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July 23, 2019

Honorable Members of the Board
Board of Standards and Appeals
250 Broadway, 29th Floor
New York, NY 10007

RE: Cal. Nos. 2019- 89-A and 2019-94-A
Premises: 36 West 66th Street, Manhattan
Block: 1118; Lot: 45

Dear Honorable Members of the Board:

The Department of Buildings (the "Department") respectfully submits this statement in response to the referenced appeals by John Low-Beer on behalf of The City Club of New York, James C.P Berry, Jan Constantine, Victor A. Kovner, Agnes C. McKeon, and Arlene Simon (collectively "City Club Appellants") and by Klein Slowick, PLLC on behalf of Landmark West! ("Landmark West Appellants") (collectively, the "Appellants"), challenging the Department's April 4, 2019 approval of a post-approval amendment application (the "PAA") which changed the scope of permit 121190200-01-NB (the "Permit") authorizing construction of a new building located at 36 West 66th Street New York, New York (the "Proposed Building"). Appellants allege that the Department's approval of the PAA is inconsistent with the New York City Zoning Resolution (the "ZR").

For the reasons explained below, the Department respectfully requests that the Board affirm the Department's determination to approve the PAA and uphold the underlying Permit.

I. BACKGROUND

A. Description of the Proposed Building

The Permit for the Proposed Building allows for the construction of a 39-story building containing 127 dwelling units utilizing 483,138 square feet of residential zoning floor area and a community facility on the first floor utilizing 22,344 square feet of community facility zoning floor area to be built on Tax Lot 45.

In addition to the Proposed Building to be constructed on Tax Lot 45,

the zoning lot on which the building will be built contains Tax Lots 14, 46, 47, 48, and 52. Tax Lot 52 contains a two-story commercial building to remain. The zoning lot is a split zoning lot with a portion of the zoning lot mapped in a C4-7(R10 equivalent) Zoning District and the other portion mapped in an R8 Zoning District.[1] The entirety of the zoning lot is located within the Special Lincoln Square District.[2]

B. Procedural History

On May 9, 2017, the Department issued the Permit authorizing the construction of a 25-story building on a smaller zoning lot comprising Tax Lots 45, 46, 47, and 48. On November 17, 2017, the owner of the Proposed Building, West 66th Sponsor LLC, (the "Owner"), filed a post-approval amendment with the Department to increase the size of the zoning lot (by adding Tax Lots 14 and 52) to thereby allow for an increase in the size of the building. On July 26, 2018, after multiple post-approval amendments were filed and reviewed by the Department, and after the Department approved a Zoning Diagram (a "ZD1"),[3] the Department issued foundation permits for the footprint of the 39-story Proposed Building.

In response to the Department's approval and posting of the ZD1 and in accordance with 1 RCNY § 101-15, on September 8, 2018, Landmark West Appellant submitted a Public Challenge challenging the Department's approval of the ZD1. Substantively, the challenge was similar in nature to the instant appeal challenging two aspects of the Department's approval: (1) zoning floor area deductions taken for mechanical equipment was inconsistent with the ZR; and (2) the Proposed Building did not comply with the ZR's "tower coverage regulations."

On November 19, 2018, the Department issued a Zoning Resolution Determination ("ZRD2") denying both challenges set forth in Landmark West Appellants' Public Challenge. However, after further review of the zoning documents approved for the Proposed Building, on January 14, 2019, the Department rescinded the ZRD2 denial, for reasons other than those provided by Landmark West Appellant in their Public Challenge, and issued an "Intent to Revoke Approval" letter to the Owner. In the "Intent to Revoke" letter, the Department requested further documentation from the Owner to confirm that the mechanical equipment in the Proposed Building was indeed "accessory," as that term is defined in the ZR, to the residential use of the Proposed Building. Additionally, the Department requested concurrence from the New York City Fire Department that the proposed layout of floors containing mechanical equipment was satisfactory.

