# BSA Cal. No. 2019-89-A; BSA Cal. No. 2019-94-A
# Statement of West 66th Sponsor LLC

## I. Introduction

This Statement of Law and Facts is submitted on behalf of West 66th Sponsor LLC ("Owner") in opposition to the appeals filed by City Club of New York, James C.P. Berry, Jan Constantine, Victor A. Kovner, Agnes C. McKeon, and Arlene Simon and by Landmark West! (the "Appellants") with the Board of Standards and Appeals (the "Board") challenging the issuance of a building permit by the Department of Buildings ("DOB") for a new development at 36 West 66th Street (the "Project").

Disappointed by the fact that new regulations that for the first time regulate the height of mechanical spaces were enacted after the Project was lawfully vested in accordance with the Zoning Resolution,[1] Appellants advance two arguments why the building permit is invalid:

First, Appellants argue that heights of the Project's mechanical spaces are nevertheless prohibited under now superseded regulations. This argument flies in the face of the fact that the Zoning Resolution was amended in May 2019 precisely in order to address the absence of any restriction upon the height of mechanical spaces, as was recognized by DOB, the Board, the Department of City Planning ("DCP"), the City Planning Commission ("CPC"), and the City Council.

Second, Appellants argue that DOB erred in calculating the bulk distribution requirements of ZR Section 82-34 based on the entire zoning lot, in accordance with the plain language of that provision. Quite simply, Appellants would prefer that ZR Section 82-34 read and apply differently than it does. However, Appellants are not entitled to have the Board or a court rewrite the plain language of the Zoning Resolution. See Raritan Dev. Corp. v. Silva, 91 N.Y.2d 98, 107 (1997).

For these and other reasons described herein, the DOB determination should be upheld and the appeals denied.

## II. Issues Presented

1. Did DOB correctly determine that the floor-to-ceiling heights of the mechanical spaces in the Project were permitted under the provisions of the Zoning Resolution in effect prior to May 29, 2019?

2. Did DOB correctly apply the bulk distribution rule of ZR Section 82-34, a regulation of the Special Lincoln Square District, to the zoning lot?

[1] References to the "Zoning Resolution" or "ZR" shall mean the Zoning Resolution of the City of New York, effective December 15, 1961, as amended from time to time.

## III. Brief Response

1. The Zoning Resolution in effect at the time the building permit for the Project was issued did not regulate the floor-to-ceiling height of mechanical spaces, as was both confirmed by the Board in 2017 and recognized by CPC and the City Council in 2019. On May 29, 2019, the City amended the Zoning Resolution to regulate the height of these spaces, but the Project was vested under the prior regulations as of April 15, 2019 and the new rule does not apply.

2. DOB correctly applied the bulk distribution rule of the Special District to the zoning lot because the zoning lot is entirely within the Special District and the rule applies without exception to all zoning lots within the Special District with no exceptions and irrespective of the underlying zoning district designation.

## IV. Project History

The Project is a 39-story residential and community facility development located on a zoning lot comprised of Manhattan Block 1118, Lots 14, 45-48, and 52 (such zoning lot, the "Project Site"). Owner originally sought to obtain permits to develop a residential building on a smaller zoning lot consisting of Lots 45-48 (the "Initial Project"). Owner obtained approval from DOB for foundation work for the Initial Project on October 25, 2016, and obtained a new building permit for a 25-story building on June 7, 2017 (Exhibit 1 hereto). Thereafter, Owner acquired an additional parcel (Tax Lot 14) as well as unused development rights from an adjacent parcel (Tax Lot 52). Those acquisitions enabled Owner to expand the development site and increase the amount of floor area in the planned development. On November 17, 2017, after securing those additional development rights, Owner filed Post-Approval Amendments with DOB, seeking approval of plans for a 39-story building at the Project Site.[2]

On July 26, 2018, DOB issued a foundation permit for the Project based on an approved Zoning Diagram (a "ZD-1" form) (Exhibit 2 hereto) showing how the Project as a whole complies with applicable zoning regulations.

On or about September 8, 2018, the cooperative located at 10 West 66th Street, together with Landmark West! (one of the Appellants), submitted a challenge (Exhibit 3 hereto) to the ZD-1 on various grounds pursuant to DOB procedure. The challengers did *not* challenge the calculation of the Project's compliance with ZR Section 82-34—their primary argument before the Board in this Appeal. In that regard, Landmark West! acknowledged that Owner and DOB had *properly* calculated the area to which ZR Section 82-34 (Bulk Distribution) applied, by applying that rule to the entire Project Site. We explain in more detail below why the challengers were correct in this particular regard. See discussion in Section VI, infra.

[2] Appellants complain that this evolution from a smaller building to a larger building was somehow improper or deceptive; however, Owner did not own the requisite parcels and development rights needed to file plans for the larger project until it negotiated and closed on those acquisitions. No City law, rule or regulation required Owner to provide advance notice that it was pursuing opportunities to expand the size of the development footprint and add floor area through the acquisition of an additional parcel and a zoning lot merger.

On November 19, 2018, DOB issued a "ZRD2" form setting forth a detailed response to each of the objections, rejecting the challenge made by Landmark West! and others and reaffirming DOB's approval of the ZD-1. (Exhibit 4 hereto.) In December 2018, Landmark West! initiated an appeal to the Board from DOB's rejection of its challenge to the Project.

Subsequently, on January 14, 2019, DOB issued a notice of its intention to revoke its approval of the ZD-1 on the ground that the height of the mechanical spaces was improper unless Owner provided "sufficient information . . . to demonstrate that the approval should not be revoked." (Exhibit 5 hereto.) Under the terms of that notice, DOB also revoked its prior ZRD2 determination, thereby rendering Landmark West!'s appeal to the Board moot.

By letter dated January 25, 2019 (Exhibit 6 hereto), Owner responded to DOB's notice and explained why the mechanical spaces comply with the Zoning Resolution and, moreover, that the position articulated in DOB's January 14 notice was inconsistent with a recent decision of the Board and prior determinations of DOB itself. DOB took no further action thereafter to revoke its approval of the ZD-1.[3]

On January 28, 2019, CPC reviewed and referred to 13 community boards an application by DCP for a zoning text amendment to modify the residential tower regulations to require mechanical spaces of a certain height to be calculated as residential floor area. A public hearing was held on February 27, 2019.

During this period, Owner revised the plans for the Project in a number of ways, including but not limited to (i) providing fire rated corridors and staging areas between various forms of egress within the mechanical spaces, (ii) providing for elevator access for FDNY personnel to all levels within the mechanical spaces, (iii) constructing a steel catwalk within the mechanical spaces to allow unobstructed access to the entire building perimeter, and (iv) making the transformer room a separate fire-rated enclosure. By letter dated March 7, 2019 (Exhibit 7 hereto), FDNY confirmed to Owner that, "[b]ased on the submitted drawings" and consultation with DOB, FDNY "has **no further objection** to the proposed design" of the Project (emphasis in original).

