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COURT OF APPEALS
STATE OF NEW YORK

WEST 58TH STREET COALITION, INC.,
et al.

Respondents-Appellants,

-against-

NO. 33

CITY OF NEW YORK, et al.

Appellants-Respondents.

20 Eagle Street
Albany, New York
April 27, 2021

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Appeal number 33, West 58th
2 Street Coalition, Inc. v. the City of New York.

3 Let's just wait, counsel, a moment, until our
4 colleagues leave the courtroom.

5 Good afternoon, counsel.

6 MS. GRAVES-POLLER: Good afternoon. May it
7 please the court. Barbara Graves-Poller for the municipal
8 appellants. I would like to reserve three minutes for
9 rebuttal, please.

10 CHIEF JUDGE DIFIORE: Three minutes?

11 MS. GRAVES-POLLER: Yes, Your Honor.

12 The First Department should have dismissed this
13 appeal which - - -

14 CHIEF JUDGE DIFIORE: Oh, excuse me, counsel.

15 MS. GRAVES-POLLER: Sure.

16 CHIEF JUDGE DIFIORE: I'm so sorry. My
17 apologies, Judge Wilson.

18 MS. GRAVES-POLLER: Sure.

19 CHIEF JUDGE DIFIORE: Excuse me. Just give Judge
20 Wilson a moment to settle in. My fault.

21 MS. GRAVES-POLLER: The First Department should
22 have dismissed this appeal which petitioners lack standing
23 to pursue. And the court was wrong to remand this case for
24 a hearing that is inconsistent with the concept of
25 rational-basis review.



1 Now, turning to the first issue of standing,
2 petitioners do not attempt to identify a single Building
3 Code provision where they can satisfy the zone-of-interest
4 test. In fact, it's not even clear what specific
5 government action they challenge here.

6 JUDGE WILSON: Do they have to have - - -

7 JUDGE RIVERA: Well, if they have a member that
8 shares a wall with the proposed shelter, why isn't that
9 clearly someone who would have standing?

10 MS. GRAVES-POLLER: If petitioners' claim
11 centered on a Building Code provision that, for example,
12 outlined specific materials used to create that wall or
13 reinforce that wall, or if DOB had made some decision-
14 making with regard to that wall, then we'd be having a
15 different zone-of-interest discussion.

16 But what petitioners are trying to do here is
17 make themselves the beneficiary of a classification system
18 that is not designed to protect neighbors or have
19 community-wide impact.

20 JUDGE WILSON: Do they need standing on a claim-
21 by-claim basis, or would it be sufficient, for example, if
22 they had standing on the nuisance claim, which they end up
23 losing on, but that would give them standing for the suit?

24 MS. GRAVES-POLLER: Well, here the question is
25 whether there's a specific government action that they're



1 challenging and whether or not they fall within that
2 specific provision under which the DOB acted. That's what
3 this court explained in MHLS v. Daniels. But here instead
4 of - - - they pivoted away from the temporary certificate
5 of occupancy. And indeed, their petition does not contain
6 a single allegation that goes squarely to the temporary
7 conditions that DOB authorized.

8 Now, even though the First Department firmly
9 rooted its decision in the TCO, petitioners have stepped
10 back from that here. But instead, what they have focused
11 on is the general concept of transient versus permanent
12 building classification. And that is a system that exists
13 to protect future residents. And we know this because, if
14 you stay at a hotel for a night or a handful of nights, we
15 all see that map - - -

16 JUDGE STEIN: Well, isn't their - - -

17 MS. GRAVES-POLLER: - - - on the back which is
18 for transient use for the occupant.

19 JUDGE STEIN: Isn't their argument a little more
20 general than that? Aren't they - - - I mean, essentially,
21 I think what their argument goes to is whether there has
22 been a change in use or occupancy that requires more
23 stringent safety - - - you know, compliance with more
24 stringent safety measures than - - - than exist in the
25 building? And why - - - why doesn't that affect - - -



1 again, at least let's use, I think the easiest example is
2 the person that shares a wall. So it - - - it is a general
3 safety provision, and so, you know, I don't understand why
4 that's not enough here.

