SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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GREGG SINGER, SING FINA CORP., and 9TH & 10TH STREET LLC,

Petitioners,

Index No. 158768/2019

Judgment Under Article 78 of the CPLR,

-against-

BILL DE BLASIO, both individually and in his official capacity as the Mayor of the City of New York, THE NEW YORK CITY DEPARTMENT OF BUILDINGS, and THE CITY OF NEW YORK,

Respondents.

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RESPONDENTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS THE VERIFIED PETITION

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November 26, 2019

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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GREGG SINGER, SING FINA CORP., and 9TH & 10TH STREET LLC,

Petitioners,

Index No. 161272/2017

Judgment Under Article 78 of the CPLR,

-against-

BILL DE BLASIO, both individually and in his official capacity as the Mayor of the City of New York, THE NEW YORK CITY DEPARTMENT OF BUILDINGS, and THE CITY OF NEW YORK,

Respondents.

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RESPONDENTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS THE PETITION

Respondents, Mayor Bill de Blasio, both individually and in his official capacity as the Mayor of the City of New York, The New York City Department of Buildings ("DOB"), and the City of New York ("City"), by their attorney, James E. Johnson, Corporation Counsel of the City of New York, submit this Memorandum of Law in Support of their Cross-Motion to Dismiss the Verified Petition (or "Petition") pursuant to Sections 3211(a)(2), 3211(a)(7), and 7804(f) of the Civil Practice Law and Rules ("CPLR") on the grounds that: (1) the Petition fails to state a cause of action for a writ of mandamus; (2) the Court lacks subject matter jurisdiction to review petitioners' claims because they are not ripe for judicial review; and (3) the Petition fails to state a cause of action for a writ of prohibition.

This case stems from petitioners' repeated failure to satisfy DOB's lawful and generally applicable requirements for building a student dormitory in the City of New York. In

1998, petitioners purchased 605 E. 9th Street in Manhattan (the "subject premises") – a now landmarked, former public school building – from the City pursuant to a deed restriction that required petitioners to use the property as a "community facility" as defined in the New York City Zoning Resolution (or "ZR"). Although the property's deed restriction permits a variety of uses, petitioners seek to build a student dormitory. The City's Dorm Rule, codified in Chapter 1, Section 51-01 of the Rules of the City of New York ("RCNY"), requires, inter alia, property owners seeking to build a dormitory to submit to DOB a lease with an educational institution demonstrating a sufficient institutional nexus before DOB will issue building permits for the construction. See 1 RCNY § 51-01. A residence which happens to house students is not a legal "community facility" under the ZR. See id. In order to qualify for "community facility" status, the dormitory must be a facility owned or operated by or on behalf of a college or school in the performance of its educational mission. Id. Without some form of established college or school having control over a building occupied by students, a proposed building ceases to be a "community facility" dormitory and instead is properly characterized as a generic residence that merely targets a student rental market.

For nearly two decades, petitioners have continuously pursued flawed plans to develop the subject premises as a generic student residence and not as a legal "dormitory" that would qualify as a "community facility" use under the Zoning Resolution. Rather than demonstrate that they have leased the property (or significant portions of the property) outright to a single college or university, petitioners have submitted deficient leases to DOB that merely provided schools with the *option* of renting most of the beds in the building. As the proposed leases revealed that petitioners truly intended to use the property as a general residence as opposed to a legal "community facility" dormitory, DOB appropriately denied petitioners the

work permits necessary for construction. Throughout the years, petitioners' proposed tenants have terminated their leases, and there is currently no proposed tenant or lease for the subject premises.

Now, petitioners have commenced the instant Article 78 Proceeding: the latest ring in a long chain of unsuccessful lawsuits against the City regarding the very issues raised here – petitioners' proposed dormitory at 605 E. 9th Street. The issues, facts, and claims raised by petitioners in this matter are neither new nor novel. As detailed more fully below, this matter has reached its way to the New York State Court of Appeals in 2008, this Court in 2017, and most recently the United States District Court for the Southern District of New York in 2018. All of these Courts squarely rejected petitioners' myriad of challenges regarding DOB's denial of a building permit to construct a dorm in the absence of a valid lease under the Dorm Rule.

Indeed, in 2017, petitioners commenced a declaratory judgment action in this Court, seeking an Order (as they do now) that the Dorm Rule does not apply to petitioners' property. Petitioners want an exemption from the Dorm Rule's plain requirement that, in order to obtain a building permit from DOB to construct a student dormitory, a property owner must first submit a lease with an educational institution to DOB to demonstrate that a proposed dormitory would actually be used as a student dormitory and not an ordinary residential apartment building. See 9th and 10th Street v. City, et al., Index No. 161272/2017, Tisch, J. (N.Y. Co. Sup. Ct. 2019). Petitioners claimed that the Dorm Rule should not apply to the development of its property because the underlying purpose of the rule does not apply in situations where the applicable provisions of the New York City Zoning Resolution permit both a residential building and a student dormitory to be the same size. By Decision and Order dated February 18, 2019, Justice Tisch dismissed petitioners' Complaint and instructed petitioners to

exhaust their available administrative remedies by obtaining a final determination from the DOB and, if necessary, appealing an unfavorable determination to the New York City Board of Standards and Appeals, the agency charged with hearing appeals from DOB's final determinations.

Although petitioners obtained a final determination from DOB on May 10, 2019, petitioners admittedly – and deliberately – failed to exhaust their administrative remedies at the BSA. Rather than appeal to the agency as directed by Justice Tisch, petitioners now claim that they should not be required to exhaust their administrative remedies under various exceptions to the exhaustion doctrine. As detailed below, none of the exceptions apply here. Petitioners were required to exhaust their available administrative remedies by appealing to the BSA within thirty days from DOB's May 10, 2019 determination. Petitioners failed to do so, and their claims are not ripe for judicial review.

In addition, petitioners seek a writ of mandamus compelling DOB to issue a building permit to petitioner without petitioner first having to satisfy the Dorm Rule. It is well-settled that a writ of mandamus is an extraordinary remedy that is only available to enforce a clear legal right where the public official has failed to perform a duty enjoined by law. Mandamus will not be awarded to compel an act that involves the exercise of judgment or discretion. DOB's determination whether or not petitioners' application has satisfied the requirements of governing law, including the Dorm Rule, necessarily requires the exercise of discretion. Thus, this Court cannot compel DOB to issue a permit to petitioners for the construction of a dorm.

Finally, petitioners seek a writ of prohibition, "enjoining DOB from acting on their Notice of Violation dated June 28, 2019 requiring certain alleged emergency repairs" at the

subject premises. Verified Petition, Wherefore Clause. However, the Court of Appeals has made explicit that a writ of prohibition is an "extraordinary" remedy, only to be invoked in limited circumstances. The extraordinary remedy of a writ of prohibition is not warranted herein because DOB has not acted without or in excess of its jurisdiction by issuing violations to direct compliance with the law due to public safety concerns. Accordingly, all of petitioners' claims set forth in the Verified Petition must be dismissed as a matter of law.

RELEVANT STATUTES AND FACTS

A. History of the 605 East 9th Street[1]

The subject premises – 605 E. 9th Street (Block 392, Lot 10) – is located between East 9th and East 10th Streets between Avenue B and Avenue C in New York, New York within a split-zoned R8-B and R7-A residential zoning district.[2] The subject premises is occupied by a five-story building, former New York City Public Elementary School (PS 64) (the "subject

[1] As detailed in the Petition, the proposed development of 605 E. 9th Street into a student dormitory has been the subject of past litigation. For the purposes of this cross-motion, respondents present a summary of the facts, including the history of the building and the prior litigation. See Matter of 9th & 10th St., LLC v. Board of Stds. & Appeals of the City of New York, 10 N.Y.3d 264 (N.Y. 2008) (upholding the New York City Board of Standards and Appeals' Resolution affirming DOB's 2004 determination to deny plaintiff's application for a building permit to construct a student dormitory at the subject premises because plaintiff had failed to submit a valid lease demonstrating that it could actually use the building as a dorm); 9th and 10th Street LLC v. City and DOB, Index No. 161272/2017, Tisch, J. (Sup. Ct. N.Y. Co. Feb. 8, 2019) (dismissing Complaint seeking a declaratory judgment that the Dorm Rule does not apply to plaintiff's property because the claim was not ripe for judicial review given that plaintiff did not exhaust its administrative remedies at DOB and the BSA); and Singer, Sing Fina Corp. and 9th and 10th Street LLC v. City of New York, et al., 18 Civ 615 (PGG) (S.D.N.Y. 2019) (granting motion to dismiss plaintiffs' claims for conspiracy and violations of constitutional rights regarding DOB's denial of building permits to construct a dorm in absence of a valid lease). For the convenience of the Court, copies of these decisions are annexed as Exhibits A, B, and C, respectively, to the accompanying Affirmation of Rachel K. Moston, dated November 26, 2019 ("Moston Aff.").

