or -2502
phyoung@law.nyc.gov

CLAUDE S. PLATTON
PHILIP W. YOUNG
of Counsel

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PRELIMINARY STATEMENT

In this Article 78 proceeding, petitioner LandmarkWest seeks to annul the determination of the New York City Board of Standards and Appeals (BSA) upholding the issuance of a permit for construction of a residential tower in Manhattan. This is the same tower involved in *City Club of New York v. New York City Board of Standards & Appeals*, 198 A.D.3d 1 (1st Dep't 2021), which rejected a different challenge to the building permit. Supreme Court, New York County (Rakower, J.) denied LandmarkWest's petition and renewal motion. This Court should affirm.

LandmarkWest challenges the developers' calculation of the project's total floor area. The New York City Zoning Resolution limits the floor area of a new building, but also allows developers to deduct from calculated floor area any "floor space used for mechanical equipment," like HVAC systems and emergency generators. Here, the BSA determined that the City's Department of Buildings (DOB) had properly allowed such a deduction for four floors that the developers planned to use exclusively to house mechanical equipment essential to the building's operation.

Supreme Court correctly held that the BSA's determination was reasonable and entitled to deference. The BSA rationally concluded that all four floors could be deducted from total floor area because they constituted "floor space used for mechanical equipment" under the Zoning Resolution. The floors contained numerous pieces of mechanical equipment, each of which needed additional space for clearance and maintenance access, and the space devoted to the equipment could not be put to other uses. The BSA also noted that the building's mechanical spaces were comparable to those in similar buildings in the City.

Supreme Court also properly denied LandmarkWest's renewal motion because the lawfulness of the floor area deductions was not affected by the City Council's May 2021 amendment of the Zoning Resolution, which specified that mechanical floor space includes the "minimum necessary floor space to provide for necessary maintenance and access." As this Court already held in *City Club*, Extell's project vested in 2019, and Extell was permitted by statute to continue construction of the building as planned, notwithstanding any subsequent changes to the Zoning Resolution.

QUESTION PRESENTED

Did Supreme Court properly deny LandmarkWest's Article 78 petition and renewal motion challenging the BSA's denial of LandmarkWest's appeal seeking to invalidate a building permit?

STATEMENT OF THE CASE

A. The BSA's role as the ultimate administrative authority on the Zoning Resolution

This proceeding seeks review of a decision of the BSA, an independent administrative body consisting of experts in architecture, urban planning, engineering, and other land-use matters. *See* N.Y. City Charter §§ 659, 661, 666. For over a century, the BSA has brought its expertise to bear in construing the City's Zoning Resolution, the complex body of laws that governs land use and development. *See Towers Mgmt. Corp. v. Thatcher,* 271 N.Y. 94, 976-98 (1936); *People ex rel. Sheldon v. Bd. of Appeals*, 234 N.Y. 484, 493 (1923). The BSA's experts 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." *Peyton v. N.Y. City Bd. of Stds. & Appeals*, 36 N.Y.3d 271, 280 (2020).

Because the BSA reviews DOB's orders and determinations, it serves as the "ultimate administrative authority charged with enforcing the Zoning Resolution." *Toys "R" Us v. Silva*, 89 N.Y.2d 411, 418 (1996); Zoning Resolution (ZR) § 72-01. BSA review affords "the benefit of trained and competent expert opinion and judgment, applied to the facts of each particular case by an experienced tribunal." *New York ex rel. Broadway & Ninety-Sixth St. Realty Co. v. Walsh*, 203 A.D. 468, 474 (1st Dep't 1922).

The BSA's expertise must be given "great weight and judicial deference." *Parkway Vill. Equities Corp. v. Bd. of Stds. & Appeals*, 279 A.D.2d 299, 299 (1st Dep't 2001). So long as the BSA's decision is "neither irrational, unreasonable nor inconsistent with the governing statute, it will be upheld." *N.Y. Botanical Garden v. Bd. of Stds. & Appeals*, 91 N.Y.2d 413, 419 (1998) (internal quotations omitted).

B. Extell's project and DOB's issuance of a building permit

In June 2017, DOB issued developers Extell Development Company and West 66th Sponsor LLC (collectively, "Extell") a permit for a 25-story building located in the Lincoln Square neighborhood on the Upper West Side of Manhattan (R115-16, 1777). After acquiring additional development rights, Extell submitted modified plans to DOB proposing the development of a 39-story, 776-foot-high residential and community-facility building on a block bounded by West 65th and 66th Streets, Columbus Avenue, and Central Park West (R3198, 3251-74). DOB issued a new permit for the building on April 11, 2019 (R365, 909). The project vested later that month after Extell completed work on the building's foundations. *See City Club*, 198 A.D.3d at 3.

This Court previously encountered this building in *City Club*, an Article 78 proceeding raising different challenges under the Zoning Resolution to the same April 2019 building permit at issue in this appeal. One issue in *City Club* was whether a zoning amendment restricting the height of mechanical spaces applied to Extell's proposed building even though the amendment was passed

after the permit was issued. *Id.* at 6-7. This Court held that the amendment did not apply because the project had vested "prior to the effective date of ZR § 12-10's amendment," thus "permitt[ing] the project to proceed with construction as of right." *Id.* at 7. The Zoning Resolution provides that if a permit is lawfully issued and the developer has completed the foundation, the project vests and any subsequent changes to the zoning law will not apply to the project. ZR § 11-331.

Like *City Club*, this case concerns the proper calculation of total floor area for Extell's project under the Zoning Resolution. That body of law "sets certain limits on the quantum of floor space that a particular building may have." *Newport Assocs., Inc. v. Solow*, 30 N.Y.2d 263, 265 (1972). "These limits, called floor area ratios, consist of the total floor area on a zoning lot divided by the lot area of that zoning lot." *Id.* (citing ZR § 12-10). "Floor area" is defined as "the sum of the gross areas" of a building's floors, "measured from the exterior faces of exterior walls." ZR § 12-10. The Zoning Resolution sets forth the types of floor space included in the term "floor area" (*e.g.*, floor space in interior balconies) and the

types that are not (*e.g.*, uncovered steps). *Id.* One portion of the building that is excluded from the definition of "floor area" is "floor space used for mechanical equipment." *Id.* The Zoning Resolution does not define that particular phrase and, before May 2021, did not provide further details about when floor space should be treated as "used for mechanical equipment."