[1] *See* Zoning Map 8c. A copy of Zoning Map 8c was attached as Attachment 9 to City Club Appellants' May 7, 2019 submission to the Board and as Attachment 4 to Landmark West Appellants' May 14, 2019 submission to the Board.
[2] *Id.*
[3] A copy of the July 26, 2018 ZD1 was attached to City Club Appellant's May 7, 2019 submission to the Board.

In response to these objections, and after receipt of a letter of no objection from the NYC Fire Department dated March 7, 2019, on April 4, 2019, the Department approved a revised ZD1 diagram (the "2019 ZD1"), which reconfigured the mechanical space in the Proposed Building, and approved a PAA based on such revision. [4] As a result of these approvals, the scope of the originally issued Permit was reconfigured to authorize the construction of the Proposed Building.

In response to the Department's approval of the PAA, on May 7, 2019 and on May 14, 2019,[5] respectively, the Appellants submitted the instant appeals to the Board.

II. <u>THE PROPOSED BUILDING COMPLIES WITH THE ZR AND THE PERMIT SHOULD BE UPHELD</u>

A. The Proposed Building Satisfies both the ZR § 82-34 Bulk Distribution and the ZR § 82-36 Tower Coverage Requirements

The Proposed Building is located within the Special Lincoln Square District. Therefore, the Proposed Building is required to comply with all of the relevant provisions of Article 8, Chapter 2 of the ZR (Special Lincoln Square District). The Appellants allege that the Proposed Building fails to comply with ZR § 82-34. However, as explained in more detail below, the Appellants misunderstand the application of ZR § 82-34 by assuming that it only applies to certain zoning districts even though no such limitation is found in the text.

In the context of this allegation, the Appellants cite the Split Lot Rules of ZR §§ 33-48 and 77-02. In addition, the Appellants reference ZR § 82-36 as evidence of the Proposed Building's failure to comply with ZR § 82-34. Since multiple ZR sections are referenced, it is important to understand the purposes of the referenced ZR sections and how they are interconnected.

1. *Zoning Lots Divided By District Boundaries*

Under Article 7, Chapter 7 of the ZR (Special Provisions for Zoning Lots Divided By District Boundaries) "[w]henever a *zoning lot* is divided by a boundary between two or more districts and such *zoning lot* did not exist on December 15, 1961, or any applicable subsequent amendment thereto, each portion of such *zoning lot* shall be regulated by all the provisions applicable to the district in which such portion of the *zoning lot* is located…" In other words, a zoning lot formed after December 15, 1961 (or after the date of an applicable subsequent amendment) which straddles a zoning district boundary such that a portion of the zoning lot is mapped within one zoning district designation whereas the other portion is mapped within another zoning district designation, each portion of the zoning lot is regulated only by the regulations imposed on the zoning district it is physically located within.

[4] A copy of the 2019 ZD1 was attached as Exhibit C to City Club Appellants' May 7, 2019 submission to the Board and as Exhibit D to Landmark West Appellants' May 14, 2019 submission to the Board.
[5] Landmark West Appellant's appeal is dated May 14, 2019. As the Department only received a courtesy copy of the appeal from the Board's Deputy Director on June 7, 2019, the Department can only speculate as to the actual submission date of the appeal.

Similarly, ZR § 33-48 (Special Provisions for Zoning Lots Divided by District Boundaries) states that:

> In [C1 - C8 zoning districts], whenever a *zoning lot* is divided by a boundary between districts, or is subject to other regulations resulting in different height and setback regulations, or whenever a *zoning lot* is divided by a boundary between a district to which the provisions of Section 33-45 (Tower Regulations) apply and a district to which such provisions do not apply, the provisions set forth in Article VII, Chapter 7, shall apply.

This provision essentially singles out the Tower Regulations of ZR § 33-45 as regulations for which ZR § 77-02 would apply.