In response to these submissions, and based on a detailed review of all plans and drawings, DOB approved the architectural plans for the Project on April 4, 2019, and approved the structural, mechanical, plumbing and fire and life safety plans on April 5, 2019. (Exhibit 8 hereto.) Accordingly, as of April 5, Owner's Post-Approval Amendments to the New Building permit issued on June 7, 2017 were fully approved and Owner held a New Building permit for

[3] Appellants attach significance to the fact that in its January 14, 2019 Notice of Intent to Revoke, DOB identified "accessory use" as a possible grounds for revocation of the July 26, 2018 ZD-1 issued for the Project, and express surprise that DOB later "reversed itself" and approved the Project. (CC SOFL at 24; LW! SOF at 16.) DOB did not "reverse itself." The letter expressly reserved decision and permitted Owner to submit additional information. DOB determined not to proceed with a revocation following later receipt of the letter setting forth the several reasons why there was no basis for doing so under the Zoning Resolution.

the Project. On April 15, 2019, DOB was advised that the foundation had been completed and the Project was therefore vested pursuant to ZR Section 11-331.[4]

Also on April 4, 2019, a new ZD-1 was approved for the Project (Exhibit 9 hereto), and the January 14, 2019 Letter of Intent to Revoke was rescinded (Exhibit 10 hereto). From a zoning perspective, the Project shown on the new ZD-1 differs only in limited respects from the building shown on the July 26, 2018 ZD-1. One difference is the configuration of the Project's mechanical spaces, which were modified to consist principally of three spaces located at the 17th, 18th and 19th floors, having floor-to-ceiling heights of 64, 64 and 48 feet, respectively. On April 11, 2019, DOB renewed and reissued the new building permit (Exhibit 11 hereto).

On April 10, 2019, CPC voted to adopt the zoning text amendment. (CPC Report N 190230 ZRY, Exhibit 12 hereto.) The City Council adopted the zoning text amendment with modifications on May 29, 2019. (Council Resolution 0916-2019, Exhibit 13 hereto.)

On April 25, 2019, the City Club of New York, the cooperative located at 10 West 66th Street, and several local residents commenced an action in New York Supreme Court seeking declaratory relief annulling the building permit issued on April 11. City Club of New York v. Extell Development Company, No. 154205/2019 (Sup. Ct. filed April 24, 2019). The court denied a motion for a temporary restraining order and scheduled oral argument on the plaintiffs' application for a preliminary injunction. On May 21, 2019, Owner filed a cross motion to dismiss the complaint, on multiple grounds, including that the plaintiffs had failed to exhaust their administrative remedies by forgoing an appeal to the Board. Following oral argument, the court issued a decision and order on June 11, 2019, granting the cross motion to dismiss. The plaintiffs appealed this decision to the Appellate Division on July 5, 2019.

## V. Mechanical Space Objection

Appellants object to the floor-to-ceiling heights of the Project's mechanical spaces as allegedly inconsistent with use and floor area regulations. The objection fails because, as of April 15, 2019, the date the Project was vested under ZR Section 11-331 (the "Project Vesting Date"), the Zoning Resolution did not contain any limitation on the floor-to-ceiling heights of mechanical spaces. The Board decided this exact issue in BSA Cal. No. 2016-4327-A (2017), upholding determinations made by DOB and supported by DCP. Following the Project Vesting Date, the City Council voted on May 29, 2019, to amend the Zoning Resolution to regulate the heights of mechanical spaces by requiring, among other things, that mechanical spaces with a height above 25 feet be included in the calculation of residential floor area. It is undisputed that these new regulations do not apply to the Project, yet Appellants persist in asserting that the heights of the Project's mechanical spaces are unlawful under the regulations in effect prior to the May 29, 2019, amendments.

[4] ZR Section 11-331 of the Zoning Resolution generally provides that an owner may continue construction of a building pursuant to zoning regulations no longer in effect provided that two conditions are met: (a) a new building permit was lawfully issued pursuant to the regulations in effect prior to amendment; and (b) building foundations have been completed.

In BSA Cal. No. 2016-4327-A, challengers contended that the mechanical spaces proposed for a building at 15 East 30th Street, which would have a combined height of 132 feet, were unlawful. DOB rejected an initial zoning challenge, stating that "the Zoning Resolution does not regulate the floor-to-ceiling height of a building's mechanical spaces." BSA Cal. No. 2016-4327-A, 1. In a letter to the Board dated July 20, 2017, the Director of the Zoning Division of DCP stated "there are no regulations in the Zoning Resolution controlling the height of mechanical floors." (Exhibit 14 hereto). The Board agreed with DOB and DCP in full and ruled:

> [B]ased upon its review of the record, the definition of "floor area" set forth in ZR § 12-10 and the Zoning Resolution as a whole, the Board finds that the Zoning Resolution does not control the floor-to-ceiling height of floor space used for mechanical equipment.
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> BSA Cal. No. 2016-4327-A, 4.

The Board explained that "insofar as Appellant or members of the community take issue with provisions of the Zoning Resolution—or absence thereof—as enacted, that grievance falls outside the scope of the Board's authority to review this appeal." Id. at 5. That is, "the Board does not have the power to zone." Id. The Board thus recognized that it had no authority to determine that the height of a mechanical space was unlawful.

In 2018, one year following the Board's decision in BSA Cal. No. 2016-4327-A, Landmark West! and others raised concerns about the floor-to-ceiling heights of the mechanical spaces proposed for the Project and advocated for changing the Zoning Resolution to address their grievance. One of the obvious and clear goals of this effort was to have new restrictions adopted as quickly as possible so that they would apply to the Project. Although the City Council did adopt a new provision on May 29, 2019, it did so after the Project Vesting Date. It is therefore undisputed that this new provision restricting the heights of the mechanical spaces does not apply to the Project.

There is no better evidence that the floor-to-ceiling heights of the Project's mechanical spaces are lawful than the fact that, on May 29, 2019, more than one month after the Project Vesting Date, the City approved an amendment to the text of the Zoning Resolution that for the first time regulates the heights of mechanical spaces. "We must assume that the Legislature in enacting the section intended that it should effect change in the existing law and accomplish some useful purpose." Raritan Dev. Corp., 91 N.Y.2d at 103 (quoting Mabie v. Fuller, 255 N.Y. 194, 201 (1931)).

In its report for the text amendment, CPC recognized that the zoning text amendment was intended to address an absence of regulation in this area, stating that "[t]he [Zoning] Resolution does not specifically identify a limit to the height of such [mechanical] spaces." (Exhibit 12, at 1.) Equally to the point, the CEQR Environmental Assessment Statement for the text amendment prepared by DCP stated that in the "No-Action scenario" (i.e., the future without the proposed amendment), developments could be built with mechanical spaces with heights ranging from 80'-190', whereas under the "With-Action Scenario" (i.e., the future with the proposed amendment), the heights of mechanical spaces would be limited to a height range of 10'-25'.

(Residential Tower Mechanical Voids Text Amendment: Revised Environmental Assessment Statement CEQR No. 19DCP110Y (April 9, 2019), Exhibit 15 hereto, at 4–9.) It was thus clearly understood that the zoning text amendment would change the law and generally serve to reduce the potential heights of mechanical spaces,[5] and was not a "clarification" regarding previously existing height limits, as Appellants now assert.[6] (CC SOFL at 27; LW! SOF at 20.)[7]

Indeed, CPC noted that the seven examples of sites with tall mechanical spaces identified in a survey it had conducted in preparing the zoning text amendment were permitted under existing zoning regulations, DOB interpretations, and BSA Decisions. (Exhibit 12, at 15.) These seven examples included the Project.[8] CPC thus clearly understood that the Project's mechanical spaces were lawful under the law then in effect.[9]

In the face of this clear history, Appellants argue that the Project's mechanical spaces are unlawful because the heights are not "customarily found in connection with" mechanical spaces within the meaning of the ZR Section 12-10 definition of "accessory use." (CC SOFL at 23; LW! SOF at 16.) At the outset, we believe that mechanical spaces are neither a "use" nor an "accessory use."

