MEETING OF: **June 25, 2019**
CALENDAR NO.: **2017-285-A**
PREMISES: **200 Amsterdam Avenue, Manhattan**
Block 1158, Lots 133, 9133, 1101–1107, 1201–1208, 1501–1672, 1001–1007 and 1401–1405
BIN No. 1030358

ACTION OF BOARD — Appeal denied.

THE VOTE TO GRANT —

I. ZONING LOT:
Affirmative: Commissioner Ottley-Brown **1**
Negative: Vice-Chair Chanda, Commissioner Sheta and Commissioner Scibetta **3**
Recused: Chair Perlmutter **1**

II. OPEN SPACE:
Affirmative: **0**
Negative: Vice-Chair Chanda, Commissioner Ottley-Brown, Commissioner Sheta and Commissioner Scibetta **4**
Recused: Chair Perlmutter **1**

THE RESOLUTION —

WHEREAS, the building permit issued by the Department of Buildings ("DOB") on September 27, 2017, under New Building Application No. 122887224 (the "Permit"), authorizes construction of a 55-story residential and community-facility building with 112 dwelling units and a total height of 668 feet (the "New Building") by Amsterdam Avenue Redevelopment Associates, LLC (the "Owner") on a development site with 110,794 square feet of lot area (the "Development Site"); and

WHEREAS, this is an appeal for interpretation under Section 72-11 of the Zoning Resolution of the City of New York ("ZR" or the "Zoning Resolution") and Section 666(6)(a) of the New York City Charter, brought on behalf of the Committee for Environmentally Sound Development ("Appellant"), alleging errors in the Permit pertaining to (i) whether the Development Site complies with the Zoning Resolution's "zoning lot" definition and (ii) whether ground-level open areas on the Development Site comply with the Zoning Resolution's "open space" regulations; and

WHEREAS, for the reasons that follow, a majority of the Board denies this appeal; and

WHEREAS, a public hearing was held on this application on March 27, 2018, after due notice by publication in *The City Record*, with a continued hearing on June 5, 2018, and then to decision on July 17, 2018; and

WHEREAS, Vice-Chair Chanda, Commissioner Ottley-Brown and Commissioner Scibetta performed inspections of the site and surrounding neighborhood; and

WHEREAS, Community Board 7, Manhattan, submitted testimony in support of this appeal, stating that the New Building is inappropriate and out of context with the surrounding neighborhood, that no rational person could view the Development Site as a single lot and that a significant portion of the open space claimed is unavailable to the public; and

WHEREAS, 170 West End Avenue Condominium (the "Condominium"), a residential condominium located on the subject block outside the bounds of the Development Site and represented by counsel in this appeal, states that it takes no position with respect to the issues presented in this appeal insofar as they do not implicate the Condominium's accessory parking and that 26 off-street parking spaces located behind the New Building are lawful and permitted under the Zoning Resolution; and

WHEREAS, New York State Assemblymember Richard N. Gottfried and State Senator Brad Hoylman submitted testimony in support of this appeal, stating that the project fails to comply with the "zoning lot" definition because it is not comprised of whole tax lots and fails to comply with applicable "open space" regulations and that these compliance failures are an abuse of zoning regulations that render the New Building contextually out of scale; and

WHEREAS, New York State Assemblymember Linda B. Rosenthal, State Senator Brad Holyman and Comptroller Scott M. Stringer submitted testimony in support of this appeal, stating that creative interpretations of the Zoning Resolution slowly chip away at the quality of life and character of the City's residential areas; and

WHEREAS, a majority of the New York City Council submitted testimony in support of this appeal, stating that divorcing zoning lots from the tax lots on a block makes ensuring compliance with the Zoning Resolution dramatically more difficult and that having zoning lot lines coincide with tax lot lines promotes clarity and transparency; and

WHEREAS, New York City Comptroller Scott M. Stringer submitted testimony in support of this appeal, stating that the Owner creatively interpreted the City's zoning regulations to create a tower on the Upper West Side by merging various tax lots to create one zoning lot and by claiming the neighboring property's open space as its own and that the City must do more to prevent the construction of inappropriately sited towers throughout the City and ensure that all development complies with the intent and letter of the law; and

WHEREAS, Manhattan Borough President Gale A. Brewer submitted testimony in support of this appeal, stating that interpreting the Zoning Resolution in such a way as to allow for the New Building is a mistake, makes for bad public policy and goes against the spirit and intent of the Zoning Resolution; and

WHEREAS, New York City Council Member Helen Rosenthal submitted testimony in support of this appeal, stating that the Development Site runs counter to the most logical interpretation of the text of the Zoning Resolution in an unprecedented manner, that divorcing zoning lots from tax lot lines would make ensuring compliance with the Zoning Resolution dramatically more difficult and that the Development Site inappropriately counts inaccessible and unusable area as open space; and

WHEREAS, the American Institute of Architects New York Chapter submitted testimony in opposition to this appeal, stating that professionals that work on buildings, such as architects, need a predictable set of zoning rules in order to design and program buildings and that as-of-right zoning affords architects and their clients that predictability; and

WHEREAS, the Municipal Art Society of New York submitted testimony in support of this appeal, stating that the Development Site does not comply with the "zoning lot" definition because it contains two entire tax lots and small portions of four tax lots; and

WHEREAS, the Real Estate Board of New York submitted testimony in opposition to this appeal, stating that the City's as-of-right framework embodied in the Zoning Resolution is meant to encourage predictability in an industry where financing needs predictability, especially when market conditions can be unpredictable, that the Permit was only granted after an exhaustive DOB review, including a rigorous audit, and that this appeal is based on a faulty interpretation of the Zoning Resolution; and

WHEREAS, the New York Building Congress submitted testimony in opposition to this appeal, stating that granting this appeal would be unprecedented and clearly stifle current and future investment, that the process for reviewing and approving the Permit was transparent and consistent with the City's procedures and that two other buildings have been permitted to be built as-of-right on the same lot: 170 Amsterdam and 180 Amsterdam; and

WHEREAS, Landmark West! submitted testimony in support of this appeal, stating that the Permit is invalid because allowing the merger of portions of tax lots in order to take advantage of certain development rights relating to the merged lots is erroneous; and

WHEREAS, a practicing architect and planner submitted testimony in opposition to this appeal, stating that the Zoning Resolution regulates the real-estate industry in accordance with the City's public and planning policies, that the key to its success has been the ability it gives owners and builders to proceed with as-of-right development, that the Department of City Planning invests substantial resources in evaluating and updating the Zoning Resolution both to reflect its evolving planning goals for the City and to correct errors and inconsistencies in the text and that City Planning takes action to legislatively clarify or amend the text when it disagrees with an interpretation; and

WHEREAS, PNC Real Estate submitted testimony in opposition to this appeal, stating that zoning lot mergers have been considered "as of right" actions and that ensuring that the decisions of city government not be reversed is important to the lending and investment communities; and

WHEREAS, Association for a Better New York submitted testimony in opposition to this appeal, stating that upholding the Permit ensures a measure of predictability and confidence in the issuance of as-of-right building permits and that there is a consistent history of allowing partial zoning lot mergers; and

WHEREAS, the Sierra Club New York City Group submitted testimony in support of this appeal, stating that the Development Site does not comply with applicable "open space" requirements; and

WHEREAS, the West 68th Street Block Association Inc. submitted testimony in support of this appeal, stating that the New Building will have negative impacts on light, air, infrastructure and other quality-of-life necessities in the community; and

WHEREAS, West End Preservation Society submitted testimony in support of this appeal, stating that the Development Site does not comply with the "zoning lot" definition because it consists of portions of tax lots; and

WHEREAS, a planner submitted testimony in support of this appeal, stating that zoning lots are composed of one or more tax lots and that there is insufficient data on zoning lots; and

WHEREAS, the Board also received letters and heard testimony from neighbors, organizations and concerned members of the public in support of and in opposition to this appeal; and

BACKGROUND AND PROCEDURAL HISTORY

WHEREAS, the subject block is bounded by Amsterdam Avenue, West 66th Street, West End Avenue and West 70th Street; and

WHEREAS, the subject block includes five buildings located at 140 West End Avenue, 150 West End Avenue, 160 West End Avenue, 170 West End Avenue and 180 West End Avenue (the "1960s Buildings") that were developed on a single parcel of land in the 1960s (the "Original Parcel"); and

WHEREAS, with DOB's review and approval of zoning compliance, said parcel of land was subdivided in April 1987 into two separate parcels that included partial tax lots: one improved with the 1960s Buildings and one unimproved (the "Unimproved Parcel"); and

WHEREAS, DOB issued certificates of occupancy to all the 1960s Buildings to reflect said subdivision that resulted in an improved parcel that included partial tax lots: DOB issued 140 West End Avenue a certificate of occupancy in 1989 and subsequently issued two certificates of occupancy; DOB issued 150 West End Avenue a certificate of occupancy in 1989 and subsequently issued six subsequent certificates of occupancy; DOB issued 160 West End Avenue a certificate of occupancy in 1990 and subsequently issued four certificates of occupancy; DOB issued 170 West End Avenue a certificate of occupancy in 1991 and subsequently issued three certificates of occupancy; and DOB issued 180 West End Avenue a certificate of occupancy in 1988 and subsequently issued four certificates of occupancy; and

WHEREAS, the 1960s Buildings' certificates of occupancy certify compliance with the Zoning Resolution and are binding and conclusive upon DOB as to all matters set forth therein—namely, that subdivision of the Original Parcel into two separate parcels that include partial tax lots complies with applicable zoning requirements—unless set aside, *see* New York City Charter § 645(3); and