5 MS. GRAVES-POLLER: It's not the type of safety
6 provision that is intended to have an impact on neighbors.
7 It is the type of safety provision - - - and again, I
8 should actually step back because it's not a specific
9 provision. There is a classification determination that
10 either has one set of requirements that apply or another
11 set of requirements. But those requirements do not benefit
12 the neighbors. They are so that - - -

13 JUDGE STEIN: Well, where does it say that it has
14 to be a specific provision? I thought it was a statutory -
15 - - you know, that it - - - it fell within the zone of
16 interest in which the statute was meant to address. I
17 mean, we refer to a statute in different ways. We refer to
18 a statute sometimes as this particular provision, and
19 sometimes we refer to a statute as a total - - - as a title
20 in a - - - you know, in a larger statute or - - - so where
21 - - - where does it say that it's - - - it's as
22 particularized as you are arguing it is?

23 MS. GRAVES-POLLER: Well, it's not simply what
24 we're arguing it is. It - - - it's the question of what
25 DOB did that they're actually challenging. But - - - but



1 ultimately, I think it's since they have not identified a
2 concrete action, we - - - we're required to look at who - -
3 - who is supposed to benefit from the classification system
4 that is at the core of their challenge. And it is not
5 community members at large. And beyond that - - -

6 JUDGE FAHEY: Yeah, but here you're - - - here
7 we're not talking exclusively about community members at
8 large. And is it really - - - I know that you opened with
9 a standing argument, but isn't really the issue for us
10 whether or not there was a rational basis for this
11 decision? Assuming standing, for a second; let's just
12 assume it for a second; is there a rational basis for this
13 decision? Is - - - is it grandfathered in, and is it under
14 the right category?

15 And if it is - - - if there is a rational basis
16 for the decision then, ultimately, is the lookback that the
17 Appellate Division ordered on the fire safety provisions,
18 is that necessary or not? Isn't that where we should be
19 headed here, not on standing, because say that somebody's
20 got - - - sharing a wall with them and saying that's not
21 within their zone of interest I think is really a difficult
22 stretch.

23 MS. GRAVES-POLLER: Well, I will get to the --
24 the core of the - - - of the remand in just one second.
25 But let me explain why we do think standing is important.



1 JUDGE FAHEY: Go ahead.

2 MS. GRAVES-POLLER: Because endorsing the view of
3 standing the petitioners have - - - have argued here means
4 that any neighbor, regardless of what the specific act or
5 decision the DOB takes, any neighbor can challenge internal
6 building features that have no direct impact on their
7 property. And they can even do it when what we're talking
8 about are features that have remained in place for a
9 century. And they can do it when there is absolutely not a
10 shred of evidence that this use has changed. This building
11 is actually right now unoccupied, so petitioners are
12 actually speculating that somehow future use will be
13 transient and inconsistent with what DOB authorized.

14 JUDGE STEIN: Well, isn't that a different
15 aspect, though, of injury?

16 MS. GRAVES-POLLER: You're right, Your Honor, it
17 is a different aspect, but -- but these two go together.
18 So number one, they don't fall within the zone of interest.
19 Number two, their entire premise is based on the idea of
20 some sort of use that will be inconsistent with what DOB
21 authorized. And so this does - - -

22 JUDGE FAHEY: That's not the way I understand it.
23 The way I understand their premise is that -- that this
24 building was being - - - was being put in the wrong use
25 category, and as a result, the renovations that are being



1 proposed are not grandfathered in and not allowable.

2 That's the way I understand the argument there.

3 That's why I'm trying to move you off of
4 standing. We understand the argument, but you only have so
5 much time, and I'd really like to get to the - - - the
6 knottier question.

7 MS. GRAVES-POLLER: Sure. There is - - - I just
8 want to clarify one factual point.

9 JUDGE FAHEY: Sure. Go ahead.

10 MS. GRAVES-POLLER: There were alterations
11 performed on the first floor of this building, not in line
12 with any prior Codes but with the current Code. It was
13 the only - - -

14 JUDGE FAHEY: I thought it was floors one through
15 four where the alterations were going to take place, and
16 then five through nine they weren't.

