Testimony Of City Council Member Rosie Mendez, Manhattan Borough President Scott Stringer, Assemblymember Brian Kavanagh And State Senator Brad Hoylman Before The New York City Board Of Standards & Appeals (BSA) | RE: Calendar Numbers 246-12-A And 245-12-A—Pertaining To 515 East 5th Street

We would like to thank Chair Srinivasan, members of the Board of Standards and Appeals (hereinafter BSA or the Board) and staff for holding this important hearing and offering representatives of our community and other interested parties the opportunity to provide testimony regarding the appeal request pertaining to 515 East 5th Street.

As you know, the owner of 515 East 5th Street is requesting that the Board make a determination that he has acquired a common law vested right to complete construction under a prior zoning regulation. Based upon concerns we have received from our residents, two prior resolutions of this Board on the underlying matter, the clear position of the Department of Buildings (DOB) in this case and the owner's repeated zoning violations, we express our unilateral and collective opposition to the owner's request for an appeal.

In Cal. No. 246-12-A, the owner seeks common law vesting for a vertical addition to those premises on the grounds that it was completed prior to November 19, 2008, the effective date of the East Village/Lower East Side amendments to the New York City Zoning Resolution—which changed the underlying zoning from R7-2 to R7-B. Frankly, the facts in this case are quite clear: the owner constructed without a valid permit and the zoning regulations were changed more than four years ago. An owner should not have an open-ended right to common law vesting several years after a zoning change.

We believe the vesting case should be denied by this Board based on the incontrovertible fact that the addition the owner seeks to vest was not built pursuant to a lawfully issued permit. The Board ruled as much in two separate prior proceedings and we commend this body for those decisions. In Cal. No. 67-07-A, on September 11, 2007, more than a year before the zoning amendments, the Board ruled that the addition violated a then-applicable zoning height restriction, namely the Sliver Law. The Board's resolution in that case was affirmed by the New York State Supreme Court on May 20, 2008. In Cal. No. 82-08-A, the Board revoked the permit altogether on grounds that it was unlawfully issued by the DOB. Consequently, none of the additions were completed pursuant to a lawfully-issued permit. Therefore, we wholeheartedly agree with the May 7, 2013 submission by the DOB in this matter—which forthrightly opposes the case for common law vesting. As the DOB explicitly points out—in their submission—any claim to vest under the old zoning "must fail because BSA has determined repeatedly that the permit was not valid for reasons unrelated to the zoning change."

Besides the Sliver Law violation, which is no longer disputable and is a matter of settled law, according to the most recent DOB objection sheets, this building could not be enlarged even under the old R7-2 zoning under either of the two available alternative remedies. Given that the building, as enlarged, does not—and did not—comply with lawful density standards applicable to a Quality Housing development, the Quality Housing option is not available. Likewise, because the building does not have adequate "open space," it cannot be enlarged under the height factor/open space regulations.

Notably, the owner does not claim that the addition was built pursuant to a valid permit or that the addition was built in compliance with the prior zoning. Instead, what the owner is asking you to do is to reinstate the permit under the old zoning, based on an unenforceable promise that eventually, somehow, the owner will bring the building into compliance—despite the compelling fact that the owner has kept the building in willful noncompliance for over six years. In the strongest possible terms, we urge you to reject this request.

Moreover, we note the essential fact that for at least six years, the owner has profited from these persistent and repeated zoning violations. According to DOB records, since at least December 2006, the owner has occupied the four duplex apartments that comprise the unlawfully built addition. We trace such unlawful occupancy back to December 5th, 2006 when the DOB issued a violation for "ALTERED BUILDING OCCUPIED WITHOUT A VALID CERTIFICATE OF OCCUPANCY. SIXTH FL AND PENTHOUSE OCCUPIED WITHOUT A VALID C OF O. REMEDY: DISCONTINUE ILLEGAL USE. OBTAIN VALID C OF O." Furthermore, rental records indicate that the owner has historically collected between $2,700 and $3,095 per month for each of these four apartments. That simple fact alone militates against vesting the addition. Certainly, there must be meaningful consequences for an owner who builds contrary to zoning regulations pursuant to a permit issued without legal authority and then monetizes these units—in violation of the law—without first obtaining a Certificate of Occupancy. Rewarding such lawlessness by vesting this unlawful construction *ex post facto* might encourage others to pursue a similar strategy that will effectively give all developers license to knowingly subvert the law—placing tenants, communities and our city at risk.

We also adamantly oppose the grant of any waivers to express provisions of the New York State Multiple Dwelling Law (MDL), as requested in Cal. No. 245-12-A. Succinctly stated, the owner in this case has immense difficulty proving that the strict application of the MDL imposes a hardship of any kind. The illegal construction and continuous collection of illegal market-rate rents for nearly 7 years, totaling almost $1 million dollars does not appear to pose a financial hardship in any way. While the owner claims that legal compliance with the MDL will present "practical difficulties"—we strongly believe that the difficulties raised by legal compliance with the MDL are no different than the difficulties posed by the illegal construction of a sixth story and penthouse on top of a five story old law tenement building. Somehow the owner overcame those difficulties, undertaking major construction at the site in short order and commencing to collect rents on illegally constructed units. The notion—specifically that the MDL provisions that categorically prohibit increases in bulk/height for five story buildings should be waived—is unconscionable to us and the argument made by the owner strikes us as hollow and hypocritical.

In sum, knowingly illegal plans that foster knowingly illegal rents for an interminable amount of time cannot be cured by the claims of financial and/or practical difficulties that strict compliance with the MDL would auger. The only solution is for the illegal penthouse and sixth floor to be vacated and removed. As the owner's own cost analysis concludes, restoring the building to its prior condition would cost the owner substantially less than the sum total of all rents already collected. Alternatively, that same cost analysis suggests that MDL compliance costs would not preclude the owner from earning a reasonable rate of return for two or more market rate apartments on a newly constructed MDL-compliant sixth floor. If one deducts the unlawful rents the owner has collected to date, as it would only be fair to do, then the owner has amortized more than half his MDL compliance costs already. We repeat: The only solution is for the illegal penthouse and sixth floor to be vacated and removed.

Given the reasons we have stated, we reiterate our shared request that the BSA: (1) reject the owner's claim of common law vesting rights; (2) deny the owner's MDL waiver requests; and (3) direct the owner to remove the illegal penthouse and sixth floor in conformance with your prior resolutions.

Thank you again for the opportunity to testify today.

Respectfully Submitted,

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Manhattan Borough President

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State Senator | District 27

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