WHEREAS, the Unimproved Parcel was merged in May 1987 with adjacent land parcels located at 162 Amsterdam Avenue, 170 Amsterdam Avenue and 200 West End Avenue, forming a larger parcel that was again enlarged in 2007 with land located at 200 Amsterdam Avenue to form a combined land parcel that included partial tax lots (the "Combined Land Parcel"); and

WHEREAS, DOB issued 170 Amsterdam Avenue a certificate of occupancy in 1987 reflecting the inclusion of partial tax lots and, after its rebuilding, issued a certificate of occupancy in 2018 during the pendency of this appeal; and

WHEREAS, DOB issued 200 West End Avenue a certificate of occupancy in 2011 reflecting the inclusion of partial tax lots; and

WHEREAS, DOB issued 180 Amsterdam Avenue a certificate of occupancy in 2017 reflecting the inclusion of partial tax lots; and

WHEREAS, 170 Amsterdam Avenue, 200 West End Avenue and 180 Amsterdam Avenue's certificates of occupancy certify compliance with the Zoning Resolution and are binding and conclusive upon DOB as to all matters set forth therein—namely, that their parcels of land that include partial tax lots comply with applicable zoning requirements—unless set aside, *see* New York City Charter § 645(3); and

WHEREAS, in sum, DOB has issued 28 binding-and-conclusive certificates of occupancy to buildings on the subject block certifying that parcels of land that include partial tax lots comply with applicable zoning requirements; and

WHEREAS, in 2015, the Combined Land Parcel was subdivided to form two separate land parcels, the first of which (occupied by 162 Amsterdam Avenue, 170 Amsterdam Avenue and 180 Amsterdam Avenue) was entitled "Zoning Lot 1" by the Declaration with Respect to Subdivision of Zoning Lot, City Register File No. 2015000209093, dated as of June 11, 2015 (the "Zoning Lot Declaration"); and

WHEREAS, the second land parcel, entitled "Zoning Lot 2" by the Zoning Lot Declaration, is the subject of this appeal: the Development Site; and

WHEREAS, the Development Site is located on the west side of Amsterdam Avenue, between West 70th Street and West 66th Street, partially in an R8 (C2-5) zoning district and partially in an R8 zoning district, in Manhattan; and

WHEREAS, the Development Site has approximately 110,794 square feet of lot area, 153 feet of frontage along Amsterdam Avenue, 224 feet of frontage along West End Avenue, 100 feet of frontage along West 70th Street, 800 feet of depth and is improved with an existing 27-story building at 200 West End Avenue with work begun on the New Building at 200 Amsterdam Avenue; and

WHEREAS, the Development Site includes land within the tax-lot boundaries of 150 West End Avenue, 160 West End Avenue, 170 West End Avenue, 180 West End Avenue, 200 West End Avenue and 200 Amsterdam Avenue; and

WHEREAS, on September 27, 2017, DOB issued the Permit to allow construction of the New Building on the Development Site at 200 Amsterdam Avenue in accordance with the DOB-approved plans (the "Plans"), and Appellant commenced this appeal on October 27, 2017; and

WHEREAS, on September 7, 2018, the Board issued the original resolution for this appeal; and

WHEREAS, on March 14, 2019, in *The Committee for Environmentally Sound Development v. Amsterdam Avenue Redevelopment Associates LLC*, No. 153819/2018, the Supreme Court of the State of New York vacated the Board's original resolution and remanded to the Board for further consideration; and

ZONING PROVISIONS

WHEREAS, ZR § 12-10 (italicized words in original to indicate defined terms) defines a "zoning lot" as follows:

> A "zoning lot" is 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 the *zoning lot*. Any Declaration of Restrictions or Declarations of Restrictions which individually or collectively cover a tract of land are referred to herein as "Declarations". Each Declaration shall be executed by each party in interest (as defined herein) in the portion of such tract of land covered by such Declaration (excepting any such party as shall have waived its right to execute such Declaration in a written instrument executed by such party in recordable form and recorded at or prior to the recording of the Declaration). Each Declaration and

waiver of right to execute a Declaration shall be recorded in the Conveyances Section of the Office of the City Register or, if applicable, the County Clerk's Office of the county in which such tract of land is located, against each lot of record constituting a portion of the land covered by such Declaration.

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, or on any recorded subdivision plat or deed.

Parcels within City-owned tracts of land located in Broad Channel within the boundaries of Community Board 14 in the Borough of Queens that were numerically identified for leasing purposes on maps filed in the Office of Borough President prior to December 15, 1961, may be considered as individual lots of record as of September 10, 1981.

(e) For purposes of the provisions of paragraph (c) hereof:

(1) Prior to issuing a building permit or a certificate of occupancy, as the case may be, the Department of Buildings shall be furnished with a certificate issued to the applicant therefor by a title insurance company licensed to do business in the State of New York showing that each party having any interest in the subject tract of land is a party in interest (as defined herein); except that where the City of New York is a fee owner, such certificate may be issued by the New York City Law Department; and

(2) A "party in interest" in the tract of land shall include only (W) the fee owner thereof, (X) the holder of any enforceable recorded interest superior to that of the fee owner and which could result in such holder obtaining possession of all or substantially all of such tract of land, (Y) the holder of any enforceable recorded interest in all or substantially all of such tract of land which would be adversely affected by the development thereof and (Z) the holder of any unrecorded interest in all or substantially all of such tract of land which would be superior to and adversely affected by the development thereof and which would be disclosed by a physical inspection of the tract of land.

(f) For purposes of the provisions of paragraph (d) hereof:

(1) Prior to issuing a building permit or a certificate of occupancy, as the case may be, the Department of Buildings shall be furnished with a certificate issued to the applicant therefor by a title insurance company licensed to do business in the State of New York showing that each party in interest (excepting those parties waiving their respective rights to join therein, as set forth in this definition) has

executed the Declaration and that the same, as well as each such waiver, have been duly recorded; except that where the City of New York is a fee owner, such certificate may be issued by the New York City Law Department;

(2) The Buildings Department, in issuing a building permit for construction of a *building or other structure* on the *zoning lot* declared pursuant to paragraph (d) above or, if no building permit is required, in issuing a certificate of occupancy for such *building or other structure*, shall accept an application for same from and, if all conditions for issuance of same are fulfilled, shall issue same to any party to the Declaration;

(3) By their execution and recording of a Declaration, the parties to the Declaration, and all parties who have waived their respective rights to execute such Declaration, shall be deemed to have agreed that no breach by any party to the Declaration, or any agreement ancillary thereto, shall have any effect on the treatment of the tract of land covered by the Declaration as one *zoning lot* for purposes of this Resolution and such tract of land shall be treated as one *zoning lot* unless such *zoning lot* is subdivided in accordance with the provisions of this Resolution; and

(4) A "party in interest" in the portion of the tract of land covered by a Declaration shall include only (W) the fee owner or owners thereof, (X) the holder of any enforceable recorded interest in all or part thereof which would be superior to the Declaration and which could result in such holder obtaining possession of any portion of such tract of land, (Y) the holder of any enforceable recorded interest in all or part thereof which would be adversely affected by the Declaration, and (Z) the holder of any unrecorded interest in all or part thereof which would be superior to and adversely affected by the Declaration and which would be disclosed by a physical inspection of the portion of the tract of land covered by the Declaration.

A *zoning lot* may be subdivided into two or more *zoning lots*, provided that all resulting *zoning lots* and all *buildings* thereon shall comply with all of the applicable provisions of this Resolution. If such *zoning lot*, however, is occupied by a *non-complying building*, such *zoning lot* may be subdivided provided such subdivision does not create a new *non-compliance* or increase the degree of *non-compliance* of such *building*.

Where ownership of a *zoning lot* or portion thereof was effected prior to the effective date of this amendment, as evidenced by an attorney's affidavit, any *development*, *enlargement* or alteration on such *zoning lot* may be based upon such prior effected ownership as then defined in the *zoning lot*

definition of Section 12-10. Such prior leasehold agreements shall be duly recorded prior to August 1, 1978.

Prior to the issuance of any permit for a *development* or *enlargement* pursuant to this Resolution a complete metes and bounds of the *zoning lot*, the tax lot number, the block number and the ownership of the *zoning lot* as set forth in paragraphs (a), (b), (c) and (d) herein shall be recorded by the applicant in the Conveyances Section of the Office of the City Register (or, if applicable, the County Clerk's Office) of the county in which the said *zoning lot* is located. The *zoning lot* definition in effect prior to the effective date of this amendment shall continue to apply to Board of Standards and Appeals approvals in effect at the effective date hereof; and

WHEREAS, ZR § 12-10 defines "open space," in pertinent part, as follows:

"Open space" is 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*; and

WHEREAS, ZR § 25-64 provides, in relevant part:

Restrictions on the use of open space for parking and driveways are set forth in this Section, in accordance with the provisions of Section 23-12 (Permitted Obstructions in Open Space). . . .

