MEETING OF: **September 17, 2019**
CALENDAR NOS.: **2019-89-A and 2019-94-A**
PREMISES: **36 West 66th Street, Manhattan**
Block 1118, Lots 14, 45, 46, 47, 48 and 52
BIN No. 1028168

ACTION OF BOARD — Application Denied.

THE VOTE —
Affirmative: ……………………………………………………………………………0
Negative: Chair Perlmutter, Vice-Chair Chanda, Commissioner Sheta and Commissioner Scibetta……………………………………………………………………4
Recused: Commissioner Ottley-Brown………………………………………………1

THE RESOLUTION —

WHEREAS, the building permit issued by the Department of Buildings ("DOB") on June 7, 2017, as amended and reissued April 11, 2019, under New Building Application No. 121190200 (the "Permit"), authorizes construction of a 39-story residential and community-facility building with a total height of 776 feet (the "New Building") by West 66th Sponsor LLC (the "Owner") on a zoning lot with 54,687 square feet of lot area; and

WHEREAS, this is an appeal for interpretation under Section 72-11 of the Zoning Resolution of the City of New York ("ZR" or the "Zoning Resolution") and Section 666 of the New York City Charter, brought on behalf of the City Club of New York and certain members ("CC Appellant") and on behalf of Landmark West! ("LW Appellant") (collectively, "Appellants"), alleging errors in the Permit pertaining to whether the floor-to-ceiling heights of "floor space used for mechanical equipment" in the New Building complied with the "floor area" definition of ZR § 12-10 in effect before May 29, 2019, and whether the New Building complies with applicable bulk-distribution regulations for zoning lots located in the Special Lincoln Square District in accordance with ZR § 83-34; and

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

ZONING PROVISIONS

WHEREAS, ZR § 12-10, entitled "Definitions," provides in pertinent part:

> [T]he *floor area* of a *building* shall not include: . . .
>
> (8) floor space used for mechanical equipment, except that such exclusion shall not apply in R2A Districts, and in R1-2A, R2X, R3, R4, or R5 Districts, such exclusion shall be limited to 50 square feet for the first *dwelling unit*, an additional 30 square feet for the second *dwelling unit* and an additional 10 square feet for each additional *dwelling unit*. For the purposes of calculating floor space used for mechanical equipment, *building segments* on a single *zoning lot* may be considered to be separate *buildings*; and

WHEREAS, ZR § 82-34, applicable in the Special Lincoln Square District and entitled "Bulk Distribution," states:

> 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*.
>
> For the purposes of determining allowable *floor area*, where a *zoning lot* has a mandatory 85 foot high *street wall* requirement along Broadway, the portion of the *zoning lot* located within 50 feet of Broadway shall not be included in *lot area* unless such portion contains or will contain a *building* with a wall at least 85 feet high coincident with the entire *street line* of Broadway; and

BACKGROUND AND PROCEDURAL HISTORY

WHEREAS, the subject site is located on West 66th Street, between Columbus Avenue and Central Park West, in the Special Lincoln Square District (the "Special District"), located partially in a C4-7 zoning district and partially in an R8 zoning district, in Manhattan; and

WHEREAS, the subject site has approximately 350 feet of frontage along West 66th Street, 201 feet of depth, 175 square feet of frontage along West 65th Street, 54,687 square feet of total lot area (35,105 square feet in a C4-7 zoning district and 19,582 square feet in an R8 zoning district), and is occupied by a two-story building and the New Building, which is under construction; and

WHEREAS, in *15 East 30th Street, Manhattan*, BSA Cal. No. 2016-4327-A (Sept. 20, 2017) ("*15 East 30th Street*"), the Board denied an interpretive appeal, finding that DOB appropriately permitted "floor space used for mechanical equipment" to be deducted from floor area without regard to floor-to-ceiling height, ZR § 12-10; and

WHEREAS, on June 7, 2017, DOB issued the Permit, authorizing construction of the New Building, originally proposed as a 27-story residential and community-facility building with a total height of 292 feet on a zoning lot with 15,021 square feet of lot area; and

WHEREAS, on April 11, 2019, DOB reissued the Permit, as amended, authorizing the taller New Building on a larger zoning lot; and

WHEREAS, Appellants commenced this appeal in May 2019 under BSA Calendar No. 2109-89-A and under BSA Calendar No. 2019-94-A, challenging the Permit; and