Extell's plans, as approved by DOB, called for devoting four of the building's 39 floors to mechanical equipment—things like emergency generators and HVAC systems (R3252-53).[1] Because those floors were devoted exclusively to housing mechanical equipment, DOB allowed Extell to deduct their area from the definition of "floor area" under ZR § 12-10 (R378).

C. LandmarkWest's appeal and the BSA's decision denying the appeal

In May 2019, LandmarkWest and City Club filed parallel appeals with the BSA seeking revocation of the April 2019 building

[1] There is also mechanical equipment housed in the first floor mezzanine and on the roof (R376). However, the BSA's decision—and LandmarkWest's appeal—focus exclusively on the mechanical equipment located in the 15th, 17th, 18th, and 19th floors (*see* Brief for Appellant 1, 15-16, 33; R104, 106).

permit issued by DOB (R339, 824). Both appeals raised identical legal issues: (1) whether Extell's methodology for calculating floor space violated the Zoning Resolution's bulk distribution and split lot rules, and (2) whether the height of the building's mechanical spaces violated the Zoning Resolution's rules governing "accessory uses" (R339-40, 354, 1088-89, 1110). Two weeks after the BSA held a public hearing on those issues (R2928), LandmarkWest filed a "supplemental statement of facts" seeking to raise a new legal issue: whether the "[a]mount of floor space used for mechanical equipment in the Proposed Building is excessive or irregular" (R360-61). LandmarkWest argued that the four floors devoted to housing mechanical equipment should not count as floor space "used for mechanical equipment" under ZR § 12-10 because they contained excessive space that was not fully used for mechanical equipment (R360-64).

In September 2019, the BSA denied LandmarkWest's and City Club's original appeals (R3192, 3195-96). City Club—but not LandmarkWest—filed an Article 78 petition challenging the BSA's decision. In July 2021, this Court unanimously reversed Supreme

Court's decision and order granting City Club's petition and held that the BSA "rationally rejected" City Club's arguments that Extell's building did not comply with the Zoning Resolution. *City Club*, 198 A.D.3d at 5-8.

However, the BSA decided to reopen LandmarkWest's appeal to receive additional testimony on the new issue raised solely by LandmarkWest: "whether architectural and mechanical plans for the New Building show sufficient mechanical equipment in the area identified as mechanical space to justify floor-area deductions" (R366). To facilitate resolution of that issue, the BSA asked DOB to "review the Proposed Building's mechanical equipment," provide a "description of the mechanical equipment housed in the floors dedicated to mechanical equipment," and determine "whether the number of floors devoted exclusively to mechanical equipment was typical for buildings of a similar nature" (R375-77). The BSA requested that DOB perform this review "in the same way" that it had for a different BSA appeal, *15 East 30th Street, Manhattan*, BSA Cal. No. 2016-4327-A (Sept. 20, 2017) (R375).

DOB followed the BSA's directives and submitted supplemental papers in October 2019 that described its review of the building's mechanical equipment (R375-79). DOB began by providing a detailed description of the mechanical equipment located on the 15th, 17th, 18th, and 19th floors, which included expansion tanks, hot water heat exchangers, electric unit heaters, emergency generators, air separators, cold water pumps, and exhaust louvers, among others (R377-78). DOB explained that the floor space on those four floors was "devoted to housing the mechanical equipment of the Proposed Building" and "cannot be occupied for purposes other than the housing of such equipment" (R377). DOB also compared the building's mechanical space to other, similar buildings and determined that the amount of space devoted to "mechanical equipment in the Proposed Building is consistent with similarly sized buildings" (*id.*) Accordingly, DOB concluded that "the floor space devoted to mechanical equipment is properly exempt from the zoning floor area" and the "[p]ermit was properly issued" (R377-78).

The BSA held a hearing on the new mechanical equipment issue in December 2019. Deputy General Counsel Felicia Miller testified on behalf of DOB. She explained that the Department "reviewed the approved mechanical drawings, just has it had done in [*15 East 30th Street*], and concluded that the space as shown on the approved mechanical plans cannot realistically be occupied for purposes other than housing such equipment" (R3695). She also explained that DOB does not have fixed "quantitative criteria" for determining when space used for mechanical equipment can be deducted from floor area (R3701). Instead, "given the differing needs of every building," DOB uses a case-by-case approach that involves consideration of "many different factors"—not just "mechanical footprint," but also the "nature of the equipment and the relation between different systems and the space needed to maintain the system" (R3698).

In response to questioning from the BSA's commissioners about DOB's approach, Ms. Miller explained that DOB reviews the building's mechanical equipment plans to determine whether the equipment and the access space around the equipment prevents the

space from being put to other uses (R3699). And she noted that if the space was "not fully utilized" for mechanical equipment, DOB would require the developer to revise the building plans (R3707).

LandmarkWest presented the testimony of its expert witness, engineer Michael Ambrosino (R3656). He provided the BSA with alternative arrangements of the mechanical equipment on each of the four mechanical equipment floors in an attempt to show that Extell was not fully utilizing all of the available floor space (R752-58). Extell's expert witness also testified at the hearing. He explained that the building's mechanical floors were developed and designed to "lay out the [mechanical equipment] in the most efficient way" (R3736-37, 3743-44). He also noted that mechanical spaces are "individually tailored" to the unique engineering and architectural specifications of each building (R3737).

The BSA denied LandmarkWest's appeal and upheld DOB's permit during a public meeting on January 28, 2020 in a 2-2 tie vote with one commissioner recused (R101). The decision was memorialized in a resolution filed on November 6, 2020 (R112). The BSA explained that its rules allow an appeal to be granted only

where there is a "concurring vote of at least three (3) commissioners" (R105). Any appeal that fails to receive three votes "is deemed a denial" (*id.*). Thus, because LandmarkWest failed to "garner[] the three affirmative votes necessary to grant" its appeal, the BSA's decision was a denial (*id.*).