17 MS. GRAVES-POLLER: No, Your Honor. The only - -
18 -

19 JUDGE FAHEY: Okay.

20 MS. GRAVES-POLLER: - - - alterations occurred on
21 the first floor. Those are - - -

22 JUDGE FAHEY: Occurred, I understand. But the
23 plan was to do one through four, right?

24 MS. GRAVES-POLLER: No, only the first floor
25 required a work permit from the Department of Buildings.



1 That work permit was issued only with respect to the first
2 floor. They were completed. The temporary certificate of
3 occupancy covers the first four floors, and that is what
4 DOB authorized to be used.

5 But going to Your Honor's questions about the
6 rational basis for the decision - - - for the
7 classification decision, that - - - there is a statutory
8 support for this thirty-day benchmark for the permanent - -
9 - permanent use designation that DOB applied. And there
10 are abundant facts.

11 We have first the Bray affirmation that explains
12 that employment shelters of this - - - in DOB's - - - or
13 DHS's experience, have a different population. They're
14 receiving a panoply of services, on site, off site, that
15 take more than thirty days to deliver.

16 The Westhab affirmation at 995 of the record also
17 describes those comprehensive services and a system of
18 assessments, internships, job programs that take more than
19 thirty days.

20 We also have the City's Turning the Tide report
21 that describes different types of specialized facilities,
22 and this one is one that will be expected to - - - to house
23 individuals for thirty days. So - - -

24 CHIEF JUDGE DIFIORE: Counsel, was there any
25 evidence in the record before the Agency that contradicts



1 your assertion that this was - - - met the thirty days?

2 MS. GRAVES-POLLER: Before the Agency?

3 CHIEF JUDGE DIFIORE: Before the Agency.

4 MS. GRAVES-POLLER: No, there's - - - there's no
5 evidence of that at all before the Agency or in this
6 record. And I'll just underscore the fact - - -

7 JUDGE WILSON: And are those findings of fact
8 that we really can't disturb?

9 MS. GRAVES-POLLER: I'm sorry, Your Honor? I
10 couldn't - - -

11 JUDGE WILSON: Is the thirty day - - - is that -
12 - - is it even in dispute?

13 MS. GRAVES-POLLER: The thirty days? It's not in
14 dispute. Petitioners - - - and this is a point the First
15 Department pointed out; petitioners, they FOIL-ed hundreds
16 of documents. They've never come up with any shred of
17 evidence that contradicts DHS's affirmation - - - or
18 project - - - projection of how this would be used.

19 I see the red light is on, so I'll - - -

20 CHIEF JUDGE DIFIORE: Isn't the - - -

21 JUDGE FAHEY: Can I just - - - Judge, would it be
22 all right - - -

23 CHIEF JUDGE DIFIORE: Yes, Judge Fahey.

24 JUDGE FAHEY: Thanks.

25 Just one final point. It seems that there was



1 substantial amount of proof, though, in the record,
2 challenging the fire safety issue, and both sides had proof
3 on that record, and the Appellate Division recommended that
4 the fire safety issue go back to Supreme Court for a
5 hearing, right?

6 MS. GRAVES-POLLER: That's - - - the court asked
7 if the use of the building would somehow contradict the
8 public safety and welfare provisions that are written into
9 the temporary certificate of occupancy sections of the - -
10 - of the Code.

11 JUDGE FAHEY: Okay. Given the way the Appellate
12 Division framed this, that this is a question of fact, do -
13 - - do you say that that's anything that we can touch?

14 MS. GRAVES-POLLER: I actually - - - so - - - so
15 squarely to Your Honor's question, no, it's not a que - - -
16 an issue for a court to resolve, but I actually will push
17 back and say I don't think that what the First Department
18 was actually remanding this for was - - - was a resolution
19 of fact. What the First Department appears to be remanding
20 for is a judicial determination about whether or not the
21 different avenues that the Code gives us for achieving an
22 acceptable level of safety, whether or not that makes
23 sense. It's really an attack on the compliance standard
24 itself.