[2] The New York City Zoning Resolution (or "ZR") divides the City into three use districts – Residential (hereinafter "R"), Commercial (hereinafter "C"), and Manufacturing (hereinafter "M"). Within each district, the size or bulk of buildings is also regulated, as is indicated by a number after the letter. The higher the number, the greater the bulk or density allowed (e.g., bulkier buildings are allowed in R4 than in R1 districts).

building"), which has been closed since 1977. Petition, ¶ 11; see also, Petitioners' accompanying Affidavit of Gregg Singer, sworn to on September 5, 2019 ("Singer Aff.") ¶ 25.

On July 20, 1998, petitioners purchased the property from the City. Singer Aff., ¶¶ 22-26. Title to the property passed on July 21, 1999, subject to the following deed restriction: "Use and development of this subject property is restricted and limited to a 'Community Facility Use' as defined in the New York City Zoning Resolution as existing on the date of the auction." Petition, ¶¶ 1-2; Petition, Exhibit 2. A "community facility use" is any use listed in Use Group[3] 3 or 4. Use Group 3 ("UG3") community facilities[4] include, inter alia, college or school dormitories, libraries, nursing homes, and health related facilities.

B. Petitioners' 2005 Article 78 Proceeding

In or around 2004, petitioners filed an application with DOB to build a nineteen-story "college or school dormitory" on the property – a dorm that, as proposed by petitioners, would be constructed much like an ordinary apartment building. Exhibit A, Matter of 9th and 10th Street LLC, 10 N.Y. at 267-68. The applicable zoning laws, as well as the deed restriction, permitted petitioners to construct a dormitory. However, if the proposed building turned out to be a residential apartment building, such use would violate both the deed restriction and the zoning laws. Id. At that time, apartment buildings were lawful in the subject property's zoning

[3] A Use Group is a group of uses that have similar functional characteristics and/or nuisance impacts. There are eighteen Use Groups that are ranked from residential to industrial uses.

[4] Pursuant to ZR § 22-13, Use Group 3 consists of community facilities that:

> (1) may appropriately be located in residential areas to serve educational needs or to provide other essential services for the residents; or
>
> (2) can perform their activities more effectively in a residential environment, unaffected by objectionable influences from adjacent industrial or general service uses; and
>
> (3) do not create significant objectionable influences in residential areas

district, but with lower maximum heights than otherwise comparable community facility buildings. Id. An ordinary apartment building at the subject premises would have been limited to ten stories, and petitioners' then-proposal involved the construction of a nineteen story dormitory. Id.

Accordingly, prior to issuing work permits, DOB required petitioners to substantiate the proposed dormitory use by showing an "institutional nexus" – a connection with an educational institution sufficient to establish that the subject building, when built, would actually be used as a dormitory. Id. Petitioners failed to satisfy DOB's request for proof of a "nexus" with a college or school. Id. DOB, therefore, denied petitioners' application to construct the dorm, and petitioners appealed that determination to the BSA. Singer Aff., ¶ 36. By Resolution dated October 18, 2005, the BSA denied petitioners' appeal of DOB's disapproval. Id., ¶ 37; Petition, Exhibit 6.

Petitioners commenced an Article 78 proceeding in New York State Supreme Court to annul the BSA's 2005 determination. Supreme Court denied the relief sought in the petition and dismissed the proceeding[5], but the Appellate Division reversed. In Matter of 9th and 10th St. LLC, the New York Court of Appeals reversed the Appellate Division's decision and reinstated the trial court's ruling. Exhibit A, Matter of 9th and 10th St. LLC, 10 N.Y.3d at 269. Finding that DOB reasonably and rationally denied petitioners' application to construct the dormitory, the Court stated as follows: "But where, as here, officials reasonably fear that the legal use proposed for a building will prove impracticable, it is not improper to insist on a showing that the applicant can actually do what it says it will do." Id.

[5] A copy of Justice Michael D. Stallman's Decision and Order in the 2005 Article 78 Proceeding, 9th & 10th St. L.L.C. v. Board of Stds. & Appeals of City of New York, 12 Misc. 3d 1183(A) (Sup. Ct. N.Y. Co., 2006), is annexed as part of Exhibit A to the Moston Aff.

C. The Dorm Rule – 1 RCNY § 51-01

On June 28, 2005, during the pendency of plaintiff's proceedings at the BSA, the Dorm Rule took effect. See 1 RCNY § 51-01. According to the Statement of Basis and Purpose, the rule is "intended to give meaning to the phrase 'student dormitory' separate and distinct from other residential uses and is intended to codify the Department's current practice of requiring a 'dormitory' to have an institutional nexus to a school(s)." 1 RCNY § 51-01, Statement of Basis and Purpose. The rule also addresses the "difficulty the Department has experienced in enforcing compliance with certificates of occupancy issued for Use Group 3 dormitories by identifying documentation that must be presented to the Department to distinguish a 'student dormitory' use and to help prevent its illegal conversion to a Use Group 2 housing type." Id.

To that end, 1 RCNY § 51-01 (b) defines "student dormitory," in relevant part, as follows:

> [A] building or a part of a building that is (1) operated by, or on behalf of, institution(s) that provide full-time instruction and a course of study that may be pursued in fulfillment of the requirements of §§ 3204, 3205, and 3210 of the New York State Education Law, or post-secondary institution(s) authorized to grant a degree by the Regents of the University of the State of New York; (2) to house students enrolled at such institution(s). A student dormitory shall not be a single dwelling unit.

1 RCNY § 51-01(b) (emphasis added).

Section 51-01(c) provides that no permit shall be issued to create a student dormitory unless the following documentation has been submitted to DOB:

> **(1) Proof of ownership or control.**
>
> (i) Copies of documents demonstrating that the owner of the building or part of the building for which such permit is sought is an educational institution that provides a course of study that meets the requirements of subdivision (b) of this section; or

(ii) Copies of a lease of the building or part of the building for a minimum ten year term by an educational institution that meets the requirements of subdivision (b) of this section, or

(iii) Copies of documents evidencing (A) the establishment of a non-profit entity, all of whose members, directors, trustees, or other individuals upon whom is conferred the management of the entity, are representatives of participating educational institutions that meet the requirements of subdivision (b) of this section to provide dormitory housing for students of such participating educational institutions; and (B) ownership or control of the building or part of the building by such non-profit entity for such purpose in the form of a deed or lease or a minimum ten-year term.

D. The 2006 Landmarking of the Subject Premises

On June 20, 2006, the New York City Landmarks Preservation Commission voted to landmark former PS 64 due to the subject building's architectural and historical significance. See Singer Aff., ¶ 60; Singer v. City, et al., 18-CV-00615, *6.

E. Petitioners' Development Efforts

1. The Cooper Union and Joffrey Ballet Leases

Since 2012, petitioners have pursued flawed and problematic development plans for the subject premises – they apply to renovate the interior of the entire building into a dormitory, but only submit illusory leases to satisfy the institutional nexus they must establish under the Dorm Rule before being granted a building permit. In February 2013, petitioners filed an application for a building permit with DOB to renovate the subject building into a dorm. 9th and 10th Street LLC, Index No. 161272/2017, p. 4. Petitioners submitted a lease with Cooper Union to merely rent approximately 196 beds on the second and third floors (out of approximately 500+ available) in the five-story building. Id.; Singer v. City., 18-CV-00615, *6.

On May 3, 2013, the Joffrey Ballet Center executed a lease for the ground and first floors of the subject premises. Id., * 7. The lease "was structured the same way as the

Cooper Union lease agreements," except that the lease involved only 132 beds in the building. Id. On August 8, 2013, petitioners provided the Cooper Union and Joffrey leases to the DOB.[6] Although DOB initially issued petitioners a permit for the proposed work in 2013, DOB ultimately issued a stop work order and revoked the permit because of issues with the terms of the proposed leases. Id.; Petition, Exhibit 58 (DOB's Notice of Objections). Both tenants terminated their leases with petitioners in 2016. Singer v. City, 18-CV-00615, *10-11.

