To Be Argued By:
JASON CYRULNIK
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

BRIEF FOR RESPONDENTS EXTELL DEVELOPMENT COMPANY AND WEST 66TH SPONSOR LLC

JASON CYRULNIK
PAUL FATTARUSO
ADINA LEVINE
CYRULNIK FATTARUSO LLP
55 Broadway, Third Floor
New York, New York 10006
646 844 2466
jcyrulnik@cf-llp.com
pfattaruso@cf-llp.com
alevine@cf-llp.com

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

Respondents Extell Development Company and West 66th Sponsor LLC (together, "Extell") respectfully submit this brief in opposition to the appeal by Petitioner-Appellant, LandmarkWest! Inc. ("LandmarkWest!"), of the Decisions and Orders of the New York Supreme Court of the State of New York, New York County (Rakower, J.), which (i) denied LandmarkWest!'s Article 78 Petition on May 4, 2021 (R4) and (ii) denied LandmarkWest!'s motion for renewal on November 5, 2021 (R32).

PRELIMINARY STATEMENT

The Supreme Court conducted a proper Article 78 review of a well-reasoned administrative agency decision and correctly held that the agency's decision was not arbitrary or capricious. That sound ruling should be affirmed.

This action concerns a building project on Manhattan's Upper West Side. Upset with the height of the project, LandmarkWest! and other neighborhood groups challenged the Department of Buildings' ("DOB") approval of the project's building permit, which vested in April 2019. LandmarkWest! and other challengers originally contended that the project was too tall under two theories: (i) purported violation of the "bulk distribution" requirements regulating the proportions of floor area permitted in the "base" and "tower" portions of the building, and (ii) purportedly excessive floor-to-ceiling height of the project's mechanical spaces. Both of those theories have now been fully litigated, and this Court has

upheld the project's compliance with zoning requirements on both issues. *See City Club of N.Y. v. BSA*, 198 A.D.3d 1, 7 (1st Dep't 2021).

Apparently recognizing (correctly) that its zoning challenges to the *height* of the project were clearly doomed to failure, LandmarkWest! suddenly changed course at the eleventh hour of its appeal before the Board of Standards and Appeals ("BSA") and pivoted to a new, untimely, and meritless theory challenging zoning compliance of the *horizontal* floor area of the project's mechanical spaces. The BSA recognized that LandmarkWest! had not timely presented this issue (*see* R366 n.1) but nonetheless resolved, in its discretion, to address the untimely issue anyway.

The BSA, a specialized agency with expertise in zoning matters, held a full hearing on LandmarkWest!'s belatedly raised issue, heard extensive testimony (including expert testimony submitted by LandmarkWest! and Extell), instructed DOB to re-review the building's mechanical plans by the standards established under BSA precedent, conducted a thorough analysis of LandmarkWest!'s position, and correctly denied LandmarkWest!'s appeal in a detailed and sound written decision (R101-12). The BSA's ruling was careful, well-considered, and plainly not arbitrary or capricious.

Accordingly, the Supreme Court, in its Article 78 review of the BSA's rational decision, correctly denied LandmarkWest!'s petition and dismissed the

proceeding. None of LandmarkWest!'s four strained arguments on this appeal remotely justify reversal of the Supreme Court's well-founded ruling.

First, LandmarkWest! incorrectly contends (at 26-28) that because the BSA's decision rejecting LandmarkWest!'s position involved a "tie vote," it somehow is not entitled to the well-established standard of judicial deference under Article 78. That is not the law. By law, the BSA's tie vote represents a decision to uphold the project's building permit. That decision has full force and effect and, to the extent it is reviewable at all (see below), it is subject to the established standards for judicial review under Article 78.

Second, LandmarkWest! wrongly asserts (at 28-34) that the BSA somehow committed a "pure legal error" in finding that Extell's mechanical floors are "used for" mechanical equipment—even though DOB found that the mechanical floors are dedicated exclusively to housing mechanical equipment and no other use (R377). LandmarkWest!'s flawed argument not only misstates the law, but also critically ignores that the BSA's decision involves application of the zoning rules to the particular project at issue—based on review of the project's architectural plans and consideration of testimony from experts, among other evidence. Far from deciding a "pure legal" question, the BSA's ruling required factual findings and the application of those findings to the zoning rules. The law is clear that such

determinations fall squarely within the BSA's expertise and are entitled to deference.

Third, LandmarkWest! falsely accuses the Supreme Court (at 34-42) of "failing to consider" a May 2021 amendment to the Zoning Resolution intended to improve buildings' resiliency to flooding. To the contrary, the Supreme Court squarely considered that amendment, which was the subject of a renewal motion. The Supreme Court correctly concluded that the amendment does not affect the outcome of this case. Among the many reasons that the 2021 flood-resiliency amendment does not help LandmarkWest!'s case, that amendment was enacted more than two years *after* Extell's permit vested, and it does not apply retroactively. Indeed, this Court already held that a zoning amendment enacted after the vesting of Extell's permit for this very project did not apply to the project. *See City Club*, 198 A.D.3d at 7 ("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").

Fourth, apparently recognizing the lack of merit in its prior arguments, LandmarkWest! resorts once again to pivoting (at 42-48) to a new theory, asking this Court to take "judicial notice" of seven zoning requests for determinations ("ZRD1" applications) from 2013-2015, with the apparent goal of belatedly trying to criticize testimony provided by DOB's general counsel at the BSA's December

2019 hearing. Of course, LandmarkWest! asks this court to take "judicial notice" because the applications were not part of the record before the BSA or the Supreme Court. LandmarkWest! cannot advance new (and meritless) theories now based on material that was not presented to the BSA or even to the Supreme Court.

Finally, beyond its lack of merit, LandmarkWest!'s Article 78 petition suffered from another fundamental defect: LandmarkWest! failed to timely raise with the BSA the issue that it raises in this case. That defect, akin to an untimely notice of appeal, poses a *jurisdictional bar* to judicial review. LandmarkWest!'s original appeal to the BSA raised only other theories that it has since abandoned. It waited until deep into the BSA's proceedings—three months too late—to raise this horizontal floor area issue in a "Hail Mary" attempt to block progress on the project once its other theories were clearly foundering. BSA in its discretion proceeded to decide the issue despite its untimeliness, but LandmarkWest! is not entitled to Article 78 judicial review of that discretionary agency determination.

Accordingly, this Court should affirm the Supreme Court's sound rulings.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Was the BSA's administrative agency review and affirmance of DOB's zoning determination rational and entitled to deference? The Supreme Court answered *Yes*. R27-28.

2. Did a May 2021 amendment to the zoning rules, enacted more than two years *after* Extell's building permit had vested, justify renewal of the Supreme Court's determination that the BSA's 2020 ruling was rational? The Supreme Court in its discretion answered *No*. R56.

3. Was LandmarkWest! even entitled to Article 78 review of an issue it had failed to timely raise before the BSA? The Supreme Court did not reach this question because LandmarkWest!'s petition failed on other, independently sufficient grounds.

COUNTER-STATEMENT OF THE CASE

1. DOB Approval

The project at issue is a 39-story, 776-foot residential and community facility building in the Upper West Side's Special Lincoln Square District, a special-purpose area with its own distinct set of zoning provisions. R101. In July 2018, DOB issued a foundation permit for the proposed building and approved the corresponding zoning diagram. R4348. In September 2018, LandmarkWest! submitted a "Zoning Challenge" to DOB, challenging the *vertical height* of the project's 161-foot-high mechanical space. R121, R136. LandmarkWest! did *not* assert that the amount of *horizontal* floor space allocated to the mechanical equipment was excessive. R136, R4349.