25 JUDGE FAHEY: I see. Thank you.



1 CHIEF JUDGE DIFIORE: Thank you.

2 Counsel?

3 MR. HONIG: Thank you. Good afternoon, Your
4 Honors, and may it please the court. My name is Jeremy
5 Honig from Rivkin Radler. I'd respectfully like to reserve
6 three minutes for rebuttal.

7 CHIEF JUDGE DIFIORE: Well, because this is a
8 cross-appeal, counsel, you have your three minutes.

9 MR. HONIG: Thank you, Your Honor.

10 The Coalition - - - I represent the respondents-
11 appellants, the West 58th Street Coalition, et al. The
12 Coalition is asking the court to require the proposed
13 shelter to comply with modern-day safety standards before
14 it is permitted to open.

15 The court should have granted this relief for
16 three reasons. First, the proposed shelter constitutes a
17 change of use. Second, the proposed shelter results in a
18 change of occupancy. And third, the City's determination
19 to apply the grandfathering provision to exempt this
20 building from modern-day safety was irrational, arbitrary,
21 and capricious.

22 There is a change in use for this proposed
23 shelter, and that determination does not hinge upon the
24 transient nature of the residents. The Appellate Division
25 conflated the two issues of use and occupancy in its



1 decision. Use is defined in the Building Code broadly as
2 the purpose for which a building is occupied or utilized.
3 That is the Building Code definition. This was a hotel, a
4 transient hotel. This is going to be a homeless shelter.
5 That, under the definition, the very broad definition, is a
6 change of use.

7 Now, if you want to get to a more specific
8 definition - - -

9 JUDGE WILSON: What about Justice Oing's separate
10 concurrence that this isn't actually a homeless shelter?

11 MR. HONIG: Judge Oing's concurrence was,
12 respectfully, about the change in occupancy, and he was
13 saying it wasn't a homeless shelter for the purpose of
14 making a distinction between transient and nontransient.
15 For purposes of change of use, that analysis is not
16 relevant and it's not necessary.

17 JUDGE RIVERA: Well - - -

18 MR. HONIG: All that it - - -

19 JUDGE RIVERA: - - - is it really a change of use
20 or change of users?

21 MR. HONIG: It's a change of use, and the reason
22 we know it's a change of use, aside from the broad
23 definition that I just gave you, is that there's a Zoning
24 Resolution, and the Zoning Resolution has specific use
25 groups that are defined by the City, they're supposed to be



1 interpreted by the - - - the City and applied by the City.
2 Use - - -

3 JUDGE STEIN: Aren't they for a completely
4 different purpose?

5 MR. HONIG: What?

6 JUDGE STEIN: Aren't they for a completely
7 different purpose that they - - - they indicate what - - -
8 what types of buildings can - - - can be in a certain zone
9 as of right, right?

10 MR. HONIG: That's not the only purpose of the
11 Zoning Resolution. The Zoning Resolution specifically
12 talks about use, what is the building going to be used for.

13 JUDGE STEIN: Well, we certainly know that - - -
14 that different words can have different meanings in
15 different statutes, and sometimes we look at things like is
16 there any cross reference and what is the purpose of the
17 statute, are they different. And here I'm not aware of any
18 cross-reference between the Building Code and the Zoning
19 Resolution.

20 MR. HONIG: Well, what we do know is that the use
21 classification, whatever classification it is, appears on
22 the certificate of occupancy. It is something that the DOB
23 uses for every single building, to determine what that use
24 group is. Use Group 2, which is what this building was
25 classified as when it was a hotel, specifically excludes

1 community facilities, specifically excludes. And a
2 community facility is defined as a not-for-profit
3 institution with sleeping accommodations. That is what we
4 have here. It is - - - and that community facility falls
5 under Use Group 3. So because we are going from Use Group
6 2 to Use Group 3, that is a change of use.