Turning to the merits, the BSA determined that the building's "mechanical plans do demonstrate sufficient floor-based mechanical equipment" because "[m]uch of [the] equipment sits directly on the floor" and requires additional floor space for "clearance and service areas" (R104). The BSA also noted that DOB followed its request and reviewed the building's mechanical equipment using the same approach that the BSA "found satisfactory in *15 East 30th Street*" (R107). Based on that review, DOB determined that "the floor space devoted to mechanical equipment is properly exempt from floor area" (*id.*). And the BSA pointed out that expert testimony established that other similarly sized buildings contained up to twelve mechanical floors, while Extell's buildings contained just four—"well within the range of standard practices for constructing buildings of this scale" (R104-

05). Accordingly, the BSA held that "[u]nder DOB's current practices, it is clear that DOB has acted reasonably in reviewing and approving the New Building's mechanical plans" (R104).[2]

D. Supreme Court's denial of LandmarkWest's Article 78 petition

LandmarkWest filed an Article 78 petition challenging the BSA's denial of its appeal. It argued that the BSA's determination was arbitrary and capricious because the BSA had purportedly "misread[]" the Zoning Resolution's definition of floor area as excluding any space that the developer subjectively "claimed" was used for mechanical equipment—rather than floor space that was "actually used for mechanical equipment" (R76-80). According to LandmarkWest, this resulted in the BSA permitting Extell to exclude from total floor area more space than was necessary for operating and servicing the mechanical equipment (R80-83). LandmarkWest also argued that DOB's review was deficient because DOB had not yet promulgated precise guidelines to govern

[2] The BSA's resolution also discussed the arguments of the two commissioners who voted to grant the appeal (R103, 105-06).

the calculation of floor area deductions for mechanical equipment (R86-94). Finally, LandmarkWest argued that the BSA's determination was not entitled to deference because it was the product of a tie vote (R83-85).

Supreme Court denied LandmarkWest's petition from the bench, following oral argument, on May 4, 2021 (R4). The court held that the BSA had acted rationally because it considered all of LandmarkWest's arguments, reviewed the various types of mechanical equipment present on each floor, and "explored [DOB's] reasoning" regarding the need to vent and service the equipment and the inability of the developer to "use that space for other purposes" (R28). Accordingly, the court deferred to the BSA's determination, held that it had not acted arbitrarily or capriciously, and denied the petition (*id.*).

E. The May 2021 Zoning Resolution amendments and Supreme Court's denial of LandmarkWest's motion to renew

Just over a week after Supreme Court's decision, the New York City Council passed an amendment to the Zoning Resolution that changed the types of mechanical space that could be deducted

from a building's total floor area (R4955). At the time Extell's projected vested, the Zoning Resolution provided that "the floor area of a building shall not include: … floor space used for mechanical equipment." ZR § 12-10. The City Council amended that language to provide that "the floor area of a building shall not include: … 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." ZR § 12-10 (2021). The amendment further provided that the floor area exclusion "shall also include the minimum necessary floor space to provide for necessary maintenance and access to such equipment." *Id.*

The amendment was part of an effort by the New York City Department of City Planning (DCP) and the City Planning Commission (CPC)[3] to "improve upon and make permanent" the

[3] "The New York City Charter requires that amendments to the Zoning Resolution be reviewed and approved by the City Planning Commission …, and then forwarded to the City Council for approval, disapproval or modification." *Beekman Hill Ass'n v. Chin*, 274 A.D.2d 161, 163 (1st Dep't 2000).

temporary zoning rules that the City Council enacted on an emergency basis in 2013 to remove zoning barriers that were hindering reconstruction and retrofitting of buildings impacted by Hurricane Sandy (R5197-98). DCP had found that post-hurricane "resiliency projects" were hampered by "shortcomings with the floor area exemptions provided for mechanical equipment" (R5219). DCP explained that "it [was not] clear whether the space necessary for routinely accessing and servicing the equipment is also exempted" (*id.*). That uncertainty purportedly caused "difficult[ies]" when property owners sought to retrofit buildings by moving mechanical equipment from below-grade to above-grade locations (*id.*). DCP intended for the amendment to "clarify that the floor area exemption for mechanical equipment applies to mechanical, electrical, [and] plumbing equipment, as well as to fire protection and power systems, and necessary maintenance and access areas" (*id.*). DCP further explained that the amendment was "consistent with the general practice at [DOB] but would ensure that buildings across the city would be treated consistently" (*id.*).

LandmarkWest filed a motion to renew, arguing that Supreme Court should reconsider its denial of the Article 78 petition in light of the City Council's May 2021 amendment. It argued that the amendment's addition to the definition of floor area—specifying that mechanical spaces included the "minimum necessary floor space to provide for necessary maintenance and access"—was a mere clarification of the law and should therefore apply retroactively to Extell's already-vested project (R4425-28). In LandmarkWest's view, the amendment's new "minimum necessary" language clarified that the statutory phrase "floor space used for mechanical equipment" had always meant the same thing: floor space that "is exclusively devoted to housing the mechanical equipment" and that "has no other use" (R4434). And it claimed that the BSA's decision was arbitrary and capricious because the BSA supposedly "misread the word 'use' to mean any and all space a developer wishes to claim" (R4426).

Supreme Court heard oral argument, "abide[d] by [its] original decision," and denied the renewal motion (R32, 56).

LandmarkWest now appeals from the denial of both the Article 78 petition and the renewal motion.[4]

ARGUMENT

SUPREME COURT CORRECTLY DENIED LANDMARKWEST'S ARTICLE 78 PETITION AND RENEWAL MOTION

A. The BSA rationally denied LandmarkWest's challenge to the building permit.

The BSA rationally denied LandmarkWest's appeal, and that determination is entitled to substantial deference. As the BSA concluded, DOB's decision to approve Extell's floor area deduction for four floors that were used exclusively for mechanical equipment was consistent with the text of the Zoning Resolution and DOB's practice in similar cases. DOB carefully reviewed Extell's mechanical equipment plans, determined that Extell's use of four floors for mechanical equipment was consistent with other, similarly sized buildings, and concluded that the space could not be

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[4] LandmarkWest has opened two separate NYSCEF dockets for this appeal. Case No. 2021-02808 is LandmarkWest's appeal from Supreme Court's denial of its Article 78 petition. Case No. 2021-04423 is LandmarkWest's appeal from Supreme Court's denial of its renewal motion. Because LandmarkWest has perfected both appeals together under Case No. 2021-02808—as permitted by 22 NYCRR § 1250.9(f)(3)—the City has filed its response brief under that docket number as well.

used for other purposes because it was devoted to housing mechanical equipment—both the equipment itself and the space around the equipment used for clearance and service access.