(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*; and

WHEREAS, ZR § 23-12 states, in relevant part:

In the districts indicated, the following obstructions shall be permitted in any *open space* required on a *zoning lot*:

(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 these items does not exceed the percentages set forth in Section 25-64 (Restrictions on Use of Open Space for Parking); and

ISSUES PRESENTED

WHEREAS, there are two issues[1] in this appeal: (i) whether the Development Site complies with the Zoning Resolution's "zoning lot" definition and (ii) whether ground-level open areas on the Development Site comply with the Zoning Resolution's "open space" requirements; and

APPELLANT'S POSITION

WHEREAS, Appellant states that this appeal should be granted because the Development Site does not comply with the requirements of the "zoning lot" definition of ZR § 12-10 and because the ground-level open areas on the Development Site do not meet the "open space" definition and applicable zoning requirements under ZR §§ 12-10, 25-64 and 23-12; and

I. ZONING LOT

WHEREAS, Appellant states that the Development Site does not comply with the "zoning lot" definition because it does not consist of lots of record, meaning entire tax lots as shown on the official tax map of the City of New York; and

WHEREAS, Appellant states that paragraph (d) of the "zoning lot" definition requires that the lots to be merged by declaration into a single zoning lot must be "lots of record" and that "lot," "of record" and "lot of record" are undefined by the Zoning Resolution; and

WHEREAS, Appellant states that "lot of record" in subdivision (a) of the "zoning lot" definition means "a lot as shown on the official tax map" and that lots shown on the tax map are entire tax lots, the dimensions of which generally correspond with deeds of ownership recorded in the City Register's Office; and

WHEREAS, Appellant states that "of record" in subdivisions (b), (c) and (d) has the same meaning: tax lots shown on the official tax map; and

WHEREAS, Appellant states that the Development Site does not consist of a series of tax lots, but of disparate, isolated bits and pieces of tax lots strung together with narrow threads made up of other bits and pieces of lots; and

WHEREAS, Appellant states that portions of the various tax lots that make up the Development Site are not, themselves, "lots," as the term is used in the "zoning lot" definition; and

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[1] Appellant also requests revocation of the Permit; however, Appellant has not presented the Board with a timely, signed final determination from DOB refusing to revoke the Permit as required by the Board's Rules of Practice and Procedure. *See* 2 Rules of the City of New York ("RCNY") § 1-06.3(a). Furthermore, as discussed herein, Appellant has failed to demonstrate that the Permit violates any applicable provision of law, so the Board need not—and does not—consider revocation of the Permit in this appeal.

WHEREAS, Appellant states that the parts of the tax lots were also not "of record" prior to the creation of the Development Site and that, for something to be "of record," it must be recorded; and

WHEREAS, Appellant states that *609 Bayside Drive, Queens*, BSA Cal. No. 229-06-A (Jan. 13, 2009), identified by the Owner as supporting the Owner's position, is distinguishable from the Development Site because Breezy Point's lots were unique, were established prior to December 15, 1961, and does not stand for the proposition that a partial tax lot is a lot of record; and

WHEREAS, Appellant states that, for two or more lots to be declared a zoning lot, they must be contiguous for a minimum of 10 linear feet and they must be "lots of record" pursuant to paragraph (d) of the "zoning lot" definition; and

WHEREAS, Appellant states that the Development Site does not consist of "two or more lots of record" because the phrase "two or more" necessarily indicates that fractions of tax lots are not permitted under paragraph (d) of the "zoning lot" definition; and

WHEREAS, Appellant states that, because the Development Site is not composed of entire tax lots, it does not meet paragraph (d) of the "zoning lot" definition; and

WHEREAS, Appellant states that the Development Site is also not an "unsubdivided" "tract of land" because an unsubdivided tract of land is a single lot of record, meaning a single tax lot; and

WHEREAS, Appellant states that the Department of City Planning's *Zoning Handbook* translates " a tract of land, either unsubdivided or consisting of two or more lots of record . . . within a single *block*" from the Zoning Resolution into "plain English" as "a tract of land comprising a single tax lot or two or more adjacent tax lots within a block"[2]; and

WHEREAS, Appellant concludes, therefore, that an "unsubdivided tract of land" is equivalent to a single lot of record, which is equivalent to a single tax lot; and

WHEREAS, Appellant states that the passing reference to "parts of tax lots" in a DOB Memorandum issued by Irving E. Minkin, P.E., Acting Commissioner, dated May 18, 1978 (the "Minkin Memorandum"), entered into the record by the Owner in this appeal, is unavailing because elsewhere it references "Tax Lot(s)" and states "as shown on the Tax Map of the City of New York"; and

[2] The disclaimer to the *Zoning Handbook* (2011) explicitly states that it "provides a brief overview of the zoning rules and regulations of New York City and is not intended to serve as a substitute for the actual regulations which are to be found in the Zoning Resolution . . . . The City disclaims any liability for errors that may be contained herein and shall not be responsible for any damages, consequential or actual, arising out of or in connection with the use of this information."

WHEREAS, Appellant states that the phrase "parts of tax lots" does not appear in the "zoning lot" definition or anywhere else in the Zoning Resolution and that such language cannot be imported into the text by interpretation; and

WHEREAS, accordingly, Appellant states that, because the Development Site includes parts of tax lots, it is neither an "unsubdivided" "tract of land" nor does it "consist[] of two or more lots of record" and, accordingly, does not meet paragraph (d) of the "zoning lot" definition; and

II. OPEN SPACE

WHEREAS, Appellant states that ground-level open areas on the Development Site do not meet the "open space" definition and do not comply with zoning regulations for permitted obstructions; and

WHEREAS, Appellant states that the "odd bits, pieces and strips of open space" do not meet the "open space" definition because said areas are not "accessible to and usable by" residents of the Development Site; and

WHEREAS, Appellant states that ZR § 23-151 only provides for the quantity—not quality—of open space but that the ground-level open areas are not "usable" in any meaningful sense as the word is used in the "open space" definition, ZR § 12-10; and

WHEREAS, Appellant states that ZR § 78-52 gives indication of the intended use and purpose of required unobstructed open space by requiring that, in large-scale residential developments, "common open space" "shall include both active and passive recreation space providing a range of recreational facilities and activities" and "be landscaped"; and

WHEREAS, Appellant states that parking spaces[3] and driveways that exist on the Development Site "may be presumed" to be accessory parking for occupants of residential buildings located on the same block but not within the Development Site; and

WHEREAS, Appellant states that, because the existing parking spaces are accessory to and used by persons occupying dwelling units off the Development Site, said parking spaces cannot also be used by persons occupying dwelling units on the Development Site; and

WHEREAS, Appellant states that, although generally driveways and open accessory parking spaces are permitted obstructions in required open space under ZR §§ 23-12 and 25-64, portions of the driveways and parking spaces located on the Development Site are actually accessory to

[3] Appellant also states that the existing parking spaces are not a joint facility under ZR § 25-52 that would be a permitted obstruction under ZR § 23-12. DOB states that the Plans neither reflect that accessory parking spaces are to be provided for the New Building nor propose or show existing open parking spaces on the Development Site. The Owner states that it is exploring the establishment of a joint parking facility in the rear yard area. However, the Board is only considering the issues presented as they pertain to construction authorized by the Permit pursuant to the Plans approved for the New Building, which do not propose a joint facility.

residential buildings off the Development Site, contrary to the "accessory use" definition in ZR § 12-10; and

WHEREAS, accordingly, Appellant states that the Development Site's ground-level open areas do not comply with the Zoning Resolution's "open space" requirements; and

DOB'S POSITION

WHEREAS, DOB states that this appeal should be denied because the Development Site meets DOB's currently-in-effect "historical interpretation" of the "zoning lot" definition of ZR § 12-10 and because the ground-level open areas on the Development Site meet the "open space" definition and applicable zoning requirements of ZR §§ 12-10, 25-64 and 23-12; and

I. ZONING LOT

A. "Historical Interpretation"

WHEREAS, DOB states that the Development Site complies with DOB's currently-in-effect "historical interpretation" of paragraph (d) of the "zoning lot" definition because it complies with the Minkin Memorandum; and

WHEREAS, DOB states that the Minkin Memorandum is currently applicable to construction applications and that the Minkin Memorandum reflects a "longstanding, plausible, and consistent" interpretation of the "zoning lot" definition; and

WHEREAS, DOB states that the Minkin Memorandum summarizes the applicability of 1977 zoning amendments, which added paragraph (d) to the "zoning lot" definition, regarding what constitutes a zoning lot, and notes that the Minkin Memorandum states that "a single zoning lot, which may consist of one or more tax lots or parts of tax lots"; and

WHEREAS, DOB states that this interpretation that a zoning lot may consist of parts of tax lots is supported by the "zoning lot" definition of ZR § 12-10, which states that a zoning lot "may or may not coincide with a lot as shown on the official tax map of the City of New York"; and

WHEREAS, DOB states that, since a zoning lot has not historically needed to coincide with a tax map, it seems that tax lots could be bifurcated by zoning lot lines; and

WHEREAS, accordingly, DOB states that, while Appellant's proffered interpretation that zoning lots cannot include partial tax lots promotes clarity and transparency, the Development Site complies with DOB's currently-in-effect "historical interpretation" of paragraph (d) of the "zoning lot" definition; and

B. "Current Interpretation"

WHEREAS, after issuance of the Permit and during the pendency of this appeal, DOB also declares that its 40-year-in-effect "historical interpretation" of the "zoning lot" definition—

pursuant to which an untold number[4] of permits and certificates of occupancy have been issued—is purportedly "incorrect"; and

WHEREAS, however, Appellant explicitly asserts that the Board should not consider DOB's draft Buildings Bulletin on zoning lots or, more significantly, DOB's "current interpretation" in this appeal:

> [T]he DOB draft bulletin is not now before the Board. . . . If and when the bulletin is adopted and appeal is brought before it, the Board may then—and only then—consider DOB's interpretation that zoning lots must consist of entire tax lots (emphasis added); and

WHEREAS, at no point in this appeal did DOB void or supersede any of its submissions to withdraw its above position on the validity of its "historical interpretation"; and

WHEREAS, in contrast to DOB's statements and positions throughout this appeal, the Minkin Memorandum was issued contemporaneously with the 1977 amendment to the "zoning lot" definition; and

WHEREAS, this closeness in time indicates the individuals drafting and reviewing the Minkin Memorandum had firsthand knowledge of the context surrounding the 1977 amendment to the "zoning lot" definition; and

WHEREAS, additionally, throughout this appeal, DOB has expressed a significant amount of uncertainty as to whether it will proceed with releasing this allegedly corrected "current interpretation" through a draft Buildings Bulletin[5]; and

WHEREAS, at hearing, the Board discussed and heard extensive testimony about the draft Buildings Bulletin; one commissioner noted that the draft Buildings Bulletin was "a very important point by DOB," but another commissioner noted that the record did not make it "certain that they will change their position on" their interpretation of the "zoning lot" definition; and

WHEREAS, in response to concerns expressed by the Board's commissioners about whether it was certain to go forward, DOB declined—on numerous occasions—to give a clear response, instead describing the draft Buildings Bulletin as "out there and as a draft" and "a potential interpretation" DOB "is considering"; and

WHEREAS, the Board also heard testimony about "DOB's practice to prepare draft bulletins to get comments internally" or to solicit "limited external review"; and

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[4] At hearing, DOB stated it "wouldn't know how to look for that" number.