2. The Adelphi Lease

Thereafter, on August 2, 2016, petitioners entered into a new lease with Adelphi University. Id. Again, petitioners offered a superficial and illusory institutional nexus and lease: (1) while the lease assigned 196 beds to Adelphi, Adelphi was only required to rent 20 beds with the others best "viewed as an option to lease beds in any given year rather than a current leasehold obligations for the beds;" and (2) the lease contained an improper provision that petitioners would be able to sublease unused beds to others in the building. Singer v. City, 18-CV-00615 * 18-19. In addition, the Temporary Certificate of Occupancy for Adelphi's Varick Street campus required an amendment to correctly identify Adelphi as a "college or university," rather than as an "Adult Trade School" – which does not qualify as an education institution, as necessary to support a student dormitory under the Dorm Rule. Id. Accordingly, DOB issued objections, finding that the lease failed to satisfy the requirements of the Dorm Rule. Id.; Petition, Exhibits 60 and 69. Although the parties attempted to cure the deficiencies by removing some of the problematic provisions, Adelphi terminated its lease with petitioners in

[6] Notably, petitioners have never submitted copies of these leases as part of their Court papers in any of their cases challenging DOB's determinations regarding the terms of the leases. See Moston Aff., Exhibits B and C.

2017. Petition, ¶ 59. There is currently no proposed tenant for the building. Id.; see generally, Petition.

F. The 2017 Declaratory Judgment Action Before Justice Tisch

By Summons and Complaint dated December 20, 2017, petitioners commenced a declaratory judgment action in New York State Supreme Court, seeking an order (as they do now) that the Dorm Rule does not apply to petitioners' proposed dorm use and that DOB must issue permits for the construction of a dorm without petitioners first submitting a lease to satisfy the "institutional nexus" requirement under the Dorm Rule. See 9th & 10th Street LLC, Index No. 161272/2017. The City moved to dismiss the Complaint, arguing that the claim for a declaratory judgment was not ripe for judicial review given that petitioners had not exhausted their available administrative remedies by first obtaining a final determination on the issue from DOB and then, if necessary, appealing that decision to the BSA, the agency that handles appeals from DOB orders. Justice Tisch agreed and dismissed the action: "Because the landlord has failed to exhaust these remedies [to the DOB and the BSA], the Court concludes that 'the anticipated harm is insignificant, remote or contingent,' and that the landlord's declaratory judgment claim fails[.]" Id.

G. The 2018 Federal § 1983 Action in the SDNY

In or around January 2018, petitioners commenced a § 1983 civil rights action in the United States District Court for the Southern District of New York against the City, DOB, Mayor de Blasio, two City Council Members, and two community groups and their directors, alleging that they obstructed petitioners' efforts to convert the subject premises into a student dormitory. See Singer v. City, 18-CV-00615. By First Amended Complaint dated July 22, 2018, petitioners asserted claims for conspiracy, violations of their constitutional rights under the

First Amendment, Equal Protection Clause, Due Process Clause, and Takings Clause, as well as state law claims for tortious interference and defamation per se. Id. Defendants moved to dismiss the Complaint.

By Order dated September 30, 2019, the Hon. Paul G. Gardephe granted defendants' motions, dismissing the Complaint in its entirety. Id. The Court found that petitioners failed to plead facts to plausibly establish violations for any of their claimed constitutional violations. The Court thus dismissed petitioners' conspiracy claims, which required a showing of an underlying constitutional violation. Id., ** 45-56. Finally, the Court refused to exercise supplemental jurisdiction over petitioners' remaining state law claims.[7] Id., ** 47-48.

H. Petitioners' Application to DOB for a Final Determination on Whether the Dorm Rule Applies to The Subject Premises.

Undeterred, petitioners continued to pursue a determination that they were exempt from the requirements of the Dorm Rule and should be permitted to construct a dorm without establishing the required nexus with a partnering school. Indeed, after Justice Tisch rendered the February 8, 2019 Decision and Order, holding that petitioners must exhaust their administrative remedies with respect to this very issue by first applying to DOB and, if necessary, appealing to the BSA, petitioners begrudgingly applied to DOB for a final determination on the applicability of the Dorm Rule to their property. Singer Aff., ¶ 125 ("After being dismissed on ripeness grounds, I was forced to seek administrative remedies before again seeking judicial intervention."). On March 14, 2019, petitioners applied to DOB for a final determination that the Dorm Rule did not apply to the subject premises (and that petitioners should not be required to

[7] On October 28, 2019, petitioners moved "to alter or amend the judgment to allow leave to amend the Complaint." See Singer v. City, 18-CV-00615 (ECF Docket No. 106).

provide a lease from an educational institution), claiming that the underlying purpose of the rule does not apply in situations where the applicable provisions of the New York City Zoning Resolution permit both a residential building and a student dormitory to be the same size.

I. DOB's May 10, 2019 Final Determination

By final determination dated May 10, 2019, DOB found there was simply "no basis" to waive the generally applicable requirements of the Dorm Rule for petitioners' property. Verified Petition, ¶ 148, and Exhibit 18. DOB found, inter alia, that the provisions of the Dorm Rule are "applicable to all new proposed student dormitories, without exclusions based on zoning regulations, including whether or not the proposed UG3 use is eligible for a higher FAR than a UG2 use." Id. Exhibit 18. Noting that the Dorm Rule "does not provide a process or criteria for a waiver," DOB found that "there is no basis to find that the Dorm Rule is inapplicable or waived." Id. Accordingly, DOB denied "the request to 'temporarily waive the requirements of Rule 51-01[.]'" Id.

J. The Instant Article 78 Proceeding

Now, by Notice of Petition, dated September 9, 2019, and Verified Petition, sworn to on September 9, 2019, petitioners commenced the instant Article 78 proceeding, seeking an Order: (1) "directing and compelling" DOB to "issue a permit authorizing petitioners to convert the existing building to a Use Group 3 College Student Dormitory for Community facility Use;" and (2) enjoining DOB from "acting on their Notice of Violation dated June 28, 2019, which requires certain alleged emergency repairs." Verified Petition, at Wherefore Clause.

ARGUMENT

POINT I

THE PETITION FAILS TO STATE A CAUSE OF ACTION FOR A WRIT OF MANDAMUS.

In their first cause of action, petitioners request a writ of mandamus "directing and compelling" DOB to issue a building permit without petitioners having to satisfy the Dorm Rule's generally applicable requirement that property owners seeking to build a dorm in the City must first submit a lease establishing a sufficient institutional nexus to a school. Petitioners claim that DOB "should be compelled to issue an as of right permit to allow restoration of the existing building for use as a community facility[.]" Verified Petition, p. 44 (first cause of action). But petitioners are not entitled to the drastic mandamus relief that they seek as a matter of law.

A. It is Well-Settled that Mandamus Cannot Be Used to Force Discretionary Duties.

A writ of mandamus "is an extraordinary remedy that is available only in limited circumstances." Alliance to End Chickens a Kaporos v. New York City Police Dep't, 32 N.Y.2d 1091, 1092 (N.Y. 2018) (citing Matter of County of Chemung v. Shah, 28 N.Y.2d 244, 266 (2016), and quoting Klostermann v. Cuomo 61 N.Y.2d 525, 537 (1984)). Such remedy will lie "only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law." N.Y. Civ. Liberties Union v. State of New York, 4 N.Y.2d 175, 184 (2005); see also CPLR 7803(1). While mandamus to compel "is an appropriate remedy to enforce the performance of a ministerial duty, it is well settled that it will not be awarded to compel an act in respect to which [a public] officer may exercise judgment or discretion.'" Kaporos, 32 N.Y.2d at 1093 (citing Klostermann, 61 NY2d at 539 and quoting Matter of Gimprich v Board of Educ. of City of N.Y., 306 NY 401, 406 [1954]).