1. The BSA's determination is entitled to deference.

The BSA's determination—which involved interpreting technical and ambiguous provisions of the Zoning Resolution—is entitled to substantial deference. *See, e.g.*, *Peyton*, 36 N.Y.3d at 280 ("[W]e have consistently deferred to the BSA's interpretation of the Zoning Resolution in matters relating to its expertise …"); *Skyhigh Murals-Colossal Media Inc. v. Bd. of Stds. & Appeals of the City of N.Y.*, 162 A.D.3d 446, 447 (1st Dep't 2018) (lower court "should have deferred to BSA's determination … since this case called for BSA to apply its expertise in zoning and land planning matters to regulations that are not entirely clear and unambiguous").

LandmarkWest does not dispute these principles, and even acknowledges that there is good reason for extending substantial deference to BSA determinations (Brief for Appellant ("App. Br.") 9-10). It nevertheless asks this Court to decline to defer to the BSA

here because the BSA's decision was the product of a tie vote (*id.* at 26). Invoking *Tall Trees Construction Corporation v. Zoning Board of Appeals*, 97 N.Y.2d 86 (2001), LandmarkWest asserts that where a BSA appeal is rejected by a tie vote, "there exists and can exist no formal statement of reasons for the rejection" that a court can defer to (App. Br. 27-28 (quotation marks omitted)).

But LandmarkWest misreads *Tall Trees* and ignores the substantial differences between the BSA and the zoning board in that case. First, *Tall Trees* doesn't say that no deference is owed to a zoning board in a tie vote scenario. It says only that a court should perform "an examination of the entire record" to "determin[e] whether the denial was arbitrary and capricious." *Tall Trees*, 97 N.Y.2d at 93. That is hardly the *de novo* standard of review that LandmarkWest insists this Court must apply. Indeed, the Court of Appeals annulled the determination in *Tall Trees* only because it found *no* evidence to support the board's denial, and because the board had previously granted a variance on essentially the same facts. *Id.* at 93-94. Its approach thus applied the core deferential standard for Article 78 review.

Second, the circumstances warranting a broad record review in *Tall Trees* are absent here. In *Tall Trees*, the Town of Huntington's Zoning Board of Appeals issued a bare "NO ACTION" decision following a tie vote. 97 N.Y.2d at 89. It made no findings of fact or conclusions of law. *Id.* The rules governing the Zoning Board's procedures did not obligate it to prepare any written findings. *See* Town Law §§ 267, 267-a, 267-b. The Court of Appeals held that in that scenario, where "[n]o factual findings … were provided by the Board," a court should engage in a broad "examination of the entire record," since there is no statement of the agency's reasoning that can form the basis for an Article 78 arbitrary-and-capricious analysis. *Tall Trees*, 97 N.Y.2d at 93; *see also Meyer v. Bd. of Trs. of the N.Y. City Fire Dep't*, 90 N.Y.2d 139, 144-45 (1997) (board "unable to pass" a resolution due to tie vote); *Zagoreos v. Conklin*, 109 A.D.2d 281, 296 (2d Dep't 1985) ("no resolution rejecting the proposal could be enacted" by Town Board due to tie vote).

The BSA's rules are markedly different. They require that, "in each case," the BSA memorialize its determination "in the form of

a written resolution" setting forth "the Board's findings and conclusion." 2 RCNY §§ 1-12.1, 1-12.9. Thus, even in a tie vote scenario where the application is "deemed denied," *id.* § 1-12.1, the BSA is obligated to prepare a written decision that presents its factual findings and reasoning. And in this case, the BSA abided by these requirements by preparing a "written resolution" setting forth its "findings and conclusion." 2 RCNY § 1-12.1; R101. Although the BSA's resolution in this case was the result of a tie vote, it is still "[t]he determination of the Board," *id.* § 1-12.9, to which this Court owes deference, *see Skyhigh Murals-Colossal Media Inc.*, 162 A.D.3d at 447.

Further, the board in *Tall Trees* was the sole agency reviewing a variance application. 97 N.Y.2d at 89. It was not reviewing the determination of a different land use agency with its own expertise in zoning matters, as is the case with DOB here. In this case, Supreme Court was reviewing an underlying DOB determination, plus a tie vote BSA resolution containing detailed findings and reasoning. In addition, the Huntington Zoning Board of Appeals lacked rules clarifying precisely what types of votes constituted a

denial. *See Tall Trees*, 97 N.Y.2d at 91. The BSA, by contrast, has made clear how a tie vote should be understood. *See* 2 RCNY § 1-12.1 ("If an application fails to receive three (3) affirmative votes, the action will be deemed denied"). In short, the circumstances in *Tall Trees* that prompted the Court of Appeals to perform a broad "examination of the entire record," 97 N.Y.2d at 93, are entirely absent here.

Indeed, LandmarkWest is unable to point to any case that has applied the *Tall Trees* tie vote rule to the BSA's determinations. That is because the *Tall Trees* rule is not a constitutional rule—it does not trump the regulations governing the BSA's procedures. Instead, it applies only where "there exists and can exist no formal statement of reasons for the rejection." *Tall Trees*, 97 N.Y.2d at 93. Because the BSA followed its own regulations and prepared a detailed 11-page written decision that made factual findings, interpreted technical Zoning Resolution terminology, and explained its reasons for denying LandmarkWest's appeal, this Court must defer to that determination. *See Comm. for Environmentally Sound*

Dev. v. Amsterdam Ave. Redev. Assoc. LLC, 194 A.D.3d 1, 10-11 (1st Dep't 2021).

In any event, even if this Court were to apply the tie vote rule from *Tall Trees* and performs a broad examination of the entire record, the result would be the same. As explained below, the documents and testimony presented to the BSA fully support the BSA's rational decision to deny LandmarkWest's appeal.

2. The BSA rationally determined that the project complied with zoning rules governing floor area deductions for mechanical equipment.

The BSA's determination denying LandmarkWest's appeal was rational because DOB's decision to issue a building permit was consistent with the Zoning Resolution and DOB's prior practices for reviewing floor area deductions for mechanical equipment.