On November 19, 2018, DOB rejected LandmarkWest!'s challenge, explaining that the "Zoning Resolution does not prescribe a height limit for building floors." R121. On December 19, 2018, LandmarkWest! appealed DOB's decision to the BSA. R162. In its appeal, LandmarkWest! again challenged the *vertical height* of the project's mechanical space—i.e., DOB's "determination that the 161-foot-tall void constitutes exempt 'mechanical space' under ZR § 12-10 for the purpose of calculating 'floor area.'" R171. Again, LandmarkWest! did *not* assert that the amount of *horizontal* floor space allocated to mechanical equipment was excessive. R4349.

In January 2019, DOB issued a notice of intent to revoke approval of the project, on the grounds that "the mechanical space with a floor-to-floor height of approximately 160 feet is not customarily found in connection with residential uses." R333. DOB, however, expressly invited Extell to present "sufficient information" to "demonstrate that the approval should not be revoked." R334. Accordingly, Extell submitted a letter to DOB to explain, based on BSA and DOB precedent, why the height of the challenged mechanical spaces complied with the zoning rules. R1864-68. Around the same time, in conjunction with comments received from the Fire Department of New York, Extell modified the building plans to, among other things, reduce the height of one mechanical floor and increase the height of other floors that were also devoted exclusively to mechanical

equipment. R4349-50. DOB ultimately determined not to revoke its approval and in April 2019 issued a post-approval amendment for the project. R4350.

2. BSA Appeal

In May 2019, LandmarkWest! appealed to the BSA, challenging the vertical height of the project's mechanical spaces and compliance with the zoning regulations' "bulk distribution" requirements. *See* R339-40, R354 (arguing that certain floors containing mechanical equipment were too tall). Those issues have since been resolved by this Court in another action and are not at issue in this case. *City Club of N.Y. v. BSA*, 198 A.D.3d 1, 6-7 (1st Dep't 2021). LandmarkWest!'s appeal to the BSA did *not* raise the issue of whether the amount of the horizontal floor space allocated to mechanical equipment was excessive. R4350.

On August 6, 2019, the BSA held a hearing on LandmarkWest! and other challengers' appeals, which concerned the vertical height of the mechanical spaces and the project's compliance with "bulk distribution" requirements. During that three-and-a-half-hour hearing, LandmarkWest! raised—for the first time—the question of whether the *horizontal* floor space of the project's mechanical spaces was too large. *See* R2962-70. Following that hearing, on August 21, 2019, LandmarkWest! submitted a brief to the BSA devoted solely to its newly raised horizontal theory, calling the "entire 'height' issue" on which LandmarkWest!'s briefing and argument had previously focused "a giant red-herring." R360. To try

to support is argument regarding its new horizontal theory, LandmarkWest! relied on the BSA's 2017 "*Sky House*" decision, 15 East 30th Street, BSA Cal. No. 2016-4327-A (available at R4325-32). *See* R360-61.

The BSA continued its hearing to September 10, 2019. During the continued hearing, which lasted more than three hours, the BSA's General Counsel explained, over repeated interruptions from LandmarkWest!'s counsel, that LandmarkWest! had failed to timely commence its new horizontal challenge under the BSA's regulations, which require that an applicant appeal a DOB determination to the BSA within 30 days. *See* R3094. At the end of that session, the BSA closed the proceedings and indicated that it would provide a decision on the issues raised in the challengers' appeals the following week. R3173.

On September 17, 2019, the BSA unanimously rejected the challengers' appeals attacking both the vertical height of the mechanical spaces and the project's compliance with "bulk distribution" requirements. R3198-207. After announcing that decision, the BSA, on its own motion, decided to re-open the proceedings to address LandmarkWest!'s belatedly raised horizontal challenge. R3211. To that end, the BSA instructed DOB to re-review the building's mechanical plans "in the same way that the Sky House mechanical drawings were reviewed," with the "same depth." R3209. The BSA explained that such a review should address whether "the amount of mechanical equipment that's shown on the

drawings" was "the amount that you would normally associate with a building of this size." R3213.

In response to the BSA's instruction, DOB clarified that it had already reviewed the plans "and found them sufficient and went through the proposed equipment" but committed to provide the BSA with further analysis consistent with what DOB had provided to the BSA in *Sky House*. R3216.

The BSA's written resolution memorializing their unanimous decision announced at the September 17, 2019, hearing explained with respect to LandmarkWest!'s late-raised horizontal challenge that "a timely third issue has not been presented" but that the BSA would nevertheless proceed to analyze and address the issue anyway, "on its own initiative." R366 n.1.

3. The BSA's Review of the Project's Floor-Area Deductions

On October 16, 2019, DOB submitted a brief to the BSA reflecting the analysis the BSA had requested at the September 17, 2019, hearing. R375-403. In the brief, DOB provided a "description and analysis of the mechanical equipment in the Proposed Building to verify that the mechanical equipment was properly deducted from floor area and that the Permit was properly issued." R376. DOB listed the mechanical equipment for each of the four mechanical floors, and stated the following:

> Using the *15 East 30th Street* case as a blueprint, a description of the mechanical equipment included in the Proposed Building includes . . .
>
> - **The 15th Floor**: A 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;
> - **The 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;
> - **The 18th Floor**: 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;
> - **The 19th Floor**: A 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.

R377-78. 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." R377.

Additionally, as directed by the BSA, DOB compared "the amount of floors deducted with similarly situated buildings." *Id.* DOB found that "the amount of

stories devoted entirely to mechanical equipment is consistent with similarly sized buildings." *Id.* Expert testimony corroborated DOB's findings. Michael Parley, a pre-eminent zoning expert, concluded that the project's percentage of mechanical floor space (13.45%) was well within the percentage range (in fact, on the lower end) of mechanical floor space in similar buildings (buildings between 665 and 880 feet tall), which ranged from 13.45% to 21.60%, with an average of 16.87%. R485-86. Moreover, the number of "full 'interstitial' mechanical floors" for the project (four) was also "entirely within the spectrum of the number of such floors in other tall buildings," which ranged from two to twelve. R485.

LandmarkWest! submitted expert testimony from Michael Ambrosino, an engineer. LandmarkWest! conceded that Ambrosino had performed only "a partial analysis." R439. Nevertheless, based on this partial analysis, LandmarkWest! represented to the BSA that the mechanical equipment on the relevant floors required only 18% to 28% of the floor space on those floors. R440. Citing a DOB draft bulletin, LandmarkWest! claimed that if Extell "cannot show that the mechanical equipment and requisite areas occupy at least 90% of the floor area," then floor-area deductions for the mechanical equipment floor were improper. R441.

Extell responded and explained that Ambrosino's admittedly incomplete analysis was replete with errors and severely understated the size and scope of the

project's mechanical infrastructure. R490. Extell observed, based on expert affidavits, that Ambrosino's analysis ignored a significant amount of mechanical equipment included in the project plans. Indeed, his analysis was "based on the HVAC mechanical ductwork plans alone" and therefore completely ignored "*all* of the equipment shown on the three other sets of mechanical plans for each floor, i.e., HVAC mechanical piping, fire protection and plumbing." *Id.* And even with respect to the HVAC mechanical ductwork plans, he failed "to account for various forms of equipment" that were "clearly shown," including "mechanical fans, heaters, shafts, chases, horizontal ductwork distribution and plenums." *Id.* Further, Ambrosino overstated the amount of total floor area on each of the relevant floors—the denominator for his percentage calculations—by approximately 10%, because he improperly included "the area of the building core, structure and curtain wall." *Id.*

On December 17, 2019, the BSA held a three-and-a-half-hour hearing on LandmarkWest!'s untimely horizontal challenge. The hearing included presentations from attorneys for DOB, LandmarkWest!, and Extell, as well as extensive expert testimony. Ambrosino testified on behalf of LandmarkWest!; Vivek Patel, the project's mechanical engineer, testified on behalf of Extell; and Michael Parley and the project's architect of record, Luigi Russo, addressed

questions from the Commissioners. Moreover, Ambrosino, Parley, Russo, and Igor Bienstock submitted written testimony. *See* R449-51; R565-99.