7 That determination is entitled to no deference.
8 That is strictly a statutory interpretation and analysis.
9 No decision has to be made about the transient nature of
10 the residence; it's only how is this building going to be
11 used and what use group does it fall under. If it falls
12 under a different use group than it was before, then the
13 grandfathering provision is inapplicable and the building
14 must meet modern-day safety codes.

15 On the issue of occupancy, which it won't be
16 necessary to reach if the court agrees on - - - that there
17 was a change of use, but assuming the court does not agree
18 that it was a change of use, now we move to a change of
19 occupancy, which independently would require the building
20 to comply with modern-day safety codes.

21 The determination that the Appellate Division
22 made and that the lower court made was that the City's
23 determination that this is an R-2 group was - - - was
24 rational. The problem here is that there is no support for
25 that. And in fact, the - - - the record shows that it's



1 the opposite. The exact same type of homeless shelter that
2 we have here, which is known as a rapid rehousing center -
3 - - that's the name of it - - - has been classified as R-1
4 previously.

5 There is no explanation by the City why there's a
6 difference between this rapid rehousing shelter - - -
7 center and the other rapid rehousing shelter.

8 JUDGE STEIN: I thought they said that there were
9 some that had been previously char - - - categorized as
10 R-1, and when they have a change of use they don't make
11 them go to a lesser standard.

12 MR. HONIG: That was one of the things they said
13 in an attorney argument. That was not something they
14 showed through either data or specifically identifying a
15 facility where this happened. What the City has done is
16 they've made a distinction between your traditional
17 homeless shelters and your rapid rehousing shelters.
18 That's fine. But where's the distinction between the exact
19 same type of shelters? Why is there no explanation about
20 why - - - how one could possibly be R-1 while the other is
21 R-2? This was part of a pre-determined outcome. The - - -
22 the City knew that if there was a change from R-2, which it
23 was before, to R-1, it would have to meet modern safety
24 Codes. So this was classified as R-2 so that it would not
25 have to do so.

1 I see that my time is expired. May - - - I - - -
2 I know I have time on rebuttal. May I make one further
3 point?

4 CHIEF JUDGE DIFIORE: You may, sir. You may,
5 sir.

6 MR. HONIG: Okay. And I'll address this point
7 further on rebuttal. It - - - it's the - - - the safety
8 provision in the grandfathering provision of the Code.
9 What that requires, the statutory language of the
10 grandfathering provision, which is 27-118 and 27-120 of the
11 Administrative Code, it requires an analysis that the
12 building, regardless of whether it's Code compliant with
13 the old Code, cannot endanger public safety and general
14 welfare or the public - - - the safety and welfare of the
15 residents.

16 The Appellate Division did find that there was a
17 question of fact about whether this building, in its
18 current condition, endangered public safety and welfare.
19 And largely, what it relied on was the expert affidavits
20 that we submitted. And - - - and these are - - -

21 JUDGE STEIN: Well, let me ask you this, just
22 more generally, in Article 78 proceedings, because you
23 would agree with me that - - - that these types of hearings
24 are - - - are pretty rare in Article 78 proceedings.

25 MR. HONIG: I would agree.



1 JUDGE STEIN: They - - - they do occur, but what
2 it seems to me is that here it's a question of a - - - of a
3 determination by the Agency as to whether it was safe or
4 not, which they're required to make in - - - in giving out
5 the temporary CO, and which included enhanced safety
6 measures like these - - - these guards, these twenty-four
7 hour guards and some increased sprinklers and things like
8 that, versus these experts that you all engaged and - - -
9 and they gave their opinion.

10 And - - - and this seems a little different to me
11 than the ordinary hearing in an Article 78 where the - - -
12 the purpose isn't to weigh - - - the courts don't weigh
13 that; the Agency weighs that. And - - - and unless its
14 determination is irrational then you don't get a hearing in
15 - - - in order to resolve conflicts like that. So I - - -
16 I'm a little confused as to why this is appropriate in this
17 context.