WHEREAS, on May 29, 2019, the City Council approved with modifications a citywide text amendment generally providing that neither mechanical spaces taller than 25 feet nor mechanical spaces within 75 feet of one another would be deducted from floor area; and

WHEREAS, a public hearing was held on this appeal on August 6, 2019, after due notice by publication in *The City Record*, with a continued hearing on September 10, 2019, and then to decision on September 17, 2019; and

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

ISSUES PRESENTED

WHEREAS, there are two issues presented in this appeal: (1) whether, at the time of the Permit's reissuance, spaces in the New Building designated to be "used for mechanical equipment" count as floor area under ZR § 12-10 and (2) whether the New Building, which is situated on a zoning lot that is divided by zoning district boundary lines, complies with bulk-distribution regulations applicable in the Special District under ZR § 82-34; and[1]

DISCUSSION

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

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

WHEREAS, as discussed herein, (A) the Board finds that Appellants have not substantiated a basis to warrant departure from its decision in *15 East 30th Street* in that the Zoning Resolution in effect prior to May 29, 2019, did not regulate the floor-to-ceiling heights of "floor space used for mechanical equipment" in exempting such mechanical space from floor-area calculations, ZR § 12-10; (B) the Board finds that Appellants have failed to demonstrate that the New Building's zoning lot does not comply with bulk-distribution regulations applicable in the Special District under ZR § 82-34; and (C) the Board has considered all of the parties' arguments on appeal, including those summarized below; and

A. Height of Mechanical Spaces

WHEREAS, Appellants contend that the Zoning Resolution in effect prior to May 29, 2019, regulated the floor-to-ceiling heights of "floor space used for mechanical equipment" in exempting such mechanical space from floor-area calculations, ZR § 12-10;

[1] There is no dispute that vesting under ZR § 11-33 is not before the Board in this appeal. On the other hand, as discussed at hearing, a timely third issue has not been presented by Appellants regarding whether the amount of floor space used for mechanical equipment in the New Building is excessive or irregular, and Appellants' discussion of mechanical space in the New Building in their initial filings instead center on the volume and floor-to-ceiling heights of mechanical spaces. However, based on the lack of clarity about LW Appellant's ability to procure a final determination from DOB, testimony corroborated by DOB that a subsequent final determination would be refused, and Appellants' requests to proceed separately, the Board finds it appropriate to address this third issue, regarding (3) whether the architectural and mechanical plans for the New Building show sufficient mechanical equipment in the area identified as mechanical space to justify floor-area deductions, in a subsequent decision. *See* ZR § 72-11 (Dec. 15, 1961) (authorizing the Board "on its own initiative" to "review any . . . order, requirement, decision or determination of the Commissioner of Buildings, [and] of any duly authorized officer of the Department of Buildings"). Accordingly, on September 17, 2019, the Board reopened the appeal filed by LW Appellant under BSA Calendar No. 2019-94-A to receive additional testimony only with respect to this third issue, which is not decided herein and is set for a continued hearing on December 17, 2019.

however, the Board finds that Appellants have not substantiated a basis to warrant departure from its decision in *15 East 30th Street*; and

WHEREAS, the Board considered this exact issue in *15 East 30th Street* and determined that, "based 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"; and

WHEREAS, in *15 East 30th Street*, DOB presented testimony that "the Zoning Resolution does not regulate the floor-to-ceiling height of a building's mechanical spaces," and the Department of City Planning ("DCP") also submitted testimony stating that "there are no regulations in the Zoning Resolution controlling the height of mechanical floors"; and

WHEREAS, Appellants present no persuasive reason for the Board to depart from its prior consideration of this issue, and the record further supports the Board's interpretation of the floor-area definition in *15 East 30th Street*; and

WHEREAS, the record reflects no evidence characterizing the Residential Tower Mechanical Voids Text Amendment, CPC Report No. N 190230 ZRY (April 10, 2019), as a mere clarification rather than a change in law, as asserted by Appellants; and

WHEREAS, instead, the accompanying report states that "[t]he [Zoning] Resolution does not specifically identify a limit to the height of such [mechanical] spaces," while the text amendment itself explicitly limits the height of mechanical spaces that are exempt from floor-area calculations, *see* CPC Report No. N 190230 ZRY (April 10, 2019); and