During the hearing, DOB reiterated that it "reviewed the approved mechanical drawings, just as it had done in the *Sky House* case, and concluded that the space as shown on the approved mechanical plans cannot realistically be occupied for purposes other than housing such equipment," and "as such is properly exempt from floor area." R3695. DOB explained that, to determine whether floor area is properly deducted, DOB typically considers whether "the room contains so much equipment and associated room to maneuver around it, and to be able to operate the equipment," such that "other uses can't be occupied in the space." R3699. DOB emphasized that if it sees "a single piece of equipment" in a large space, DOB "will question it," "reject if it was obvious," and "give pushback and ask for more." *Id.*[1] In essence, DOB asks: "is it going to become some other use, or is this mechanical space." R3706. DOB explained that it does not apply "quantitative criteria" to analyze floor area used for mechanical equipment because it is "too difficult to articulate how much mechanical equipment is acceptable in all

[1] This record evidence controverts LandmarkWest!'s unsupported contention (at 15) that DOB somehow "admitted" that "as a policy" it "does not review ME plans for accuracy of FAR calculations on largescale commercial or residential condominium projects."

buildings throughout the city, given the differing needs of every building." R3698, R3701; *cf.* R3627.

LandmarkWest! did not show—or even suggest—that the floor space Extell had identified as being used for mechanical equipment would be used for anything other than mechanical equipment. Moreover, DOB confirmed that there were "many flaws" with the analysis submitted by LandmarkWest!'s proffered expert, Ambrosino. R3696-97. Further, DOB emphatically stated that the years-old draft DOB bulletin LandmarkWest! had relied upon was merely a 2013 "draft" and had "never been issued." R3697-98.[2]

4. BSA Ruling

On January 28, 2020, the BSA publicly announced its decision rejecting LandmarkWest!'s untimely raised horizontal challenge. The BSA then memorialized its decision and reasoning in a resolution dated November 6, 2020. R101-12.

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-

[2] The draft bulletin was never issued or adopted for good reason. Stakeholders identified a litany of concerns with the draft bulletin's proposed methodology, including because it failed to adequately account for circulation space, and DOB never adopted the draft for these and other reasons. R591-98.

area deductions." R103-04. The BSA explained that, consistent with precedent, it "reviewed the record in its entirety, including expert testimony and plans for the New Building." R104. Based on that review, the BSA found that the building's plans "demonstrate sufficient floor-based mechanical equipment." R103. As further support for its conclusion, the BSA 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." R104-05.

In sum, the BSA reviewed DOB's determination of the horizontal challenge de novo and concluded that DOB "acted reasonably in reviewing and approving the New Building's mechanical plans." R103-04.

5. Article 78 Proceeding Before the Supreme Court

Unhappy with the BSA's sound ruling, LandmarkWest! commenced this Article 78 proceeding. After a hearing on May 4, 2021, the Supreme Court correctly denied LandmarkWest!'s petition and dismissed the proceeding. R4. The Supreme Court found that the BSA had rationally considered LandmarkWest!'s arguments and found them unavailing. R28. The Supreme Court recognized that the BSA had reached its decision after duly considering the project's amount and types of equipment. *Id.* The Supreme Court concluded that it was "not for this Court to substitute its judgment for that of the BSA." *Id.* In short, the Supreme

Court held: "The BSA made a finding, I find that it was not arbitrary and capricious and the petition is denied." *Id.*

Several months later, in August 2021, LandmarkWest! moved for leave to renew based on a May 12, 2021, amendment to the Zoning Resolution. That amendment afforded greater flexibility to homeowners taking flood resiliency measures, and the amendment does not provide for retroactive application. R4441-42. After a hearing on November 5, 2021, the Supreme Court correctly held that the amendment did not alter the decision to deny LandmarkWest!'s petition and thus denied LandmarkWest!'s motion to renew. R32, R56.

ARGUMENT

The Supreme Court correctly held that the BSA's rational ruling was not arbitrary and capricious. In an Article 78 proceeding such as this, the "function of the court" is limited to determining, based on "the evidence and arguments raised before the agency when the administrative determination was rendered," whether an administrative agency determination "had a rational basis in the record or was arbitrary and capricious." *HLV Assocs. v. Aponte*, 223 A.D.2d 362, 363 (1st Dep't 1996). The Court of Appeals has long emphasized:

> Judicial review of local zoning decisions is limited; not only in our courts but in all courts. Where there is a rational basis for the local decision, that decision should be sustained. It matters not whether, in close cases, a court would have, or should have, decided the matter differently. The judicial responsibility is to review zoning decisions

> but not, absent proof of arbitrary and unreasonable action, to make them.

Cowan v. Kern, 41 N.Y.2d 591, 599 (1977).

Indeed, the Court of Appeals has recently reiterated its well-established standard of deference: "Where the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute." *Peyton v. BSA*, 36 N.Y.3d 271, 282 (2020). This Court has properly applied that standard to this very project. *City Club of N.Y. v. BSA*, 198 A.D.3d 1, 7 (1st Dep't 2021) (BSA ruling entitled to deference) (citing *Peyton*).

Here, the BSA rationally considered an extensive record, including DOB analysis conducted at the BSA's direction pursuant to BSA precedent, as well as additional expert testimony, architectural plans, and other evidence including examples of similar buildings. *See, e.g.*, R103-05. Accordingly, the Supreme Court correctly declined to substitute its judgment for that of the administrative agency with deep experience and expertise applying the zoning rules. R28.

LandmarkWest! makes four arguments to try to convince this Court to reverse the Supreme Court's sound ruling: (i) it asks the Court to make new law and change the "arbitrary and capricious" standard for when there is a "tie vote";

(ii) it claims that the BSA committed a "pure legal error" in the factual finding that Extell's mechanical floors are used for mechanical equipment and have no other use; (iii) it accuses the Supreme Court of "failing to consider" a May 2021 amendment to the Zoning Resolution intended to improve buildings' resiliency to flooding; and (iv) it now proffers new factual evidence that it claims this Court should consider, even though that evidence was neither presented to the Court below or the BSA. LandmarkWest!'s arguments fail.

I. The BSA's Denial of LandmarkWest!'s Application Is Not Subject to Any Different Standard of Judicial Review for Being a "Tie Vote"

LandmarkWest! is not entitled to any different, less deferential standard of judicial review simply because the BSA commissioners' vote to deny LandmarkWest!'s application was 2–2. The BSA's vote and decision have the full force and effect of rejecting LandmarkWest!'s arguments and denying LandmarkWest!'s request to revoke the project's building permit. To the extent it is reviewable at all (*see* Section V below), the BSA's ruling is subject to the established standards for judicial review under Article 78.

Under applicable law, the BSA's ruling was indisputably a valid and binding determination and a denial of LandmarkWest!'s application. *See* BSA Rules 1-11.5, 1-12.1, 1-12.9; *see also* NYC Charter Section 663; R27; R105. The BSA commissioners who rejected LandmarkWest!'s argument "constitute a controlling group for purposes of the decision," and "their rationale necessarily states the

agency's reasons for acting as it did." *Fed. Election Comm'n v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) (discussing tie in FEC context where, as here, tie results in denial). As courts have found in analogous cases, such agency decisions are entitled to the same deference as any other. *See In re Sealed Cases*, 223 F.3d 775, 779 (D.C. Cir. 2000) ("we owe deference to [an FEC] legal interpretation supporting a negative probable cause determination that prevails on a 3–3 deadlock").