18 MR. HONIG: Thank you. Generally speaking, Your
19 Honor, I agree with you that if there were competing expert
20 opinions, and the Agency deferred to one over the other, I
21 would agree with you that a hearing would not be
22 appropriate. That is not at all what we have here.

23 JUDGE STEIN: Well, we have the fire department
24 having no problem with it.

25 MR. HONIG: That - - - what - - - what the - - -



1 JUDGE STEIN: The current fire department.

2 MR. HONIG: Well, what the - - -

3 JUDGE STEIN: They - - - they didn't - - - they
4 didn't raise any objection.

5 MR. HONIG: Well, if you look at what the fire
6 department actually issued, they issued something called a
7 letter of no objection to the fire plan. Now, what do we
8 know about that letter of no objection? It's A-117 of the
9 record. It - - - it, first of all, lists the occupancy
10 classification as R-1. That's the first thing that should
11 be noted. Secondly, it says on the letter, this letter,
12 however, does not waive the requirements of other agencies
13 having jurisdiction.

14 All it is is a - - - a cursory review of a plan.
15 It doesn't look at - - - it looks at certain aspects of the
16 plan. It doesn't look at means of egress or some of the
17 other - - - or dead end corridors. What we have here is
18 not a battle of the experts. What we have here is the City
19 relying upon the issuance of a partial temporary
20 certificate of occupancy that applies only to floors one
21 through four.

22 We do not know whether there was any analysis of
23 the overall safety of the building. We have no idea
24 whether anybody analyzed the means of egress, dead-end
25 corridors, things of that nature. What - - - what should



1 be noted here, Your Honors, is that we've been litigating
2 for years. We have a - - - a relatively large record here.
3 You will not find one single person who's willing to go on
4 the record and swear in an affidavit from the City that
5 this building is actually safe. Nobody says, hey, wait a
6 second - - - no expert says, hey, wait a second, here's why
7 having one means of egress that's too narrow is okay here.
8 What they argue is, well, we issued a temporary certificate
9 of occupancy, and it technically complies with the older
10 Code, so it's fine.

11 The Appellate Division correctly saw through that
12 and said the TCO is not a substitute for the actual safety
13 analysis that you were supposed to do under the
14 grandfathering provision. What - - - what it is is a - - -
15 it - - - it simply creates a rebuttable presumption, and
16 they've clearly rebutted that presumption.

17 If the Appellate Division made any mistake or the
18 - - - the lower court made any mistake, it was not granting
19 us summary judgment on that issue because we have
20 affidavits saying it's actually dangerous, and there are no
21 competing affidavits saying that it's not.

22 CHIEF JUDGE DIFIORE: Thank you, counsel.

23 Counsel?

24 MS. GRAVES-POLLER: First, Your Honors, I'd like
25 to correct a couple of statements first about what use and



1 occupancy means in the Building Code and then a statement
2 of fact that - - - that my colleague has made.

3 First, the Building Code is clear when it talks
4 about what it means in terms of use. When the Building
5 Code talks about use and occupancy, it's talking about use
6 and occupancy of buildings and structures. And - - - and I
7 think petitioners miss the import of that because they
8 distinguish between use and occupancy in a way that doesn't
9 recognize that something like a tent is a structure that
10 may be used by not occupied. But a building like this one
11 is one where the use and occupancy analysis is overlapping.

12 The second point of correction goes to a point in
13 the record itself. Petitioners take the position that DO -
14 - - DOB never analyzed safety of egress, for example. And
15 number one, the - - - the outcome of that analysis is
16 embodied in the TCO. But I would also point Your Honors to
17 page 588 of the record, because at the time that the
18 building owner submitted the alteration provision in
19 conjunction with that first - - - the - - - the work
20 permit, DOB analyzed what the egress requirements were
21 under the Multiple Dwelling Law.

22 And the Multiple Dwelling Law isn't some old
23 Code. The current Code, at 310.1, tells us that buildings
24 of this type shall be covered by the Multiple Dwelling Law.
25 And this court has recognized that in Mullen v. Zoebe.