Discretionary acts "involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result." N.Y. Civ. Liberties Union, 4 NY3d at 184 (quoting Tango v Tulevech, 61 NY2d 34, 41 [1983]). See e.g. Utica Cheese v. Barber, 49 N.Y.2d 1028 (1980) (affirming writ compelling the Commissioner of Agriculture to render decision on petitioner's license application within 60 days); Bottom v. Goord, 96 N.Y.2d 870 (2001) (affirming writ compelling Department of Corrections to calculate petitioner's jail-time credit). Further, mandamus may only be issued to compel a public officer to execute a legal duty; it may not "direct how [the officer] shall perform that duty." Kaporos, 32 N.Y.2d at 1093 (internal citations omitted).

B. The Issuance of a Building Permit Involves the Exercise of Discretion and, Thus, Cannot Be Compelled.

Petitioners erroneously claim that their application under the Dorm Rule is for an "'as-of-right' building permit which is one that must be issued as a ministerial act by DOB where DOB is not empowered to exercise discretion." Verified Petition, ¶ 42. Petitioners are wrong. Petitioners cannot establish that the issuance of a building permit is "ministerial" because, as the Court found in petitioners' 2005 Article 78 Proceeding involving this property, "the NYC Building Code vests DOB with the authority to examine all applications for permits for compliance with the building code and applicable laws and regulations." Moston Aff., Exhibit A, 9th and 10th Street LLC, 12 Misc. 3d 1183(A), at *5 (internal citations omitted); see also, RRI Realty Corp. v. Southampton, 870 F.2d 911, 918-19 (town officials had discretion to grant or deny a building permit); Natale v. Town of Ridgefield, 170 F.3d 258, 264 (2d Cir. 1999) (no clear entitlement to building permit because issuance is discretionary).

In addition, the plain text of the relevant provisions in the New York City Charter and Building Code demonstrate the broad level of discretion afforded to DOB to determine whether a proposed application satisfies the relevant laws and, thus whether to grant or deny building permits. See City Charter § 641, et seq, and Admin. Code § 28-105.1, et seq. (vesting DOB with jurisdiction over the issuance of building permits). It is unlawful to "construct, enlarge, alter, repair, move, demolish, remove or change the use or occupancy of any building in the city … unless and until a written permit therefore shall have been issued by the commissioner in accordance with the requirements of this code[.]" Admin. Code § 28-105.1. DOB "shall not issue a permit pursuant to this code … until it approves all required construction documents for such work." Admin Code. § 28-104.1. DOB "shall examine construction documents ... for compliance with the provisions of this code and other applicable laws and rules." Admin. Code § 28-104.2. Emphases added.

These provisions necessarily grant DOB discretionary authority to consider, analyze, and where appropriate, deny applications for building permits. In determining whether a permit should be issued, DOB must assess the facts regarding a proposed development, interpret the ZR and other relevant rules, review building plans to determine compliance with the ZR, Building Code, and other relevant rules, and order the correction of violations – all to promote the safe and lawful use of the proposed development. DOB must also exercise judgment in determining whether a property owner has provided a valid lease under the law to establish a sufficient institutional nexus with a school, as required by the Dorm Rule. See 1 RCNY § 51-01(c). Once satisfied that the proposed structure complies with the ZR, Building Code, and other relevant rules, DOB must issue a building permit. Accordingly, it cannot be said

that DOB's actions are purely ministerial in issuing building permits, and thus petitioners are not entitled to a writ of mandamus compelling the issuance of the permit as a matter of law.

C. In Dismissing Petitioners' Substantive Due Process Claim in Petitioners' Related § 1983 Case in Singer v. City, 18-CV-00615, the SDNY Recently Held that DOB's Determination Whether to Issue a Building Permit Under the Dorm Rule is Discretionary. Thus, Petitioners' Claim for Mandamus Relief Fails.

In the September 30, 2019 Order, dismissing petitioners' constitutional and conspiracy claims in Singer v. City, 18 CV-006125, Judge Gardephe held that petitioners possessed no constitutionally protected property right in the issuance of a building permit because DOB's issuance of a building permit under the Dorm Rule is a discretionary – and not a ministerial – function. Id. Accordingly, petitioners' claim for mandamus relief in the instant Article 78 proceeding is foreclosed by Judge Gardephe's Order.

Indeed, in Singer v. City, 18-CV-00615, petitioners claimed, inter alia, that their due process rights were violated by the City's refusal to issue a building permit under the Dorm Rule. Id. Defendants argued otherwise, claiming that petitioners had failed to sufficiently allege that they possessed a property right in a building permit sufficient to trigger due process protections. Id. As set forth in Judge Gardephe's Order, to state a substantive due process claim, petitioners first had to allege that they possessed a valid property interest in a building permit. Id., * 35-36. Under the Second Circuit's test for determining whether a party's interest is protectable under the Fourteenth Amendment to the U.S. Constitution, the party "must demonstrate that there was no uncertainty regarding his entitlement to it under the applicable state or local law, and that the issuing authority had no discretion to withhold it in his particular case." Id., * 36 (quoting Natale v. Town of Ridgefield, 170 F.3d 258, 263 n.1 (2d Cir. 1999)). In other words, the court's inquiry "focuses on the extent to which the deciding authority may exercise *discretion* in arriving at a decision[.]" Clubside, 468 F.3d at 153 (quoting Zahra v. Town

of Southold, 48 F.3d 674, 680 (2d Cir. 1995) (emphasis in original)). Thus, the analysis for petitioners' due process claim is the same as the analysis for petitioners' instant claim for mandamus relief under CPLR § 7801(3) – the question is whether DOB has discretion to determine where it is appropriate to issue a building permit under the Dorm Rule.

Dismissing petitioners' substantive due process claim, Judge Gardephe found that DOB's issuance of a building permit is discretionary and not ministerial:

> Plaintiffs agree that '[t]he DOB only issues permits when it is satisfied that all requirements have been met' [internal citations omitted]. Plaintiffs deny, however, that DOB's authority to assess compliance with applicable law qualifies as 'discretion' [b]ecause 'DOB must issue a building permit' once the Department is satisfied that the relevant requirements have been met. [internal citation omitted].
>
> Courts in this Circuit have rejected plaintiffs' interpretation of 'discretion' in this context, however. Courts have concluded that an agency charged with issuing permits has discretion sufficient to deny a claim of entitlement to a permit where the agency is tasked with determining an application's compliance with applicable laws and regulations – even where, upon a showing of compliance, issuance of the permit is mandatory.
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> ***
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> Plaintiffs agree that DOB … is responsible for determining whether the application conforms to all required laws and regulations. Because this responsibility 'amounts to discretion in the issuing authority to determine … whether the permit should be issued, … plaintiffs cannot establish a property interest in the building permits.

Singer v. City, 18-CV-00615, * 36-38.

Applying Judge Gardephe's reasoning to petitioners' instant claim for mandamus relief, petitioners' claim necessarily fails. DOB's determination as to whether petitioners' application satisfies the Dorm Rule and all other applicable provisions of law involves some exercise of discretion. Id. Only upon determining that the application complies with applicable

laws and regulations can DOB issue a permit. Petitioners here clearly "do not seek to compel the performance of ministerial duties but, rather, seek to compel a particular outcome" – i.e., the granting of the permit. Accordingly, "mandamus is not the appropriate vehicle for the relief sought." Kaporos, 32 N.Y.3d at 1093 (citing Walsh v. Law Guardia, 269 N.Y. 437, 440-41 (1936)). Petitioners' first cause of action for mandamus relief fails as a matter of law.

POINT II

PETITIONERS' CLAIM THAT THE DORM RULE DOES NOT APPLY TO THE SUBJECT PREMISES IS NOT RIPE FOR JUDICIAL REVIEW.

Although not expressly set forth in petitioners' Wherefore Clause[8], petitioners appear to seek a declaratory judgment (as they did before Justice Tisch) that the Dorm Rule does not apply to petitioners' property. Petition ¶ 175 ("Here, Petitioner seeks a declaratory judgment that Rule 51 does not apply to buildings, such as petitioner's, that seek only to renovate the interior of the building."); ¶ 197 ("For this reason, a declaratory judgment would be both useful and necessary, in that petitioner's goal is to determine … the standards applicable to renovating its building into a student dormitory, and a declaratory judgment from this impartial Court may be the only avenue for relief."); ¶ 198 ("Petitioner seeks a declaratory judgment from this Court holding that Rule 51 is inapplicable to the P.S. 64 proposed college student dormitory[.]"). To this end, petitioners challenge DOB's May 10, 2019 final determination that the Dorm Rule applies to the subject premises and that there is no basis for a waiver. But, as Justice Tisch

[8] Petitioners' "Wherefore clause" seeks: (1) a writ of mandamus compelling the issuance of a building permit; and (2) a writ of prohibition enjoining DOB from acting on the June 28, 2019 Notice of Violation. See Petition, Wherefore Clause. Petitioners are also not entitled to mandamus compelling the issuance of a building permit on the grounds that the Dorm Rule does not apply to them. As set forth herein, BSA must first opine on DOB's determination that the Dorm Rule is applicable to petitioners. Additionally, even if not applicable as detailed in Point I, the issuance of a building permit is nevertheless discretionary.

squarely held in his February 18, 2019 Decision and Order, petitioners' purported declaratory judgment claims are not ripe for judicial review.