Evidently recognizing that the established standard for Article 78 review is fatal to its case, LandmarkWest! complains (at 10) that the "arbitrary and capricious standard is merely copied and pasted from one decision to another as homage to formalities." It attempts (at 26) to downplay its "loss at the BSA" as a mere "technicality" and asks the Court to make a new rule that "judicial deference is owed to the BSA only if it reaches a majority vote." That is not the law, and LandmarkWest! cites to no authority to support its novel and unfounded notion. Indeed, LandmarkWest!'s cited authority reinforces that the established standards of Article 78 review apply equally to decisions involving tie votes. *See Tall Trees Constr. Corp. v. Zoning Bd. of Appeals of the Town of Huntington*. 97 N.Y.2d 86, 92-93 (2001) (holding that tie-vote decision was judicially reviewable and affirming application "arbitrary and capricious" standard of review); *Palladino v. Zoning Bd. of Appeals of Town of Chatham*, 39 A.D.3d 1004, 1006 (3d Dep't

2007) (applying same arbitrary and capricious standard to tie-vote decision); *Zagoreos v. Conklin*, 109 A.D.2d 281, 296 (2d Dep't 1985) (tie-vote decision denying application was reviewable on the question of "whether the denial was arbitrary and capricious").

LandmarkWest! incorrectly suggests (at 27) that the BSA was somehow incapable of issuing a resolution containing factual findings under a tie-vote scenario. To the contrary, the BSA's regulations *require* the BSA to issue a resolution memorializing its decision, including in the event of a tie vote. *See* BSA Rule 1-12.1 (if an application "fails to receive three (3) affirmative votes, the action will be deemed denied," and "a final determination of the Board *will be* in the form of a written resolution," which "will set forth the Board's findings and conclusions") (emphasis added); BSA Rule 1-12.9 ("The determination of the Board *in each case will be* incorporated in a resolution formally adopted and filed at the Board's office.") (emphasis added). The BSA duly issued such a resolution here, which sets forth its reasoned findings. R101-12. The decision itself and the record more broadly establish that the BSA's ruling was rational and well-considered, not at all arbitrary or capricious.

II. LandmarkWest! Fails to Identify Any Valid Grounds for Judicial Reversal of the BSA's Well-Founded Findings and Ruling

The BSA, with the benefit of a review and analysis supplied by DOB, carefully assessed the question of whether the project's mechanical spaces are used

for mechanical equipment, and the BSA rationally and correctly concluded that they are. That finding was the product of an hours-long hearing informed by an extensive factual record and expert testimony. LandmarkWest!'s strained attempt (at 28-34) to impute a "pure legal error" to the BSA's findings and ruling falls flat.

A. The BSA's Interpretation Is Entitled to Deference

The BSA's interpretation of the relevant statutory language is entitled to deference for at least four reasons.

First, the "BSA and DOB are responsible for administering and enforcing the zoning resolution," including ZR 12-10, and BSA's interpretation "must therefore be 'given great weight and judicial deference, so long as the interpretation is neither irrational, unreasonable, nor inconsistent with the governing statute.'" *Applebaum v. Deutsch*, 66 N.Y.2d 975, 977 (1985) (quoting *Trump-Equitable Fifth Ave. Co. v. Gliedman*, 62 N.Y.2d 539, 545 (1984)). "Decisions of the BSA are entitled to deference and a court may not substitute its own judgement for the reasoned determination of the board." *Barry's Bootcamp NYC LLC v. BSA*, 195 A.D.3d 501, 502 (1st Dep't 2021); *see N.Y. Botanical Gardens v. BSA*, 91 N.Y.2d 413, 418-19 (1998) (Court of Appeals has "frequently recognized" that the BSA's "interpretation of the Zoning Resolution is entitled to deference"); *see also Andryeyeva v. N.Y. Health Care, Inc.*, 33 N.Y.3d 152, 175 (2019) ("the Court '*must* defer to an administrative agency's rational interpretation

of its own regulations'") (quoting *Peckham v. Calogero*, 12 N.Y.3d 424, 431 (2009)); *Tenants United Fighting for the Lower E. Side v. CPC*, 191 A.D.3d 548 (1st Dep't 2021) ("court should have deferred to CPC's reasonable interpretation of the ZR").

Second, far from being irrational, unreasonable, or inconsistent with the governing statute, the BSA's interpretation is correct and, at an absolute minimum, a reasonable interpretation. "When a statute is ambiguous and requires interpretation, the construction given to the statute by an administrative agency responsible for its administration should be upheld by the courts." *Better World Real Estate Grp. v. N.Y. City Dep't of Fin.*, 122 A.D.3d 27, 35 (2d Dep't 2014) (citing *Robins v. Blaney*, 59 N.Y.2d 393, 399 (1983)); *Comm. for Environmentally Sound Dev. v. Amsterdam Ave. Redev. Assocs. LLC*, 194 A.D.3d 1, 10 (1st Dep't 2021) (where law is "not entirely clear and unambiguous," courts must defer to BSA interpretation "since it involved special expertise in a particular field to interpret statutory language"), *leave to appeal denied,* 37 N.Y.3d 906 (2021). While Extell submits that the BSA's interpretation of ZR 12-10 is consistent with the provision's clear language (as discussed below), even if the provision were ambiguous, the BSA's interpretation is still entitled to deference as it is plainly reasonable.

Third, in interpreting ZR 12-10, the BSA necessarily and properly relied on its expertise. *See N.Y. Botanical Gardens v. BSA*, 91 N.Y.2d 413, 419 (1998) ("when applying its special expertise in a particular field to interpret statutory language, an agency's rational construction is entitled to deference"). ZR 12-10 sets forth the definition of "floor area" in a 15-part definition that contains 14 independent exceptions. That definition and its exceptions, in turn, incorporate dozens of defined terms. *Cf. Peyton v. BSA*, 36 N.Y.3d 271, 282 (2020) ("complex set of cross-references and interlocking provisions" in ZR 12-10 definition "comprises no less than 13 defined terms, many of which cross-reference other defined terms," which "counsels deference"). Thus, as the Court of Appeals has recognized, ZR 12-10 "is part of an intricate statutory edifice with which the BSA is most familiar." *Id.*

The BSA's determination involved "specific application of broad statutory terms"—including the Zoning Resolution's defined term "used for"—and thus "is entitled to deference." *Chaudanson v. City of N.Y.*, 200 A.D.3d 571, 572-73 (1st Dep't 2021) (agency's "specific application of broad statutory terms—specifically, 'maintenance' and 'use'" as those terms are used in the Building Code—"is entitled to deference") (citing *Peyton*). Indeed, even the undefined terms of ZR 12-10—such as the term "mechanical equipment"—are technical and call for the BSA's expertise regarding, among other things, what constitutes "mechanical

equipment" sufficient to qualify for exclusion from "floor area" for purposes of calculating floor area ratio. *See Comm. for Environmentally Sound Dev.*, 194 A.D.3d at 11 (1st Dep't 2021) (holding that ZR 12-10 "contained undefined and technical terms with conflicting interpretations and we defer to the BSA's interpretation when it is reasonable"); *Queens Neighborhood United v. DOB*, 2019 WL 302167, at *4 (Sup. Ct. N.Y. Cty. Jan. 23, 2019) ("BSA is best situated to address" question of "whether an establishment's 'floor area' for the purposes of determining its classification should include subterranean space"), *injunction pending appeal denied*, 2019 WL 1052273 (1st Dep't Mar. 5, 2019)