WHEREAS, the Residential Tower Mechanical Voids Text Amendment's attendant environmental review also characterizes the "No-Action Scenario" as allowing the development of buildings with mechanical spaces ranging from 80 to 90 feet in height, while the "With-Action Scenario" would limit mechanical spaces to heights from 10 to 25 feet; and

WHEREAS, lastly, DCP's *Residential Mechanical Voids Findings* about mechanical spaces' floor-to-ceiling heights, which Appellants assert is a study of typical floor-to-ceiling heights for mechanical spaces, is not relevant to the Board's decision in *15 East 30th Street* because *Residential Mechanical Voids* studies floor-to-ceiling heights, while *15 East 30th Street* determined such floor-to-ceiling heights were not regulated to qualify as floor-area-exempted "floor space used for mechanical equipment," ZR § 12-10; and

WHEREAS, accordingly, based on the foregoing, the Board finds that Appellants have not substantiated a basis to warrant departure from its decision in *15 East 30th Street* in that the Zoning Resolution in effect prior to May 29, 2019, did not regulate the floor-to-ceiling heights of "floor space used for mechanical equipment" in exempting such mechanical space from floor-area calculations, ZR § 12-10; and

B. Bulk Distribution

WHEREAS, the Board finds that Appellants have also failed to demonstrate that the New Building's zoning lot does not comply with bulk-distribution regulations applicable in the Special District under ZR § 82-34; and

WHEREAS, the subject zoning lot is wholly located within the Special District, which was established and designed to "conserve [this area's] status as . . . a cosmopolitan residential community," ZR § 82-00(a), and "to promote the most desirable use of land in this area and thus to conserve the value of land and buildings, and thereby protect the City's tax revenues," ZR § 82-00(f); and

WHEREAS, because the subject zoning lot is partially located in a R8 zoning district and partially located in a C4-7 zoning district, the Zoning Resolution treats the subject site as a zoning lot divided by a district boundary; and

WHEREAS, the Zoning Resolution contains special provisions for zoning lots divided by district boundaries,[2] *see* ZR § 77-00, and "[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," ZR § 77-02; and

WHEREAS, there is no dispute that the Zoning Resolution's split-lot provisions apply "on a regulation-by-regulation basis," *Beekman Hill Ass'n v. Chin*, 274 A.D.2d 161 (1st Dep't 2000); and

WHEREAS, however, Appellants contend that the New Building's zoning lot does not comply with the Zoning Resolution's split-lot provisions with respect to the Special District's bulk-distribution regulations, *see* ZR § 82-34; and

WHEREAS, more specifically, Appellants contend that the Special District's bulk-distribution regulations and tower regulations, ZR §§ 82-34 and 82-36, are intended to operate together—always, and only, together—such that the Special District's bulk-distribution regulations do not constitute "provisions applicable to the [R8] district in which . . . such portion of the zoning lot is located," ZR § 77-02; and

WHEREAS, there is no dispute that the New Building is located on a split lot for purposes of the tower-coverage regulations and that the New Building complies with the Special District's applicable tower-coverage regulations, *see* ZR § 82-36; and

WHEREAS, Appellants, the Owner, and DOB vigorously dispute whether the Special District's bulk-distribution regulations apply to the R8 portion of the subject site, *see* ZR § 82-34; and

WHEREAS, the Zoning Resolution provides 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*," ZR § 82-34; and

[2] Such zoning lots are commonly called "split lots."

WHEREAS, from this provision, it is clear that the bulk-distribution regulations apply "[w]ithin the Special District"—in other words, throughout the Special District without qualification or regard to subdistrict, street frontage, or underlying zoning district; and

WHEREAS, nothing about the text of the Special District's bulk-distribution regulations evinces an intent to link inextricably these bulk-distribution regulations with tower-coverage regulations; and

WHEREAS, nowhere in the text of this first sentence is there a cross-referenced citation to the Special District's tower-coverage regulations or to the bulk-distribution or tower-coverage regulations found at ZR §§ 23-65, 33-45 or 35-64, *see* ZR § 82-34; and

WHEREAS, in comparison, the text of the second sentence contains provisions applicable to a specifically defined area ("along Broadway"), ZR § 82-34, and the Special District's tower-coverage regulations contain similarly delineated areas ("Subdistrict A" and "Block 3"), ZR § 82-36; and

WHEREAS, on the other hand, the Special District's bulk-distribution regulations applicable to the New Building contain no such qualification—providing only the blanket applicability of "[w]ithin the Special District," ZR § 82-34; and