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[5] The text amendment creates a new framework that discourages but does not prohibit tall mechanical spaces. ZR Section 23-16 as amended requires that, in non-contextual R9 and R10 residential districts and their equivalent commercial districts, floors occupied predominantly by mechanical space taller than 25 feet are counted as floor area. Every additional 25 feet of height of the mechanical floor counts as an additional floor of floor area. Further, any mechanical spaces located within 75 feet of one another that, in the aggregate, add up to more than 25 feet in height similarly count as floor area. Appellants' current argument that there was an implied height limit prior to the zoning text amendment is at odds with the zoning framework that the City ultimately adopted—a set of disincentives to increasing the height of mechanical spaces that does not impose any absolute limits. Incredibly, Appellants' argument would mean that, in this respect, the prior law was more stringent than the new law adopted in the May 29, 2019, amendments.

[6] This is further demonstrated by CPC's rejection of a proposal made by real estate industry representatives that projects in the pre-development phase and under development with mechanical spaces that exceeded the proposed new limitations should be grandfathered. CPC's discussion of the grandfathering proposal (Exhibit 12, at 15-16) evidences CPC's clear understanding that then-current law did not restrict the height of mechanical spaces, and that adopting a grandfathering provision would perpetuate the absence of height restrictions for projects that were under development. At the City Council, the zoning text amendment was in fact modified to add a new ZR Section 11-341, which expressly grandfathers a particular development, described as "a development on a corner lot with a lot area of less than 5,000 square feet, located in a C5-2 District in Community District 5." ZR § 11-341. However, the grandfathering of mechanical floors in this development is expressly conditioned upon mechanical spaces being limited to a height of 80 feet. Id. Accordingly, the City Council similarly recognized that grandfathering of a project would allow for tall mechanical spaces and only allowed this for a particular project, subject to a restriction of its mechanical floors to a height of 80 feet.

[7] Citations to "CC SOFL" refer to City Club of New York's Statement of Facts and Law, BSA Cal. No. 2019-89-A. Citations to LW! SOF refer to Landmark West!'s Statement of Facts, BSA Cal. No. 2019-94-A.

[8] See CPC review session presentation (January 28, 2019), presentation at https://www.youtube.com/watch?v=wna5xmtqroc&feature=youtu.be.

[9] Landmark West! recognized this as well, and submitted testimony to CPC that without further amendments to the zoning text it desired, the proposed text amendment would effectively only curb the Project, thereby acknowledging that the Project could proceed unimpeded without it. (Exhibit 16 hereto.)

A "use" is defined under ZR Section 12-10 as "(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 uses of the Project within the meaning of this definition are residential and house of worship. Plainly, a boiler, HVAC or other mechanical equipment is not the "purpose" of the Project or the business or occupation intended to be carried on in the Project. Likewise, an "accessory" use is a "use which is clearly incidental" to another use, such as a gift shop (Use Group 6C) in a museum (Use Group 3) or a small convenience store (Use Group 6A) at a gas station (Use Group 16B).[10]

Mechanical space is therefore not an accessory use any more than it is a principal use. Rather, it is building infrastructure used for the operation of any type of building, whether for residential, commercial or manufacturing use. Mechanical space is, in this way, similar to many other areas within a building, such as elevator shafts or stairwells, elevator or stair bulkheads, or exterior wall thickness. Like these spaces, mechanical space is not a distinct use but part and parcel to the uses in the building.

Even assuming *arguendo* that mechanical space is an "accessory use," the Board determined in BSA Cal. No. 2016-4327-A, that the floor-to-ceiling height of a particular mechanical space is not relevant to determining if it is a legal accessory use. In its letter to the Board, DCP had stated that "regardless of its floor-to-ceiling height, any space which is devoted to accessory residential mechanical equipment is considered to be a legal accessory use." (Exhibit 14, at 1.) The Board agreed and applied the "accessory use" test by considering only whether the "the amount of floor space used for mechanical equipment" and "the proposed mechanical equipment" were clearly incidental to and customarily found in connection with the principal use of the Project. BSA Cal. No. 2016-4327-A, 4.[11]

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[10] An " accessory use" is defined under ZR Section 12-10 in relevant part as a "*use*" that:
- (a) … is conducted on the same zoning lot as the principal use to which it is related…
- (b) … 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.

[11] The case law that the Appellants cite is not to the contrary. In N.Y. Botanical Garden v. Bd. of Standards and Appeals, 91 N.Y. 2d 413 (1998), the Court of Appeals decided whether a tall radio transmission tower proposed for construction at Fordham University was an "accessory use." The Court of Appeals noted that, unlike other types of accessory uses such as "home occupations," radio and television towers are not subject to any size restriction under the Zoning Resolution. Id. at 422–3. For that reason, the court looked to the signal strength and not the height of Fordham's proposed radio tower to determine if it was a use customarily found in connection with a college or university. See id. at 421–2. In BSA Cal. No. 14-11-A (2011), cited by Appellant Landmark West!, the Board upheld a DOB determination that a cellar space was not accessory to a residential use due to its size, under standards set forth in a Buildings Bulletin that limited the area of floor space of accessory non-habitable cellars. The standard promulgated in the Bulletin was not based on the volume of space occupied by a cellar, but the floor space of a cellar as a percentage of the floor space of the residential dwelling. Further, as noted by the Board in a subsequent case, BSA Cal. No. 151-12-A (2012), BSA Cal. No. 14-11-A involved a single, objective and universally applicable standard memorialized in a Buildings Bulletin. By contrast, in Cal. No. 151-12-A itself, which involved the accessory use status of an amateur radio tower, the Board stated that it considered the lack of an objective standard for determining whether an amateur radio tower of a given height is accessory "to be problematic and prone to arbitrary results" and "recognize[d] that establishing a bright line standard for the permissible height of accessory

Appellants argue that the survey of mechanical space heights subsequently conducted by DCP in connection with the zoning text amendment supplies evidence that the tall mechanical spaces at the Project are not customary, thereby allowing the Board to determine that they are not "customarily found in connection with" residential or other uses.[12] (CC SOFL at 25; LW! SOF at 17.) But whether tall mechanical spaces are common in residential buildings (and the record before the Board in Cal. No. 2016-4327-A showed that they have proliferated) is irrelevant. As discussed above, DCP conducted the study with the clear understanding that tall mechanical spaces could be built without restriction with regard to height, recognizing that the Board had correctly determined that the issue could be addressed only by legislative amendment.

Appellants' other argument that the tall mechanical spaces do not qualify for a floor area exemption because "the space must actually be 'used for mechanical equipment" similarly misses the point. (CC SOFL at 26 (quoting ZR § 12-10); LW! SOF at 18 (quoting ZR § 12-10).) The exclusion from the calculation of floor area set forth in ZR Section 12-10 is for "*floor* space used for mechanical equipment." (Emphasis added). In effect, Appellants are asking the Board to improperly graft onto the floor area exclusion "an addendum of its own," Raritan Dev. Corp., 91 N.Y.2d at 104, relating to the volume of space in which the mechanical floor space is located.

In short, having successfully advocated for a zoning text amendment to limit the height of the Project's mechanical spaces but disappointed that the zoning text amendment was enacted after the Project Vesting Date, Appellants now remarkably contend that a legislative change was unnecessary to prohibit or restrict tall mechanical spaces. This objection to DOB's approval should be rejected, consistent with the clear determinations and conclusions reached by DOB, DCP and the Board in 2017 and consistent with the clear understanding of CPC and the City Council in their adoption of the recent amendments.