Although petitioners obtained a final determination from DOB, they did not appeal that May 10, 2019 final determination to the BSA, as required by law and as directed by Justice Tisch. See City Charter §§ 666, 648; Admin. Code § 28-103.4 ("[a]n appeal from any decision or interpretation of the commissioner [of Buildings] may be taken to the board of standards and appeals pursuant to the procedures of the board[.]"); Contest Promotions-NY LLC v. New York City Dep't of Bldgs., 93 A.D.3d 436, 437 (1st Dep't 2012) (petition dismissed for failure to exhaust administrative remedies, where petitioner failed to obtain a final determination from the DOB Borough Commissioner for a sign permit and then appeal such determination to the BSA for a final determination); Wilkins v. Babbar, 294 A.D.2d 186, 187 (1st Dep't 2002) (proceeding commenced prior to petitioner's exhaustion of their administrative remedies was dismissed as premature, where DOB final determination regarding a nonconforming use was not appealed to BSA before petitioner resorted to the courts); Weissman v. City of New York, 96 A.D.2d 454, 456 (1st Dep't 1983) (where revocation of an alteration permit was sought, court found that "petitioners had an available remedy through administrative review before the Board of Standards and Appeals... [t]he failure to exhaust administrative remedies is dispositive"). Thus, petitioners' claims are not ripe for judicial review.

A. In the February 18, 2019 Decision and Order, Justice Tisch Held that Petitioners Must Exhaust Their Administrative Remedies by Appealing DOB's Final Determination to the BSA. As Plaintiffs' Have Deliberately Failed to Do So, Petitioners' Claims are Not Ripe for Judicial Review.

Dismissing petitioners' declaratory judgment claim as unripe, Justice Tisch summarized the case law governing ripeness in this context. Moston Aff., Exhibit B, 9th and 10th Street LLC, Index No. 161272/2017 at p. 6. In Church of St. Paul and St. Andrew v. Barwick,

67 N.Y.2d 510 (1986), the Court of Appeals utilized a two-part test for determining whether a request for declaratory judgment was ripe for judicial determination. Exhibit B, 9th and 10th Street LLC, Index No. 161272/2017 at p. 6 (internal citations omitted). The analysis required the court, first, to determine whether the issues presented are "'appropriate for judicial resolution,' and second, 'to assess the hardship to the parties if judicial relief is denied.'" Id. (internal citations omitted).

The appropriateness prong "looks to whether the administrative action is final, that is, whether the agency arrived at a "definitive position" on the issue inflicting an "actual, concrete injury" or whether the action relies on factors as yet unknown. Id. The second portion of the test – the hardship prong – requires an analysis of whether withholding or granting judicial review will result in hardship to either of the parties, as well as its potential effect on the agency and its program. Id. If the anticipated harm is "insignificant, remote or contingent" the controversy is not ripe. A controversy cannot be ripe 'if the claimed harm may be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party.'" Id.

First, Justice Tisch held that petitioners failed to satisfy the appropriateness prong of the ripeness test because – in the context of the 2017 declaratory judgment case – petitioners had not obtained a final determination from DOB as to whether the Dorm Rule could be waived for petitioners.[9] Id., *7. Second, Justice Tisch found that petitioners failed to satisfy the hardship prong of the ripeness test because petitioners had not availed themselves of "administrative remedies that could ameliorate the claimed harm." Id. Petitioners did not obtain

[9] Prior to commencing the 2017 action, petitioners had written a letter to DOB, requesting a "final determination" on this issue, but had not yet received the final decision at the time petitioners commenced the 2017 declaratory judgment action. Id. * 7.

a final determination from DOB, or appeal an unfavorable decision to the BSA, which handles appeals from DOB orders. Id.

Petitioners argued – as they do now – that "although exhaustion of administrative remedies is often required," the Court of Appeals recognizes a "futility exception" where no available administrative remedy will afford the applying party the relief it seeks. Id. *7-8 (citing petitioners' memorandum of law). Petitioners also claimed – as they do here – that their construction application for the building had "been rebuffed numerous times by DOB." Id., * 8. Justice Tisch flatly rejected this claim, holding that "[t]his does not constitute 'an exercise in futility,' as case law defines that term." Id. (internal citations omitted). Justice Tisch noted that DOB is certainly capable of issuing an order approving petitioners' application, but "the law requires such applications to comport with the requirements of the Building Code and the Zoning Resolution." Id. Justice Tisch found: "If [petitioners'] application does *not* comport with those requirements, then the agency may correctly deny it. It is incumbent on the landlord to present a legally sufficient application, and it is within the landlord's sole power to do so." Id. (emphasis added). The Court held as follows:

> Because the landlord has not demonstrated that exhausting its administrative remedies before the DOB and/or BSA herein would constitute an 'act of futility,' the Court finds that the landlord is, indeed, bound by the doctrine of exhaustion of administrative remedies herein. See e.g., Matter of Contest Promotions-NY LLC v. DOB, 93 A.D.3d 436 (1st Dep't 2012) (Petitioner required to final determination from the DOB, and thereafter appeal that determination to the BSA, prior to commencing Article 78 proceeding). Because the landlord has failed to exhaust these remedies, the Court concludes that "the anticipated harm is insignificant, remote or contingent,' and that the landlord's declaratory judgment claim fails the 'hardship prong of the ripeness test.' Matter of Committee to Save Beacon Theater. V City of New York, 146 A.D.3d at 403. Accordingly, having found that the landlord's claim fails both prongs of that test, the Court

> finds that the landlord's declaratory judgment claim is not ripe for judicial review[.]

Id. ** 7-9.

Thus, in light of Justice Tisch's ruling, there is no question that petitioners must follow the appropriate administrative process for appealing DOB's May 10, 2019 determination to the BSA before seeking judicial review in this Court. See also, Lehigh Portland Cement Co. v. N.Y. State Dep't of Envtl. Conservation, 87 N.Y.2d 136, 140 (1995) ("one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law") (internal citations omitted); Murray v. Scully, 170 A.D.2d 829, appeal denied, 78 N.Y.2d 856 (1991) ("[a]n agency should be permitted to complete its deliberation in a case before a right to judicial intervention ripens. Judicial review of nonfinal agency determinations is thus denied until a final record is compiled"); Young Men's Christian Ass'n. v. Rochester Pure Waters Dist., 37 N.Y.2d 371, 375 (1975) ("[t]he doctrine of exhaustion of administrative remedies requires litigants to address their complaints initially to administrative tribunals, rather than to the courts, and . . . to exhaust all possibilities of obtaining relief through administrative channels before appealing to the courts") (internal quotations omitted). As petitioners admittedly – and deliberately – failed to exhaust their administrative remedies by appealing DOB's May 10, 2019 determination to the BSA, petitioners' claims are not ripe for judicial review and must be dismissed as a matter of law.

B. As Justice Tisch Already Held, There are No Exceptions to the Exhaustion Requirement Applicable Here.

Petitioners' long and meandering Petition rests on the baseless claim that petitioners should not be required to exhaust their administrative remedies at the BSA because any appeal of DOB's May 10, 2019 determination would be futile and treated unfairly given the history of petitioners' proposed development of the subject premises. See generally, Verified

Petition. Notwithstanding that Justice Tisch already rejected this claim in the February 18, 2019 Decision and Order, petitioners maintain that exhaustion at the BSA would be pointless. But, contrary to petitioners' claims, nothing has changed since Justice Tisch's Decision and Order, directing petitioners to exhaust their administrative remedies before seeking judicial review of their claims. There are no new factual allegations, claims, or arguments asserted in the Verified Petition to suddenly justify an exception to the doctrine of exhaustion of administrative remedies. Indeed, plaintiffs' Complaint in the 2017 declaratory judgment action raised many of the same factual allegations and legal claims as the Verified Petition here. See Verified Petition; compare with Complaint in 9th and 10th Street v. City, et al., Index No. 161272/2017 (ECF Docket No. 1). Thus, there is no basis to permit petitioners to evade the exhaustion requirement now, particularly in light of Justice Tisch's holding otherwise.