First, the BSA reasonably concluded (R104-05) that the building's four mechanical floors constituted "floor space used for mechanical equipment" under the Zoning Resolution. ZR § 12-10. The phrase "used for," standing alone, is construed in the Zoning Resolution as including "arranged for," "designed for," "intended

for," "maintained for," "or occupied for." *Id.* § 12-01. However, "the Zoning Resolution does not define" the full phrase "floor space used for mechanical equipment." *N.Y. City Educ. Constr. Fund v. Verizon N.Y. Inc.*, 114 A.D.3d 529, 530 (1st Dep't 2014). And the phrase on its own does not definitively answer the question at issue here—how densely packed mechanical equipment must be for the space devoted to it to qualify as "used for" that equipment. Because that phrase is an "undefined technical term[]" that is "capable of conflicting interpretations" regarding that question, this Court should defer to the BSA's interpretation of the phrase. *Comm. for Environmentally Sound Dev.*, 194 A.D.3d at 10; *see also Golia v. Srinivasan*, 95 A.D.3d 628, 629-30 (1st Dep't 2012).

Here, the BSA rationally concluded that the four mechanical floors "indisputably represent[] 'floor space used for mechanical equipment'" under ZR § 12-10 because "[m]uch of th[e] equipment sits directly on the floor or directly on pads" and because "these pieces require clearance and service areas" that extend beyond the footprint of the equipment (R104). That determination was consistent with the Zoning Resolution because the four floors were

in fact "arranged for," "intended for," and "occupied for" mechanical equipment. ZR § 12-01. As the BSA noted, each floor would contain numerous pieces of mechanical equipment (R108). For example, the 18th floor alone would contain "a 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" (*id.*).

All of those items need additional space beyond the footprint of the equipment itself. As DOB explained, "mechanical footprint [of equipment] alone does not equate with how the space is used" (R3698). Instead, the "nature of the equipment and the relation between different systems and the space needed to maintain the system must be considered. For example, a large exhaust with intake ducts pull[s] volumes of air and need[s] large space around … the ducts to accommodate that [air flow]" (*id.*).

DOB also informed the BSA that the number of stories in the building devoted to mechanical spaces would be "consistent with

similarly sized buildings" (R377). The BSA heard that similarly sized buildings contained up to twelve mechanical floors, while Extell's building contained just four (R485). Thus, the BSA concluded, the space devoted to mechanical equipment would be "well within the range of standard practices for constructing buildings of this scale" (R104-05).

Given the quantity of mechanical equipment located on each of the four floors, the undisputed need for additional access and clearance space around the equipment, and the consistency of the mechanical spaces with those of comparable buildings, the BSA rationally credited DOB's conclusion that the four floors were "used for mechanical equipment," ZR § 12-10, because they were "devoted to housing the mechanical equipment of the Proposed Building" and "cannot be occupied for purposes other than the housing of such equipment" (R107).

Second, BSA's determination is also rational because DOB's review of Extell's mechanical plans was consistent with BSA precedent and DOB's own historical practices for reviewing proposed floor area deductions for mechanical equipment. *See*

Peckham v. Calogero, 12 N.Y.3d 424, 431 (2009) (rational for agency to act "consistent with its own rules and precedents").

When it reopened LandmarkWest's appeal, the BSA specifically asked DOB to "review the mechanical drawings in the same way that the [*15 East 30th Street*] mechanical drawings were reviewed" because that appeal involved a similar dispute about mechanical equipment deductions (R3209, 3213). It also asked DOB to "review whether the number of floors devoted exclusively to mechanical equipment was typical for buildings of a similar nature" (R107, 3213). And it requested that DOB prepare a letter explaining what it had reviewed and how it had reached its conclusions about mechanical space (R3216-17).

DOB complied with that request and prepared a five-page letter explaining its reasoning (R375-79). It used the *15 East 30th Street* case "as a model," described the mechanical equipment housed on each floor, and "verif[ied] that the … equipment was properly deducted from floor area and that the Permit was properly issued" (R376). DOB also performed a review of the mechanical spaces in other similar buildings and, as noted, concluded that "the

amount of stories devoted entirely to mechanical equipment in the Proposed Building is consistent with similarly sized buildings" (R377).

That analytical approach accorded with DOB's approach in *15 East 30th Street*, where it analyzed the mechanical equipment in a planned condominium building and determined that "the deduction of floor space … is consistent with … mechanical floor space in comparable mixed-use developments in the City" (R4329). And DOB's analysis was also consistent with testimony from Extell's expert witness, who explained that the building's four floors of mechanical space were "entirely within the spectrum of the number of such floors in other tall buildings" (R485).

Because the BSA relied on its own precedent and DOB's prior practices for calculating deductible mechanical space, its determination was rational and entitled to deference. *See, e.g.*, *City Club*, 198 A.D.3d at 6-7 (rational for the BSA to rely on *15 East 30th Street* when rejecting City Club's challenge to the same April 2019 permit at issue in this appeal).

B. LandmarkWest's challenges to the BSA's determination are meritless.

1. The BSA was not required to adopt LandmarkWest's interpretation of the Zoning Resolution.

LandmarkWest's challenges to the BSA's determination largely center on the theory that the Zoning Resolution requires developers to pack their mechanical equipment into the smallest possible space. The BSA, however, determined that the statute contained no such requirement. And LandmarkWest has provided this Court with no valid reason to override the BSA's interpretation and adopt LandmarkWest's view of how the Zoning Resolution's technical and ambiguous mechanical equipment rules should be read.

LandmarkWest argues that the Court must reject the BSA's interpretation of the technical phrase "used for mechanical equipment" because the BSA improperly adopted a "subjective standard" for determining deductible floor space, rather than the "objective standard" supposedly required by the Zoning Resolution (App. Br. 28-34). But the BSA did not adopt a "subjective" standard. Indeed, the BSA's determination contains no reference to this

subjective/objective dichotomy (*see* R101-12). The BSA focused instead on the types of mechanical equipment located on each floor (R104, 108), the additional floor space the equipment needed for "clearance and service areas" (R104), and whether the number of mechanical floors was consistent with that of other similarly sized buildings (R104-05).

There is no support in the record for LandmarkWest's extravagant claim that the BSA "misread the word 'use' to mean any and all space a developer wishes to claim" (App. Br. 34). The BSA carefully scrutinized Extell's proposed mechanical deductions to determine whether the space was in fact used for—that is, "arranged for," "designed for," "intended for," "maintained for," "or occupied for"—mechanical equipment. ZR § 12-01. And DOB testified that it does not unquestioningly allow full floor deductions, explaining that if the agency determined that a floor "was not fully utilized" for mechanical equipment, it would require the developer to prepare new mechanical plans (R3707).

