Dear Honorable Members of the Board:

The Department of Buildings (the "Department") respectfully submits this statement in response to the referenced appeals from Landmark West! and from Rosenberg & Estis, P.C., on behalf of the Committee for Environmental Sound Development (the "Appellants,") challenging the Department’s September 27, 2017 determination to issue permit 122887224-01-NB (the "Permit") for a new building to be constructed at 200 Amsterdam Avenue in the Borough of Manhattan (the "Proposed Building") on a large zoning lot (the "Subject Zoning Lot") consisting of the entirety of Tax Lot 133, Tax Lot 9133, Condominium Lot 7506 (1501-1672) (formerly Tax Lot 65), and portions of Condominium Lot 7501 (1001-1007) (formerly Tax Lot 1), Condominium Lot 7505 (1401-1405) (formerly Tax Lot 30), Condominium Lot 7502 (1101-1107) (formerly Tax Lot 70), and Condominium Lot 7503 (1201-1208) (formerly Tax Lot 80), all located on Block 1158, pursuant to the New York City Zoning Resolution (the "ZR").

For the reasons explained below, the Department respectfully requests that the Board affirm the Department’s determination to issue the Permit.

I. BACKGROUND

A. Description of the Premises

The Permit for the Proposed Building allows for construction of a 55 story building, containing 112 dwelling units and 2,725 square feet of community facility floor area. The Proposed Building and the Zoning Lot are located in a R8/C2-5 Zoning District, pursuant to Zoning Map 8c.
B. Description of the Zoning Lot Formation

The origin of the Subject Zoning Lot stems back to 1987 when a large zoning lot containing the present day Lincoln Towers was subdivided into two separate zoning lots. One of the newly formed zoning lots was the precursor to the Subject Zoning Lot, which consisted of portions of Tax Lots 1, 30, 70, and 80 together with the entirety of Tax Lots 10, 12, and 65. The other newly formed zoning lot consists of the remaining portions of Tax Lots 1, 30, 70, and 80, together with the entirety of Tax Lot 90. This second zoning lot contains the present day Lincoln Towers condominium buildings (the "Lincoln Towers Zoning Lot").

On or about December 21, 2005, Tax Lots 1, 30, 70, and 80 were established as condominium lots. Tax Lot 1 became Condominium Lot 7501 (1001-1007), Tax Lot 30 became Condominium Lot 7505 (1401-1405), Tax Lot 70 became Condominium Lot 7502 (1101-1107), and Tax Lot 80 became Condominium Lot 7503 (1201-1208).

In 2007, Tax Lots 133 and 134 were merged into the Subject Zoning Lot. At that point, the Subject Zoning Lot consisted of portions of Condominium Lot 7501 (1001-1007) (formerly Tax Lot 1), Condominium Lot 7505 (1401-1405) (formerly Tax Lot 30), Condominium Lot 7502 (1101-1107) (formerly Tax Lot 70), and Condominium Lot 7503 (1201-1208) (formerly Tax Lot 80) together with the entirety of lots 10, 12, 18, 65, 133, and 134.

On or about October 10, 2012, Tax Lot 65 was established as Condominium Lot 7506 (1501-1672). At that point, the Subject Zoning Lot consisted of portions of Condominium Lot 7501 (1001-1007) (formerly Tax Lot 1), Condominium Lot 7505 (1401-1405) (formerly Tax Lot 30), Condominium Lot 7502 (1101-1107) (formerly Tax Lot 70), and Condominium Lot 7503 (1201-1208) (formerly Tax Lot 80) together with the entirety of lots 10, 12, 18, 65, 133, and 134.

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1 The Declaration of Zoning Lot Restrictions was recorded on April 16, 1987 on Reel 1217, Page 1402 at the Office of the Register. (See Exhibit E of Appellant’s 1.9.18 submission to the Board.)

2 On the same day that the subdivision happened, Tax Lots 10, 12, and 65 were merged into the Subject Zoning Lot. However, it was only finalized on June 3, 1987 as the merger was later amended. This merger was recorded on Reel 1239, Page 1366 at the Office of the Register. A Zoning Lot Description and Ownership Statement for the newly formed Zoning Lot was recorded simultaneously on Reel 1239, Page 1343 (See Exhibit E of Appellant’s 1.9.18 submission to the Board.)