1. Futility.[10]

a. Petitioners Have Failed to Allege Nefarious Conduct that Establishes Futility.

Petitioners base their claims of futility on colorful allegations of nefarious conduct on the part of DOB, the Mayor, City Council Members, and historic preservation activists. Attempting to paint a picture of conspiracy, political pressure, and backroom dealings, petitioners claim that the City has "dug in its heels and made clear that all applications will be denied." Petition, ¶ 126. Petitioners contend that the City has used "repetitive and unfair procedures" in denying petitioners' prior applications over a period of decades. Id., ¶ 130. Finally, petitioners summarily allege that the BSA is inherently biased as "merely another arm of

[10] Petitioners appear to claim that the "futility" and "repetitive and unfair procedures" exceptions to the exhaustion requirement apply in tandem. Petition ¶ 130 ("Although these two exceptions to the finality requirement – futility and unfair/repetitive procedures – are distinct concepts, in the instant case, the analyses for the two are the same.").

City Hall" and any appeal to that agency would be futile. Id., ¶ 140. However, these arguments do not establish futility.

As an initial matter, petitioners have failed to allege that the BSA – the agency where petitioners must exhaust their administrative remedies – has clearly and unequivocally stated a position with regard to petitioners' claim that the Dorm Rule does not apply to their property. The facts and allegations plead in the Verified Petition are directed at the Mayor, City Council Members, historic preservationists, and DOB. With respect to the BSA, petitioners merely allege that the agency is an "arm" of the Mayor, insinuating that any appeal to the BSA would be futile. Such speculative and conclusory assertions fail to establish futility. City Club of New York v. Extell, et al., Index No. 154205/2019, Jaffe, J. (Sup. Ct. N.Y. Co. 2019) (holding that plaintiffs failed to establish an appeal to the BSA would be futile where plaintiffs did not assert facts demonstrating that the BSA clearly dug in its heels).

In any event, the fact remains that petitioners have failed – over a period of many years – to satisfy the Dorm Rule by showing an adequate nexus between the plan to build a dorm and a specific school exercising control over the building. Indeed, this, petitioners have never done. To date, all of petitioners' efforts have been to dodge the Dorm Rule's requirements, submit illusory leases, and seek to obtain rulings that the Dorm Rule is altogether inapplicable. That DOB lawfully and properly objected to the terms of petitioners' leases, and that DOB required the submission of the leases in the first place under the governing law, does not render the exhaustion requirement futile. Petitioners may not like the outcome of the administrative process, but that does not mean they can skirt the requirement to exhaust it. Exhibit B, 9th and 10th Street v. City, et al., Index No. 161272/2017 (noting that petitioners do not explain how DOB and the BSA are incapable of affording relief via administrative action, and rejecting

petitioners' claim that DOB's past denials of petitioners' construction applications constitute an exercise in futility). As Justice Tisch warned petitioners, "[T]he law requires such applications to comport with the requirements of the Building Code and the Zoning Resolution." Moston Aff., Exhibit B, p. 8. If petitioners' "application does *not* comport with those requirements, then the agency may correctly deny it." Id. It is petitioners' legal obligation "to present a legally sufficient application and it is within [petitioners'] sole power to do so." Id.

Significantly, at every stage in this process, the City's actions with respect to petitioners' property have been upheld by Courts as lawful and proper; thus, petitioners' attempt to characterize the City's conduct over the past twenty years as unlawful and improper is simply unwarranted. In 2008, the New York Court of Appeals found it was lawful for DOB to require petitioners to submit a sufficient lease prior to obtaining a building permit to construct a dorm. Exhibit A, Matter of 9th & 10th St., LLC, 10 N.Y.3d at 264. In February 2019, Justice Tisch rejected the same claims raised now by petitioners and directed petitioners to exhaust their administrative remedies at the DOB and BSA before seeking judicial review. Exhibit B, 9th and 10th Street, Index No. 161272/2017. And, most recently, on September 30, 2019, Judge Gardephe dismissed petitioners' claims of constitutional violations and conspiracy that rested on the very same facts, conduct, and actions complained of herein. Exhibit C, Singer v. City, 18-CV-0615. Thus, exhaustion at the BSA is not futile merely because petitioners have been unsuccessful in their attempts to comply with the lawful requirements of the Dorm Rule over the years.

b. Community Involvement and Activism Do not Establish Futility.

Petitioners make much to do about the involvement of the Mayor, City Council Members, community members, and historic preservation activists Sosnick, Berman, and Wolf

in petitioners' proposed development of the subject premises. But such involvement does not suggest a "tainted process," "evil eye," "improper motive," or conspiracy (as petitioners contend) such that the futility exception is warranted here.[11] Verified Petition, ¶¶ 1-10.

It is undisputed that petitioners' proposed development is located in a politically active community that opposes the construction of a dorm. However, as with any proposed land use development, local opposition from community members may be a common part of the process. The fact that interested community groups lobbied their elected officials and attempted to exert political influence shows nothing more than a proceeding in which various viewpoints were necessarily considered. See Harlen Assocs., 273 F.3d at 501 (vocal community opposition to permit does not make denial improper). It was entirely lawful and proper for DOB to consider the viewpoints of the local preservationist groups and the elected officials upon evaluating petitioners' application. In fact, in petitioners' 2005 Article 78 proceeding challenging the BSA's determination that petitioners must submit a lease to DOB prior to obtaining building permits for a dorm, Justice Michael D. Stallman held:

> No principle of law forbids a public agency from considering input from community residents or organizations. Rather, the hearing and submission process seeks to give members of the community an opportunity to examine development proposals and the way the

[11] As an initial matter, Judge Gardephe's Order, dismissing petitioners' constitutional and conspiracy claims, is instructive here. Indeed, Judge Gardephe dismissed petitioners' claims for conspiracy based upon the same facts alleged in the Verified Petition. Exhibit C. Additionally, in dismissing petitioners' substantive due process claim, Judge Gardephe found that petitioners failed to allege arbitrary, conscience-shocking, and oppressive conduct on the part of the City defendants. Id., at *39-39 ("[Petitioners] have not sufficiently alleged that Defendants acted arbitrarily and irrationally in declining to issue or in revoking the permits at issue."). The Court noted that claims of "improper motives," "selective enforcement" and "differential treatment" on the part of municipal officials "fall into the 'non-conscience-shocking category[].'" Id. (internal citations omitted). Finally, Judge Gardephe dismissed petitioners' equal protection challenge, finding that petitioners failed to plead facts establishing that other similarly situated property owners were treated differently than petitioners. Id., at *33. In light of Judge Gardephe's findings, petitioners' instant claims of conspiracy, disparate treatment, and arbitrary and improper conduct not only fail as a matter of law, but these allegations do not establish an exception to the exhaustion requirement.

> various City agencies consider them. Even proposed 'as-of-right' projects, when exposed to public scrutiny, may turn out to be not legitimately 'as-of-right.' Public participation helps open a window on a decision-making process that can affect the future course of a community's development.

Exhibit A, 9th & 10th St. L.L.C., 12 Misc. 3d 1183(A), at *8.

Although petitioners purport to claim that DOB improperly succumbed to political pressure, and that the Mayor, former-City Council Member Mendez, and City Council Member Rivera's conduct in opposing the dormitory in accordance with their constituents' desires was unlawful, petitioners are simply incorrect. Petition, ¶¶ 33-36, 38, 63-68. There is nothing improper about politicians exercising their own First Amendment rights and advocating on behalf of their constituencies. X Men Sec., Inc. v. Pataki, 196 F.3d 56, 69 (2d Cir. 1999) (The First Amendment "guarantees all persons freedom to express their views" and one "does not lose one's right to speak upon becoming a legislator."); Gravel v. United States, 408 U.S. 606, 625 (1972) ("Members of Congress are constantly in touch with the Executive Branch of Government and with administrative agencies – they may cajole, and exhort with respect to the administration of a federal statute …"); Bond v. Floyd, 385 U.S. 116 135-36 (1966) ("The manifest function of the First Amendment in a representative government requires that legislators be given the widest possible latitude to express their views on issues of policy."); Manistee Town Center v. City of Glendale, 227 F.3d 1090, 1093 (9th Cir. 2000)("Government officials are frequently called upon to ... lobby, intercede, and generate publicity in order to advance their constituents' goals ... and [t]his kind of petitioning may be nearly as vital to the functioning of a modern representative democracy as petitioning that originates with private citizens.").