In any event, the Zoning Resolution does not require a purely "objective" approach to determining whether floor space is used for

mechanical equipment, as LandmarkWest claims (App. Br. 29). If anything, it allows for the consideration of some "subjective" factors, insofar as it permits reference to what purpose the floor space was "intended for." ZR § 12-01. LandmarkWest's claim that the BSA was required to consider only objective factors (App Br. 29-30) cannot be squared with the text of the Zoning Resolution.

These strained efforts to characterize the BSA's position are in service of LandmarkWest's bottom-line position that floor space is "used for mechanical equipment" under the Zoning Resolution only where the equipment is packed together as closely as possible (App. Br. 31-33). But even if it may be possible to rearrange some of Extell's planned equipment to fit more compactly, as LandmarkWest's expert argued (*id.* at 32-33), the BSA was under no obligation to adopt the expert's "minimum necessary" approach. Because the phrase "used for mechanical equipment" is undefined, the BSA has broad discretion to determine what mechanical space can be deducted by applying its "expertise in zoning and land planning matters." *Skyhigh Murals-Colossal Media Inc.*, 162 A.D.3d at 447.

The BSA's decision to endorse a less restrictive approach here was rational, particularly in light of DOB's testimony about the varying mechanical space needs of different types of buildings (R3698). As DOB explained, "[a] hospital versus a commercial office," for example, would have substantially different needs in terms of engineering and cooling requirements, making fixed uniform criteria impracticable (R3702). And Extell's expert testified that "jam[ming] the equipment together," as LandmarkWest proposed, was "not a good practice" (R3748). Moreover, the BSA's determination was rational in light of the difficulties associated with determining whether an alternative mechanical equipment layout would still allow for the effective operation and servicing of the equipment. This Court should not "second-guess" the BSA's "thoughtful … decisionmaking" on that issue. *Riverkeeper, Inc. v. Planning Bd. of Town of Southeast*, 9 N.Y.3d 219, 232 (2007).

In yet another bid to avoid the deference owed to the BSA's determination, LandmarkWest argues that the phrase "floor space used for mechanical equipment" is "not technical" and "represent[s] ordinary language" (App. Br. 30). It asks this Court to consider the

dictionary definitions of the words "use" and "for" as interpretive guides, rather than deferring to the BSA's own interpretation (*id.* at 31). LandmarkWest is wrong, for two reasons. First, the Zoning Resolution already construes the phrase "used for," *see* ZR § 12-01, so there is no need to resort to dictionary definitions, s*ee People v. Aleynikov*, 31 N.Y.3d 383, 397 (2018) (resort to dictionary definitions appropriate where "a word used in a statute is not defined in the statute"); *Spota v. Jackson*, 10 N.Y.3d 46, 52 (2008) ("In the first instance, a statutory term should be defined by the context of the statute rather than by the dictionary.").

Second, the full phrase "floor space used for mechanical equipment" is technical and specific to the zoning context. The phrase "is part of an intricate statutory edifice with which the BSA is most familiar," *Peyton*, 36 N.Y.3d at 282—the statutory definition of "floor area," which contains 15 parts, many with subparts, as well as a litany of exclusions. ZR § 12-10. That warrants deference to the BSA's interpretation, not resort to ordinary dictionary definitions. *See Peyton*, 36 N.Y.3d at 282-83 ("agency charged with administering the Zoning Resolution in all its complexity is well

placed to understand how the various parts of the statute fit together"); *see also Comm. for Environmentally Sound Dev.*, 194 A.D.3d at 10-11.

In short, LandmarkWest asks this Court to apply a restrictive definition of "floor space used for mechanical equipment" that is not compelled by the text of the Zoning Resolution. This Court should instead defer to the BSA's interpretation of that statutory phrase because interpreting the Zoning Resolution "involves knowledge and understanding of underlying operational practices," including an understanding of "how the various parts of the statute fit together." *Peyton*, 36 N.Y.3d at 280, 282-83.

2. DOB provided accurate information to the BSA about its policy on mechanical equipment deductions.

LandmarkWest also argues that a remand is required because DOB supposedly gave incomplete and inaccurate testimony at the BSA hearing by purportedly "fail[ing] to disclose" its policy on when mechanical equipment can be deducted and DCP's "then-pending consideration" of that policy (App. Br. 42-48). This Court should not consider this argument because this is the first time

LandmarkWest has raised it. *See Wells Fargo Bank N.A. v. Ho-Shing*, 168 A.D.3d 126, 130 (1st Dep't 2019) (rejecting argument "raised for the first time on appeal"); *First N.Y. Bank for Bus. v. Alexander*, 106 A.D.3d 138, 143 (1st Dep't 2013) (holding that arguments raised "for the first time on appeal" are "not properly before this Court and cannot be considered"). LandmarkWest did not raise this argument in its Article 78 petition or in its motion to renew (*see* R57-100, 4422-38).

In any event, LandmarkWest's argument is based on a faulty premise. Ms. Miller's testimony accurately described DOB's policy governing mechanical equipment deductions as it existed in 2019. She explained that DOB does not have fixed "quantitative criteria" for determining mechanical equipment deductions (R3701). Instead, "given the differing needs of every building," DOB uses a case-by-case approach that considers "many different factors"—not just "mechanical footprint," but also the "nature of the equipment and the relation between different systems and the space needed to maintain the system" (R3698). Ms. Miller also explained that DOB had attempted to develop a fixed standard for mechanical

equipment deductions but found that it was "too difficult to articulate how much mechanical equipment is acceptable in all buildings throughout the city, given the differing needs of every building" (R3698).

LandmarkWest asserts that DOB's description of its mechanical equipment policy is inconsistent with its actual policy and DCP's "understanding of [that] policy in the same time frame" (App. Br. 43-45). LandmarkWest notes that there is evidence that DOB has sometimes required that mechanical equipment areas "be minimally sized" and has "doubt[ed] if access space was deductible" at all (*id.* at 44-47 (citing several Zoning Resolution Determination Forms for individual buildings)). As an initial matter, LandmarkWest fails to explain how these assertions about DOB's general policies are relevant to the issue here—whether the BSA properly upheld DOB's issuance of a specific building permit in light of specific mechanical space deductions. In the administrative appeal, DOB followed the BSA's direction to review the deductions using the same methods the BSA had approved with respect to a similar building several years earlier, in *15 East 30th Street*. The

BSA evaluated the results of that inquiry in determining that the mechanical equipment deductions here were appropriate; it was not evaluating DOB's policies in the abstract.