2. *The Proposed Building Complies with ZR § 82-36 Tower Coverage Requirements and ZR § 82-34 Bulk Distribution*

    i. The Proposed Building Complies with ZR § 82-36

The Proposed Building is located wholly within the Special Lincoln Square District.[6] Therefore, the Proposed Building is required to comply with all of the relevant provisions of Article 8, Chapter 2 of the ZR (Special Lincoln Square District). ZR § 82-36 (Special Tower Coverage and Setback Regulations) states that ZR § 33-45 (Tower Regulations) applies to buildings qualifying as towers with slight modifications. ZR § 33-45 clearly indicates that *it only applies to certain zoning districts* (including C4-7 but excluding R8). Therefore, since the Proposed Building is located within a zoning lot which is mapped within a C4-7 Zoning District, the Proposed Building is required to comply with ZR § 33-45 as modified by ZR § 82-36. However, since the Proposed Building is located within a zoning lot divided by district boundaries, and since ZR § 33-45 as modified by ZR § 82-36 is only applicable to the portion of the zoning lot mapped within a C4-7 Zoning District and is not applicable to the portion of the zoning lot mapped within an R8 Zoning District, only the portion of the zoning lot mapped within the C4-7 Zoning District is utilized for satisfying the requirements of ZR §§ 33-45 and 82-36.

Pursuant to the 2019 ZD1, the C4-7 portion of the zoning lot comprises 35,105 square feet of lot area. Pursuant to ZR § 82-36, every level of the tower portion of the Proposed Building, above a height of 85 feet above curb level, must contain somewhere between 30 and 40 percent of the lot

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[6] In 1993, the NYC City Planning Commission (the "CPC") amended the ZR "to modify the use, bulk, and accessory parking and loading regulations of the Special Lincoln Square District." See CPC Report N 940127(A) ZRM (Dec. 20, 1993) (the "1993 CPC Report"). A copy of the 1993 CPC Report was attached as Exhibit A to City Club Appellants' May 7, 2019 submission to the Board and as Exhibit A to Landmark West Appellants' May 17, 2019 submission to the Board. It should be noted that although the original proposal called for a specific height limitation in the Special Lincoln Square District, the CPC stated that, "specific height limits are not generally necessary in an area characterized by towers of various heights, and that the proposed mandated envelope and coverage controls should predictably regulate the heights of new development. It was with this in mind that the CPC amended the regulations of the Special Lincoln Square District including the introduction of ZR §§ 82-34 and 83-36.

area of the zoning lot. Since the C4-7 portion of the zoning lot is 35,105 square feet, the tower portion of the Proposed Building above 85 feet above curb level must contain between 10,531.5 square feet and 14,042 square feet. Pursuant to the 2019 ZD1, every floor contains between 10,537 and 11,218 square feet of lot area. Therefore, the Proposed Building complies with ZR §§ 33-45 and 82-36.

ii. The Proposed Building Complies with ZR § 82-34

The relevant portion of ZR § 82-34 simply states that, "[w]ithin the Special District, at least 60 percent of the *total floor* area permitted on a *zoning lot* shall be within *stories* located partially or entirely below a height of 150 feet from *curb level...*"

This provision does not distinguish between any of the zoning districts mapped within the Special District. Indeed, the CPC specifically added the four words "within the special district" to show that the provision applies to both, the C4-7 and the R8 portions of the Special Lincoln Square District.

Accordingly, pursuant to the 2019 ZD1, the entire zoning lot comprises 548,543 square feet of total floor area. As required by ZR § 82-34, 60 percent of such floor area is required to be below a height of 150 feet from curb level. Sixty percent of 548,543 square feet yields a requirement of 329,125.80 square feet below the 150 foot mark. Pursuant to the 2019 ZD1, the zoning lot contains a total of 329,131.92 square feet below 150 feet above curb level. As such, the Proposed Building satisfies the requirements of ZR § 82-34.

iii. The Appellants Other Arguments As to Why the Split Lot Provisions Should Apply to ZR § 82-34 are Without Merit

The Appellants agree that the Proposed Building complies with ZR § 82-36. However, the Appellants allege that the Department erred in not using the same split lot analysis in calculating the Special Lincoln Square District bulk distribution requirements of ZR § 82-34. This allegation is unfounded.