1 But - - - but again, at 588 of the record, DOB analyzed
 2 exactly what type of egress would be safe, given a building
 3 - - - given the building's age, fireproof construction, and
 4 mitigation factors that are in place. This is not a zoning
 5 case. The zoning use groups are irrelevant to our
 6 understanding of what use means in this context.

7 And I would just refer Your Honors to Section
 8 2803 - - - 28-103.25 of the Building Code where there's no
 9 doubt, when we want to borrow a Zoning Resolution
 10 definition in the Building Code, the Building Code does so
 11 expressly.

12 But the fundamental error that petitioners seem
 13 to be making in the Code is that they're staying at this
 14 superficial reading of the administrative provisions. When
 15 we drill down into chapter 7, the actual specifics of the
 16 Code itself, there we find the granular instructions on how
 17 to achieve an acceptable level of safety.

18 And I would just refer Your Honors to 508.1 and
 19 302.1 that give - - - and 901.19, which give crystal clear
 20 instructions on when a - - - a portion of a building has to
 21 be changed, undergoes a change in use, versus the entire
 22 structure as a whole.

23 So I see my time is up, and I would just ask, you
 24 know, our city is diverse, incredibly so, so it's not
 25 surprising that some members of a community will - - - will



1 disklike or be unhappy with a decision that we make to
2 address an urgent problem. But we cannot let a small group
3 of well-resourced neighbors override rational action.

4 So we urge this court to modify the First
5 Department's remand, and either dismiss this on standing
6 grounds or deny the petition on the merits.

7 CHIEF JUDGE DIFIORE: Thank you, counsel.

8 Counsel?

9 MR. HONIG: Yes, Your Honors. First, counsel
10 cited to the record for the Alt-1 application that was
11 submitted. What should be noted is that, if we're going to
12 rely upon the owner's submission in the Alt-1, remember
13 what the Alt-1 said. The Alt-1 said there's a change in
14 use here, and that change in use requires a new certificate
15 of occupancy. Now, the City pivoted quickly away from that
16 position when they realized the ramifications of what a
17 change in use means. But if we're looking at the Alt-1,
18 that is instructive, initially, for what - - -

19 JUDGE STEIN: Why isn't that limited to the
20 restaurant, to the -- to the ground floor because, I mean,
21 otherwise, it - - - it seems to me that that application
22 would certainly not have been adequate for the entire
23 building.

24 MR. HONIG: Well, if you look at the Alt-1, it
25 also says that there's work being done on floors cellar



1 through nine. It was only later that they made a
2 distinction between types of work, certain type of work
3 happening on the first floor versus more, quote, unquote,
4 "minor" work happening on the larger floors. That was not
5 a distinction that was made in the Alt-1. The Alt-1 says
6 there's work being done on cellar through nine that's going
7 to require a change in use.

8 Secondly - - -

9 JUDGE RIVERA: So counsel, specifically, I don't
10 think you've really fleshed it out, so I'm just going to
11 give you that opportunity to do that now. What is the
12 actual change in use that you're talking about?

13 MR. HONIG: The change in - - -

14 JUDGE RIVERA: There - - - I mean, you have
15 people living in the space, a roof over their head, what's
16 the change in use?

17 MR. HONIG: Well, Your Honor, the - - - the
18 change - - - there's two reasons for the change in use.
19 One is the definition in the Building Code alone for the
20 purpose that it's being used. I suppose you could always
21 say that, well, people are sleeping there so there's no
22 change in use. Well, then there would never be a change in
23 use. There wouldn't be a change in use for a dormitory,
24 which is also excluded from Use Group 2, and - - - and
25 other facilities like that.

1 There is a reason that there were distinctions
2 made in the Zoning Resolution which is promulgated by the -
3 - - by the DOB, decided by the DOB. I - - - I understand
4 that they're trying to distance themselves from that now,
5 but that is the distinctions that were made, and there's a
6 reason those distinctions were made.