Fourth, the BSA's decision was based on its "practical construction" of ZR 12-10. As "a general rule, 'the practical construction of the statute by the agency charged with implementing it, if not unreasonable, is entitled to deference by the courts.'" *Vill. of Scarsdale v. Jorling*, 91 N.Y.2d 507, 516 (1998) (quoting *Harris & Assocs. v. deLeon*, 84 N.Y.2d 698, 706 (1994)). The BSA is the agency "responsible for the sound and practical administration of" the Zoning Resolution. *McKernan v. City of N.Y. Civil Serv. Comm'n*, 127 Misc. 2d 946, 952 (Sup. Ct. N.Y. Cty. 1985). It is composed of "experts in land use and planning" who "not only possess technical knowledge of New York City's reticulated zoning regulations and their operation in practice, but also are uniquely equipped to assess the practical implications of zoning determinations affecting the City's eight

million residents." *Peyton v. BSA*, 36 N.Y.3d 271, 280 (2020) (quoting *Toys R Us v. Silva*, 89 N.Y.2d 411, 418 (1996)). It would therefore be improper for the court to substitute "its judgment for that of the agency" with respect to which, and how much, mechanical equipment should be considered in excluding a space from floor area. *Hatanaka v. Lynch*, 304 A.D.2d 325, 326 (1st Dep't 2003) (reversing court that "improperly substituted its judgment for that of the agency").

Accordingly, the BSA's interpretation of ZR 12-10 is entitled to deference and "must be upheld if reasonable." *P'ship 92 LP v. State Div. of Hous. & Cmty. Renewal*, 46 A.D.3d 425, 429 (1st Dep't 2007).

B. The BSA's Interpretation Is Rational and Correct

Here, the BSA's interpretation of ZR 12-10 is eminently reasonable and comports with the regulation's plain language. The BSA interprets the phrase "used for mechanical equipment" to refer to floor space "devoted to housing the mechanical equipment," as opposed to floor space that is being used for some other use in the building. R104-05, 107. That interpretation is also reflected in the BSA's prior *Sky House* decision, which explained that floor space is "used for mechanical equipment" when "there is no reason to suspect that floor spaces designated as being used for mechanical equipment on the approved plans will not be put to such use." R4327-28, *15 East 30th Street*, BSA Cal. No. 2016-4327-A; *see also City Club of N.Y. v. BSA*, 198 A.D.3d 1, 7 (1st Dep't 2021) (upholding BSA's rational

reliance on the *Sky House* decision, *15 East 30th Street*—the same precedent on which the BSA rationally relied here).

As the Supreme Court correctly ruled, LandmarkWest! offers no valid basis for this Court to override the BSA's rational interpretation of regulations the BSA is responsible for administering. R27-28. Instead, LandmarkWest! wrongly criticizes the BSA (at 28-34) for supposedly applying a "subjective" standard that allows mechanical-equipment deductions for "any and all space a developer wishes to claim"—but that is not what the BSA did. The record amply demonstrates that the BSA carefully considered Extell's deductions and did not simply permit them blindly.

The BSA explained that the process for determining whether floor space is "used for mechanical equipment," set forth in the *Sky House* precedent, involves (among other things) reviewing a building's mechanical drawings and considering whether (i) there is any "reason to suspect that floor spaces designated as being used for mechanical equipment on the approved plans will not be put to such use" and (ii) the amount of proposed mechanical equipment "is customarily found in connection with" similar buildings. R4281-82, *15 East 30th Street*, BSA Cal.No. 2016-4327-A; *see also* R3209 (BSA instructing DOB to "review the mechanical drawings in the same way that the *Sky House* mechanical drawings were reviewed").

Consistent with those standards, DOB specifically examined whether the space at issue was "going to become some other use, or is this mechanical space," and reviewed the project plans to determine whether the space could "realistically be occupied for purposes other than housing such equipment." R3695:15-19, R3706:17-21. DOB specifically stated that it would not allow an applicant to designate a large area containing "a single piece of equipment" as "floor space used for mechanical equipment," and that DOB would question a design that doesn't make sense, "give pushback and ask for more," and potentially "reject it." *Id.*; R3699:3-9. Upon searching examination, the BSA and DOB rationally found that the project's mechanical spaces "cannot realistically be occupied for purposes other than housing such equipment," and "as such is properly exempt from floor area." R3695.

Despite that finding, LandmarkWest! effectively asked the BSA, and now asks this Court, to adopt LandmarkWest!'s preferred re-arrangement of the building's mechanical equipment in place of Extell's engineers' arrangement of the equipment. LandmarkWest! contends (at 32-33), for example, that its proffered expert Michael Ambrosino's analysis "presented the most efficient layout" for the building's HVAC equipment. The BSA rationally and correctly declined to adopt LandmarkWest!'s approach. For starters, as discussed further below, the BSA had ample ground not to credit Mr. Ambrosino's testimony, including because he

significantly understated "the amount and types of mechanical equipment" in the building. *See* R4371-73 (discussing salient flaws in Mr. Ambrosino's analysis); R3698 (finding that Mr. Ambrosino's "alternative layouts omit proposed equipment in the building").

More fundamentally, the applicable Zoning Resolution does not require property owners such as Extell to cram their mechanical equipment into the smallest footprint possible—yet LandmarkWest! seeks to re-write it to impose such a requirement. LandmarkWest!'s position is untenable under New York law because "a court cannot amend a statute by inserting words that are not there," nor "read into a statute a provision which the Legislature did not see fit to enact." *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)).

Not only does LandmarkWest!'s interpretation improperly add new language and requirements to the statute, but it also does so in a manner that imposes additional burdens on property owners. Thus, LandmarkWest! disregards the well-settled principle that zoning ordinances "are in derogation of common law rights and, accordingly, must be strictly construed so as not to place any greater [influence] upon the free use of land than is absolutely required." *Exxon Corp. v. BSA*, 128 A.D.2d 289, 295-96 (1st Dep't 1987). Zoning regulations "are in

derogation of the common law" and any ambiguity "must be resolved in favor of the property owner." *Allen v. Adami*, 39 N.Y.2d 275, 277 (1976).

Moreover, LandmarkWest!'s interpretation *directly conflicts* with the Zoning Resolution, which expressly defines the phrase "used for" to include "arranged for," "designed for," "intended for," "maintained for," or "occupied for." ZR 12-01. LandmarkWest! self-servingly seeks to change the definition of "used for" to include "required for"—but that phrase is entirely absent from the definition in ZR 12-01. The definition of "used for" makes clear that a space *designed for* or *intended for* mechanical equipment is "used for" mechanical equipment and may be deducted from the calculation of floor area ratio, regardless of whether that space is the amount *required for* mechanical equipment.

In an apparent attempt to avoid the Zoning Resolution definition, which is fatal to LandmarkWest!'s position, LandmarkWest! urges (at 30) that "we must also turn to the dictionary." LandmarkWest!'s strained theory fares no better under its cited dictionary definitions, but resort to those dictionary definitions is unwarranted since the operative term "used for" is expressly defined in the Zoning Resolution. *See Yaniveth R. ex rel. Ramona S. v. LTD Realty Co*., 27 N.Y.3d 186, 192 (2016) (court consults dictionary definitions in "absence of a statutory definition"). Indeed, LandmarkWest! originally sought to justify its reliance on dictionary definitions by falsely claiming: "'Use' is not a defined term in the ZR."

R77 ¶ 65. Both Extell and the BSA refuted that obvious falsehood, pointing to ZR 12-10 which defines "use" and ZR 12-01 (f) which defines "used for." R781-82 ¶ 65; R4286 ¶ 65. On this appeal, LandmarkWest! does not repeat its false premise for relying on dictionary definitions, instead simply relying on them without justification.