As noted earlier, ZR § 82-36 modifies ZR § 33-45 which only applies to certain zoning districts (C4-7 in this case). Pursuant to ZR §§ 77-02 and 33-48, ZR §§ 82-36 and 33-45 only apply to the *portion* of the zoning lot located within the districts to which they apply. Therefore, ZR §§ 82-36 and 33-45 are only applied to the C4-7 portion of the zoning lot. In contrast, ZR § 82-34 is applicable to *all* zoning districts within the Special Lincoln Square District—without exception. Since the bulk distribution requirements apply to all zoning districts, ZR §§ 77-02 and 33-48 do not apply, and the calculations are based on the entire zoning lot without discrimination for underlying zoning district types.

This distinction is supported clearly by the text of the ZR in two ways. First, ZR § 82-36 specifically states that ZR § 33-45 is an applicable provision. ZR § 33-45 *clearly* lists the only zoning districts for which it is applicable. In fact, ZR § 33-451 is titled "[i]n certain specified Commercial Districts," enumerating only districts for which it applies. In contrast, ZR § 82-34

does not reference any other provision—it stands on its own. More importantly, ZR § 82-34 does not limit the districts for which it applies, because it applies to all zoning districts. Second, the prefatory language of ZR § 82-34 *specifically* states that it applies to every zoning district as it states that it applies "*within the Special District.*" (Emphasis added).

Appellants dismiss these crucial distinctions between the two provisions and state that the split lot provision analysis should be applied uniformly, notwithstanding the difference in language. However, the ZR must not be read as to render portions of the text meaningless. Under Appellants' reading, the words "within the special district" would not merely be rendered meaningless, they would be rendered contradictory. Appellants would read the words "within the special district" to mean "within *certain portions of* the special district." (Emphasis added to indicate Appellants interpretation of the ZR language). Similarly, the Appellants impermissibly read in a district limitation to ZR § 82-34. Although the provision states no limitation to its applicability, the Appellants unfoundedly claim that it only applies to the C4-7 Zoning District mapped within the Special Lincoln Square District and not the R8 Zoning District portion.

The Appellants state that the language "within the special district" can be explained to distinguish ZR § 82-34 from other ZR provisions. Specifically, the Appellants propose that it was intended to distinguish ZR § 82-34 from other provisions within the Article 8, Chapter 2 provisions which only apply to portions of the Special Lincoln Square District (e.g. ZR §§ 82-37 through 82-40). This analysis is belied by the Appellants' own interpretation of the words "within the special district" to mean *not* within the entirety of the Special District.

Alternatively, the Appellants suggest that perhaps the language was intended to differentiate ZR § 82-34's version of the bulk distribution rule with the general tower-on-a-base provisions of ZR § 23-651(a)(2). This argument fails for two reasons. Firstly, the Appellants state that this language is meant to distinguish the two provisions while, in the next breath, actively comparing the two provisions in an attempt to say that ZR § 82-34 only applies to R9 and R10 zoning districts—just like ZR § 23-651(a)(2). Secondly, if the drafters of the ZR intended for this language to operate as a simple means of distinguishing provisions intended for the Special District from their generic counterparts, then they would have added the same prefatory language to other provisions within Article 8, Chapter 2. Alternatively, they could have referenced ZR § 23-651(a)(2) and stated that ZR § 82-34 was only modifying it—a drafting choice specifically made for ZR § 82-36. In essence, the Appellants are left with no alternative explanation for the words "within the special district" besides the logical one—that it applies to *all* developments that are located "within the special district."

Accordingly, the Proposed Building satisfies ZR § 82-34 and the Department acted properly in issuing the Permit.

B. The Proposed Building's Mechanical Space Complies with the ZR

The Appellants allege that floors in the Proposed Building containing mechanical space are contrary to the ZR. The Appellants argue that the mechanical space does not meet the definition of "accessory use" and is impermissibly deducted from the floor area of the building. In fact, the floors in the Proposed Building containing mechanical equipment do meet the accessory use definition in the ZR and are therefore permitted deductions from the Proposed Building's total floor area.