[5] Discussion of the draft Buildings Bulletin was originally located in footnote four of the original version of this resolution, issued September 7, 2018. Additional discussion has been added herein to better reflect the record in this appeal.

WHEREAS, notably, the Board's commissioners heard and considered testimony that the draft Buildings Bulletin "may not see the light of day"; and

WHEREAS, at hearing, DOB's general counsel noted that the "current interpretation," wherein zoning lots would have to align with tax-lot boundaries, would be a "fairly significant change" because, among other things, "since 1978, that has not been [DOB's] position"; and

WHEREAS, notwithstanding the likelihood (or unlikelihood) of the issuance of the draft Buildings Bulletin, DOB states that the Minkin Memorandum is an erroneous interpretation of the "zoning lot" definition and that, because of a need to clarify the requirements for forming zoning lots, DOB is in the process of writing a Buildings Bulletin to set forth the administrative procedures and forms required to create and verify the formation of a zoning lot; and

WHEREAS, DOB states that, under its purportedly corrected "current interpretation," the Minkin Memorandum is erroneous because the "zoning lot" definition indicates that zoning lots cannot consist of partial tax lots, because partial tax lots cannot be lots "of record," because the evidence previously relied upon by DOB (that zoning lots can consist of partial tax lots) is erroneous and because interpreting zoning lots to only allow tax lots in the entirety makes for good public policy by promoting clarity and transparency; and

WHEREAS, DOB states that "lots of record" refer only to complete tax lots because a Declaration of Restrictions must be recorded "against each lot of record constituting a portion of the land covered by such Declaration" under paragraph (d) of the "zoning lot" definition; and

WHEREAS, DOB states that complete tax lots are the only types of lots that a Declaration can be recorded "against"; and

WHEREAS, DOB has furnished no evidence to substantiate this proposition; and

WHEREAS, instead DOB relies on its own bare assertion that a lot of record "must" only be a complete tax lot—rather than a recorded parcel; and

WHEREAS, DOB states that the 1961 "zoning lot" definition did permit zoning lots to contain partial tax lots, though the 1977 amendment added a requirement that zoning lots may only contain entire tax lots; that this explains the Minkin Memorandum's error; that the term "unsubdivided" refers to a single tax lot and that the "may or may not coincide" language reflects that a zoning lot may consist of two or more complete tax lots; and

WHEREAS, despite the foregoing, the Board's commissioners considered DOB's uncertainty about the draft Buildings Bulletin's "see[ing] the light of day" in conjunction with DOB's clear statements that it seeks to have the Board uphold the Permit as indication that DOB's actual position in this appeal is that the Development Site complies with the currently-in-effect "historical interpretation" of paragraph (d) of the "zoning lot" definition and the Minkin Memorandum because, otherwise, DOB would be taking the unlawful position that the Board should uphold an invalid permit that was issued contrary to the Zoning Resolution; and

WHEREAS, insofar as DOB has represented throughout this appeal that the Permit does not comply with the "zoning lot" definition under DOB's purportedly corrected "current

interpretation," it is unclear by what authority DOB could issue illegal building permits that purport to authorize construction contrary to law, *cf.* N.Y.C. Administrative Code § 28-105.8 ("The issuance or granting of a permit shall not be construed to be a permit for, or an approval of, any violation of any of the provisions of this code or of any other law or rule. Permits presuming to give authority to violate or cancel the provisions of this code or other law or rule shall not be valid."); and

WHEREAS, accordingly, Appellant has advised the Board against considering DOB's draft Buildings Bulletin or its "current interpretation," and throughout this appeal, DOB has argued inconsistently that a zoning lot may include parts of tax lots (under DOB's "historical interpretation") but also that a zoning lot may not include parts of parts of tax lots (under DOB's purportedly corrected "current interpretation"), and the Board has considered both arguments in reaching its determination set forth herein; and

II. OPEN SPACE

WHEREAS, DOB states that, according to the Plans, the Development Site provides the required 77,643 square feet of open space for residents of the Development Site; and

WHEREAS, DOB states that ground-level open areas comply with the "open space" definition of ZR § 12-10 because they will be "accessible to and usable by" residents of the Development Site; and

WHEREAS, DOB states that, contrary to Appellant's analogy to the "common open space" provision of ZR § 78-52, which requires "active and passive recreation space" for large-scale residential developments, the general "open space" definition, which is applicable to the Development Site, contains no such requirement; and

WHEREAS, DOB states that Appellant's analogies to ZR §§ 136-324 and 141-33 similarly fail because they contain specific requirements for "publicly accessible" open space and for "special" open space, which are distinct from the general definition of "open space"; and

WHEREAS, DOB states that driveways are permitted obstructions in required open space under ZR §§ 23-12 and 25-64; and

WHEREAS, DOB states that ZR § 25-64 adds the limitation that driveways and other specified permitted obstructions "may not use more than 50 percent" of the open space required; and

WHEREAS, DOB states that the Plans indicate that the Development Site's open space contains 12.6 percent permitted obstructions, which is less than the 50 percent maximum; and

WHEREAS, DOB states that Appellant would add the word "accessory" before word "driveways" in ZR §§ 23-12 and 25-64 but that neither provision states "accessory driveways," while providing that other obstructions (bicycle parking spaces, off-street loading berths and open off-street parking spaces) must be accessory, suggesting that driveways need not be "accessory" to qualify as permitted obstructions under ZR §§ 23-12 and 25-64; and

WHEREAS, DOB states that, according to the Plans, no accessory parking spaces are proposed for the New Building and that, to the extent parking spaces would be proposed in the rear yard of the New Building, the Plans would need to be revised to reflect their existence with their legality to be demonstrated by the Owner; and

WHEREAS, in response to questions from the Board at the first hearing regarding whether non-compliance with "open space" provisions would render the Permit invalid, DOB states that open space requirements must be satisfied at the time of permit issuance and during the final inspection prior to the issuance of a certificate of occupancy; and

WHEREAS, in response to questions from the Board at the second hearing regarding the status of the parking, DOB states that the parking in the Development Site's open space is lawful permitted parking accessory to 170 West End Avenue because the 26 parking spaces located on the Development Site were lawfully established prior to 1961 as accessory parking spaces serving 170 West End Avenue; and

WHEREAS, accordingly, DOB states that the Development Site's ground-level open areas comply with applicable "open space" requirements of ZR §§ 12-10, 25-64 and 23-12; and

OWNER'S POSITION

WHEREAS, the Owner states that this appeal should be denied because the Development Site, which includes parts of tax lots, meets the "zoning lot" definition of ZR § 12-10 and because ground-level open areas on the Development Site meet the "open space" definition and applicable zoning requirements of ZR §§ 12-10, 25-64 and 23-12; and

I. ZONING LOT

WHEREAS, the Owner states that the Development Site complies with paragraph (d) of the "zoning lot" definition because it is an unsubdivided tract of land that was "declared to be a tract of land to be treated as" a single zoning lot; and

WHEREAS, the Owner states that a "lot of record" may be something other than a tax lot and that a zoning lot may be an unsubdivided portion of land that does not correspond to lots of record; and

WHEREAS, the Owner states that the City's first zoning regulations, the Building Zone Resolution (1916), as amended through 1960, originally defined "lot" as synonymous with a development plot—any plot of land that could or would be developed—and subsequently clarified its definition to be "a parcel or plot of ground which is or may be occupied by a building and accessory buildings including the open spaces required by this resolution"; and

WHEREAS, the Owner states that the reports *Plan for Rezoning the City of New York* (Oct. 1950) by Harrison, Ballard & Allen and *Zoning New York City: A Proposal for a Zoning Resolution for the City of New York Submitted to the City Planning Commission* (Aug. 1958) by Voorhees Walker Smith & Smith evince a clear distinction between zoning lots and tax lots intended to allow real-estate developers wide latitude and flexibility in distributing bulk across a parcel of land, delineated from surrounding parcels by the boundaries of a zoning lot, not a tax lot; and

WHEREAS, the Owner states that the comprehensive amendment to the Zoning Resolution (1961) codifies this flexibility while protecting the lawful status of existing buildings and of tracts of land that would be rendered non-complying by implementation of this comprehensive amendment; and