## VI. Special District Rule Objection

Appellants' second objection is to DOB's approval of a new building permit for the Project on the basis of DOB's application of ZR Section 82-34, a regulation of the Special Lincoln Square District (the "SLSD" or "Special District"), the special zoning district in which the Project Site is located. The provision reads in relevant part:

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radio towers may require an amendment to the Zoning Resolution or the promulgation of a Buildings Bulletin, as was the case in BSA Cal. No. 14-11-A." BSA Cal. No. 151-12-A, 9. Appellants also cite New York City Educ. Constr. Fund v. Verizon NY Inc., 981 N.Y.S.2d 11 (Sup. Ct. 2012), aff'd, 981 N.Y.S.2d (1st Dep't 2014), in which the Supreme Court determined that an opinion issued by DOB was not a final agency determination and that therefore a challenge to such determination was premature. The case is not relevant to the present appeal.

[12] We note that, although the Appellants argue before the Board that this survey provides evidence that was unavailable to the Board in BSA Cal. No. 2016-4327-A and therefore warrants a different result, in its brief appealing the decision of the Supreme Court, the City Club of New York states that the Board in BSA Cal. No. 2016-4327 "decisively rejected" their argument regarding mechanical voids and argue that, as a result, a requirement to exhaust remedies at the Board is futile. Brief for Plaintiffs-Appellants at 35, City Club of New York v. Extell Development Company, No. 154205/19 (1st Dep't July 5, 2019).

> Within 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.

The total floor area permitted on the Project Site is 548,543 square feet, which includes 421,260 square feet permitted in the C4-7 district (12 FAR) and 127,283 square feet permitted in the R8 district (6.5 FAR). Under ZR Section 82-34, 60% of the total floor area permitted on the zoning lot (329,125.8 square feet), must be located below a height of 150 feet. With the construction of the Project, 329,131.92 square feet of floor area would be located below a height of 150 feet. (Exhibit 9, at 2). The Project thus fully complies with this provision.

Appellants argue that the phrase "[w]ithin the Special District" somehow means in only certain portions of the Special District, but not within the entire Special District. But those select portions to which Appellants claim ZR Section 82-34 applies (i.e., C4-7 districts) or to which Appellants claim ZR Section 82-34 does not apply (i.e., R8 districts) are nowhere identified in the text of the regulation. Appellants therefore ask the Board to "interpolate exceptions in a statute," something which it may not do. Ocean Hill-Brownsville Governing Board v. Board of Education, 30 A.D. 447, 451 (2nd Dep't 1968).

Appellants would prefer that ZR Section 82-34 read and be applied differently, and they therefore make various arguments why the plain language of the statute should be ignored. For the reasons stated below, Appellants' request to have the Board rewrite the terms of the plain language of the Zoning Resolution should be rejected.

**A. ZR Section 82-34 Applies to All Zoning Lots in the SLSD, Including All Portions of the Project Site**

The SLSD, set forth in Article VIII, Chapter 2 of the Zoning Resolution, was established in 1969 to guide new growth and uses in the area surrounding the Lincoln Center campus and Fordham University developed pursuant to the 1957 Lincoln Square Urban Renewal Plan. Among other things, the Special District as originally enacted regulated ground floor uses and urban design elements, and made floor area bonuses available by CPC Special Permit in exchange for the provision of certain public amenities. CP-20365A. Amendments made in 1984 eliminated most bonus-able public amenities, CPC Report N 840235 ZRY, while a 1987 amendment substituted the new as-of-right inclusionary housing program for a prior lower income housing bonus, CPC Report N 850487 ZRY(A). In 1993, a comprehensive set of amendments to the SLSD was adopted which included: (1) limiting the amount of commercial floor area allowed in certain areas to 3.4 FAR, (2) imposing a limit of 1 FAR for entertainment uses in the Special District, with limited exception only, (3) mandating retail continuity and transparency requirements at the ground level, (4) creating urban design controls to regulate building form throughout the district and providing special controls for specific sites, (5) establishing requirements for subway stair relocation or access on certain sites, (6) reducing the bonus amount for arcades, and (7) modifying parking and loading requirements. CPC Report N 940127(A) ZRM, December 20, 1993 (Exhibit 17 hereto), approved by the City Council under Resolution No. 130, February 9, 1994 (Exhibit 18 hereto). ZR Section 82-34 was among the many provisions added to the SLSD regulations at that time.

The SLSD regulations include numerous provisions which apply only to certain subdistricts or other specially designated areas of the SLSD, to specific street frontages or other locations, or to certain of the underlying zoning districts mapped within the Special District, reflecting the fine-grained and carefully tailored application of the SLSD provisions to portions of the Special District. These include, by way of example, the following use and bulk regulations:

- ZR § 82-11: Special provisions for optional arcades in developments which coincide with street lines on the east side of Broadway between West 61st and West 65th Streets or the east side of Columbus Avenue between West 65th and West 66th Streets;

- ZR § 82-21: Restrictions on street level uses within 30 feet of Broadway, Columbus Avenue or Amsterdam Avenue street lines;

- ZR § 82-23: Streetwall transparency provisions for buildings located on Broadway, Columbus Avenue or Amsterdam Avenue;

- ZR § 82-24: Supplementary sign regulations for Subdistrict B of the SLSD;

- ZR § 82-31: Restriction upon the maximum permitted commercial floor area "[w]ithin Subdistrict A, for any building in a C4-7 District ";

- ZR § 82-32: Floor area bonus subway improvements for zoning lots adjacent to the West 59th Street or the West 66th Street subway stations; and

- ZR § 82-37: Regulation of street wall height, length and location on specified frontages along Broadway and Columbus Avenues and within certain blocks identified in the District Plan.

Other SLSD provisions apply to the Special District as a whole, subject to certain identified exceptions:

- ZR § 82-35: "Within the Special District, all buildings shall be subject to the height and setback regulations of the underlying districts, except as set forth in [ZR Section 82-37 (a)-(d) under certain conditions]."

- ZR § 82-50: "The regulations of Article I, Chapter 3 (Comprehensive Off-street Parking and Loading Regulations in the Manhattan Core) and the applicable underlying district regulations of Article III, Chapter 6, relating to Off-Street Loading regulations, shall apply in the Special Lincoln Square District except as otherwise provided in this Section . . . ."

In contrast to all of the above, ZR Section 82-34 applies with no delineated exceptions—that is, it applies within the Special District irrespective of subdistrict, street frontage or other designated location. Unlike other provisions of the SLSD, see, e.g., ZR § 82-31, discussed infra, ZR Section

82-34 therefore applies irrespective of the underlying zoning district designation(s) on a zoning lot. It therefore applies equally and fully to: (a) a zoning lot mapped with an R8 district only; (b) a zoning lot mapped with a C4-7 district only; and (c) a zoning lot, such as the Project Site, which is split between C4-7 and R8 districts.