7 So if Use Group 2, which we all agree the
8 building was, excludes community facilities, and a
9 community facility is a nonprofit institution with sleeping
10 accommodations, then a homeless shelter cannot be in Use
11 Group 2. It's - - - this isn't a - - - there's no
12 discretion involved in this. Just look at the Zoning
13 Resolution. It can't be in there. So there's a change in
14 use, so it has to comply with the new Code.

15 Counsel also references the Multiple Dwelling
16 Law. The reason the Multiple Dwelling Law does not apply
17 here to the - - - specifically to the means of egress is
18 Section 3, sub (5) of the MDL says if there's a local law
19 or ordinance that is more restrictive, then that supersedes
20 the Multiple Dwelling Law.

21 Well, here we have the law saying you have to
22 have more than one means of egress and the Multiple
23 Dwelling Law says in some cases you could have one means of
24 egress. So clearly it's more restrictive, so the Multiple
25 Dwelling Law does not apply.



1 But even if you wanted to try to apply the
2 Multiple Dwelling Law here, the only way you could have a
3 single means of egress is if you have a automatic sprinkler
4 head in every stair hall or public hall and every hall or
5 passage within an apartment. There are no sprinklers
6 within these apartments. That is not up for debate or
7 dispute; that is an agreed-upon fact. So even if you
8 wanted to apply the MDL, for that reason, you couldn't have
9 a single means of egress.

10 Finally, I think that - - -

11 JUDGE RIVERA: Are they apartments?

12 MR. HONIG: I'm sorry?

13 JUDGE RIVERA: Are those rooms apartments?

14 MR. HONIG: Yes, apartments are - - - yes, under
15 the definitions. I don't think there's any dispute that
16 we've all been operating under the definition of an
17 apartment - - -

18 JUDGE RIVERA: An apartment, okay.

19 MR. HONIG: - - - whether it's a homeless shelter
20 or something else.

21 I think it's important, Your Honors, this is not
22 a group of community members challenging trivial defects.
23 We have - - - the experts here are former high-ranking DOB
24 and DHS members. We have a former FDNY lieutenant who
25 fought the fire in the World Trade Center, and his name is



1 John Bongiorno, and his affidavit is A-2083 in the record.
2 And he said that he would never want a fire - - - a fire in
3 this building. You have one means of egress that's too
4 narrow. In that staircase - - -

5 JUDGE WILSON: What are the buildings he would
6 want a fire in?

7 MR. HONIG: Well, I don't - - - that's a good
8 point. He probably wouldn't want to fight a fire anywhere,
9 although he became a fireman, so I guess there's something
10 that he enjoys about it. But his point was, of course,
11 that this is extremely dangerous in terms of fighting
12 fires. You have the standpipe system, which is the way to
13 connect the water to the hose.

14 JUDGE WILSON: But the great difficulty with that
15 is this building has been around a hundred years, right?
16 And it's had a lot of people who lived there, in and out,
17 and nothing much has happened.

18 MR. HONIG: Your Honor, thankfully, you're right,
19 but I'd say you could say that about any building where
20 there has been a catastrophe. Before it happens, there's
21 no problem. But we know about it now. And despite the
22 fact that counsel tries to impute some kind of NIMBY
23 argument, the record tells a different story.

24 My client's affidavit in A-2048, my client,
25 Suzanne Silverstein, we - - - my clients found another



1 building four blocks away that was used as a - - - a drug
2 rehab facility. It is zoned correctly. It has multiple
3 means of egress. We spoke with the landlord. The landlord
4 was willing to give a lease to do it. The City wouldn't
5 entertain it.

6 So the argument that my clients don't want a
7 homeless shelter in the neighborhood is - - - it fails for
8 that reason. And - - - but even if it didn't, that's not a
9 reason to put homeless people in a dangerous building.
10 What we're asking for is to hold the City accountable.
11 Somebody has to be able to look at their decisions and make
12 sure that this building is safe before people can move in.

13 CHIEF JUDGE DIFIORE: Thank you, counsel.

14 MR. HONIG: Thank you, Your Honor.

15 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the court of Appeals of West 58th Street Coalition, Inc. v. City of New York, No. 33, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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