3 Although not part of the Subject Zoning Lot in any way, it should be noted that Tax Lot 90 was ultimately established as a Condominium Lot and renumbered 7504.

4 A Declaration and Confirmation Agreement, recorded on January 24, 2006, at CRFN 2006000066490 confirms continuation of the 1987 zoning lot subdivision agreement with the recently formed condominium lots. (See Exhibit E of Appellant’s 1.9.18 submission to the Board.)

5 The Declaration of Zoning of Restrictions was recorded on December 12, 2007, at CRFN 200700069689. This Declaration was rerecorded on April 29, 2008 at CRFN 2008000171223 to include the Condominium Lots and the newly formed Tax Lot 18. (See Exhibit E of Appellant’s 1.9.18 submission to the Board for copies of both documents.)

6 This Declaration of Zoning Lot Restrictions also reapportioned Tax Lot 12 into Tax Lots 12 and 18.

7 A Zoning Lot Description and Ownership Statement, recorded October 11, 2012, at CRFN 2012000403589 depicts the continuation of the Zoning Lot with Condominium Lot 7506 (1501-1672) replacing the name of Tax Lot 65. (See Exhibit E of Appellant’s 1.9.18 submission to the Board.)
1208) (formerly Tax Lot 80) together with the entirety of Condominium Lot 7506 (1501-1672) (formerly Tax Lot 65) and Tax Lots 10, 12, 18, 65, 133, and 134.

On June 18, 2015, the Subject Zoning Lot was subdivided once more. The entirety of Tax Lots 10, 12, 18, and portions of Condominium Lots 7501 (1001-1007) (formerly Tax Lot 1) and 7505 (1401-1405) (formerly Tax Lot 30) were subdivided out of the Subject Zoning Lot.8

At that point, the Subject Zoning Lot consisted of the entirety of Tax Lots 133 and 134, Condominium Lot 7506 (1501-1672) (formerly Tax Lot 65), and portions of Condominium Lot 7501 (1001-1007) (formerly Tax Lot 1), Condominium Lot 7505 (1401-1405) (formerly Tax Lot 30),9 Condominium Lot 7502 (1101-1107) (formerly Tax Lot 70), and Condominium Lot 7503 (1201-1208) (formerly Tax Lot 80).10 This reflects the zoning lot lines comprising the Subject Zoning Lot, and neighboring zoning lots, as they exist today.

The only change to the Subject Zoning Lot since the June 18, 2015 formation is the reassignment of Tax Lots 133 and 134 into a single Tax Lot 133. This reassignment was followed by a tax lot subdivision where Tax Lot 133 was reapportioned to create Tax Lot 9133 (an air rights parcel) above Tax Lot 133 (the fee parcel at grade).11

C. The Appellant’s Zoning Challenge History

Pursuant to Department Rule 1 RCNY § 101-15, members of the public are allotted 45 days from the date of posting a zoning diagram to challenge a Department zoning diagram approval (“ZD1”). Accordingly, on May 15, 2017 the Appellants timely challenged the Department’s ZD1 approval which was posted on the Department’s website on March 29, 2017. This challenge was in the form of a Zoning Resolution Determination Form (“ZRD1”) request sent to the Manhattan Borough Commissioner.

On July 11, 2017, the Department issued a response to the ZRD1 request accepting the Appellant’s challenges concerning the ZD1 approval.12 This response noted that, “the

8 A Declaration with Respect to Subdivision of Zoning Lot was recorded on June 18, 2015, at CRFN 2015000209093. (See Exhibit E of Appellant’s 1.9.18 submission to the Board.)

9 Although portions of Condominium Lots 7501 (1001-1007) (formerly Tax Lot 1) and 7505 (1401-1405) (formerly Tax Lot 30) were subdivided out of the Subject Zoning Lot, smaller portions of the Condominium Lots still remained as part of the Subject Zoning Lot post-subdivision.

10 A Zoning Lot Description and Ownership Statement for the Zoning Lot was recorded on June 25, 2017, at CRFN 2015000218679. Zoning Lot Description and Ownership Statement was similarly recorded for the newly formed zoning lot consisting of the lots subdivided out of the Zoning Lot days earlier. (See Exhibit E of Appellant’s 1.9.18 submission to the Board for copies of both documents.)