WHEREAS, there is no basis to import the qualifications suggested by Appellants into the Special District's bulk-distribution regulations where the text describes other regulations as applicable in specifically defined areas ("along Broadway," "Subdistrict A," and "Block 3") in other instances, ZR §§ 82-34 and 82-36; and

WHEREAS, the Board has considered evidence presented by Appellants but finds it unconvincing at best: for instance, DCP's *Regulating Residential Towers and Plazas*, and the timing of an unrelated same-day text amendment to ZR § 23-651 provide no support for Appellants' assertion that the Special District's bulk-distribution regulations always and only apply together with the Special District's tower-coverage regulations; DCP's *Regulating Residential Towers and Plazas* says no such thing, and the timing of unrelated text amendments provides no guidance whatsoever; and, if anything, DCP's *Regulating Residential Towers and Plazas* reflects that the City rejected an outright height limitation of 275 feet within the Special District, favoring the more flexible bulk controls set forth in ZR § 82-00; and

WHEREAS, while the Board has heard and considered all of Appellants' arguments, Appellants have presented no persuasive basis to find the applicability of the Special District's bulk-distribution regulations unclear, so the Board declines Appellants' invitation to delve further into the legislative history "in strictly applying and interpreting the provisions of" the Special District's bulk-distribution regulations in this appeal, ZR § 77-11; and

WHEREAS, Appellants contend that this literal interpretation ("[w]ithin the Special District" means "throughout the Special District") leads to absurd results that gut the purported purpose of the Special District's bulk-distribution—to whit, reducing the height of buildings; and

WHEREAS, however, nothing in the record indicates that this literal interpretation reflects a mistake or scrivener's error in drafting the 1994 text amendment to the Special District's bulk-distribution regulations; and

WHEREAS, the record instead reflects testimony and credible evidence in the form of architectural diagrams and examples of buildings in the vicinity indicating that such a result is not absurd and that, instead, the Special District's bulk-distribution regulations do operate to reduce the height of buildings in the Special District—only not to the extent Appellants wish; and

WHEREAS, at hearing, the Board examined a number of examples of buildings in the Special District constructed before and after the enactment of the Special District's bulk-distribution regulations in 1994, finding the pre-1994 buildings generally exceeded the heights of post-1994 buildings on similarly sized zoning lots; and

WHEREAS, the Board also compared buildings constructed inside and outside the Special District, finding that post-1994 buildings outside the Special District generally exceeded the heights of post-1994 buildings inside the Special District on similarly sized zoning lots; and

WHEREAS, this discrepancy in building height before and after the enactment of the Special District's bulk-distribution regulations and this discrepancy inside and outside the Special District both lend credence to DOB and the Owner's assertion that the Special District's bulk-distribution regulations—as interpreted herein—do operate to reduce the height of buildings in the Special District; and

WHEREAS, at hearing, the Board further noted that floor plates the size of those in the New Building—a recent architectural development that results in less floor area being used per floor and that allows for taller towers in zoning districts without height limits—could not have been anticipated in 1994 when the City amended the Special District's bulk-distribution regulations, but the Board also observed that Appellants' height concerns in this appeal appear focused not on the Special District's bulk-distribution regulations but rather on the height of mechanical spaces in the New Building—a separate issue settled in *15 East 30th Street* and addressed above; and

WHEREAS, accordingly, the Board finds that Appellants have failed to demonstrate that the Zoning Resolution treats the New Building's zoning lot as a split lot with respect to the Special District's bulk-distribution regulations and that Appellants have failed to demonstrate that the New Building's zoning lot does not comply with the bulk-distribution regulations applicable in the Special District under ZR § 82-34; and

C. Parties' Positions

WHEREAS, in reaching its decision set forth herein, the Board has considered all of the parties' arguments on appeal, including those put forth by Appellants, DOB, and the Owner, but ultimately finds Appellants' arguments unpersuasive; and

Appellants' Position

WHEREAS, the Board has considered all of Appellants' arguments on appeal but finds them ultimately unpersuasive in light of the foregoing; and

WHEREAS, Appellants state that this appeal should be granted because, at the time of the Permit's reissuance, "196 vertical feet of purported mechanical space in the midsection of" the New Building would not be "used for mechanical equipment" and is not "customarily accessory to residential uses," therefore should be included as "floor area" as defined in ZR § 12-10, and because the New Building does not comply with the bulk-distribution regulations applicable in the Special District, *see* ZR § 82-34; and