Appellants' argument that ZR Section 82-34 applies only within a C4-7 district flies in the face of the language and structure of the SLSD, and flouts the admonition that "[a] court must consider a statute as a whole, reading and construing all parts of an act together." Friedman v. Connecticut Gen. Life Ins. Co., 9 N.Y.3d 105, 115 (2007). As discussed above, each provision of the SLSD that does not apply throughout the Special District as a whole identifies the specific subdistrict, street frontage, underlying zoning district or other specific location to which it applies. Moreover, where the phrase "within the Special District" is utilized but the rule contains exceptions, the SLSD regulations are careful to describe those exceptions with precision. See, e.g., ZR § 82-35, discussed infra. By contrast, ZR Section 82-34 states that its rule applies "within the Special District" without *any* qualifications or exceptions. It thus means exactly what it says: this rule applies throughout the Special District.

Appellants argue that even though it doesn't say so, ZR Section 82-34 must be read to apply only within a C4-7 district because tower development is not allowed in an R8 district. (CC SOFL at 2; LW! SOF at 2.) But that is plainly incorrect, since ZR Section 24-54 allows for towers consisting of community facility use to be developed in an R8 district under the standard tower regulations of ZR Section 23-652.[13] Regardless, the plain language of ZR Section 82-34 applies the rule to developments in the Special District without exception—and thus irrespective of whether a development is being built under standard height and setback regulations or tower regulations.

### B. DOB's Application of ZR Section 82-34 to the Project Site is Fully Consistent With the Split Lot Rules

Ignoring the plain language of ZR Section 82-34, Appellants assert that DOB's calculation of bulk distribution under that section based on the entire Project Site is prohibited by the "split" lot rules of the Zoning Resolution which govern zoning lots that straddle a zoning district boundary. (CC SOFL at 18, LW! SOF at 12.) That is also wrong. To the contrary, DOB's straightforward application of ZR Section 82-34 is fully consistent with the "split" lot rules.

This conclusion follows directly from the language of the Zoning Resolution and the fundamental principles applicable to "split" lots. As the Appellate Division recognized in Beekman Hill Ass'n v. Chin, 274 A.D.2d 161 (1st Dep't 2000), the Zoning Resolution provisions governing "split" lots work "on a regulation-by-regulation basis," id. at 175, such that

[13] Exhibit 19 hereto illustrates two scenarios involving development of a community facility tower within the R8 portion of the Project Site. Drawing SK-1 illustrates that if, as Appellants argue, ZR Section 82-34 did not apply to the R8 district, a 30-story, 470-foot tower could be built on the zoning lot depicted. Drawing SK-2 illustrates that application of ZR Section 82-34, as mandated by the language of that provision, would result in a 22-story, 350-foot tower.

(1) compliance with statutory requirements is determined and measured on the basis of the zoning lot as a whole where both parts of the zoning lot are subject to the same rule, and (2) a zoning lot is "treated as a split-lot only with respect to the application of individual use or bulk regulations that do not apply to both portions of the zoning lot," id. at 175.

Here, unable to point to any language in ZR Section 82-34 which limits the applicability of that provision to one portion of the Project Site only, Appellants instead point to another provision altogether—ZR Section 82-36—and argue that that provision somehow limits the application of ZR Section 82-34 to the C4-7 portion of the Project Site, excluding the R8 portion. (CC SOFL at 11; LW! SOF at 8.)

However, in contrast to ZR Section 82-34, the SLSD provision governing tower coverage set forth in ZR Section 82-36 applies only to those portions of the Special District in which towers are permitted under commercial zoning district regulations (i.e., the C4-7 district). ZR Section 82-36 (Special Tower Coverage and Setback Regulations) sets forth how the underlying requirements for tower development in commercial districts set forth in ZR Section 33-45 (Tower Regulations) or ZR Section 35-64 (Special Tower Regulations for Mixed Buildings) apply in the SLSD, with certain modifications related to, inter alia, the calculation of tower lot coverage. The referenced provisions, ZR Sections 33-45 and 35-64, apply in a C4-7 district but not in an R8 district. The Project Site is therefore a "split" lot for purposes of the tower rules set forth in ZR Section 82-36. This result is in accord with the provisions of ZR Section 33-48 which state, in relevant part, that "whenever a zoning lot is divided by a boundary between a district to which the provisions of ZR 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 (Special Provisions for Zoning Lots Divided by District Boundaries), shall apply."

As discussed above (see Section I) nothing in ZR Section 82-34 sets forth a similar limitation restricting its applicability to a C4-7 district only. Nor does ZR Section 82-36, whether by cross-reference or otherwise, purport to provide that the bulk distribution calculation rules set forth in ZR Section 82-34 are limited to the C4-7 portion of a split zoning lot. Under the "regulation-by-regulation" approach pronounced by the Beekman court, the Project Site is not a "split" lot for purposes of application of ZR Section 82-34, and in the absence of statutory language limiting its application, that provision must be applied across the entire zoning lot without differentiating between zoning districts.

DOB precedent is consistent with this result. In 2002, DOB approved a residential tower within the Special District, located at 1930 Broadway. The 1930 Broadway zoning lot is divided between a C4-7 district (28,765 square feet) and an R8 district (9 square feet), for a total of 28,774 square feet. As shown on Drawing Z-01 (1930 Broadway Drawings, Exhibit 20 hereto), the bulk distribution calculation under ZR Section 82-34 approved by DOB was based on the amount of floor area provided on the entire zoning lot (345,196 square feet), including 345,180 square feet in the C4-7 district and 16 square feet in the R8 district. By contrast, as shown on Drawing Z-02, the calculation of minimum and maximum tower coverage under ZR Section 82-36 approved by DOB was based on the lot area of the C4-7 portion of the zoning lot only (28,765 square feet).

In fact, Appellants themselves have recognized that the plain language of the bulk distribution rule set forth in ZR Section 82-34 applies to the entire Project Site and that the calculation cannot be limited to the C4-7 district within the zoning lot. In its September 8, 2018, Zoning Challenge to the ZD-1 issued by DOB on July 26, 2018, Landmark West! stated "ZR 82-34 instructs that floor area under 150 feet should be calculated on the entire zoning lot." (Exhibit 3, at 8.) In this appeal, Landmark West! has reversed course, now arguing—in defiance of the plain language of the regulation—that ZR Section 82-34 does not apply to the entire Project Site, but instead only to the C4-7 portion of the zoning lot.

At the time of their initial challenge, Appellant Landmark West! argued that the tower lot coverage requirements of ZR Section 82-36 are calculated over the entire zoning lot, failing to recognize that the tower coverage rules apply only to the C4-7 portion of the Project Site. Having realized that fact, they now reverse course because they do not like the outcome associated with applying the regulations as written. Landmark West!'s initial position (in its 2018 challenge) that the calculation of tower lot coverage under ZR Section 82-36 is based on the entire Project Site was as untethered from the plain language of the Zoning Resolution and the "split" lot rules as the argument it now makes in this appeal seeking to calculate the bulk distribution rule on the basis of the C4-7 portion alone. ZR Sections 82-34 and 82-36 are simply different in their scope, the former applying to the Project Site as a whole and the latter to the C4-7 portion of the Project Site only. Appellants' insistence on trying to conflate one with the other—either by arguing that both apply to the Project Site as a whole or to the C4-7 portion of the Project Site alone—are necessarily divorced from the plain language of one of the two provisions, and is an attempt to rewrite the statutory framework at issue.