1. *Mechanical Space is Not Included in Floor Area*

ZR § 12-10 defines floor area as:

> …the sum of the gross areas of the several floors of a *building* or *buildings*, measured from the exterior faces of exterior walls or from the center lines of walls separating two *buildings*....
>
> …However, the *floor area* of a *building* shall not include…
>
> …(8) floor space used for mechanical equipment…

The Proposed Building utilizes 548,535.39 square feet of floor area across the entire zoning lot. Pursuant to the ZD1, the Proposed Building contains mechanical equipment on floors 15, 17, 18, and 19. In accordance with the definition of "floor area," such space containing mechanical equipment does not count towards the calculable floor area for the Proposed Building and the zoning lot.

2. *The Proposed Mechanical Space is an Accessory Use*

The Appellants allege that the proposed mechanical space does not meet the definition of "accessory use" in the ZR. While the Department agrees that for mechanical space to be exempt from floor area of a building, it must be an accessory use, the Department disagrees with the Appellants conclusion that the proposed mechanical space fails to satisfy the definition requirements of accessory use.

ZR § 12-10 defines an accessory use as:

> (a) …a *use* conducted on the same *zoning lot* as the principal *use* to which it is related (whether located within the same or an *accessory building or other structure*, or as an *accessory use* of land), except that, where specifically provided in the applicable district regulations or elsewhere in this Resolution, *accessory* docks, off-street parking or off-street loading need not be located on the same *zoning lot*; and
>
> (b) is a *use* which is clearly incidental to, and customarily found in connection with, such principal *use*; and

> (c) is either in the same ownership as such principal *use*, or is operated and maintained on the same *zoning lot* substantially for the benefit or convenience of the owners, occupants, employees, customers, or visitors of the principal *use*....

Space used for mechanical equipment fits this definition. Specifically, mechanical space is a use. "Use" is defined in ZR § 12-10 as either:

> (a) any purpose for which a *building or other structure* or an open tract of land may be designed, arranged, intended, maintained or occupied; or
>
> (b) any activity, occupation, business or operation carried on, or intended to be carried on, in a *building or other structure* or on an open tract of land.

The space containing mechanical equipment meets both of these definitions as it can be described as either a purpose for which the Proposed Building is designed or an activity or operation carried on in the Proposed Building. In either event, mechanical space is a use within the Proposed Building.

The mechanical equipment is located within the Proposed Building and therefore on the same zoning lot as the principal uses (residential and community facility). The accessory use of mechanical equipment is incidental to the principal use, as the mechanical equipment comprises significantly less area than the floor area of the principal uses to which it is accessory. Mechanical equipment, indeed entire floors containing mechanical equipment, is customarily found within buildings for which residential uses are the principal use in the building. Lastly, the mechanical equipment is located in the Proposed Building and owned by the same owner as the principal uses to which it is accessory. Consequently, the proposed mechanical equipment satisfies all of the requirements in the definition of "accessory use."

The Appellants allege that the proposed mechanical equipment is not an acceptable form of accessory use because of the large floor-to-ceiling heights of the floors containing the mechanical equipment (floors 17, 18, and 19). Specifically, the Appellants allege that floors with floor-to-ceiling heights of 48, 64, and 64 feet respectively are not "customarily found" in connection with residential uses. However, the Board has already concluded that floors with large floor-to-ceiling heights containing mechanical space are accessory uses for residential buildings and thereby properly exempt from the calculable "floor area" of a building. In *15 East 30th Street,* BSA Cal. No. 2016-4327-A (September 20, 2017) the Board delved into the ZR's regulation of floor-to-ceiling height of floors with mechanical equipment and specifically ruled that mechanical equipment contained on floors with high floor-to-ceiling heights are permitted accessory uses to the residential/mixed-use buildings that house them.[7] Specifically, the Board considered the height of the floors containing mechanical equipment, the incidental nature of the mechanical equipment, and whether or not such mechanical equipment was customarily found in such buildings. Regarding the floor-to-ceiling height of mechanical floors, the Board found that

[7] A copy of *15 East 30th Street* is hereby attached as Exhibit A.