11 The Second Amendment to the Supplemental Zoning Lot Development Agreement was recorded on July 21, 2016 at CRFN 2016000248582. (See Exhibit E of Appellant’s 1.9.18 submission to the Board.)

12 It should be noted that in addition to posting this ZRD1 response on the Department’s website on July 11, 2017, the Department reposted the same determination on November 16, 2017 on the more appropriate ZRD2 form. The November 16, 2017 reposting also included the original submission to which the determination was responding for the sake of clarity. In comparison, the ZRD1 determination posted on July 11, 2017 only contained the Department’s
Department ha[d] issued a notice of objections and an intent to revoke to verify the open space ratio and that the zoning lot was properly formed. The Department’s response also denied the Appellant’s challenge concerning the mechanical space towards the top of the building.

Having satisfied the objections of the June 23, 2017 Notice of Objections, on September 27, 2017 the Department issued the Permit. On October 27, 2017, in accordance with 1 RCNY § 101-15(b)(3), the Appellants submitted the instant appeal to the Board challenging the Department’s issuance of the Permit. The instant appeal to the Board challenges the Department’s approval of the Zoning Lot on which the Proposed Building is to be built and whether the open space requirement of the ZR is satisfied on the Zoning Lot.

II. THE APPROVAL OF THE ZONING LOT WAS PROPER
A. ZR § 12-10 Definition of “Zoning Lot”

A zoning lot can be formed in one of four ways pursuant to ZR § 12-10, “Zoning Lot.” A zoning lot can be, either:

(a) a lot of record existing on December 15, 1961 or any applicable subsequent amendment thereto;

(b) a tract of land, either unsubdivided or consisting of two or more contiguous lots of record, located within a single block, which, on December 15, 1961 or any applicable subsequent amendment thereto, was in single ownership;

(c) a tract of land, either unsubdivided or consisting of two or more lots of record contiguous for a minimum of ten linear feet, located within a single block, which at the time of filing for a building permit (or, if no building permit is required, at the time of the filing for a certificate of occupancy) is under single fee ownership and with respect to which each party having any interest therein is a party in interest (as defined herein); or

(d) a tract of land, either unsubdivided or consisting of two or more lots of record contiguous for a minimum of ten linear feet, located within a single block, which at the time of filing for a building permit (or, if no building permit is required, at the time of filing for a certificate of occupancy) is declared to be a tract of land to be treated as one zoning lot for the purpose of this Resolution. Such declaration shall be made in one written Declaration of Restrictions covering all of such tract of land or in separate written Declarations of Restrictions covering parts of such tract of land and which in the aggregate cover the entire tract of land comprising

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response without the request. The language of the actual determination is identical on both documents. Copies of both determinations were attached to Appellant’s 1.9.18 submission to the Board as Attachments C and D.

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A copy of the issued Intent to Revoke Approvals and Notice of Objections, dated June 23, 2017, is attached as Department’s Exhibit A.
the zoning lot... Each Declaration shall be executed by each party in interest...[and] shall be recorded in the Conveyances Section of the Office of the City Register.”

The definition of zoning lot continues, adding clarifications and requirements for the formation of zoning lots. One of the other clarifications explains that, “A zoning lot, therefore, may or may not coincide with a lot as shown on the official tax map of the City of New York.”

B. The Department’s Historical Interpretation of “Zoning Lot”

The current ZR § 12-10 definition of zoning lot was amended in 1977. On July 13, 1977 the NYC City Planning Commission (CPC) approved a text amendment which added requirements for the formation of certain zoning lots.14

In response to the CPC’s text amendment, on May 18, 1978; then Acting Commissioner of the Department, Irving Minkin, issued a Departmental Memorandum (the “Minkin Memo”) with the intention of providing guidance and forms (known as “Zoning Lot Exhibits”) acceptable to implementing the amended definition of zoning lot.15 The Minkin Memo summarized the applicability of the recently adopted zoning amendments (Board of Estimate Cal. No. 52, August 18, 1977) regarding what constitutes a zoning lot, and stated: “a single zoning lot, which may consist of one or more tax lots or parts of tax lots…” (italics added). Consequently, according to this Departmental memorandum, the zoning lot definition allowed zoning lots to consist of parts of tax lots.