As a practical matter, in contrast to the BSA's and DOB's reasonable approach, LandmarkWest!'s proposed interpretation would effectively appoint DOB as the mechanical engineer and designer of each project, requiring it to engage in a burdensome analysis of how mechanical equipment should be laid out for each project to minimize floor-area deductions. *See* R3698 (DOB explaining at BSA hearing: "this type of alternative design layout analysis" is "not required to be done by the Department"). In addition to imposing significant costs on regulators and property owners alike, such an interpretation would, as Commissioner Chanda observed, have wide-ranging implications, including by limiting developers' energy choices in significant ways. *See* R4217-18. Indeed, as DOB explained, "every building" has "differing needs" (R3698), depending on, among other things, "the design of the building and different energy efficiency goals of different applicants" (R377). Even within the same building, LandmarkWest!'s own expert recognized, "if you give this building to five engineers, you're going to get back five different designs." R3670. Yet LandmarkWest!'s proposed interpretation

would restrict the choices of both developers and consumers, and effectively implement legislation requiring that developers myopically focus on minimizing horizontal space devoted to mechanical equipment. There is no basis for such a restriction in the Zoning Resolution.

Ultimately, LandmarkWest! is unable to hide the fact that its meritless challenge to the project's floor-area deduction is merely a back-door attempt to indirectly challenge the project's vertical height. LandmarkWest! does not and cannot identify any purported injury from Extell's use of *horizontal* floor area for mechanical equipment. Instead, LandmarkWest! complains (at 30) of the mechanical floors' "cavernous *vertical* space," which "elevate ultra-luxury apartments to seventh heaven" (emphasis added).[3] But LandmarkWest!'s criticism of the vertical height of the building's mechanical floors is squarely foreclosed by this Court's well-reasoned decision rejecting those complaints and holding that the BSA rationally found the Zoning Resolution "did not provide a basis for counting

[3] Indeed, LandmarkWest! openly admits (at 11-13) that its goal is to try to strip Extell of its vesting rights and force Extell to "redraw its plans" under amended height rules that were enacted *after* this project vested—rules that this Court has already held do not apply to Extell's vested project. *City Club*, 198 A.D.3d at 7. LandmarkWest!'s remarkable admission of its true motive underscores that LandmarkWest! suffers *no injury* from the horizonal arrangement of the building's mechanical equipment and instead is misusing the courts in hope of somehow canceling Extell's permit by any available means and subjecting the project to different *height* rules that LandmarkWest! prefers.

the height of the project's mechanical floor areas against the zoning lot's total permissible floor area." *City Club of N.Y. v. BSA*, 198 A.D.3d 1, 7 (1st Dep't 2021).

C. The BSA's Factual Findings Are Entitled to Deference and Were Rational and Correct

LandmarkWest!'s argument also fails for an independent reason: far from deciding a "pure legal" question as LandmarkWest! incorrectly contends, the BSA's ruling involved factual findings and the application of those findings to the zoning regulations. The Court of Appeals has made clear: "Where the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute." *Peyton v. BSA*, 36 N.Y.3d 271, 280-81 (2020) (quoting *Kurcsics v. Merchants Mut. Ins.*, 49 N.Y.2d 451, 459 (1980)); *see also Chaudanson v. City of N.Y.*, 200 A.D.3d 571, 572 (1st Dep't 2021) (deferring to agency where "petitioner's statutory construction claim, while raising a question of law, also involves a question of substantial evidence"); *City Club*, 198 A.D.3d at 5 (deferring where BSA had expressly considered "testimony and credible evidence in the form of architectural diagrams and examples of buildings in the vicinity").

"The courts may not weigh the evidence or reject the choice made by" an administrative agency "where the evidence is conflicting and room for choice exists." *Berenhaus v. Ward*, 760 N.Y.2d 436, 444 (1987) (quoting *Stork Rest. v. Boland*, 282 N.Y. 256, 267 (1940)); *see also Lindemann v. Am. Horse Shows Ass'n, Inc.*, 222 A.D.2d 248, 250 (1st Dep't 1995) ("It is axiomatic that the court may *not* weigh the evidence, choose between conflicting proof, or substitute its assessment of the evidence or credibility of the witnesses for that of the administrative judge or hearing panel.").

This case involves substantial factual analysis that compels deference. The BSA reviewed "expert testimony and plans for the New Building." R104. It reviewed the project's "architectural and mechanical plans" and found "sufficient floor-based mechanical equipment" to demonstrate that the space was in fact devoted to housing mechanical equipment and not some other use. *Id.*

The BSA credited the expert testimony in the record demonstrating that "other similar buildings contain 12 mechanical floors," whereas Extell's project "contains 4—well within the range of standard practices for constructing buildings of this scale." R104-05; *cf. N.Y. Botanical Gardens*, 91 N.Y.2d at 421 (owner's evidence indicating that it was "commonplace for stations affiliated with educational institutions to operate on the scale of" the owner's station provided "a substantial basis for the BSA's determination").

DOB, at the BSA's direction, analyzed the mechanical equipment for each of the four mechanical floors and 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." R103 (emphasis added); *see also* R377-78 (listing the building's mechanical equipment by floor).

Underscoring the fact-intensive nature of the BSA's findings and the need for deference to the BSA's expertise, LandmarkWest! relies heavily (*e.g.*, at 15-18, 32) on the analysis of its proffered expert, Michael Ambrosino. But the BSA had ample ground not to credit Mr. Ambrosino's testimony. As LandmarkWest! acknowledges (R81-82), another expert witness, Mr. Patel, testified that Mr. Ambrosino's analysis badly understated "the amount and types of mechanical equipment on the floor" because it was "based on the HVAC mechanical ductwork plans alone" and omitted "all the equipment shown on the other three sets of mechanical plans (HVAC mechanical piping, fire protection, and plumbing)," as well as "pieces of equipment shown on the HVAC mechanical drawings." Mr. Bienstock came to a similar conclusion in written testimony submitted to the BSA. *See* R565-66. LandmarkWest! does not (because it cannot) dispute that Mr. Ambrosino understated the amount of mechanical equipment in the proposed building, including in the areas referenced in the petition (*see* R80-81). Indeed,

DOB observed that Mr. Ambrosino "only focused on one set of plans, the HVAC set, and did not show the mechanical piping, plumbing or sprinkler standpipe plans." R3696:21-3697:8. Thus, it was reasonable for the BSA not to adopt Mr. Ambrosino's position—especially given LandmarkWest!'s admission to the BSA that Mr. Ambrosino's analysis was based on incomplete information. *See* R439.

Similarly, the BSA reasonably chose not to adopt Mr. Ambrosino's "alternative layout" of the mechanical equipment, which Mr. Bienstock explained was "based on the false premise that having equipment occupy the minimum amount of floor space on a floor equates to mechanical efficiency." R567. Mr. Bienstock further explained that when "designing a full building," there are "a host of considerations an engineer must take into account, including accessibility, constructability, and proximity of equipment and systems to the occupied spaces they served," as well as "the effect of location on individual system parameters, such as voltage drops and operating pressures," "the required separation between specific systems," and "proximity to exterior walls for air intake and exhaust." *Id.* Indeed, the record makes clear that even similarly sized buildings may have significantly different needs. As Mr. Parley's analysis demonstrates, buildings similar to the proposed building included between two and twelve floors for mechanical equipment and allocated between 13.45% and 21.6% of the building's

floor space to mechanical equipment. R484-86. And Mr. Bienstock described to the BSA in detail the array of factors driving the needs of the proposed building. *See* R568-73. Mr. Ambrosino failed to properly consider these factors, and thus proposed an unrealistic and inoperable floor plan. R567. The BSA properly and reasonably recognized this complexity. *See, e.g.*, R104.