Appellants: Height of Mechanical Spaces

WHEREAS, Appellants state that "196 vertical feet of purported mechanical space" in the New Building do not comply with the ZR § 12-10 "accessory use" definition because "these floors" are not "customarily found in connection with residential uses"; and

WHEREAS, Appellants state that this issue is not settled by the Board's *15 East 30th Street* decision, where the appellant in that appeal failed to provide any evidence or expert opinion that mechanical space in that building was "irregular"; and

WHEREAS, Appellants state that, however, since the Board's resolution of that appeal, the New York City Department of City Planning ("DCP") studied mechanical space in 796 residential buildings constructed between 2007 and 2017 in R6–R10 zoning districts, finding that "[o]nly a few TOB [tower-on-base] buildings had a mechanical floor below the highest residential floor (exclusive of cellars)," that "their typical height was 12–15 feet" and that "[l]arger mechanical spaces were generally reserved for the uppermost floors of the building in a mechanical penthouse, or in the cellar below ground," *Residential Mechanical Voids Findings: Building Permits Issued b/w 2007 and 2017 R6 through R10 Districts* (Feb. 2019) ("*Residential Mechanical Voids Findings*"); and

WHEREAS, Appellants state that DCP's *Residential Mechanical Voids Findings* shows that the New Building's mechanical space, with an aggregate height of 229 feet throughout the New Building, is anomalous—not customary—because of its height; and

WHEREAS, Appellants state that the Owner's argument that the mechanical spaces do not constitute a "use" under the Zoning Resolution is unpersuasive because these spaces are "designed," "arranged," "intended," "maintained" and "occupied" for mechanical equipment, though Appellants assert their use is better characterized as increasing the New Building's height; and

WHEREAS, Appellants state that mechanical spaces in the New Building are not "floor space used for mechanical equipment," ZR § 12-10, because they are unnecessary since no mechanical equipment requires floor-to-ceiling heights of 48 feet to 64 feet; and

WHEREAS, Appellants state that, accordingly, mechanical spaces in the New Building do not qualify as "floor space used for mechanical equipment" that is exempt from floor-area calculations, ZR § 12-10; and

Appellants: Bulk Distribution

WHEREAS, Appellants state that the New Building does not comply with the Zoning Resolution's split-lot provisions and the Special District's bulk-distribution regulations under ZR §§ 82-34, 77-02 and 33-48; and

WHEREAS, first, Appellants state that the text "[w]ithin the Special District" is vague, and the Special District's bulk-distribution regulations do not apply in districts where, as Appellants contend, no towers are permitted; and

WHEREAS, Appellants state that, here, interpreting the Special District's bulk-distribution regulations to distribute "at least 60 percent of the total floor area" across the entirety of the subject zoning lot "below a height of 150 feet from curb level," ZR § 82-34, runs contrary to the Special District's bulk-distribution regulations' purpose; and

WHEREAS, Appellants state that proper application of the Special District's bulk-distribution regulations requires the total floor area of the tower and base to be equal to the total floor area permitted in the portion of the subject zoning lot located in the C4-7 zoning district; and

WHEREAS, Appellants state that including floor area from the R8 portion of the zoning lot, which floor area is located below a height of 150 feet from curb level, as well as floor area from the C4-7 zoning district does not have the effect of reducing the floor area, and ultimately the height of the tower, which Appellants assert, is the intent of the bulk-distribution regulations; and

WHEREAS, Appellants state that the proffered interpretation by DOB and the Owner actually results in a base with a total of 48 percent of the total floor area and a tower with 52 percent of the total floor area where, Appellants assert, the legislative intent was otherwise; and

WHEREAS, second, Appellants state that the subject zoning lot does not comply with the Zoning Resolution's split-lot provisions, which state that "each portion of such [split] *zoning lot* shall be regulated by all the provisions applicable to the district in which such portion of the zoning lot is located," ZR § 77-02, because residential towers are not permitted in the R8 district and are in the C4-7 district, hence the bulk-distribution regulations of ZR § 82-34 cannot apply in an R8 district ; and

WHEREAS, third, Appellants state that the phrase in ZR § 82-34 "[w]ithin a Special District" differentiates the applicability of the Special District's bulk-distribution regulations from the generally applicable bulk-distribution rule, set forth in ZR § 23-651(a)(2), and does not make ZR § 82-34 applicable to the R8 portion of the subject zoning lot; and