The Department’s statement that the zoning lot may consist of “parts of tax lots” appeared to be supported by the additional text of the zoning lot definition which says that, “[a] zoning lot, therefore, may or may not coincide with a lot as shown on the official tax map of the City of New York.” Since a zoning lot did not need to coincide with a tax map, it seems that it was thought that tax lots could be bifurcated by zoning lot lines. Zoning lots, in turn, could consist of portions of tax lots.

C. The Department’s Current Interpretation of “Zoning Lot”

Due to a need for clarification of the requirements for formation of zoning lots, the Department began the process of writing a Department Bulletin to clarify the proper procedures and forms required to create and verify the proper formation of a zoning lot.16 In the context of the subject

14 CPC Report N 760226 ZRY, explaining the rationale for the new requirements, was attached to Appellants 1.9.18 submission to the Board.
15 A copy of the Minkin Memo was attached to the Appellant’s 1.19.18 submission to the Board.
16 Drafts of the proposed Department Bulletin that would supersede the Minkin Memo have been issued for comment. These drafts continue to be revised to address complex issues relating to the proper interpretation of various aspects of the ZR 12-10 Zoning Lot definition, and to address the extent of review of Department records and public records recorded against tax lots that should be required of an applicant to verify that the identified zoning lot was properly formed, and does not conflict with another existing zoning lot. In each of these drafts, reference was made to the requirement that the zoning lot consist of “one or more contiguous lots” but no draft until
appeal, the Minkin Memo’s incorrect interpretation that the ZR permitted zoning lots to consist of portions of tax lots in addition to complete tax lots came to light.

As explained by the Appellants, there is strong evidence that the ZR did not intend to allow zoning lots to consist of partial tax lots.

1. The ZR § 12-10 Definition of “Zoning Lot” Indicates that Zoning Lots Cannot Consist of Partial Tax Lots

The text of ZR § 12-10 refers to types of land that can comprise a zoning lot in one of two ways: “a tract of land...[that is] unsubdivided” or “lot(s) of record.” In order to form a zoning lot under subsection (a) of the definition, a “lot of record” is required. In order to form a zoning lot under subsections (b) through (d), “a tract of land, either unsubdivided or consisting of two or more lots of record” is required. The terms “lot” and “lot of record” are not defined in the ZR. Later in the definition of zoning lot, however, the ZR says that “a zoning lot, therefore, may or may not coincide with a lot as shown on the official tax map of the City of New York...” (italics added). This wording indicates that when the ZR says the word “lot” it is referring to a lot on the official tax map of the City of New York (i.e. “tax lots.”) Therefore, a “lot of record” or multiple “lots of record” refers to a single or multiple tax lots in their entirety. There is no indication that this phrase means that zoning lots could consist of partial tax lots since parts of tax lots do not appear on the official tax map of the City of New York.

Similarly, the phrase “tract of land...unsubdivided” is not defined in the ZR. Although the word “unsubdivided is not defined in the dictionary, Merriam-Webster defines the verb “subdivide” as, “to divide into several parts; especially: to divide (a tract of land) into building lot.” In the ZR definition of “zoning lot,” the presence of the prefix “un” before the word “subdivided” indicates the lack of a subdivision. Therefore, in order to be a zoning lot comprised of an unsubdivided tract of land, the applicable tract of land could not have been divided into parts before becoming a zoning lot. The presence of the word “unsubdivided” in the definition of zoning lots excludes partial tax lots, which, by virtue of the fact that they are being bifurcated into multiple zoning lots, have been subdivided.

Defining “an unsubdivided tract of land” and “lot of record” as tax lots is supported by the New York City Department of City Planning (“DCP”). In the Zoning Handbook, a publication written by DCP for the purpose of providing a “brief overview of the zoning rules and regulations of New York City,” the term Zoning Lot is defined as: “...a tract of land comprising a single tax lot or two or more adjacent tax lots within a block.” DCP substitutes the words “tract of land...unsubdivided” for the term “portion” in the definition of zoning lots.