### C. The Phrase 'Within the Special District' Is Not A Reference to ZR Section 23-651

Appellants argue that the phrase "within the Special District" means something different altogether than what the plain language provides, specifically, that it is intended only to highlight that ZR Section 82-34 differs in what they characterize as "minor" respects from the "Bulk Packing" rule set forth ZR Section 23-651(a)(3).[14] (CC SOFL 11, 18-19; LW! SOF at 7, 12-13.) According to this convoluted logic, the term "within the Special District" signifies in four short words that "[t]he general version [of the Bulk Packing rule in ZR Section 23-651(a)(3)] differs from the Special District version [in ZR Section 82-34] in that it is slightly less demanding, and also more complex: the required percentage of floor area below 150 feet [under ZR Section 23-651(a)(3)] starts at 55 percent and increases to 59.5 percent as tower lot coverage decreases from 40 percent to 31 percent." (CC SOFL at 19; LW! SOF at 12-13.)

The pretext for Appellants' fanciful argument regarding ZR Section 82-34 is that the 1993 amendments to the SLSD which include ZR Section 82-34 and the Tower-on-a-Base regulations (which include ZR Section 23-651(a)(3)) were adopted through separate actions on the same day. (CC SOFL at 18-19; LW! SOF at 12.) In effect, Appellants conjecture that CPC

[14] ZR Section 23-651(a)(3) states: "At least 55 percent of the total floor area permitted on the zoning lot shall be located in stories located either partially or entirely below a height of 150 feet. When the lot coverage of the tower portion is less than 40 percent, the required 55 percent of the total floor area distribution, within a height of 150 feet, shall be increased in accordance with the following [table]."

must have wanted to convey to readers of the Zoning Resolution that the two provisions differ only in "minor" respects. Of course, if CPC wanted to say that ZR Section 23-651(a)(3) applies in the SLSD, subject to certain modifications, it easily could have done so.[15] And ZR Section 82-34 plainly says nothing of the kind. The characterization of the phrase "within the Special District" as a mere "explanatory note" included in the text of the statute is, simply put, nonsensical. A statute must be "construed 'according to its natural and most obvious sense, without resorting to an artificial or forced construction.'" Schmidt v. Roberts, 74 N.Y.2d 513, 520 (1989) (quoting McKinney's Cons Laws of NY, Book 1, Statutes § 94).

Appellants' tortured reading of the phrase "within the Special District" carries with it an underlying, albeit transparent agenda: by reading the phrase out of the statute and relegating it to an explanatory note that ZR Section 82-34 varies from Tower-on-a-Base regulations in only a "minor" respect (i.e., with respect to the percentage of floor area subject to bulk distribution), Appellants are seeking to rewrite the method for calculation of bulk distribution under ZR Section 82-34 to function in the exact same manner as the rules set forth in ZR Section 23-651(a)(3) apply with respect to a "split" lot that includes a portion in an R8 district. That is because, as detailed below, ZR Section 23-651(a)(3) applies to floor area generated within R9 or R10 zoning districts only, such that the R8 portion of a zoning lot split between an R9 or R10 district and an R8 district is not included in the calculation. But that of course is not the rule that applies in the SLSD.

This attempt to characterize the Special District rule as another version of the Tower-on-a-Base regulations that apply outside the SLSD fails for several reasons:

First, the Tower-on-a-Base regulations apply only in R9 and R10 districts, or in C1-8, C1-9, C2-7 and C2-8 districts. See ZR §§ 23-651, 35-64(a). They do not apply in C4-7 districts, such as that mapped on the Project Site (and, except as discussed further below, therefore have no application in any portion of the SLSD, whether zoned R8 or C4-7).

Second, the differences between the Tower-on-a-Base regulations and the SLSD regulations are not "minor" at all; they are many. As just one prime example, the Tower-on-a-Base regulations apply only to a zoning lot with wide street frontage. See ZR § 23-65(a)(1). Consequently, if the Tower-on-Base regulations applied in the Special District, no bulk distribution requirement whatsoever would apply to the Project Site, since it lacks any wide street frontage.[16]

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[15] See, e.g., ZR Section 86-23 (Special Forest Hills District) ("Buildings or other structures **within the Special District** shall comply with the height and setback regulations of Section 35-65, except as modified by this Section."); ZR Section 91-111 (Special Lower Manhattan District) ("[T]he use regulations for C5 Districts **within the Special Lower Manhattan District** are modified to permit the following uses . . . ."); ZR Section 97-30 (Special 125th Street District) ("Signs for all uses **within the Special 125th Street District** shall be subject to the applicable sign requirements in Section 32-60, inclusive, subject to the modifications of Sections 97-31 through 97-34, inclusive."); ZR Section 98-422 (Special West Chelsea District) ("The provisions of Section 33-42 (Permitted Obstructions) shall apply to all buildings or other structures **within the Special West Chelsea District**, except that dormers may penetrate a maximum base height in accordance with the provisions of paragraph (c)(1) of Section 23-621 (Permitted obstructions in certain districts).").

[16] A more detailed listing of the differences between the Tower-on-a-Base regulations and the SLSD regulations is attached as Exhibit 21 hereto.

Third, had CPC intended to apply the Tower-on-a-Base regulations in the SLSD, it easily could have done so. This is illustrated by ZR Section 35-64(a) (adopted in 1993 as part of the Tower-on-Base zoning), which expands the locations to which Tower-on-a-Base regulations apply beyond the R9 and R10 districts specified in ZR Section 23-651. ZR Section 35-64(a) provides that the Tower-on-a-Base regulations apply to specified commercial districts (not including C4-7 districts), subject to certain modifications.[17] By contrast, ZR Section 82-34 does nothing of the sort—it makes no cross-reference to ZR Section 23-651 and does not otherwise incorporate the provisions of that section by reference, either with or without modifications.

Fourth, Appellants ignore that there are in fact provisions of the SLSD which specifically incorporate the Tower-on-a-Base regulations by reference, again demonstrating that where CPC wished the Tower-on-a-Base regulations to apply, it knew how to do so. ZR Section 82-36(c), provides that: "In Subdistrict A, the provisions of paragraph (a) of Section 35-64, as modified by paragraphs (a) and (b) of this Section, shall apply to any mixed building."[18]

In contrast to ZR Section 82-36(c), ZR Section 82-34 is devoid of any cross-reference to ZR Section 23-651 and cannot even remotely be considered a slightly modified version of that provision, as Appellants argue. ZR Section 82-34 is instead a Special District rule distinct from ZR Section 23-651.

As a result, ZR Section 82-34 and the provisions of ZR Section 23-651(a)(3) operate differently where a "split" lot includes a portion mapped with an R8 district. Under the Tower-on-a-Base regulations, the tower coverage requirement of ZR Section 23-651(a)(1) and the bulk packing requirement of ZR Section 23-651(a)(3) are two subparts of the same provision of the Zoning Resolution, ZR Section 23-65, which applies *only* in R9 and R10 zoning districts. Accordingly, where a Tower-on-a-Base building is built on a zoning lot split by an R9 or R10 district and another district such as an R8 district, the bulk packing calculation is based on the floor area of the portion of the zoning lot within the R9/R10 district only, consistent with the express terms of ZR Section 23-65. By contrast, within the SLSD, ZR Sections 82-34 and 82-36 are two separate provisions each of which applies consistent with its plain language; they are not subparts of one provision nor provisions that cross-reference one another. The provisions of ZR Section 82-34 expressly apply to all development within the Special District, whereas the provisions of ZR Section 82-36 governing the calculation of tower lot coverage apply *only* to the

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[17] Section 35-64(a) applies to C1 or C2 districts mapped with R9 or R10 districts and C1-8, C1-9, C2-7 or C2-8 districts and provides, in relevant part, that in such districts "a mixed building that meets the location and floor area criteria of paragraph (a) of Section 23-65 (Tower Regulations) shall be governed by the provisions of Section 23-651 (Tower-on-a-base)" with certain modifications and exceptions.