WHEREAS, the Owner states that, in *609 Bayside Drive, Queens*, BSA Cal. No. 229-06-A (Jan. 13, 2009), as upheld in *Golia v. Srinivasan*, 95 A.D.3d 628, 630 (N.Y. App. Div. 2012), treatment by DOB and by the Board of a plot of land in the Breezy Point Cooperative as a separate zoning lot distinct from the cooperative's larger, single tax lot indicates that a partial tax lot can be a "lot of record" as referenced in the "zoning lot" definition; and

WHEREAS, the Owner states that, as added in 1977, paragraph (d) of the "zoning lot" definition allows for the complex assemblage of contiguous parcels of land to be declared a single zoning lot and does not contain any requirement that said parcels correspond to entire tax lots; and

WHEREAS, the Owner states that, as used in the "zoning lot" definition, an "unsubdivided" tract of land refers to something other than a single lot of record and something other than two or more lots of record; and

WHEREAS, the Owner states that there are few, but scant, instances where the Zoning Resolution uses the term "tax lot" and that these references generally refer to recording requirements or perform a tracking function associated with (E) designations' environmental restrictions; and

WHEREAS, the Owner states that the Minkin Memorandum indicates that a "single zoning lot . . . may consist of one or more tax lots or parts of tax lots" and that "boundaries of such zoning lot may or may not coincide with its comprising tax lots"; and

WHEREAS, the Owner states that tax lots and zoning lots serve different purposes: tax lots are established to identify owners to whom tax bills may be sent and zoning lots are delineated for applying zoning regulations to a parcel of land; and

WHEREAS, in response to questions from the Board at the first hearing regarding the meaning of "lot of record," the Owner states that the more reasonable meaning of "lot of record" is either its historic and common meaning as a lot that, if located within the City of New York, has been recorded in the office of the City Register or as a lot shown on DOB's records as available for development or already developed; and

WHEREAS, the Owner states that a memorandum issued by Department of City Planning Counsel William Valletta (Dec. 28, 1987) (the "Valletta Memorandum") shows that "lot of record" does not equate to "tax lot" and that a zoning lot may contain a partial tax lot because it takes care to use general expressions such as "constituent parts of a zoning lot" and "the lot or its other constituent" when describing a lot of record, suggesting that tax lots are not the sole unit of measurement; and

WHEREAS, in response to questions from the Board at the second hearing regarding whether paragraph (d) of the "zoning lot" definition allows for parts of "lots of record," the Owner states that a zoning lot may be composed of both whole and partial "lots of record," even assuming

that "lot of record" means a tax lot as used in paragraph (d) of the "zoning lot" definition because an "unsubdivided" "tract of land" can include a single whole "lot of record" or a combination of whole and partial "lots of record"; and

WHEREAS, accordingly, the Owner concludes that the Development Site complies with paragraph (d) of the "zoning lot" definition; and

II. OPEN SPACE

WHEREAS, the Owner states that the Development Site provides the required amount of open space because, as approved by DOB, the Development Site must provide a minimum of 77,642 square feet of open space, that 86,972 square feet of open space is provided by ground-level open areas and that the ground-level open areas comply with the "open space" definition of ZR § 12-10 because they will be "accessible to and usable by" residents of the Development Site; and

WHEREAS, the Owner refers to a private agreement between all parties in interest on the Development Site, which states that "all owners and permitted occupants of any buildings within the Combined Zoning Lot, a non-exclusive right of access to the Vacant Land Parcel, but only to the extent necessary for the Vacant Land Parcel to constitute 'open space' under the Zoning Resolution," as evidence that occupants of the Development Site are assured access; and

WHEREAS, the Owner states that the ground-level open areas are usable, that ZR § 78-52, cited by Appellant, has no applicability to the Development Site since this provision only applies to large-scale residential developments and that there is no minimum dimension requirement applicable to the Development Site's open space; and

WHEREAS, the Owner states that 16,157 square feet of the Development Site classified as open space (18.58 percent) is obstructed by driveways, which complies with the 50 percent maximum permitted by ZR §§ 25-64 and 23-12; and

WHEREAS, the Owner states that there are no open accessory off-street parking spaces obstructing the Development Site's open space and that eliminating the disputed parking area (approximately 6,623 square feet) from the open space calculations would not reduce the Development Site's open space below the 77,642 square feet required; and

WHEREAS, accordingly, the Owner states that ground-level open areas meet the "open space" definition of ZR § 12-10 and that obstructions within the Development Site's open space are permitted under ZR §§ 25-64 and 23-12; and

DISCUSSION

WHEREAS, because this is an appeal for interpretation, pursuant to ZR § 72-11, the Board "may make such . . . determination as in its opinion should have been made in the premises in strictly applying and interpreting the provisions of" the Zoning Resolution; and

WHEREAS, the Board has reviewed and considered—but need not follow—DOB's interpretation of the Zoning Resolution in rendering the Board's own decision in this appeal, and the standard of review in this appeal is de novo; and

WHEREAS, however, a majority of the Board finds that Appellant has failed to demonstrate that the Development Site does not comply with the Zoning Resolution's "zoning lot" definition, and the Board unanimously finds that Appellant has failed to demonstrate that ground-level open areas on the Development Site do not comply with the Zoning Resolution's "open space" requirements; and

I. ZONING LOT

WHEREAS, a majority of the Board[6] finds that the Development Site meets paragraph (d) the of the "zoning lot" definition based upon the record in this appeal; and

WHEREAS, the Zoning Resolution sets forth varied purposes, from "regulating the density of population" to "provid[ing] freedom of architectural design, in order to encourage the development of more attractive and economic building forms," "promot[ing] the most desirable use of land and direction of building development in accord with a well-considered plan," "promot[ing] stability of residential development," and "conserv[ing] the value of land and buildings," *see* ZR § 21-00; and

WHEREAS, by structuring the "zoning lot" definition with paragraphs (a)–(d) connected by "either . . . or," the Zoning Resolution affords substantial flexibility in defining and redefining the boundaries a "zoning lot" and specifically allows that "[a] *zoning lot* may be subdivided into two or more *zoning lots*," ZR § 12-10; and

WHEREAS, here, strictly applying and interpreting the "zoning lot" definition turns on whether the Development Site meets paragraph (d); and

WHEREAS, at the outset, the text of paragraph (d) states in part that a zoning lot is "a tract of land, either unsubdivided or consisting of two or more lots of record"; and

WHEREAS, in other words, paragraph (d) of the "zoning lot" definition requires only that a zoning lot be an "unsubdivided" "tract of land" or a "tract of land" "consisting of two or more lots of record"; and

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[6] As indicated by the Board's vote and as discussed further herein, a minority of the Board finds that Appellant has shown that the Development Site does not comply with the Zoning Resolution's "zoning lot" definition. (It is undisputed that the Development Site does not comply with paragraphs (a), (b) or (c) of the "zoning lot" definition.)

WHEREAS, this text provides neither definitions of the terms "tract of land," "unsubdivided" or "lots of record" nor reference to "tax lots"; and

WHEREAS, as surface land, the Development Site is "land," ZR § 12-10; and

WHEREAS, as discussed herein, a majority of the Board concludes that—based upon the record in this appeal—the Development Site is a "tract of land" that is "either unsubdivided or consisting of two or more lots of record" for the purposes of the Zoning Resolution when considering the text with regard to the following: (a) the location and demarcation of the land in question; (b) the purposes of delineating the land in question; (c) the assemblage and constituents of the land in question; (d) the evidence in the record; and (e) the position presented by a minority of the Board; and

A. Location and Demarcation

WHEREAS, the following pertinent part of the "zoning lot" definition relates to the location and demarcation of the land in question:

> A "zoning lot" is . . . (d) a tract of land . . . located within a single *block*, which at the time of filing for a building permit . . . is declared to be a tract of land to be treated as one *zoning lot* for the purpose of this Resolution . . . . Each Declaration . . . shall be recorded in the Conveyances Section of the Office of the City Register . . . against each lot of record constituting a portion of the land covered by such Declaration. . . .
>
> [A] complete metes and bounds of the *zoning lot*, the tax lot number, the block number and the ownership of the *zoning lot* as set forth in paragraph[] . . . (d) herein shall be recorded by the applicant in the Conveyances Section of the Office of the City Register [(underlined emphasis added)]; and

WHEREAS, the Development Site is "land" "located within a single *block*,"[7] ZR § 12-10, bounded by Amsterdam Avenue, West 66th Street, West End Avenue and West 70th Street, as illustrated on Zoning Map 8c,[8] which map is incorporated into the Zoning Resolution; and

WHEREAS, the Development Site has been "declared to be a tract of land to be treated as one *zoning lot* for the purpose of this Resolution," ZR § 12-10, as evidenced by the Zoning Lot Declaration; and

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[7] The Zoning Resolution defines a "block" as "a tract of land bounded by . . . streets." ZR § 12-10.

[8] The Zoning Resolutions defines "zoning maps" as "the maps incorporated into the provisions of this Resolution in accordance with the provisions of Section 11-14 (Incorporation of Maps)." ZR § 12-10.