In any event, there is no inconsistency between DOB's policy and its description of that policy before the BSA; LandmarkWest has mistaken the practices of individual DOB examiners for a citywide policy. What the DCP and CPC reports describe (R4474-75, 5219) and what the cherry-picked handful of Zoning Resolution Determination Forms that LandmarkWest cites show (App. Br. 46-47 n.8), is that individual DOB examiners focus on different factors and reach different conclusions about mechanical equipment space depending on the unique characteristics of each building. That is entirely consistent with Ms. Miller's description of a case-by-case approach that involves consideration of "many different factors," not fixed "quantitative criteria" (R3698, 3701). While some DOB examiners may have imposed something like LandmarkWest's preferred "minimum necessary" standard in some instances, that

does not mean that DOB had a citywide policy to that effect—and DOB's counsel confirmed that there was no such policy.[5]

As to LandmarkWest's other assertion, DOB did not improperly fail to disclose that DCP was evaluating DOB's policy on mechanical equipment deductions (*see* App. Br. 42). LandmarkWest has not shown that DOB's counsel was even aware of this review at the time of the hearing. Nor has it identified any legal obligation that would require DOB to disclose the fact of DCP's review if it had known. No BSA commissioner ever asked DOB about it. And LandmarkWest did not even bother to raise the issue before the BSA. Plus, DOB's testimony was focused narrowly on how its mechanical equipment policy was applied to a specific building (R3694-707), while DCP's review was part of a broad effort to streamline the unrelated permitting process for resiliency projects (R5219). DOB had no reason or obligation to disclose the review to the BSA.

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[5] LandmarkWest's failure to raise this argument before the BSA is a further reason for the Court to reject this argument. Because the BSA was not given the opportunity to address this issue, there is very little in the record that would allow this Court to meaningfully assess the Zoning Resolution Determination forms that LandmarkWest cites to.

Accordingly, because DOB accurately represented its mechanical equipment review policy, and because "the record is sufficient for [this Court's] review," remand is "not necessary." *Horowitz v. Zucker*, 172 A.D.3d 538, 539 (1st Dep't 2019).

C. Supreme Court properly denied the motion to renew because the May 2021 amendment does not apply to Extell's project.

Supreme Court also properly denied LandmarkWest's motion to renew, which was premised on an amendment to the Zoning Resolution enacted just over a week after Supreme Court's decision denying LandmarkWest's petition. The amendment provided that deductible mechanical space includes "the minimum necessary floor space to provide for necessary maintenance and access to such equipment." ZR § 12-10 (2021). LandmarkWest argues that Supreme Court should have applied that amendment to Extell's project even though the amendment was enacted more than one year after the BSA's determination and more than two years after DOB issued the building permit to Extell.

LandmarkWest is wrong once again. The BSA has not yet had the opportunity to construe the May 2021 amendment, but the

amendment has no bearing on this case because, as this Court previously held in *City Club*, Extell's project vested in April 2019. 198 A.D.3d at 3. At that point, Extell was allowed to continue construction regardless of any subsequent changes to the Zoning Resolution. But even if the project had not vested, LandmarkWest has failed to overcome the strong presumption against the retroactive application of statutes.

1. The May 2021 amendment does not apply because Extell's project vested in 2019.

The Zoning Resolution provides that a project vests when "a building permit has been lawfully issued, as set forth in paragraph (a) of Section 11-31" and all foundation work has been completed. ZR § 11-331. At that point, the developer may continue construction of the building, notwithstanding any subsequent changes to the Zoning Resolution. *Id.*; *see also City Club*, 198 A.D.3d at 7. A building permit is "lawfully issued" under section 11-331 when it "is based on an approved application showing complete plans and specifications, authorizes the entire construction and not merely a

part thereof, and is issued prior to any applicable amendment to this Resolution." ZR § 11-31(a).

Section 11-331 is based on the common law principle of "vested rights," which allows property owners to "complete construction of a structure or development which constitutes a nonconforming use … where substantial construction had been undertaken and substantial expenditures made prior to the effective date of [a new] ordinance." *Putnam Armonk, Inc. v. Southeast*, 52 A.D.2d 10, 14 (2d Dep't 1976). Without such a rule, a developer who began a project in reliance on the then-existing zoning rules "could be faced with large losses and unanticipated additional cost if compelled to restructure its plans and dismantle and reconstruct" its building. *Ellington Constr. Corp. v. Zoning Bd. of Appeals*, 77 N.Y.2d 114, 124 (1990). Such an outcome would "impede[] rational land use planning." *Id.*

This case fits squarely within the vesting statute and the policy rationale underlying it. DOB issued Extell a building permit in April 2019 (R909). That permit was "lawfully issued" for vesting purposes because it (1) was based on Extell's application, which

included complete plans and specifications (*see* R3251-74), (2) authorized construction of the complete building (*see* R909), and (3) was issued more than two years before the May 2021 amendment. *See* ZR § 11-31(a). After the building's foundations were completed later that month, "the project vested" under section 11-331, thus insulating Extell from any future changes to the zoning laws. *City Club*, 198 A.D.3d at 3.

In *City Club*—a parallel challenge to the same April 2019 building permit—this Court rejected City Club's attempt to retroactively apply a different Zoning Resolution amendment to the project, explaining that because "the project's foundation[]" was completed "prior to the effective date of [the] amendment," the project could "proceed with construction as of right under ZR § 11-331." 198 A.D.3d at 7. The result in this case must be the same. Extell has expended substantial time, energy, and money on this project in reliance on DOB's lawfully issued April 2019 permit. Applying the City Council's May 2021 zoning amendments to this project retroactively would contravene Extell's reliance interests and violate sections 11-31 and 11-331.

LandmarkWest protests that Extell's project never vested because DOB's permit "was invalid at the time of issuance" (App. Br. 11-12). But the question for purposes of vesting under the Zoning Resolution is whether the permit was "lawfully issued" under section 11-31 and 11-331. And LandmarkWest makes no attempt to argue that the permit was not lawfully issued under those statutes. It doesn't dispute that DOB's April 2019 permit was based on "an approved application showing complete plans and specifications." ZR § 11-31(a). Nor does it dispute that DOB's permit "authorizes the entire construction" of the building. *Id.* It also does not dispute that the permit was "issued prior to" the May 2021 amendment. *Id.* Indeed, LandmarkWest does not even bother to cite sections 11-31 or 11-331 in its brief.