[18] The effect of this provision is to apply ZR Section 35-64 and, by extension, the provisions of ZR Section 23-651, to buildings located within the C4-7 portion of Subdistrict A of the Special District, where, as provided in ZR Section 35-64, the "location and floor area criteria of paragraph (a) of Section 23-65" are met (i.e., the building has more than 25 percent of its total floor area in residential use, is located on a zoning lot that fronts upon a wide street, and satisfies other specific locational requirements). ZR Section 82-36(c) does not apply to the Project Site, but a mixed-use building on a zoning lot within the SLSD with frontage on Broadway or Columbus Avenues that meets all the location and floor area criteria of ZR Section 23-65(a) and other requirements of ZR Section 35-64(a) *would* be governed by Tower-on-a-Base regulations.

C4-7 district governed by that section. Accordingly, where (as here) a tower is built within the Special District on a zoning lot split between a C4-7 district and an R8 district, the bulk distribution calculation is based on the floor area of the zoning lot as a whole, consistent with the express terms of ZR Section 82-34.

The further arguments made by Appellants that ZR Section 82-34 must operate the same way as ZR Sections 23-651(a)(3) because these provisions were adopted on the same day (December 20, 1993) are illogical. The opposite is true. The Special District amendments and Tower-on-a-Base regulations were adopted through separate actions, are different in their language and structure, and apply to different locations.

**D. Appellants' Arguments Based on Legislative History Fail to Override the Plain Meaning of ZR Section 82-34**

Unable to ground their preferred interpretation in the language or structure of the SLSD provisions, Appellants turn to the legislative history of the 1993 amendments. In a further attempt to rewrite the plain language of ZR Section 82-34, they make various assertions regarding how the provisions of ZR Sections 82-34 and 82-36 "must" operate together. However, Appellants fail to identify an ambiguity that requires interpretation by way of reference to extrinsic evidence (see discussion in Subsections A-C, infra), and there is no warrant for examination of the legislative history: "[W]here the legislative language is clear, as in the instant appeal, there is no occasion for examination intro extrinsic evidence to discover legislative intent." BSA Cal. No. 136-08-A (2008); see also BSA Cal. No. 153-06-A (2007) ("legislative history is unnecessary" where the applicability of a zoning provision is clear).

The legislative history does not in any event support Appellants' position that the plain language of ZR Section 82-34 should be cast aside. Appellants' further assertions regarding how the rules "must" work do not reflect the language or legislative history of the SLSD, but instead their preferences for how CPC should have drafted and adopted the regulations.

1. DCP's Study of Potential Development Sites

The CPC Report for the 1993 SLSD amendments describes the background to the proposal, including the land use trends which led to development of the zoning proposal. (Exhibit 17, at 2–6.) As discussed in the Report, DCP identified six remaining development sites in the Special District for study, in order to evaluate how they might develop under the then-existing SLSD regulations and the proposed amendments. (Id. at 6.) Each of these sites is located entirely in a C4-7 district. In explaining how the newly proposed bulk distribution and tower coverage regulations would operate on these six sites, CPC stated that "[t]his would produce building heights ranging from the mid-20 to the low-30 stories (including penthouse floors) on the remaining development sites." (Id. at 19.)

Because "[n]one of the sites identified for potential development was located in the R8 portion of the Special District," Appellants insist that ZR Section 82-34 must therefore apply only to the C4-7 portion of the Project Site. (CC SOFL at 3.) However, ZR Section 82-34 plainly does not apply to only those six study sites, but rather to the entire Special District, and

there is no support for the proposition that a regulation be narrowly construed to apply only where the characteristics of a site match those of the potential development sites that were selected for a planning study. Put simply, development on the Project Site is governed by the rules that apply to the site, and the extent to which it is similar or different from sites used for a planning study before CPC adopted the broader regulations is irrelevant. Cf. CPC Report N 190180(A) ZRM, 12 (explaining that additional environmental analysis is not necessary for a development at 270 Park Avenue, which was not identified as a projected development site in the EIS for the Greater East Midtown plan, because "an EIS is not meant to foresee the exact future of development but rather . . . provide a reasonable analysis concerning possible impacts"). Thus, while CPC may not have specifically studied how ZR Section 82-34 would apply in a "split-lot" condition, that is no basis for ignoring the plain language of the provision CPC enacted.[19]

The legislative record in fact shows that CPC understood that ZR Section 82-34 would apply beyond the six study sites it had considered and that it would apply on a district-wide basis. Rejecting a proposal by Manhattan Community Board 7 and others to impose a district-wide height limit of 275 feet, CPC stated its belief that "specific 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. The Commission also believes that these controls would sufficiently regulate the resultant building form and scale even in the case of development involving zoning lot mergers." (Exhibit 17, at 19.)

CPC's views regarding the predictability of how bulk distribution under ZR Section 82-34 would apply within the Special District were in fact strongly disputed by Manhattan Community Board 7. In its November 3, 1993 Resolution recommending disapproval of the 1993 amendments, Community Board 7 stated:

> City Planning's proposal to limit building height with "packing the bulk" (requiring 60% of the bulk below 150 feet) has not been tested on actual buildings, and is therefore unpredictable. . . . A straightforward height limit of 275 feet would achieve the height goal of "packing" . . . with a predictability which would be beneficial to both private developers and the general public.
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> (Exhibit 22 hereto, at 3)

Others made similar comments at CPC's November 17, 1993, public hearing.[20]

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[19] In adopting the 1993 amendments CPC was fully aware that the SLSD contains an R8 district: "A small area of the district is zoned R8, which permits mid-density residential and community facility development." (Exhibit 17, at 4). Had it wished to exclude R8 districts from the calculation of bulk distribution under ZR Section 82-34, it could have done so.

[20] See, e.g., Testimony of Congressman Jerrold Nadler before the City Planning Commission Hearing on the Special Lincoln Square District (November 17, 1993) ("[t]he notion of 'packing the bulk' in order to limit building height is an idea that has not seen practicle [sic] application."). (Exhibit 23 hereto, at 2.)

The legislative history thus illustrates that while CPC conducted planning studies on six potential development sites, it (and various stakeholders) well understood that the new rules would not be limited to those sites only. The legislative history further confirms that CPC's view regarding the predictability of how the rules would function at sites within the SLSD other than the six study sites themselves was a disputed issue, with Community Board 7 taking the position that this had not been adequately studied and that the results would be uncertain.

At most, the legislative history indicates that the results of applying ZR Section 82-34 to a zoning lot split between a C4-7 and an R8 district was not specifically studied at the time. That is no basis for rewriting the plain language of ZR Section 82-34. "[N]o rule of construction gives the court discretion to declare the intent of the law *when the words are unequivocal.* Lastly, the courts are not free to legislate and if any unsought consequences result, the Legislature is best suited to evaluate and resolve them." Raritan Dev. Corp., 91 N.Y.2d at 107.

2. Appellants' Own "Rules" Have No Basis In The Legislative History

Appellants nevertheless make numerous categorical assertions about how ZR Sections 82-34 and 82-36 "must" interrelate and apply in all circumstances, insisting that these have a basis in the legislative history. These include, among others:

- "When applied correctly, these two rules ensure that the number of stories in the tower portion of the building (i.e., the portion above 150 feet) remains constant regardless of lot size." (CC SOFL at 12; LW! SOF at 8.)