The BSA also had significant reasons to credit Mr. Bienstock instead of Mr. Ambrosino. In his sworn affidavit, Mr. Ambrosino blatantly misrepresented that DOB's 2013 draft bulletin had been "approved." R488. In contrast, LandmarkWest!'s own expert characterized Extell's mechanical engineers as "reputable" and "good engineers." R3676:15-17.

The Supreme Court properly declined to second-guess the BSA's fact-intensive determination regarding the sufficiency of the project's floor-area deductions for mechanical equipment. R28.

III. The Supreme Court Reasonably Exercised Its Discretion in Rejecting LandmarkWest!'s Untenable Renewal Theory Based on a May 2021 Post-Vesting Amendment to the Zoning Rules

LandmarkWest!'s challenge fares no better under the strained arguments it raised in a post-dismissal motion to renew with the Supreme Court based on a May 2021 amendment to the Zoning Resolution enacted to address flood-resiliency issues. LandmarkWest! inexplicably accuses the Supreme Court (at 34) of "failing to consider" the May 2021 flood-resiliency amendment. The record, however,

squarely demonstrates otherwise: the amendment was the subject of a fully briefed renewal motion, which the Supreme Court duly considered, heard argument on, and correctly rejected. R32-56, R4420-5356.[4]

The Supreme Court's decision to deny LandmarkWest!'s motion to renew should not be disturbed absent abuse of discretion. *S.V.L. by Yohanny L. v. PBM, LLC*, 191 A.D.3d 564, 565 (1st Dep't 2021) ("We review Supreme Court's determination to grant or deny leave to renew for an abuse of discretion.") (citing *Dousmanis v. Joe Hornstein, Inc.*, 181 A.D.2d 592, 593 (1st Dep't 1992); *Mestel & Co. v. Smythe, Masterson & Judd, Manda Weintraub*, 181 A.D.2d 501, 502 (1st Dep't 1992)). LandmarkWest! does not even acknowledge or address this applicable standard of review, much less satisfy it. The Supreme Court's denial of LandmarkWest!'s renewal motion was a sound exercise of its discretion and not remotely an abuse of discretion. The Supreme Court had at least five valid grounds to deny renewal.

First, as a threshold dispositive matter, changes to the Zoning Resolution that post-date the project's vesting date do not apply to the project. Because Extell's building project lawfully vested in April 2019, *City Club of N.Y. v. BSA*,

[4] LandmarkWest! also misleadingly suggests (at 9) that the Supreme Court did not review the flood-resiliency amendment's legislative package—even though the Supreme Court expressly made clear that it *had* reviewed the papers submitted on the renewal, which included legislative history. R38.

198 A.D.3d 1, 7 (1st Dep't 2021) ("the project vested" in April 2019), changes to the Zoning Resolution that became effective after that date do not apply to the project. ZR 11-311 (where permit has lawfully vested, owner may continue construction irrespective of subsequent amendments to ZR).

Indeed, this Court 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 May 2021 flood-resiliency amendment LandmarkWest! cites). Specifically, this Court 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*, 198 A.D.3d at 7. This Court therefore reviewed the BSA's application of ZR 12-10 as it existed "prior to its amendment." *Id.* 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 a fundamental 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. The Supreme Court 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. R28. It would have violated the fundamental principles of vesting and the "deeply rooted" presumption against retroactive legislation for the Supreme Court to have revisited the question based on an amendment that postdated not only the project's vesting date, but also the BSA's ruling. *Landgraf*, 511 U.S. at 265.

Second, the May 2021 flood-resiliency amendment does not have retroactive effect and cannot render the BSA's decision retroactively arbitrary and capricious. 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 (at 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 R4441, 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 (at 38) 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." R4473 (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 retroactive application. *See* R4878 (new section 25-435.1 of administrative code "is retroactive to and deemed to have been in effect as of July 1, 2020"), R4881 (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 contains no 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.").

Third, 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.*

The Supreme Court rightly determined that the BSA's January 2020 decision was not arbitrary or capricious. R28. 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").

Fourth, by LandmarkWest!'s own characterization of the 2021 flood-resiliency amendment, it does not meet the requirements for renewal. By insisting (*e.g.*, at 8, 37, 40) 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). This Court 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). Thus, 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").

Fifth, while the terms of the 2021 flood-resiliency amendment do not apply, they would not affect the outcome here even if they theoretically did apply. *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 amendment *did not alter* the Zoning Resolution's broad definition of "used for" and *did not alter* that property owners may deduct "floor space used for mechanical equipment" from their floor-area calculations. *See* ZR 12-01 (f); ZR 12-10. Thus, the basis for DOB's and BSA's exclusion of Extell's four mechanical floors from the "floor area" of the project here was *unchanged* by the amendment—as the BSA and DOB found, the project's mechanical floors 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." R377.

LandmarkWest! misreads the flood-resiliency amendment by focusing on the words "minimum necessary" that describe a newly added *second* category of excludable floor area (for "necessary maintenance and access") 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. *See*, *e.g.*, *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").

Indeed, LandmarkWest!'s interpretation would be 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. *See* R5333-37 (analyzing text and history of flood-resiliency amendment changes). Indeed, LandmarkWest! has candidly admitted that Hurricane Sandy, which prompted the flood-resiliency amendment, "had nothing to do with high-rise construction on Manhattan," and that the issue of mechanical-equipment floor-area deductions in high-rise buildings were "*not even considered by the City Council*" when it enacted the flood-resiliency amendment. R5348 (emphasis added).

LandmarkWest!'s strained interpretation would render the 2021 flood-resiliency amendment a major—and impracticable—change in the law, not a mere "clarification" as LandmarkWest! claims it to be. *See Mayblum v. Chu*, 67 N.Y.2d 1008, 1010 (1986) ("change in judicial construction" of statute is not merited where purpose of amendment was merely to "clarify" prior law). But, as explained above, any such change does *not* apply retroactively to Extell's vested project. Reinterpreting the Zoning Resolution to now require mechanical equipment to be crammed into the smallest area possible 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).

IV. LandmarkWest!'s Attempt to Introduce New Evidence on Appeal Is Improper and Further Underscores the Lack of Merit in LandmarkWest!'s Position

Evidently recognizing the insufficiency of its arguments based on the extant administrative and judicial record, LandmarkWest! asks this Court (at 45-48) to take "judicial notice" of a selective "sample" of Zoning Resolution Determinations ("ZRD1s") from 2013-2015—materials that LandmarkWest! *did not present to the*

BSA or the Supreme Court and which are squarely within the BSA's special expertise to review and interpret.

LandmarkWest!'s request runs contrary the "fundamental principle of Article 78 review" that judicial review of administrative decisions is "confined to the facts and record adduced before the agency." *Rizzo v. DHCR*, 6 N.Y.3d 104, 110 (2005) (quoting *Yarbough v. Franco*, 95 N.Y.2d 342, 347 (2000)). "A claim not raised before an administrative agency may not be raised for the first time in an article 78 proceeding." *Ferrer v. N.Y. State Div. of Human Rights*, 82 A.D.3d 431, 431 (1st Dep't 2011); *see also, e.g.*, *Murray v. City of N.Y.*, 195 A.D.2d 379, 381 (1st Dep't 1993) (finding "unpreserved for review" argument that was "raised for the first time on appeal").