Instead, LandmarkWest argues that Extell's project has not vested under traditional common law vesting rules (*see* App. Br. 11 (citing *Natchev v. Klein*, 41 N.Y.2d 833, 834 (1977)). But vesting under the common law is irrelevant here because the Zoning Resolution contains an explicit vesting provision with its own set of specific rules focusing on "whether or not certain physical stages of

construction relating to excavation and the foundation have been completed." *Estate of Kadin v. Bennett*, 163 A.D.2d 308, 309 (2d Dep't 1990). And because LandmarkWest does not dispute that Extell's project has vested under the Zoning Resolution, that is the end of the inquiry.

Even under common law vesting principles, if they applied, Extell's project vested because DOB's permit was not "invalid at the time of issuance," as LandmarkWest claims (App. Br. 12). Under the common law, vested rights "cannot be acquired … where there is a reliance on an invalid permit." *Perlbinder Holdings, LLC v. Srinivasan*, 27 N.Y.3d 1, 8 (2016). However, where "the permit [is] initially issued based on a reasonable interpretation of the Zoning Resolution, it [is] valid when issued." *Golia*, 95 A.D.3d at 629-30. Here, as explained *supra* at 25-30, the permit was valid when initially issued because DOB rationally determined that the building's four mechanical floors were "used for mechanical equipment" and could thus be deducted from the definition of floor area under ZR § 12-10. Because DOB's permit was "based on a reasonable interpretation of the Zoning Resolution," it gave Extell

"a vested right" to construct the building "in reliance on the validity of the permit." *Id.*

To the extent LandmarkWest argues that the May 2021 amendment retroactively renders the April 2019 permit invalid—by purportedly clarifying the definition of deductible mechanical space—that argument has no support in the case law. Courts treat building permits as invalid for purposes of common law vesting where they were issued "due to a misrepresentation by the applicant or an error by the municipal agency." *Town of Southold v. Estate of Grace R. Edson*, 78 A.D.3d 816, 817 (2d Dep't 2010); *see also Perrotta v. New York*, 107 A.D.2d 320, 324-25 (1st Dep't 1985). And the sort of municipal agency errors that warrant invalidating a permit typically involve permits that were mistakenly issued in contravention of clear zoning rules in effect at the time the permit was issued. *See, e.g.*, *Astoria Landing, Inc. v. N.Y. City Envt'l Control Bd.*, 148 A.D.3d 1141, 1142-43 (2d Dep't 2017); *Westbury Laundromat, Inc. v. Mammina*, 62 A.D.3d 888, 890 (2d Dep't 2009). LandmarkWest has not identified any case where a court held that a later-in-time zoning amendment retroactively rendered a permit

invalid and warranted depriving a developer of its vested right to construct a building. To do so would undermine Extell's reliance interests and "impede[] rational land use planning." *Ellington Constr. Corp.*, 77 N.Y.2d at 124.

2. Even if Extell's project had not vested, the May 2021 amendment would not apply retroactively.

LandmarkWest devotes substantial space to arguing that the May 2021 amendment should be applied retroactively to DOB's April 2019 building permit because it purportedly clarified what the law was all along (App. Br. 34-42). But, as just explained, whether the May 2021 amendment applies retroactively is irrelevant because the April 2019 permit was "lawfully issued" by DOB, ZR § 11-31, and gave Extell a vested right to continue construction regardless of any subsequent changes to the Zoning Resolution, *id.* § 11-331.

In any event, LandmarkWest has not overcome the strong presumption against retroactive application of statutes. *See James Sq. Assoc. LP v. Mullen*, 21 N.Y.3d 233, 246 (2013). "This 'deeply rooted' presumption against retroactivity is based on '[e]lementary

considerations of fairness [that] dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.'" *Regina Metro. Co., LLC v. N.Y. State Div. of Hous. & Community Renewal*, 35 N.Y.3d 332, 370 (2020) (quoting *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 265 (1994)). Those fairness considerations "are further heightened" where "the new statutory provisions affect[] contractual or property rights, matters in which predictability and stability are of prime importance." *Id.* at 382 (internal quotations omitted).

Here, retroactive application of the May 2021 amendment is unwarranted—regardless of vesting—for two reasons. First, the May 2021 amendment was not a mere clarification. It made a substantive change to the law governing floor area deductions for mechanical equipment because, for the first time, those deductions were limited to "the *minimum necessary* floor space to provide for necessary maintenance and access to such equipment." ZR § 12-10 (2021) (emphasis added). The presumption against retroactivity is particularly strong where the amendment makes a substantive change in the law, rather than serving a remedial or clarifying

purpose. *See, e.g.*, *Bros. v. Florence*, 95 N.Y.2d 290, 298-99 (2000); *Raquel T. v. Angel Guardian Children & Family Servs.*, 293 A.D.2d 223, 228 (1st Dep't 2002); *Colombo v. City of N.Y.*, 216 A.D.2d 27, 27 (1st Dep't 1995).

Second, even if the May 2021 amendment had been merely clarifying, it would not apply retroactively because LandmarkWest has not pointed to any clear evidence showing that the City Council intended it to have retroactive effect. *See Schultz Constr., Inc. v. Ross*, 76 A.D.2d 151, 154 (3d Dep't 1980) (argument that "the amendment simply clarifies the pre-existing intent of the Legislature is not an adequate basis for finding a retroactive intent" because no "clear expression of [retroactive] intent"), *aff'd*, 53 N.Y.2d 792 (1981).

Because Extell's project has already vested, and because LandmarkWest cannot establish that the May 2021 amendments should be applied retroactively, those amendments do not affect the validity of the April 2019 permit.

CONCLUSION

This Court should affirm Supreme Court's order.

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Respectfully submitted,

HON. SYLVIA O. HINDS-RADIX
Corporation Counsel
of the City of New York
Attorney for City Respondents

By: _____
PHILIP W. YOUNG
Assistant Corporation Counsel

100 Church Street
New York, NY 10007
(212) 356-2375
phyoung@law.nyc.gov

CLAUDE S. PLATTON
PHILIP W. YOUNG
of Counsel

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