WHEREAS, the Zoning Lot Declaration contains a metes and bounds description of the Development Site, referred to therein as Zoning Lot 2, in Exhibit I:

> Description of Zoning Lot 2
>
> All those certain lots, pieces or parcels of land, situate, lying and being in the Borough of Manhattan, City, County and State of New York, Bounded and Described as follows:
>
> Beginning at a point on the westerly side of Amsterdam Avenue, distant 100′5″ (100.42′) southerly from the corner formed by the intersection of the westerly side of Amsterdam Avenue and the southerly side of West 70th Street; running thence southerly along the westerly side of Amsterdam Avenue 152′8-7/8″ (152.73′); thence westerly 110′; thence southerly 58′8-1/8″ (58.67′); thence westerly 69′0-1/2″ (69.04′); thence westerly, along the arc of a circle bearing to the left, having a radius of 63′9″(63.75′); thence northerly 65′10-3/4″ (65.89′); thence westerly 164′; thence southerly 46′; thence westerly 46′; thence westerly 68′; thence southerly 172′4″ (172.33′); thence easterly 68′; thence southerly 148′; thence westerly 68′; thence southerly 74′2″ (74.17′); thence westerly 13′11″ (13.92′); thence northerly 108′3″ (108.25′); thence westerly 98′1″ (98.08′); thence northerly 59′8″ (59.67′); thence westerly 151′1″ (151.08′); thence southerly 59′8″ (59.76′); thence westerly 48′7″ (48.58′); thence northerly 158′3-1/2″ (158.29′); thence easterly 37′; thence southerly 60′10-1/2″ (60.88′); thence easterly 162′8″ (162.67′); thence northerly 60′10-1/2″ (60.88′); thence easterly 98′1″ (98.08′); thence northerly 164′; thence westerly 48′; thence thence northerly 18′11″(18.96′); thence westerly 179′9″ (179.75′); thence southerly 12′11″; thence westerly 100′; thence northerly 223′10″ (223.83′); thence easterly 100′; thence southerly 200′10″ (200.83′); thence easterly 545′; thence northerly 120′5″ (120.42′); thence easterly 155′ to the westerly side of Amsterdam Avenue, the point or place of beginning; and

WHEREAS, the Zoning Lot Declaration defines Zoning Lot 2—that is, the Development Site—as "a zoning lot comprised of Tax Lots 133, 134, p/o 1101–1107 f/k/a 70; p/o 1201–1208 f/k/a 80; 1501–1672 f/k/a 65; p/o 1001–1007 f/k/a 1; p/o 1401–1405 f/k/a 30, and more particularly described on *Exhibit I*" above; and

WHEREAS, in the Property Data section, the Zoning Lot Declaration's Recording and Endorsement Cover Page and continuation pages state the following: Lots 133 (Entire Lot), 134 (Entire Lot), 1001 (Partial Lot), 1002 (Partial Lot), 1003 (Entire Lot), 1004 (Partial Lot), 1005 (Partial Lot), 1006 (Partial Lot), 1007 (Partial Lot), 1401 (Partial Lot), 1402 (Partial Lot), 1403 (Partial Lot), 1404 (Partial Lot), 1101 (Partial Lot), 1102 (Partial Lot), 1103 (Partial Lot), 1104 (Partial Lot), 1105 (Partial Lot), 1106 (Partial Lot), 1107 (Partial Lot), 1201 (Partial Lot), 1201 (Partial Lot), 1203 (Partial Lot), 1204 (Partial Lot), 1205 (Partial Lot), 1206 (Partial Lot), 1207 (Partial Lot), 1208 (Partial Lot), 1501 (Partial Lot), 1502 (Partial Lot), 1503 (Partial Lot), 1504 (Entire Lot), 1505 (Partial Lot), 1506 (Partial Lot), 1507 (Partial Lot), 1508 (Partial Lot), 1509 (Partial Lot), 1509 (Partial Lot), 1510 (Partial Lot), 1511 (Partial Lot), 1512 (Partial Lot), 1513 (Partial Lot), 1514 (Partial Lot),

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WHEREAS, accordingly, the Zoning Lot Declaration's Recording and Endorsement Cover Page and continuation pages indicate the Zoning Lot Declaration has been recorded in the Office of the City Register "against each lot of record constituting a portion of the land covered by such Declaration" in accordance with paragraph (d) of the "zoning lot" definition, ZR § 12-10; and

WHEREAS, contrary to assertions made by Appellant and DOB (insofar as DOB argues that its "current interpretation" of the "zoning lot" definition is "correct" because complete tax lots are the only types of lots that a Declaration can be recorded "against"), it is clear from the record in this appeal that the Zoning Lot Declaration may be recorded against "Partial [Tax] Lot[s]" in light of the Zoning Lot Declaration's Recording and Endorsement Cover Page and continuation pages; and

WHEREAS, the Zoning Lot Declaration's description of the Development Site corresponds to the Zoning Lot Description and Ownership Statement, City Register File No. 2017000053112, dated January 26, 2017, which contains "a complete metes and bounds of the

zoning lot, the tax lot number[s], the block number and the ownership of the *zoning lot*," ZR § 12-10 (final paragraph of "zoning lot" definition); and

WHEREAS, contrary to assertions made by Appellant and DOB, it is clear from the record in this appeal that the Zoning Lot Description and Ownership Statement may be recorded against "Partial [Tax] Lot[s]" in light of the Zoning Lot Description and Ownership Statement's Recording and Endorsement Cover Page and continuation pages; and

WHEREAS, accordingly, as set forth in the Zoning Lot Description and Ownership Statement, there is a single legal description with dimensions set forth in "metes and bounds" for the Development Site, which description has been recorded in the Office of the City Register, ZR § 12-10 (final paragraph of "zoning lot" definition); and

B. Purposes of Delineation

WHEREAS, turning again to ZR § 12-10, the following text pertains to the purposes of delineating the land in question:

> A "zoning lot" is . . . (d) a tract of land, either unsubdivided or consisting of two or more lots of record contiguous for a minimum of ten linear feet . . . , which . . . is declared to be a tract of land to be treated as one *zoning lot* for the purpose of this Resolution.
>
> 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, or on any recorded subdivision plat or deed [(underlined emphasis added)]; and

WHEREAS, as one specifically delineated land parcel, described by metes and bounds, the Development Site is "a" single "tract of land," ZR § 12-10; and

WHEREAS, no categorical rule appears in the provisions of the Zoning Resolution that a "tract of land" need be a complete tax lot; and

WHEREAS, the Zoning Lot Description and Ownership Statement indicates that the Development Site is a land assemblage involving multiple owners and multiple tax lot numbers; and

WHEREAS, the Zoning Lot Declaration indicates that, as a whole, the Development Site is "to be treated as one *zoning lot* for the purpose of" the Zoning Resolution, ZR § 12-10; and

WHEREAS, the Zoning Lot Declaration indicates that the Development Site has been subdivided from the Combined Land Parcel[9] but, as a result of said subdivision,[10] the Development Site in and of itself constitutes a single, unified tract of land; and

WHEREAS, the Zoning Resolution expressly provides that a zoning lot "may not"—and, in fact, the Development Site does not—"coincide" with a lot shown on the City's tax map, ZR § 12-10; and

WHEREAS, the record in this appeal indicates that the phrase "may not coincide with a lot as shown on the official tax map" does not refer only to tax-lot boundaries traversing the interior of a zoning lot comprised of two or more complete, abutting tax lots sharing tax-lot boundaries, and there is affirmative evidence—including DOB-issued certificates of occupancy indicating that other parcels located on the subject block that include partial tax lots comply with applicable zoning regulations—that a zoning lot's perimeter "may not coincide" with tax-lot boundaries in accordance with the plain meaning of that phrase, ZR § 12-10; and

WHEREAS, the record in this appeal—including the Valletta Memorandum, which describes zoning lots as the basis for the application of the bulk provisions of the Zoning Resolution, and the Department of City Planning's *A Survey of Transferable Development Rights Mechanisms in New York City* (Feb. 26, 2015), which describes tax-lot boundaries as unrelated to any land-use purpose—also indicates that the Zoning Resolution and the City's tax map serve different purposes and that "not coincid[ing]" with tax-lot boundaries does not prevent a tract of land from complying with paragraph (d) of the "zoning lot" definition or other applicable zoning regulations, which are based on the size, location and orientation of a "zoning lot," not its constituent tax lots; and

C. Assemblage and Constituents

WHEREAS, with respect to ZR § 12-10, the following part of the "zoning lot" definition relates to the assemblage and constituents of the land in question:

> A "zoning lot" is . . . (d) a tract of land, either unsubdivided or consisting of two or more lots of record contiguous for a minimum of ten linear feet [(underlined emphasis added)]; and

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[9] The Board expresses no opinion as to the Combined Land Parcel or other tracts of land that are not before the Board in this appeal.

[10] Consistent with the "zoning lot" definition, which states that zoning lots "may be subdivided into two or more *zoning* lots, provided that all resulting *zoning* lots and all buildings thereon shall comply with all of the applicable provisions of" the Zoning Resolution, nothing in the record indicates that the zoning-lot subdivision evinced by the Zoning Lot Declaration contravened any applicable zoning provision. Insofar as Appellant alleges such non-compliance with respect to applicable "open space" regulations, as discussed herein, the Board finds no merit in this contention.