- "[T]his mechanism can only work if the total allowable floor area, bulk below 150 feet, and tower coverage are all calculated based on the same area." (CC SOFL at 12-13; LW! SOF at 8.)

- "[T]his mechanism can work only if the total allowable floor area, tower coverage and bulk packing are calculated based on a common denominator: one lot size, one FAR and one set of rules applicable to the entire envelope. Only in this way can it keep the number of tower floors constant even as lot size varies." (CC SOFL at 15; LW! SOF at 10.)

- "To work right, the calculation must be zero-sum: the total square footage of the tower and base must add up to the total allowed on [sic] C4-7 portion of the lot." (CC SOFL at 15; LW! SOF at 10.)

Nothing in the SLSD regulations incorporates any of these formulas or categorical requirements. Moreover, Appellants' version of how the SLSD regulations "must" work is also nowhere to be found in the 1993 CPC Report. ZR Sections 82-34 and 82-36 are instead described in the CPC Report as follows:

- Section 82-34 would establish envelop controls to govern the massing and height of new buildings by requiring a minimum of 60 percent of a development's total floor area to be located below an elevation of 150 feet.

- Section 82-36 would establish minimum tower coverage standards, and allow for the penthouse provision at the top of buildings.[21]

(Exhibit 17, at 8.)

The CPC Report thus characterizes the two provisions as separate requirements that, while complementary, are not linked in the manner described by Appellants. (See id. at 19.)

Appellants then make a further leap and argue that results that depart from their preferred scenario are unlawful:

> The result of Extell's mix-and-match approach is that instead of 60/40, the ratio of the base to the tower is a 48/52 ratio. Only 48 percent of the bulk is in the base and a majority, 52 percent, is in the tower. This is an inversion of the correct ratio.
>
> (CC SOFL at 16; see LW! SOF at 11.)

Appellants calculate the 48/52 ratio based on the floor area permitted in the C4-7 district only.[22] What they fail to acknowledge, however, is that nothing in the SLSD regulations or its legislative history dictate a "correct ratio" of 60/40 on a *portion* of the Project Site, i.e., the portion within in the C4-7 district.

The apparent purpose of Appellants' argument is to suggest that the 48/52 ratio of floor area within the C4-7 portion renders ZR Section 82-34 a nullity ("an inversion of the correct ratio"). (CC SOFL at 16; LW! SOF at 11.) But that is wrong. The DOB's application of ZR Section 82-34 to the Project functioned to significantly reduce the amount of floor area within the tower and its height relative to what could be developed absent the bulk distribution requirement. Exhibit 24 hereto illustrates that a 43-floor, 839-foot tower could be developed on the Project Site absent ZR Section 82-34. This contrasts with the 39-floor, 775-foot tower approved by DOB through application of ZR Section 82-34 to the entire zoning lot.

Appellants elsewhere acknowledge that the difference between their preferred method for applying ZR Section 82-34 to the Project Site and how it has been applied by DOB amounts to only an approximately 5-story difference. (CC SOFL at 17; LW! SOF at 11.) Exhibit 24 demonstrates that the difference is six floors: that is, a 33-floor, 679-foot tower (under

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[21] Appellants make much of the fact that this description of ZR Sections 82-34 and 82-36 in the CPC Report falls under a heading of "Urban Design" provisions which "would apply throughout the District." (Exhibit 17, at 7.) Since it is undisputed that ZR Section 82-36 applies only in those portions of the SLSD mapped C4-7, Appellants argue that it is not necessarily the case that the phrase "throughout the district" means that ZR Section 82-34 applies to portions of the SLSD mapped R8. (CC SOFL at 20; LW! SOF at 14.) The differences between the plain language of ZR Section 82-34, which applies "[w]ithin the Special District" without any exception or qualification, and that of ZR Section 82-36, which modifies regulations applicable in the C4-7 district only, are addressed in detail above (see discussion in Subsections A-C).

[22] To clarify, the 48/52 ratio to which the Appellants refer is the ratio of the floor area located in the tower of the Project (219,403 square feet) to the floor area permitted within C4-7 district (421,260 square feet), removing from the denominator the 127,283 square feet of floor area permitted in the R8 district.

Appellants' interpretation of ZR Section 82-34) as opposed to a 39-floor, 775-foot tower (as approved by DOB).[23]

Appellants cannot point to anything in the language ZR Section 82-34 or its legislative history that suggests that this difference is impermissible. Perhaps realizing this, Appellants resort to arguing that applying ZR Section 82-34 as written could, in theory, given a large enough portion of the zoning lot mapped R8, result in the Project being built as a 40-story tower of 1,019 feet. (CC SOFL at 17; LW! SOF at 11-12.) Based on this purely hypothetical scenario, Appellants urge the Board to disregard the plain language of ZR Section 82-34 in order to avoid what they term an "absurd" result (CC SOFL at 14; LW! SOF at 9), albeit by way of reference to a non-existent project that does not remotely correspond to the Project approved by DOB.

Appellants' invented scenario cannot be the basis for a determination that the plain language of ZR Section 82-34 should be disregarded on the basis of the "absurdity" doctrine. "If the result proffered in the case being adjudged would be fair, concluding that the statute bespeaks absurd results based upon an atypical hypothetical is not an intellectually compelling claim. . . . that 'a' result may in a court's view be absurd is not by itself sufficient to permit a court not to follow the legislative direction." People v. Pena, 169 Misc. 2d 75, 84–85 (Sup. Ct. 1996).

3. The Board Should Reject Appellants' Request to Rewrite the Zoning Resolution

As demonstrated above, Appellants' desired outcome in this proceeding is inconsistent with the plain language, structure and history of the SLSD regulations, and can only be achieved by amending the Zoning Resolution. To do so, an amendment of ZR Section 82-34 similar to the following would be required:

> Within a C4-7 district in the Special District, at least 60 percent of the total floor area Permitted on a zoning lot (and not including the floor area of a portion of a zoning lot located within an R8 district where such zoning lot is divided between a C4-7district and an R8 district) shall be within stories located partially or entirely below a height of 150 feet from curb level.

Alternatively, consistent with Appellants' view that ZR Section 82-34 is simply a variant of ZR Section 23-651(a)(3), ZR Section 82-34 could be rewritten to cross-reference ZR Section 23-651 with any necessary "minor" exceptions. Finally, ZR Section 82-34 could be relocated to be made a subpart of ZR Section 82-36, thereby limiting its application to tower development located in the C4-7 district.

There are undoubtedly other ways that the SLSD regulations could be amended to produce the result that Appellants desire, and Appellants are free to propose them. However, this is a matter for CPC and the City Council, rather than the Board, to consider.[24] For this reason, Appellants' second objection should be rejected.

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[23] The 39 stories in the Project include four floors of mechanical space. There are 35 floors of residential use/community facility use.

[24] If CPC were disposed to support such an amendment, it would likely want to consider other ancillary questions: Should community facility towers in the R8 district continue to be subject to the bulk distribution rule? Should the

## VII. Conclusion

Appellants fail to establish that the Project approved by DOB contravenes provisions of the Zoning Resolution. We respectfully request that the Board expeditiously deny the appeals.

rule apply if a building is developed in a C4-7 district under standard height and setback rather than the tower regulations? Should the provisions of Section 82-36(c) continue to apply Tower-on-a-Base rules via Section 35-64(a) to zoning lots which meet the locational criteria of Section 23-65(a)? And so on.