WHEREAS, Appellants state that the legislative history indicates that "[w]ithin a Special District" does not apply to the R8 portion of the subject site because in its consideration of the Special Lincoln Square District, *see* CPC Report, No. N 940127 (A) ZRM (Dec. 20, 1993) (the "1993 CPC Report") and Special Lincoln Square District Zoning Review (May 1993) (the "1993 DCP Lincoln Square Review"), the Department of City Planning studied six sites (including part of the subject zoning lot before its merger into the larger subject zoning lot) where development may occur, and none of the six were located in the 5.3 percent of the Special District located in an R8 zoning district; and

WHEREAS, Appellants state that the 1993 CPC Report, and the 1993 DCP Lincoln Square Review, do not support the Owner's argument that the bulk-distribution rule should apply to the entire zoning lot because they refer to both the Special District's

bulk-distribution regulations and the tower-coverage regulations in tandem as conjunctive "urban design" controls; and

WHEREAS, Appellants state that the 1993 CPC Report's reference to "throughout the district" contrasts with the text amendment's other location-specific controls—such as "along Broadway," "for the Bow Tie sites" and "on the Mayflower block"—that do not apply here; and

WHEREAS, Appellants state that the 1993 CPC Report notes that the tower-on-a-base rules were meant to confine building height to "the low-30 stories" in order to prohibit another Millennium Tower, *id.* at 19, described in the 1993 DCP Lincoln Square Review as "an extreme case [that] will rise to 46 stories or 525 feet in height, with only 42 percent of its bulk located below 150 feet. This is largely due to almost 125,000 square feet of movie theater uses, which create hollow spaces that substantially add to the mass and height of the building," *id.* at 14; and

WHEREAS, furthermore, Appellants state that, even if "[w]ithin a Special District" could be read to apply to the R8 portion of the subject site, ZR § 82-34 must not be interpreted to eviscerate legislative intent; and

WHEREAS, additionally, because the tower-coverage and bulk-distribution text of ZR § 23-651 is substantially similar and "identical in concept," to the bulk distribution text of ZR § 82-34 and the tower-coverage text of ZR § 82-36 Appellants state that there is clear legislative intent that ZR §§ 82-34 and 82-36 must be applied together; and

WHEREAS, Appellants state that the chart in ZR § 23-651 relates general tower-coverage to general bulk-distribution regulations by increasing the amount of floor area that must be located below a level of 150 feet as tower coverage increases, thereby ensuring a constant tower height regardless of tower coverage or lot area, but Appellants provide no evidence or explanation for the absence of such a chart from the Special District's bulk-distribution and tower-coverage regulations, *see* ZR §§ 82-34 and 82-36; and

WHEREAS, Appellants state that DCP's *Regulating Residential Towers and Plazas: Issues and Options*, DCP No. 89-46 (Nov. 1989) ("*Regulating Residential Towers and Plazas*"), supports this contention because it states that "[a] potentially effective approach [to reducing the height of new buildings] could be to require that a minimum percentage of the total floor area of the zoning lot be located at elevations less than 150 feet above the curb level," and "[i]n some instances, an appropriate relationship might be established by coupling other envelope controls, such as a minimum tower coverage, with a lower minimum percentage for the proposed Packing-the-Bulk regulations," *id.* at 27; and

WHEREAS, furthermore, Appellants state that, because ZR § 23-651 and ZR §§ 82-34 and 82-36 purportedly share "a common history and purpose," as suggested by their contemporaneous CPC reports, ZR §§ 82-34 and 82-36 must be applied together, *see* 1993 CPC Report and CPC Report No. N 940013 ZRM (Dec. 20, 1993) (pertaining to tower-on-base regulations for high density districts); and

WHEREAS, additionally, Appellants state that ZR §§ 82-34 and 82-36 only apply to towers, which are not permitted for residential use, but are for community facility uses, in R8 zoning districts; and

WHEREAS, in post-hearing submissions, Appellants argue that the Owner's failure to illustrate a hypothetical building subject to R8 height-and-setback regulations where the Special District's bulk-distribution regulations would have an impact indicates that the Special District's bulk-distribution regulations are pointless because "that Rule is doing no work at all" here; and