WHEREAS, because of the either–or construction the text employs, the Development Site need only be one of the following: "unsubdivided" or "consisting of two or more lots of record contiguous for a minimum of ten linear feet," ZR § 12-10; and

WHEREAS, Appellant would urge these to be mutually exclusive categories; and

WHEREAS, reading the entirety of the "zoning lot" definition, it is clear that its paragraphs may overlap: a paragraph (a) "lot of record" that existed in 1961 may also today be a paragraph (c) unsubdivided tract of land; and

WHEREAS, similarly overlapping, tax lots may—in some instances—be "lots of record" under the "zoning lot" definition,[11] ZR § 12-10; and

WHEREAS, however, it does not follow that all "lots of record" are complete tax lots or that only complete tax lots are "lots of record," ZR § 12-10; and

WHEREAS, the "zoning lot" definition specifically refers to different types of lots: "a lot as shown on the official tax map," "a lot as shown . . . on any recorded subdivision plat," "a lot as shown . . . on any recorded . . . deed," "[p]arcels . . . that were numerically identified for leasing purposes on maps filed in the Office of the Borough President" and a "tax lot"; and

WHEREAS, for a lot to be considered "of record" under the Zoning Resolution, it must have been "legally recorded," City Planning Commission Report No. N 810406 ZRQ (August 12, 1981)[12]; and

WHEREAS, it is undisputed in this appeal that complete tax lots are "legally recorded" lots, *id.*; and

WHEREAS, were complete tax lots the only lots considered by the Zoning Resolution to be "lots of record," ZR § 12-10, it would be wholly unnecessary for the Zoning Resolution to further refer to lots "on any recorded subdivision plat or deed"; and

WHEREAS, Appellant's complete-tax-lots-only interpretation of the phrase "lots of record" would render the Zoning Resolution's specific statement about lots "on any recorded subdivision plat or deed" wholly redundant because the only "lots of record" would be the previously described "lot as shown on the official tax map"; and

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[11] The Board need not and does not consider or address the various types of tax lots in this appeal. That said, the Department of Finance has recently released a three-dimensional digital tax map that visualizes air lots: tax lots floating above the ground in air space. As a point of comparison, the "zoning lot" definition is rooted to the ground with its "tract of land" verbiage. ZR § 12-10.

[12] Appellant cites this City Planning Commission report in its history of the "zoning lot" definition.

WHEREAS, accordingly, for the phrase "recorded subdivision plat[s] or deed[s]" to have any meaning, "lots of record" must be an umbrella category in which complete tax lots are included, though not to the exclusion of other recorded lots; and

WHEREAS, Appellant urges that an "unsubdivided" "tract of land" must be a single "lot of record"—essentially a legally recorded lot; and

WHEREAS, "unsubdivided" is not defined and is subject to several interpretations, including but not limited to Appellant's assertion that "unsubdivided" means that a tract of land has never been subdivided on the tax map of the City of New York; and

WHEREAS, the use of the term "unsubdivided" may also refer to situations where the boundaries of a tract of land are merged for zoning purposes with those of an adjacent parcel, thereby creating a single land assemblage aggregated for development purposes with a single metes and bounds description; and

WHEREAS, even assuming that an "unsubdivided" "tract of land" means a single "lot of record," the Development Site is itself a single lot of record and accordingly meets Appellant's proffered interpretation of an "unsubdivided" "tract of land"; and

WHEREAS, it is undisputed in this appeal and the record reflects that the Development Site has a single metes and bounds description set forth in a plethora of recorded documents provided by Appellant; and

WHEREAS, it is also undisputed in this appeal and the record further reflects that the Development Site is a single lot shown on a number of maps recorded in the Office of the City Register provided by Appellant; and

WHEREAS, various recorded documents in the record—including the Zoning Lot Declaration and legal instruments—indicate that the Development Site in and of itself constitutes, in the aggregate, a single tract of land with multiple owners and parties in interest, which tract is ultimately described around its perimeter by metes and bounds as one specifically delineated, unified land parcel; and

WHEREAS, additionally, the Zoning Lot Declaration declares, in satisfaction of paragraph (d) of the "zoning lot" definition, that the Development Site is treated as one zoning lot for the purposes of the Zoning Resolution; and

WHEREAS, accordingly, the Development Site is "unsubdivided" for zoning purposes, ZR § 12-10; and

WHEREAS, it is undisputed in this appeal that the Development Site is described or shown on a number of documents and maps recorded in the Office of the City Register as "consisting of two or more" legally recorded lots; and

WHEREAS, accordingly, Appellant has failed to demonstrate that the Development Site does not "consist[] of two or more lots of record contiguous for a minimum of 10 linear feet," ZR § 12-10; and

WHEREAS, based on the record in this appeal and consistent with paragraph (d) of the "zoning lot" definition, as a single land assemblage aggregated for the purpose of developing the New Building in compliance with the Zoning Resolution, the Development Site is itself—for the purposes of the Zoning Resolution—"either unsubdivided or consisting of two or more lots of record," ZR § 12-10; and

D. Evidence

WHEREAS, considering all of the evidence in the record, the interpretation herein is consistent with the City's longstanding administration of zoning lots; and

WHEREAS, the discussion herein is consistent with the Board's own prior precedent in *609 Bayside Drive, Queens*, BSA Cal. No. 229-06-A (Jan. 13, 2009), as upheld in *Golia v. Srinivasan*, 95 A.D.3d 628, 630 (N.Y. App. Div. 2012), insofar as an "unsubdivided" "tract of land" is not necessarily governed by tax-lot boundaries and may refer to a tract of land that traverses parts of tax lots, ZR § 12-10; although said appeal does not directly speak to the zoning-lot issue presented in this appeal, the Board had considered paragraph (a) of the "zoning lot" definition and interpreted the phrase "lot of record existing on December 15, 1961," as including a separate, individually designated plot within the Breezy Point Cooperative that was part of a single, larger tax lot; and

WHEREAS, City Planning Commission Report No. N 0760226 ZRY (July 13, 1977) (the "CPC Report"), filed in connection with the text amendment that introduced paragraph (d) of the "zoning lot" definition, states: "[W]here two or more adjacent properties have a property interest, they shall jointly declare and record their parcels as a single zoning lot for development purposes"; and

WHEREAS, the CPC Report continues:

> [A] single zoning lot can be created from adjacent, differently held *parcels* through the filing and recording of a declaration of single zoning lot status executed by all parties having a defined interest in the *parcels in question*, such recording of a declaration of single zoning lot status executed by all parties having a defined interest in the *parcels in question*, such recording to be against each tax lot constituting a portion of the land covered by such declaration and to be in the Office of the City Register. . . . The declaration would *declare the several parcels to be one zoning lot*, and this zoning lot would remain integral, notwithstanding any party's breach of a provision of the declaration or any agreement ancillary thereto, until such time as the zoning lot is subdivided in accordance with existing zoning lot subdivision rules. These rules preclude any subdivision's creating-noncompliance with any applicable provisions of the zoning. The recorded declaration will put all persons on notice that the *several parcels in question* have been constituted as one zoning lot (the recording of the declaration will eliminate the current problem of not being able to determine from the public record whether a building has been built in part on the basis of development rights applicable to land on which the building is not physically located). The

> amendment as proposed thus protects the City's interest in avoiding over-building, and provides private parties with certainty based on which they can protect their own interest. When a declared zoning lot has to be subdivided creating potential non-compliance, it is necessary to record a restrictive declaration constituting an enforceable covenant running with the land in perpetuity restricting all properties within each newly subdivided portion in accordance with the terms and agreement as originally set forth in the declared zoning lot [(emphasis added)]; and

WHEREAS, consistent with the CPC Report, the Development Site contains adjacent "parcels" that have been "jointly declare[d] and record[ed] . . . as a single zoning lot for development purposes," *id.*; and

WHEREAS, by being recorded, the Zoning Lot Declaration "put[s] all persons on notice that the several parcels in question have been constituted as one zoning lot," *id.*; and

WHEREAS, the Minkin Memorandum—while not conclusive insofar as the interpretation memorialized therein could conflict with the Zoning Resolution and insofar as the standard of review in this appeal is de novo—states that "a single zoning lot . . . may consist of one or more tax lots or parts of tax lots," and a majority of the Board credits this interpretation as being consistent with the "zoning lot" definition, as discussed herein; and

WHEREAS, a majority of the Board does not credit Appellant or DOB's dismissal of the Minkin Memorandum as setting forth an "incorrect" interpretation, rather than an alternative interpretation equally supported by a plain reading of the text, because, as discussed above, the Development Site does consist of parts of tax lots but is also "unsubdivided or consisting of two or more lots of record," ZR § 12-10; and

WHEREAS, a majority of the Board does not credit DOB's unsubstantiated assertion that tax lots are the only lots that can be recorded against, which appears to be DOB's main argument as to why "lots of record" can only mean complete tax lots, because the record contradicts this statement; and

WHEREAS, in accordance with the Minkin Memorandum, since 1987, DOB has issued 28 binding-and-conclusive certificates of occupancy to buildings on the subject block certifying that parcels of land that include partial tax lots comply with applicable zoning requirements; and

WHEREAS, the Development Site includes land within the tax-lot boundaries of 150 West End Avenue, 160 West End Avenue, 170 West End Avenue, 180 West End Avenue and 200 West End Avenue, which have received 21 certificates of occupancy since 1987 certifying that parcels of land that include partial tax lots comply with applicable zoning requirements; and

WHEREAS, notably, in 2018, during the pendency of this appeal, DOB issued 170 Amsterdam Avenue a certificate of occupancy certifying that the Combined Land Parcel's subdivision—the exact subdivision that formed the Development Site—into two parcels of land that include partial tax lots complies with applicable zoning requirements; and

WHEREAS, notwithstanding the history of development on the subject block and the issuance of said certificates of occupancy, DOB has argued in this appeal that the purpose of the draft Buildings Bulletin—which a majority of the Board is unconvinced will ever "see the light of day"—is to correct a purportedly erroneous interpretation of the "zoning lot" definition reflected in the Minkin Memorandum; and

WHEREAS, it is unclear by what authority DOB could apply the draft Buildings Bulletin's purportedly corrected interpretation (that zoning lots cannot consist of partial tax lots) to the Development Site when DOB has issued certificates of occupancy on the subject block—some covering the very tract of land at issue in this appeal—certifying that the opposite proposition (that zoning lots can consist of partial tax lots) complies with applicable zoning requirements, *see* New York City Charter § 645(3); and