"the Zoning Resolution does not control the floor-to-ceiling height of floor space used for mechanical equipment." *Id*. at page 4.

The Board proceeded to analyze mechanical equipment under the tripartite accessory use test, focusing on the "clearly incidental to" and "customarily found in connection with" prongs. The Board credited the Department's analysis as to whether the amount and size of the mechanical equipment was justifiable in relation to the building to which it was serving. Regarding the customary prong, the Board focused on similarly situated large residential and mixed-use buildings that were planned, under construction, or had been recently built to determine if the proposed mechanical equipment was the industry norm. The Board focused on approved or proposed mechanical equipment floors on six other tall buildings, including one located on the same block as 15 East 30th Street (the building the Board was reviewing in that case). In light of the similar buildings containing similarly heighted mechanical floors and in light of the Department's statement that "mechanical floor space deductions are evaluated on a case-by-case basis," the Board agreed that floors containing mechanical equipment with high floor-to-ceiling heights are customarily found within the City. As such, the Board concluded that the mechanical equipment floors were an accessory use and properly deducted from the floor area in the building.

Accordingly, the Department followed the Board's direction in analyzing floors housing mechanical equipment for the Proposed Building. In analyzing the "incidental" prong, the Department reviewed the proposed mechanical equipment and found that the amount of equipment proposed was sufficient to justify its exemption from floor area as it was serving the principal use.

Likewise, just as the Board found in *15 East 30th Street*, the Department agreed that mechanical equipment for the Proposed Building was customarily found in connection with similarly situated residential and mixed-use buildings.

Therefore, the Department was correct in concluding that the mechanical space was an accessory use within the Proposed Building and is therefore deducted from the total floor area.

3. *The ZR Was Amended After the Permit Was Issued for the Proposed Building*

On May 29, 2019, the CPC amended the ZR to limit the floor-to-ceiling heights of mechanical floors, the clustering of mechanical floors, and the overall prevalence of mechanical floors within tower portions of certain R9 and R10 buildings.[8] In CPC Report N 190230 ZRY, issued on April 10, 2019, the CPC explained the rationale and purpose of the amendment.[9] Specifically, the report stated that "[i]n recent years, some developments have been built or proposed that use

[8] Specifically, the amendment added ZR §§ 11-34, 11-341, 35-352, 98-221 and amended ZR §§ 23-10, 23-16, 24-112, and 96-21.
[9] A copy of CPC Report N 190230 ZRY is hereby attached as Exhibit B.

mechanical or structural floors that are taller than is usually necessary to meet functional needs…" The report also noted that "[t]he height of these [previously proposed or built] mechanical spaces varied significantly but ranged between approximately 80 feet to 190 feet in the aggregate." In essence, the CPC agreed with the Department that such floor-to-ceiling height was previously not regulated by the ZR and therefore amended the ZR to disallow a previously approved practice.

Importantly, the PAA which changed the scope of the Permit was approved on April 4, 2019, and the foundation for the Proposed Building was complete prior to the date of the text change. Accordingly, the amended provisions of the ZR are inapplicable to the Proposed Building. That retroactive application of the new law, however, is exactly the request that the Appellants seek of the Board. Such requirement to comply with the amended ZR text would be contrary to ZR § 11-331 (Right to Construct if Foundations Complete), which clearly states that if a permit is issued and foundations are complete, subsequent ZR amendments are inapplicable.

Put simply, the Appellants would like to apply a newly-enacted zoning prohibition to the Proposed Building which had received the lawful approval of the PAA which changed the scope of the Permit and had completed the foundation of the building *prior* to the enactment of the new prohibition. Since floors containing mechanical equipment with higher than average floor-to-ceiling heights were not prohibited at the time the Permit was issued and at the time of the subsequent PAA approval, the Department acted appropriately in issuing the Permit.

III. CONCLUSION

Based on the foregoing, the Department respectfully requests that the Board affirm the determination to issue the Permit.

Respectfully submitted,

Michael J. Zoltan

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