WHEREAS, Appellants state that a hypothetical community-facility tower permitted in the R8 portion of the subject site is also unavailing because there was no legislative intent to limit the height of community-facility towers and because the community facility tower regulations at ZR § 24-54(a) predate the 1994 amendments at issue and are not relevant to whether the 1994 amendments to the tower-coverage and bulk-distribution regulations must apply together throughout the Special District; and

WHEREAS, additionally, Appellants state that the text of ZR § 82-34 is ambiguous, and Appellants reiterate that the legislative history indicates that ZR §§ 82-34 and 82-36 must be applied in tandem to the C4-7 portion of the subject site only and not include the R8 portion for bulk-distribution purposes, since tower coverage, ZR § 82-36, applies only to the C4-7 under the split lot rules; and

WHEREAS, Appellants state that the Zoning Resolution's calculations that relate tower-coverage regulations to bulk-distribution regulations, as indicated in the chart in ZR § 23-651, similarly dictate that development cannot mathematically exceed the "low-30 stories" referenced in the legislative history of ZR § 82-34, and Appellants submitted a spreadsheet without zoning citations purporting to demonstrate that "the parameters [on lot area, bulk distribution, tower coverage, and the percentage of floor space that does not count as floor area] embody a mathematical limit that, not coincidentally, is in the low-30 stories"; and

WHEREAS, furthermore, Appellants state that the literal reading of ZR § 82-34 urged by DOB and the Owner does not control in this appeal because it leads to the absurd result of increasing the amount of floor area located more than 150 feet above curb level which results in a taller tower than was contemplated by the Zoning Resolution's drafters; and

WHEREAS, lastly, Appellants state that it is not plausible that ZR § 82-34 was meant to apply to the R8 portion of the subject site because there is no evidence of such intent; and

WHEREAS, accordingly, Appellants submit that the New Building violates the Special District's bulk-distribution regulations, *see* ZR § 82-34; and

DOB's Position

WHEREAS, DOB states that this appeal should be denied because, at the time of the Permit's reissuance, the Zoning Resolution did not regulate the floor-to-ceiling heights of floor space used for mechanical equipment and because the New Building's zoning lot complies with bulk-distribution regulations applicable in the Special District; and

DOB: Height of Mechanical Spaces

WHEREAS, DOB states that notwithstanding an amendment to the Zoning Resolution effective May 29, 2019, it is undisputed that the New Building's foundation had been completed by that time, so the New Building is allowed to proceed with construction as of right under ZR § 11-33; and

WHEREAS, DOB, however, disputes that the Zoning Resolution in effect before May 29, 2019, regulated floor-to-ceiling height of mechanical spaces in buildings, as asserted by Appellants; and

WHEREAS, instead, DOB notes that the Zoning Resolution specifically excluded "floor space used for mechanical equipment" from floor-area calculations under the "floor area" definition, ZR § 12-10; and

WHEREAS, DOB states that the New Building's mechanical space constitutes an "accessory use," ZR § 12-10; and

WHEREAS, DOB disputes the Owner's contention that mechanical space is not a "use" because mechanical space is a "purpose for which a building . . . may be designed, arranged, intended, maintained or occupied" as well as an "activity . . . operation carried on, or intended to be carried on, in a building," ZR § 12-10; and

WHEREAS, DOB states that, in particular, the mechanical space is "either a purpose for which the [New Building] is designed or an activity or operation carried on in the [New Building]"; and

WHEREAS, DOB states that the New Building's mechanical space meets the ZR § 12-10 "accessory use" definition because it is located on the same zoning lot as the related principal residential and community-facility uses; because it is incidental to the principal use by virtue of comprising significantly less floor space than the floor area of the principal uses; because mechanical equipment is customarily found in connection with residential and community-facility uses on a similar scale to the New Building's mechanical space; and because the mechanical space is in common ownership with the principal residential and community-facility uses; and

WHEREAS, DOB states that, additionally, the Board considered this exact issue in *15 East 30th Street* and determined that, "based 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"; and

WHEREAS, DOB states that, in so determining, the Board specifically credited DOB's technical review of the amount and size of mechanical equipment, and there is no reason to reach a different determination in this appeal; and

WHEREAS, DOB has reviewed and approved the New Building's 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"; and

DOB: Bulk Distribution

WHEREAS, DOB states that the New Building complies with the bulk-distribution regulations applicable in the Special District; and