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2018 clarified whether “one or more contiguous lots” may include one lot plus only part of another lot. The last draft issued for comment in 2018 clarifies that “one or more” means “one tax lot or two or more tax lots (not parts of tax lots).”


either unsubdivided or consisting of two or more lots of record” with the words “comprising a single tax lot or two or more adjacent tax lots.” A partial tax lot is not the same as a single tax lot or two tax lots. Accordingly, a zoning lot cannot consist of a partial tax lot.

It is therefore correct to conclude that a plain text reading of the definition of zoning lot does not permit the formation of a zoning lot consisting of partial tax lots.

2. Partial Tax Lots Cannot Be Lot “Of Record”

In order to form a zoning lot with one more tax lots, pursuant to the ZR, the tax lots are required to be “of record.” For the lot to be “of record,” it is required to be recorded in some capacity. Tax Lots are considered recorded because they are depicted on official tax maps for the City of New York. Partial tax lots are not shown on tax maps in any form.

Since the concept of zoning lots did not exist prior to December 15, 1961, and since the zoning lot definition adopted on that date defined a zoning lot as a “lot of record” existing on that date, and since zoning lot documents were not recorded prior to the 1977 CPC text amendment, it is apparent that the term “lot of record” could not have referred to zoning lots. Additionally, defining a zoning lot with the term “lot of record” to mean a zoning lot, would lead to a circular definition. Thus, although a zoning lot is “of record” since applicants are required to record a document containing the metes and bounds, tax lot number(s), block number, and ownership information, the term “lot of record” is not a zoning lot, but rather must refer to the official tax lot of record. Since the term “lot of record” cannot mean anything other than a tax lot for the purpose of subsection (a), it follows that the plural of the term, “lots of record,” used in subsections (b) through (d) would have the same definition.

For these reasons, it is apparent that when the ZR uses the term “lots of record” when defining zoning lot, it means tax lots.

3. The Evidence, that Zoning Lots Can Consist of Partial Tax Lots, Which the Department Previously Relied Upon, Is Incorrect

The interpretation that a zoning lot could consist of partial tax lots was based upon two grounds: the Minkin Memo and a sentence in the middle of the ZR’s definition of zoning lot.

In introducing the concept of certification of a zoning lot, the Minkin Memo includes a passing reference in the opening paragraph to “parts of tax lots.” The purpose of the Minkin Memo was to introduce new, uniform documents to enforce the ZR’s requirements for zoning lot formation (“Zoning Lot Exhibits”). The Zoning Lot Exhibits require applicants seeking to form a zoning lot to input the tax lot numbers of the tax lots comprising the zoning lot. There is no place to input whether the identified lot is a complete or partial tax lot. The Zoning Lot Exhibits contradict the earlier statement in the Minkin Memo which indicates that zoning lots could contain partial tax lots.
The statement that a zoning lot could consist of partial tax lots places weight on words within the ZR § 12-10 definition of zoning lot regarding the relationship between zoning lots and tax lots. After explaining the four ways of forming a zoning lot, the definition continues: “[a] zoning lot, therefore, may or may not coincide with a lot as shown on the official tax map of the City of New York.” Although according to the Minkin Memo, this sentence was interpreted to explain that zoning lots were not required to consist of tax lots in their entirety, a proper reading of this section is much narrower. The section is simply stating that because zoning lots can consist of two or more tax lots, the zoning lot may be larger than the tax lot it contains. This intuitively makes sense, since when the zoning lot consists of two tax lots, it will not coincide with any one tax lot.

4. Interpreting Zoning Lots to Only Allow Tax Lots in the Entirety Makes for Good Public Policy

Documents are recorded in order to provide proper notice to the public. Allowing documents to be recorded against only parts of a specific tax lot creates unwarranted confusion, a lack of transparency, and undermines the concept of notice and protection that recording aims to preserve. Having zoning lot lines coincide with tax lot lines promotes clarity and transparency.