LandmarkWest!'s cited authority (at 47) does not support its improper attempt to introduce new material for the first time on appeal to introduce further (meritless) arguments it could have, but did not, raise with the BSA or the Supreme Court. *See Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co*., 61 A.D.3d 13, 19-21 (2d Dep't 2009) (discussing *Supreme Court* taking judicial notice of documents, not Appellate Division taking judicial notice in an Article 78 proceeding of materials that could have been introduced before the agency but were not); *LaSonde v. Seabrook*, 89 A.D.3d 132, 137 (1st Dep't 2011) (court merely took judicial notice of union's non-profit status). Judicial notice is unwarranted here

given LandmarkWest!'s failure to introduce the ZRD1s as part of the BSA's administrative record. *See, e.g.*, *Shon v. State*, 75 A.D.3d 1035, 1038 (3d Dep't 2010) (refusing to take judicial notice for evidence that party failed to present at trial); *City of Poughkeepsie v. Black*, 130 A.D.2d 541, 542 (2d Dep't 1987) (declining to take judicial notice of documents that were "not before the Supreme Court" and "thus not a proper part of the record on appeal").

LandmarkWest!'s belated attempt to introduce these technical ZRD1s would be unavailing in any event: LandmarkWest! apparently seeks to find fault with the December 2017 testimony of DOB's general counsel, but LandmarkWest!'s unfounded criticisms of that testimony reduce to a request that this Court substitute its judgment for BSA's judgment in weighing DOB's testimony together with the other extensive evidence of the project's compliance with the zoning rules. "The courts may not weigh the evidence or reject the choice made by" an administrative agency "where the evidence is conflicting and room for choice exists." *Berenhaus v. Ward*, 760 N.Y.2d 436, 444 (1987) (quoting *Stork Rest. v. Boland*, 282 N.Y. 256, 267 (1940)). The record is clear that the BSA fully and fairly considered the Commissioners' conflicting views and ultimately rejected LandmarkWest!'s challenge. *See* R105 (summarizing dissenting views and noting that "the Board has considered but ultimately declines to follow the alternate positions of the two commissioners that would grant this appeal").

V. LandmarkWest!'s Failure to Timely Appeal DOB's Determination to the BSA Precludes Article 78 Review

Beyond its lack of substantive merit (discussed above), LandmarkWest!'s appeal fails on the additional, independently sufficient ground that LandmarkWest! did not timely raise its challenge to the project's horizontal floor area, which precludes Article 78 review. "Failure to timely file or perfect an administrative appeal," by law, "precludes review pursuant to CPLR article 78." *Shahid v. City of N.Y.*, 144 A.D.3d 1163, 1164 (2d Dep't 2016); *see also Lutz v. Superintendent Demars of Altona Corr. Facility*, 117 A.D.3d 1354, 1354-55 (3d Dep't 2014) (dismissing Article 78 petition, where appeal to administrative agency was properly rejected as untimely); *St. Mary's Hosp. of Troy v. Axelrod*, 108 A.D.2d 1068, 1070 (3d Dep't 1985) (same). Thus, where "administrative review of the merits" of an "agency's determination" is "time-barred," an Article 78 challenge to that determination "must fail." *McGirr v. Div. of Veterans Affairs*, 43 N.Y.2d 635, 639 (1978).

That threshold ground for denying an Article 78 challenge applies even if the administrative agency proceeded to consider the untimely appeal. 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." *Liebman v. Shaw*, 223 A.D.2d 471, 471 (1st Dep't 1996). Accordingly, once a petitioner fails to timely file an appeal with an administrative agency, that petitioner has

failed to properly preserve the issue for Article 78 review—regardless of whether the agency dismisses the appeal as untimely. *Cf. Miskiewicz v. Hartley Rest. Corp.*, 58 N.Y.2d 963, 965 (1983) (reversing Appellate Division, where "notice of appeal to the Appellate Division was not timely and therefore that court was without jurisdiction").

Here, LandmarkWest!'s horizontal challenge to the BSA was time-barred, and, as a result, LandmarkWest!'s instant Article 78 challenge must fail. Under the BSA's rules, a party must file an appeal application "within thirty (30) days" from the date of the "agency final determination." BSA Rule 1-06.3. LandmarkWest! failed to timely commence the horizontal challenge with the BSA (or even DOB) until August 2019—*three months* too late under the BSA's rules. *See* R2962-70. The BSA repeatedly and correctly recognized that the newly raised challenge was untimely. *See* R102 ("a timely third issue had *not* been presented" regarding horizontal floor space) (emphasis added); R366 n.1 (same).[5] Accordingly, because

[5] Whether LandmarkWest! timely filed *an* appeal to the BSA on May 13, 2019 is not dispositive. Instead, the issue is whether LandmarkWest! timely appealed to the BSA *on the ground raised here*. Indeed, the City Charter makes clear that an appeal to the BSA *is limited to the specific issues raised by the appellant in its notice of appeal*. *See* N.Y.C. Charter § 669 (appeal of DOB determination "may be taken within such time as shall be prescribed by the BSA by general rule, by filing with the officer from whom the appeal is taken and with the [BSA] a notice of appeal, *specifying the grounds thereof*") (emphasis added). LandmarkWest! did *not* raise the horizontal challenge with the BSA in its May 2019 filing. LandmarkWest!'s argument in its BSA submission that the project's mechanical

LandmarkWest! failed to timely appeal to the BSA, it failed to preserve the issue for judicial review and therefore cannot challenge the BSA's determination with respect to the horizonal challenge through an Article 78 proceeding.

That outcome is unaffected by the BSA's decision to review the untimely raised horizontal challenge *sua sponte*. *See* R3173 (closing LandmarkWest!'s appeal); R3211 (re-opening appeal on BSA's own motion solely for purposes of considering horizontal challenge). LandmarkWest! failed to timely commence the horizontal challenge and thus had no *right* to have the BSA consider it, through *sua sponte* review or otherwise. LandmarkWest! cannot be heard to complaint that the BSA—which had no obligation to even consider the horizontal challenge—declined to decide the issue in LandmarkWest!'s favor. *Cf. Miskiewicz*, 58 N.Y.2d at 965; *Pomygalski v. Eagle Lake Farms, Inc.*, 192 A.D.2d 810, 812 (3d Dep't 1993) ("Finally, we find that defendants' motion for reconsideration was essentially one for reargument addressed to the court's discretion and, if denied, is not appealable.").

---

spaces were not "used for mechanical equipment" (R356) is clearly a challenge to the *height* of those spaces, not their *horizontal* floor space usage. Thus, the horizontal challenge was outside of the scope of that appeal and could only be raised in a subsequent appeal to the BSA. Indeed, as LandmarkWest! acknowledges, when the BSA decided to consider the horizontal challenge, it assigned a *new calendar number* to that challenge. *See* R69 ¶ 42.

The Supreme Court did not address this issue and did not need to reach the issue given its ruling that the BSA's ruling was rational. This issue, however, independently bars LandmarkWest!'s Article 78 petition and supports affirmance of the Supreme Court's ruling denying the petition. *See Nieves v. Martinez*, 285 A.D.2d 410, 411 (1st Dep't 2001) (affirming dismissal of Article 78 proceeding for untimeliness as "alternate ground for affirmance").

CONCLUSION

For these reasons, Extell respectfully submits that this Court deny LandmarkWest!'s appeal and affirm the Supreme Court's Decision.

Dated: March 2, 2022

Respectfully submitted,
CYRULNIK FATTARUSO LLP

Jason Cyrulnik
Paul Fattaruso
Adina C. Levine
55 Broadway, Third Floor
New York, New York 10006
646 844 2466
jcyrulnik@cf-llp.com
pfattaruso@cf-llp.com
alevine@cf-llp.com

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

PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR § 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

Type: A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

Word Count: The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, printing specifications statement, or any authorized addendum is 11,965.

Dated: March 2, 2022