The fact that the former-Council Member Mendez and Council Member Rivera simply urged compliance with the law in representing their constituents' interests cannot be

entertained as a legal violation, bad faith, or as evidence of a tainted process sufficient to establish futility. Petition, ¶¶68-71. The fact that the Mayor expressed interest in the City purchasing the subject premises does not indicate bad faith or nefarious actions. Id. ¶¶ 61-67. Rather, the conduct complained of by petitioners simply reflects the political process at play in a politically charged local land use dispute. Thus, petitioners have not – and cannot – establish that the futility exception applies due to improper political pressure, obstruction, or a tainted process. Id.

c. Petitioners' Remaining Claims Fail to Establish Futility.

In an effort to dodge the exhaustion requirement, petitioners set forth a grab bag of grievances that are wholly irrelevant to the fact that petitioners must appeal DOB's determination regarding the applicability of the Dorm Rule at the BSA. Petitioners complain about an alleged "anonymous phone call" from the Mayor's Office regarding unsafe conditions at the subject premises (Petition, ¶¶ 72-85); and petitioners challenge the issuance of a Commissioner's Order and Notices of Violations for violations of the Building Code at the subject premises (Petition, ¶¶ 68-71, Exhibits 12 and 13). The New York City Building Code requires petitioners to maintain their building in a safe and Code-complaint manner. As detailed in the DOB Commissioner's Order and Notices of Violation (see Petition, Exhibits 12 and 13), DOB observed emergency conditions at the subject premises that threatened public safety. Id. Petitioners proffer the absurd claim that DOB's denial of petitioners' application under the Dorm Rule for a permit to renovate the *interior* of the building was the reason that the *exterior* of the structure became dilapidated, unsafe, and structurally unsound. Id. ¶ 85 ("The irony of the City's conduct over the past six months is that petitioner has been prevented from making any

renovations and repairs whatsoever as a result of the DOB's refusal to issue petitioner a building permit.").

Petitioners' argument is unavailing. DOB's refusal to issue petitioners a permit under the Dorm Rule is an issue *separate and apart* from petitioners' legal obligation to comply with the Building Code's requirement to maintain the façade, structure, and exterior of buildings in a manner that does not threaten public safety. See Admin. Code §§ 28-301.1 and 28-302.1. DOB's directive that petitioners perform emergency work and complete the structural repairs (see Petition, Exhibits 12 and 13) does not mean that DOB must issue petitioner a permit under the Dorm Rule when petitioner has no proposed tenant or lease. Rather, petitioners must expend the resources to make the necessary repairs and stop using their failure to satisfy the Dorm Rule as an excuse for violating the law.[12] Thus, the issuance of violations for public safety concerns does not demonstrate futility or any other exception to the exhaustion requirement.

Finally, petitioners appear to claim that DOB rendered conflicting determinations with respect to petitioners' requests for zoning determinations, and that such determinations evidence arbitrary and capricious conduct. See Verified Petition, ¶ 93. On August 12, 2019, petitioners submitted a request for a construction code determination to DOB, seeking "concurrence that a qualified lease agreement for one of the proposed student dormitory floors is sufficient documentation to allow the issuance of a permit for the entire building per [the Dorm Rule]." Id. DOB concluded as follows:

[12] In an effort to demonstrate "taint," petitioners complain that DOB inadequately responded to their FOIL requests. Petition, ¶¶ 97-115. However, to date, DOB has produced thousands of documents in response to petitioners' barrage of FOIL requests. Petitioners have also failed to articulate what documents they believe are being withheld in a "cloak of secrecy" (Petition, ¶114) and how DOB's FOIL responses dispel with petitioners' requirement to exhaust their administrative remedies at the BSA. Indeed, these claims are nothing more than a red herring designed to detract from the fact that petitioners' challenge to DOB's determination is simply not ripe for judicial review.

> The Department disagrees with your interpretation. Per [the Dorm Rule], the lease agreement shall be for the entirety of the student dormitory establishment whether it occupies the entire building or portion of the building. Therefore the lease agreement for only one of the proposed student dormitory floors is not sufficient for the issuance of a permit for the entire building per [the Dorm Rule].
>
> However, the Department can issue a permit for the entire building with the following conditions:
>
> 1. For the floor with the student dormitory lease accepted by the Department, the construction for that floor shall be built entirely in accordance to the approved plans for the leased floor.
>
> 2. For the floors without the lease, the construction is limited to core and shell with fire protection, required egress and exterior wall insulation … all in accordance with approved plans[.]

Verified Petition, Exhibit 105 (August 12, 2019 CCD1).

On or around August 8, 2013 and May 26, 2016, petitioners had previously applied to DOB for a construction code determination, seeking DOB's "confirmation that proof of lease agreements for the occupancy of a portion of the building … is sufficient to allow the issuance of an alteration and related permit(s) for the building in its entirety, and within the existing building envelope." Verified Petition, Exhibit 105 (May 25, 2016 CCD1). DOB found that a permit may be issued upon submission of a lease that meets the requirements of the Dorm Rule for a portion of the building. According to DOB, an application may be approved and a permit issued upon evidence of a lease for a portion of the building. Id.

Thus, these determinations are not conflicting.[13] They are entirely consistent – both find that DOB may issue a permit for the development of the interior of a building if petitioner submits a lease for a portion of the building. The August 12, 2019 determination is

[13] Regardless, even if the determinations conflict, this does not excuse petitioners' failure to exhaust their administrative remedies at the BSA.

more specific than the 2016 and 2013 determinations, but *not* inconsistent in any way. The floor with the lease can be built entirely in accordance with the approved plans. DOB can also issue a permit for the floors without the lease. The August 12, 2019 determination provides more details as to the work that can be done on the floors without the lease – "construction is limited to core and shell with fire protection, required egress and exterior wall insulation"—but in no way contradicts the 2013 and 2016 determinations. Id. Thus, petitioners' claim that these determinations are the "exact opposite" is wholly unfounded.

As petitioners' litany of grievances is unavailing and irrelevant, petitioners have not demonstrated that exhaustion to the BSA would be futile.

2. The Question of Whether the Dorm Rule Applies to Petitioners' Property is Not a Question of Law. Rather, it is One that the BSA – the Agency with the Expertise in Real Property and Zoning – Must First Consider.

Petitioners claim that exhaustion of administrative remedies is not required because the determination of whether the Dorm Rule applies is purely a question of law. Again, Justice Tisch rejected this notion when he directed petitioners to exhaust their administrative remedies at the DOB and BSA before seeking judicial review of this very claim. Exhibit B. In any event, petitioners are wrong.

Petitioners want this Court to interpret the Dorm Rule (and related provisions of the Zoning Resolution) and issue a decision before the BSA – the agency possessing the expertise on issues of interpreting the Zoning Resolution – has had the opportunity to opine or issue a decision on the matter. Indeed, the BSA is a five-member body comprised of persons with unique professional qualifications, including a planner, a registered architect, and a licensed professional engineer, each with at least ten years of experience. City Charter § 659; Matter of the New York Botanical Garden v. BSA, 91 N.Y.2d 413 (1998).

The BSA is empowered to, inter alia, entertain administrative appeals from DOB determinations applying provisions of the Building Code and Zoning Resolution, to consider and decide applications for zoning variances and to make certain other zoning determinations as specified in the ZR. City Charter § 666(5). These include appeals from determinations of the Commissioner of Buildings. City Charter § 666 (6) and ZR § 72-01(a). The BSA is the ultimate administrative authority charged with enforcing the Zoning Resolution. Consequently, it is settled that "in questions relating to its expertise, the BSA's interpretation of the statute's terms must be 'given great weight and judicial deference,' so long as the interpretation is neither irrational, unreasonable, nor inconsistent with the governing statute.'" Toys "R" Us v. Silva, 89 N.Y.2d 411 (1996).