D. Not Applying the Department’s Old Interpretation of “Zoning Lot” in the Instant Case Would be Arbitrary and Capricious

The Department is prohibited from acting in an arbitrary and capricious manner. That is to say, the Department cannot act differently in cases of similar facts. Although the Department now recognizes that the Minkin Memo interpretation of the term is incorrect, and that zoning lots are required to contain entire tax lots, for the formation of the Subject Zoning Lot, the Department also recognizes that the Minkin Memo was issued by a high level Department official 40 years ago. Many of the zoning lot lines of the Subject Zoning Lot that bisect tax lots, are the zoning lot lines of previously recognized zoning lots going back as far as 1987 that are documented with Certificates of Occupancy (“CO”). As explained below, based on this long-standing memo and the fact that permits and certificates of occupancy have been issued for many years in reliance on such interpretation, and based on the fact that the Department is still in the process of preparing a Bulletin that will supersede the Minkin Memo and as a result has not yet rescinded the Minkin Memo, the Department is required to issue a permit for a zoning lot containing a partial tax lot to avoid acting arbitrarily and capriciously.

In 1987 the Department approved a zoning lot subdivision of Block 1158 which resulted in a pair of zoning lots each containing partial tax lots. This subdivision approval resulted in even more Department approvals and culminated in many COs issued to buildings based on the incorrect interpretation of the term “Zoning Lot”:

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19 See supra Section I.B.
• 160 West End Avenue, Block 1158, Condominium Lot 7501 (formerly Tax Lot 1), received CO No. 96887 on August 30, 1990. This CO, and four subsequent COs, was issued to the building based on the formation of a zoning lot containing partial tax lots.

• 180 West End Avenue, Block 1158, Condominium Lot 7502 (formerly Tax Lot 70), received CO No. 92713 on August 23, 1988. This CO, and four subsequent COs, was issued to the building based on the formation of a zoning lot containing partial tax lots.

• 150 West End Avenue, Block 1158, Condominium Lot 7503 (formerly Tax Lot 80), received CO No. 93891 on March 28, 1989. This CO, and six subsequent COs, was issued to the building based on the formation of a zoning lot containing partial tax lots.

• 140 West End Avenue, Block 1158, Condominium Lot 7504 (formerly Tax Lot 90), received CO No. 93996 on April 17, 1989. This CO, and two subsequent COs, was issued to the building based on the formation of a zoning lot containing partial tax lots.

• 170 West End Avenue, Block 1158, Condominium Lot 7505 (formerly Tax Lot 30), received CO No. 99349 on October 21, 1991. This CO, and three subsequent COs, was issued to the building based on the formation of a zoning lot containing partial tax lots.

• 166-170 Amsterdam Avenue, Block 1158, Lot 12, received CO No. 90566 on July 27, 1987. This CO was based on the formation of a zoning lot containing partial tax lots. Additionally, beginning in 2012, this building was rebuilt pursuant to a different zoning lot than the one formed in 1987. The new zoning lot contains portions of tax lots as well. This new building resulted in CO No. 121182718F, issued on February 6, 2018.

In 2006 the Department approved construction of a building on a zoning lot containing partial tax lots. This approval led to the issuance of CO No. 104173591F on April 12, 2011, for 200 West End Avenue, Block 1158, Tax Lot 65.

The next year, in 2007, the Department again approved construction of a building on a zoning lot containing partial tax lots. This approval led to the issuance of CO No. 104855444F on March 20, 2017, for 180 Amsterdam Avenue, Block 1158, Tax Lot 18.

In 2015 the Department approved a zoning lot subdivision that resulted in two zoning lots each containing partial tax lots.20

Finally, on September 27, 2017, the Department issued the Permit for construction of the Proposed Building at 200 Amsterdam Avenue on the Subject Zoning Lot containing the existing partial tax lots previously recognized by the formation of the zoning lots in 1987 and 2015.

In light of the Department’s history of issuing permits and COs within this block based on zoning lots containing partial tax lots consistent with the Minkin Memo, the Department could not reject this application on such basis.

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20 Although this subdivision resulted in only two zoning lots, at this point there are three distinct zoning lots on Block 1158, each of which contains partial tax lots.
III. THE DEMONSTRATED OPEN SPACE ON THE ZONING LOT COMPLIES WITH THE ZR

Open space is defined under ZR § 12-10 “Open Space” as:

...that part of a zoning lot, including courts or yards, which is open and unobstructed from its lowest level to the sky and is accessible to and usable by all persons occupying a dwelling unit or a rooming unit on the zoning lot...