WHEREAS, accordingly, based on the record in this appeal, a majority of the Board is unpersuaded by DOB's assertions that the Minkin Memorandum is "incorrect" or that only complete tax lots can be "lots of record," ZR § 12-10; and

WHEREAS, in *A Survey of Transferable Development Rights Mechanisms in New York City* 5–6 (Feb. 26, 2015), the Department of City Planning states:

> Zoning lot mergers . . . combine contiguous tax lots within a block, *eliminating lot lines for zoning purposes* and *allowing the free movement of floor area* within the merged zoning lot. . . .
>
> Because ZLMs don't otherwise allow for exceptions to bulk or other regulations, and because they don't allow any buildings or developments that couldn't happen as of right anyway, the city has not found it necessary to restrict or regulate ZLMs beyond the recording requirement and regulations to curb what might be considered extreme uses of the measure.
>
> Regulation beyond that may prove problematic. *Tax lot lines reflect historic ownership patterns but typically do not relate to any land use purposes.* Restrictions on the ability to merge them into unified zoning lots would give *land use effect to tax lot lines*, often without an obvious underlying land use rationale. That may present legal and administrative difficulties [(emphasis added)]; and

WHEREAS, the interpretation herein would not "give land use effect to tax lot lines," *id.*; and

WHEREAS, the Valletta Memorandum describes a zoning lot as "the essential building block on which the bulk calculations of the Zoning Resolution were intended to be calculated"; and

WHEREAS, according to the Plans, the zoning calculations for the New Building have been computed based on the Development Site; and

E. Minority Position

WHEREAS, a minority of the Board finds that the meaning of "lot of record" and its relationship to the Development Site is dispositive as to whether the Development Site complies with the "zoning lot" definition; and

WHEREAS, a minority of the Board notes that a "lot of record," though undefined in the Zoning Resolution, is an entire tax lot; and

WHEREAS, a minority of the Board notes that, within the Borough of Manhattan, "of record" refers to being recorded with and maintained by the Office of the City Register; and

WHEREAS, a minority of the Board notes that the "zoning lot" definition itself uses "record" in a number of instances: "a written instrument executed by such party in recordable form and recorded at or prior to the recording of the Declaration," "any recorded subdivision plat or deed," "any enforceable recorded interest superior to that of the fee owner," "any enforceable recorded interest in all or substantially all of such tract of land," "any unrecorded interest in all or substantially all of such tract of land," "the same, as well as each such waiver, have been duly recorded," "their execution and recording of a Declaration," "any enforceable recorded interest," "the holder of any enforceable recorded interest," any unrecorded interest," "prior leasehold agreements shall be duly recorded" and "a complete metes and bounds of the *zoning lot*, the tax lot number, the block number and the ownership of the *zoning lot* as set forth in paragraphs (a), (b), (c) and (d) herein shall be recorded by the applicant in the Conveyances Section of the Office of the City Register (or, if applicable, the County Clerk's Office) of the county in which the said *zoning lot* is located," ZR § 12-10 (underlined emphasis added); and

WHEREAS, a minority of the Board notes that, in each instance, recording evinces the act of depositing an official document with the appropriate authority, which in the Borough of Manhattan is the City Register; and

WHEREAS, a minority of the Board notes, however, that "lot of record" as used in the "zoning lot" definition dates to 1961, before the "zoning lot" definition was amended to allow for the recording of declarations with respect to zoning lots; and

WHEREAS, a minority of the Board notes that there is no indication in the record in this appeal of any other instances of recording that would lead to the conclusion that "lots of record" does not refer to tax lots "as shown on the official tax map of the City of New York," ZR § 12-10; and

WHEREAS, a minority of the Board notes that Appellant has demonstrated that, in 1961, there was no other formal record for any kind of land use and that the only form a "lot of record" could take was as a tax lot; and

WHEREAS, a minority of the Board notes that this interpretation is further evidenced by the requirement that, under paragraph (d), a zoning lot may "consist[] of two or more" tax lots and that such language contains no suggestion that a zoning lot may "consist[] of" parts of "two or more" tax lots; and

WHEREAS, a minority of the Board notes that, if a tract of land is "unsubdivided," it cannot include parts of tax lots; and

WHEREAS, a minority of the Board notes that there is a connection between the purposes served by zoning lots and tax lots because, for decades, the City has required that newly created tax lots comply with all applicable zoning regulations under Section 11-203 of the Administrative Code of the City of New York; and

WHEREAS, a minority of the Board notes that interpreting the "zoning lot" definition to require whole tax lots and disallowing parts of tax lots furthers the City's interest in ensuring zoning compliance; and

WHEREAS, a minority of the Board finds that, based upon the foregoing, the Minkin Memorandum sets forth an erroneous interpretation of the "zoning lot" definition that should no longer be followed because a "lot of record" is an entire tax lot; and

WHEREAS, accordingly, a minority of the Board finds that, because the Development Site includes partial tax lots, the Development Site does not comply with the "zoning lot" definition and that this appeal should be granted on that basis alone; and

Conclusion

WHEREAS, based upon the foregoing, a majority of the Board finds that, as a single land assemblage aggregated for the purpose of developing the New Building in compliance with the Zoning Resolution, the Development Site is a "tract of land" that is "either unsubdivided or consisting of two or more lots of record," consistent with paragraph (d) of the "zoning lot" definition; and

WHEREAS, accordingly, a majority of the Board finds no basis to grant this appeal with respect to Appellant's assertion that the Development Site does not comply with the Zoning Resolution's "zoning lot" definition; and

II. OPEN SPACE

WHEREAS, the Board unanimously finds that ground-level open areas on the Development Site comply with the Zoning Resolution's "open space" requirements under ZR §§ 12-10, 25-64 and 23-12; and

WHEREAS, ZR § 12-10 defines "open space," in pertinent part, as follows:

> "Open space" is 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*. . . . ; and

WHEREAS, the Plans indicate that there will be ground-level open areas on the Development Site; and

WHEREAS, there is no basis to import requirements from non-applicable provisions in strictly applying and interpreting the text of the generally applicable "open space" definition; and

WHEREAS, the evidence in the record, including the Plans, which illustrate no physical barriers to the Development Site's occupants, and a private agreement between parties in interest on the Development Site, assures that these ground-level open areas are "accessible to and usable by" residential occupants of the Development Site; and

WHEREAS, the Board credits DOB's testimony that an inspection will be performed prior to the issuance of a certificate of occupancy to ensure that actual conditions continue to conform to the Plans with respect to open space; and

WHEREAS, the Plans indicate that these ground-level open areas will be "open and unobstructed from its lowest level to the sky"; and

WHEREAS, the Board finds that these ground-level open areas on the Development Site meet the "open space" definition; and

WHEREAS, ZR § 25-64 provides, in relevant part:

> Restrictions on the use of open space for parking and driveways are set forth in this Section, in accordance with the provisions of Section 23-12 (Permitted Obstructions in Open Space). . . .
>
> (d) 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*; and

WHEREAS, ZR § 23-12 states, in relevant part:

> In the districts indicated, the following obstructions shall be permitted in any *open space* required on a *zoning lot*:
>
> (f) 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 these items does not exceed the percentages set forth in Section 25-64 (Restrictions on Use of Open Space for Parking); and

WHEREAS, the Development Site's ground-level open areas contain driveways[13]; and

[13] Insofar as the record includes discussion of parking, the Board expresses no opinion because the Plans, under which the Permit was issued, do not reflect parking in the ground-level open areas.

WHEREAS, the Plans indicate that not "more than 50 percent of the required *open space*" on the Development Site is used by driveways; and

WHEREAS, there is no basis to import the word "accessory" into these provisions where the text describes some permitted obstructions as "accessory" but not others; and

WHEREAS, the text does not describe driveways as "accessory"; and

WHEREAS, the Board finds that the driveways located in the ground-level open areas are permitted obstructions under ZR §§ 25-64 and 23-12; and

WHEREAS, accordingly, the Board finds no basis to grant this appeal with respect to Appellant's assertion that the Development Site does not comply with the Zoning Resolution's "open space" requirements; and

CONCLUSION

WHEREAS, the Board has considered all of the arguments on appeal, but a majority of the Board finds them ultimately unpersuasive; and

WHEREAS, notwithstanding the above, DOB is tasked with administering and enforcing the Zoning Resolution for over one million properties within the City of New York, *see* ZR § 71-00; in furtherance of this mission, the New York City Charter and the New York City Construction Codes—as well as other sources of legal authority—provide DOB with wide latitude to develop and employ new techniques for the effective enforcement of the City's Zoning Resolution; and nothing herein shall be deemed an abrogation of DOB's enforcement authority with respect to developing techniques that ensure the lawful use and development of buildings within the City; and

WHEREAS, however, for the foregoing reasons and based on the record in this appeal, a majority of the Board finds that Appellant has failed to demonstrate that the Development Site does not comply with the Zoning Resolution's "zoning lot" definition, and the Board unanimously finds that Appellant has failed to demonstrate that ground-level open areas on the Development Site do not comply with the Zoning Resolution's "open space" requirements.

Therefore, it is Resolved, that the permit issued by the Department of Buildings on September 27, 2017, under New Building Application No. 122887224, shall be and hereby is *upheld* and that this appeal shall be and hereby is *denied*.

Adopted by the Board of Standards and Appeals, July 17, 2018.
Adopted by the Board of Standards and Appeals, as revised, June 25, 2019.

CERTIFICATION

This copy of the Resolution
dated July 17, 2018 and
Revised on June 25, 2019
is hereby filed by
the Board of Standards and Appeals
dated June 25, 2019