Knowledge of real property uses and the Zoning Resolution is crucial in the instant matter. Here, petitioners claim that the subject building is now zoned in an R8-B and R7-A district and that the maximum Floor Area Ratio ("FAR") for a dormitory and a residential building are equal. See Petition. According to petitioners, this was not the case when plaintiff submitted its prior application to build a 19-story dormitory. Id. Petitioners allege that because the FAR is equal, the Dorm Rule should not apply altogether to petitioners' property. It should be the BSA – and not this Court – that interprets the Zoning Resolution to determine whether the FAR is equal for community facilities and residential buildings in a split zoned R8-B and R7-A zoning district and whether or not such a claim is even relevant to the applicability of the Dorm Rule. The BSA is the agency holding the necessary land use expertise to reach such conclusions and to interpret the interplay between the Zoning Resolution and the Dorm Rule.

This is why the statutory scheme has left such technical questions to be determined in the first instance by the BSA, and not the Courts. Indeed, Courts consistently hold

that such matters are best left to the agency with the necessary expertise. Matter of Perotta v. City of New York, 107 A.D.2d 320, 324 (1stk Dep't 1985), aff'd 66 N.Y.2d 859 (1986). As petitioners cannot establish that this issue is a question of law that does not require the expertise of the BSA, petitioners must be required to exhaust their available administrative remedies before petitioning this Court.

3. DOB Has Not Engaged in an Illegal Usurpation of Legislative Authority.

Petitioners claim that DOB has "usurped legislative authority" from the City Council by enacting the Dorm Rule and requiring that petitioner submit pre-permitting documentation (in the form of a lease with a school) prior to the issuance of a building permit. Petition, ¶ 221. Petitioners complain there "was simply no [pre-permitting] requirement in the Zoning Resolution in 1999" when petitioners purchased the subject property; and petitioners claim that DOB has unlawfully amended the Zoning Resolution by requiring pre-permitting documents. Id., ¶ 221-222. These claims fail as a matter of law, as the New York Court of Appeals has already upheld DOB's "pre-permitting requirement" under the Dorm Rule with respect to petitioners' property. See Moston Aff., Exhibit A, Matter of 9th & 10th St. L.L.C., 10 N.Y.3d at 264.

In 2005, petitioners challenged DOB's determination, and the BSA's affirmance of that decision, to deny petitioners' application for a building permit to construct a dorm without petitioners' prior submission of a lease with an educational institution. Id. With respect to petitioners' proposed use of the property, DOB "doubted that dormitory use would ever be possible, and asked for assurances – in the form of a connection with an educational institution – that it would be." Id. at 270. The Court found that "where, as here, officials reasonably fear that the legal use proposed for a building will prove impracticable, it is not improper to insist on a

showing that the applicant can actually do what it says it will do." Id. at 269. In a footnote, the Court noted that: "During the course of its discussions with petitioner, the Department promulgated a new regulation (1 RCNY 51-01) governing applications for permits to build dormitories. The requirements this regulation imposes are similar to those the Department imposed on petitioner here[.]" Id. at 268.

Accordingly, the Court of Appeals has already upheld DOB's practice (which was later codified as the Dorm Rule in 1 RCNY 51-01) of requiring the submission of a lease before the issuance of a building permit. Petitioners' claim that DOB has usurped legislative authority is, therefore, wholly without merit.

POINT III

PETITIONERS ARE NOT ENTITLED TO A WRIT OF PROHIBITION AS A MATTER OF LAW.

In their second cause of action, petitioners seek a "writ of prohibition pursuant to CPLR § 7803(2)" to enjoin DOB "from acting on their Notice of Violation dated June 28, 2019 requiring certain alleged emergency repairs" at the subject premises. Petition, ¶¶ 234-36. Petitioners' claim is unfounded, and petitioners are not entitled to a writ of prohibition as a matter of law. The Petition fails to state a cognizable claim for a writ of prohibition because DOB is not acting without, or in excess of, its jurisdiction and, in any event, a writ of prohibition will not lie where, as here, an ordinary remedy would be available to petitioner if the agency acted in excess of its jurisdiction.

Article 78 of the CPLR provides for judicial review and relief in the nature of prohibition when a petitioner demonstrates that a governmental body or officer in a judicial or quasi-judicial capacity is about to proceed in excess of its jurisdiction. See CPLR § 7803(2). The Court of Appeals has explained that "[a] writ of prohibition may be obtained only when a

clear legal right of a petitioner is threatened by a body or officer acting in a judicial or quasi-judicial capacity without jurisdiction in a matter over which it has no power over the subject matter or where it exceeds its authorized powers in a proceeding over which it has jurisdiction … In light of the reluctance to interfere with the normal, orderly administration of justice, an important factor is the adequacy of other legal remedies to correct the asserted error; if there is an adequate 'ordinary' remedy, then there is no need to invoke the extraordinary remedy. Morgenthau v. Erlbaum, 59 N.Y.2d 731 (1987) (emphasis added). Put simply, a writ of prohibition is an "extraordinary remedy," only to be invoked where a body is wholly without jurisdiction to act or where the body is exceeding its authorized powers. And even then, a court should not intervene where there is an "ordinary" remedy available.

Petitioners' claim asserted herein fails to state a cause of action because DOB has not exceeded its jurisdiction in issuing Notices of Violation (also referred to as "summonses")[14] to petitioners for hazardous conditions at the subject premises. New York City Administrative Code § 28.201, et seq. provides that DOB has the authority and jurisdiction to enforce the provisions of the Building Code, the Zoning Resolution, and all other laws or rules enforced by DOB. See Admin Code § 28-201.3. DOB has the authority to issues Notices of Violation,

[14] Petitioners appear to challenge a "June 28, 2019 Notice of Violation." See Petition, p. 87, Second Cause of Action, subheading "a." However, according to DOB's records, DOB did not issue a June 28, 2019 Notice of Violation to petitioners; nor do petitioners append a copy of such a document to their Petition. Rather, DOB issued summonses returnable at the New York City Office of Administrative Trials and Hearings, DOB Civil Penalties, and Commissioners Order to petitioners. See Petition, Exhibits 12 and 13. Records of all of the summonses, DOB Civil Penalties, and Commissioners Orders that DOB has issued to petitioners for the subject building can be found on DOB's Building Information System Website ("BIS"), which is publicly available at the following links: http://dob-bisweb.buildings.nycnet/bisweb-intra/ActionsByLocationServlet?requestid=4&allbin=1079685&allinquirytype=BXS4OCV3&stypeocv3=V (DOB's Commissioner Orders and Civil Penalties); and http://dob-bisweb.buildings.nycnet/biswebi-intra/PropertyProfileOverviewServlet?requestid=3&bin=1079685 (OATH/ECB Summonses) (both links last accessed on November 26, 2019).

Commissioner's Orders, Civil Penalties, and even criminal summonses to ensure compliance with the law. Id. Pursuant to Administrative Code § 28-201.1, "it shall be unlawful to … fail to maintain … use or operate any building [or] structure regulated by this code or by the zoning resolution … in conflict with or in violation of any of the provisions of this code, the zoning resolution, or the rules of [DOB]."[15]

DOB acted well within its statutory authority by issuing Notices of Violation, Civil Penalties, and Commissioners Order to petitioners for their failure to maintain the subject building in a safe and lawful manner. There is simply no basis to prohibit DOB from issuing Notices of Violations, Commissioners Orders, or utilizing any other enforcement tool to ensure that petitioners comply with the law. This Court cannot issue a writ of prohibition to enjoin DOB from acting to protect the public safety.

CONCLUSION

For the foregoing reasons, the Verified Petition should be dismissed in its entirety, together with such other and further relief as this Court may seem just, proper and equitable.

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[15] Significantly, petitioners' own expert engineer submitted a report to DOB, dated March 18, 2019, labeling certain conditions of the subject building as a public hazard. See Petition, Exhibit 41 (Old Structures Report), p. 3. Indeed, the report stated as follows, in pertinent part:

> C. The loose terra cotta at the east and west mansard parapets is a public hazard. The loose terra cotta trim at the courtyards is a potential public hazard, as it has the same probability of failure as the parapets but will fail onto the unoccupied courtyards. There is no sign of current movement (since 2013) of the chimney, but given its location above the neighboring building it should be treated as hazardous.
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> Note that item C has been increasing in severity and will continue to do so as the building weathers and receives no maintenance.

Dated: New York, New York
November 26, 2019

Respectfully submitted,

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