Pursuant to the approved zoning diagrams Z001.00 through Z020.00 (the “Zoning Diagrams”); the Subject Zoning Lot is required to provide 77,642 square feet of open space for residents of the Subject Zoning Lot.\(^{21}\) The Appellants allege that the Subject Zoning Lot does not satisfy this requirement. These allegations focus on the fact that the open space contains certain obstructions. More specifically, the Appellants question whether driveways and parking spaces are permitted obstructions in the required open space.

A. Driveways Are Permitted Obstructions in Open Space

As noted by the Appellants, portions of the open space to be provided for the Proposed Building contain driveways servicing parking lots located on the neighboring Lincoln Towers Zoning Lot. The Appellants claim that since driveways are not permitted obstructions, they cannot be used to satisfy the 77,642 square foot open space requirement. However, the ZR clearly says that driveways are permitted obstructions within required open space. Of note is subsection (e):

Driveways, private streets, open accessory off-street parking spaces, unenclosed accessory bicycle parking spaces or open accessory off-street loading berths, provided that the total area occupied by all of these items does not exceed the percentages set forth in Section 25-64 (Restrictions on Use of Open Space for parking);

Similarly, ZR § 25-64, which cross-references ZR § 23-12, states in subsection (c):

In R6, R7, R8, R9 and R10 Districts without a letter suffix, driveways, private streets, open accessory off-street parking spaces, unenclosed accessory bicycle parking spaces or open accessory off-street loading berths may not use more than 50 percent of the required open space on any zoning lot. The provisions of this paragraph (c) shall not apply to Quality Housing buildings.

Both sections of the ZR clearly say that driveways are permitted obstructions within required open space. ZR § 25-64 adds the limitation that these obstructions must contain less than 50% of the required open space. The Zoning Diagrams show that the open space contains 12.6%...

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\(^{21}\) Copies of the Zoning Diagrams were attached to the Appellant’s 1.9.18 submission to the Board.
permitted obstructions. Since the driveways obstruct significantly less than 50% of the required open space, the driveways are permitted obstructions pursuant to the ZR.

It should be noted that the Appellants read an additional word “accessory” into ZR §§ 23-12 and 25-64 to be placed in front of the word driveways. However, the ZR clearly distinguished between obstructions which are required to be accessory in order to be permitted (such as bicycle parking spaces, off-street loading berths, and open off-street parking spaces) and which obstructions were not required to be accessory in order to be permitted (driveways and private streets).

B. The Parking Spaces Located in the Rear Yard of the Proposed Building

Similar to the question of whether driveways are permitted obstructions in required open space, the Appellant questions whether parking spaces are permitted obstructions in required open space. In contrast with the driveway question, however, pursuant to ZR §§ 23-12 and 25-64, parking spaces are required to be accessory to the zoning lot on which they are located in order to qualify as permitted obstructions.

Pursuant to the Zoning Diagrams, no accessory parking spaces are to be provided for the Proposed Building. The only other building on the Subject Zoning Lot, 200 West End Avenue, does contain accessory parking but only in a below grade facility below its’ building. As the current approved plans do not propose or show existing open parking spaces on the Subject Zoning Lot, there is no issue as to compliance with open space.

Nonetheless, the Appellants allege that there are parking spaces serving the Lincoln Towers Zoning Lot located in the rear yard of the Proposed Building.22 To the extent there are to be parking spaces in the rear yard of the Proposed Building, the applicant must remove them or submit revised plans to reflect their legality.23

IV. CONCLUSION

Based on the foregoing, the Department respectfully requests that the Board affirm the Department’s September 27, 2017 determination to issue the Permit.

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22 The Zoning Diagrams calculate the area containing the alleged impermissible parking spaces as 6,622.55 square feet (55-feet by 120.41-feet). Should the Board conclude that this area reflects parking and not count as permitted obstructions to the required open space, the resulting provided open space of 80,349.45 square feet would still satisfy the requirement (86,972 minus 6,622.55 yields 80,349.45 square feet which is still more than the required 77,642 square feet.) The applicant would be required to update the Zoning Documents accordingly.

23 As noted by the Appellant, parking spaces serving another zoning lot would be permitted as accessory if the parking lot was considered a “joint facility” serving both zoning lots, pursuant to ZR § 25-52.
Respectfully submitted,

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