WHEREAS, DOB cites to ZR § 82-64, which 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*,"; and

WHEREAS, DOB states that therefore ZR § 82-64 applies throughout the Special District without regard to the underlying district designations, so the New Building's zoning lot is not treated as a split lot subject to ZR § 77-00 for the purposes of the bulk-distribution regulations of ZR § 82-64; and

WHEREAS, DOB states that, instead, the New Building's zoning lot is allowed 548,543 square feet of floor area, of which more than 60 percent (329,126 square feet) is located below a height of 150 feet from curb level in accordance with ZR § 82-64; and

WHEREAS, DOB states that it is undisputed in this appeal that since the zoning lot is a split lot for purposes of tower-coverage regulations, the New Building complies with applicable tower-coverage regulations, ZR § 82-36; and

WHEREAS, DOB states that Appellants' arguments that the New Building is on a split lot for purposes of ZR § 82-34 are unpersuasive because the Zoning Resolution considers split lots on a regulation-by-regulation basis; unlike ZR § 82-36, which only applies to the portion of the subject site in a C4-7 zoning district, ZR § 82-34 applies equally to the entirety of the subject site without regard to the underlying zoning district designations; and there is no basis to conclude that ZR § 82-34 was intended as a modification to general tower-on-a-base provisions of ZR § 23-651(a)(2) whereby ZR §§ 82-34 and 82-36 only operate together, like the provisions of ZR § 23-651; and

WHEREAS, in post-hearing submissions, DOB reiterates that ZR § 82-34 clearly applies throughout the Special District, and as such no reference to the legislative history is necessary to determine legislative intent; and

Owner's Position

WHEREAS, the Owner states that this appeal should be denied because, at the time of the Permit's reissuance, the Zoning Resolution did not regulate the floor-to-ceiling heights of floor space used for mechanical equipment and because the New Building's zoning lot complies with bulk-distribution regulations applicable in the Special District; and

Owner: Height of Mechanical Spaces

WHEREAS, the Owner states that, notwithstanding an amendment to the Zoning Resolution effective May 29, 2019, it is undisputed that the New Building's foundation had been completed by that time, so the New Building is allowed to proceed with construction as of right under ZR § 11-33; and

WHEREAS, the Owner, however, disputes that the Zoning Resolution in effect before May 29, 2019, regulated the floor-to-ceiling heights of mechanical spaces in buildings, as asserted by Appellants; and

WHEREAS, in support of this contention, the Owner notes that the Board considered this exact issue in *15 East 30th Street* and determined that, "based 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"; and

WHEREAS, the Owner notes that, in that appeal, DOB had taken the position that "the Zoning Resolution does not regulate the floor-to-ceiling height of a building's mechanical spaces," and DCP had also submitted testimony stating that "there are no regulations in the Zoning Resolution controlling the height of mechanical floors"; and

WHEREAS, the Owner states that there is no reason for the Board to depart from its prior consideration of this issue and notes that there is now further support for the Board's interpretation of the "floor area" definition; and

WHEREAS, the Owner disputes Appellants' characterization of the text amendment as a mere clarification rather than a change in law; and

WHEREAS, the Owner notes that the resolution accompanying the zoning text amendment, City Planning Commission Report No. N 190230 ZRY (April 10, 2019) states that "[t]he [Zoning] Resolution does not specifically identify a limit to the height of such [mechanical] spaces," when the text amendment explicitly limits the height of mechanical spaces that are exempt from floor-area calculations; and

WHEREAS, the Owner notes that the attendant environmental review also characterized the "No-Action Scenario" as allowing the development of buildings with mechanical spaces ranging from 80 to 90 feet in height, while the "With-Action Scenario" would limit these mechanical spaces to heights from 10 to 25 feet; and

WHEREAS, the Owner states that mechanical spaces in the New Building need not comply with the Zoning Resolution's "accessory use" definition, contrary to Appellants' assertions that mechanical spaces of such height are not "customarily found in connection with" mechanical spaces; and

WHEREAS, the Owner states that a mechanical space is neither a "use" nor an "accessory use" under ZR § 12-10 because the Zoning Resolution defines a "use" 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" and defines an "accessory use" as "*use* which is clearly incidental" to a principal use; and

WHEREAS, instead, the Owner characterizes mechanical space as "building infrastructure used for the operation of any type of building . . . similar to many other areas within a building, such as elevator shafts or stairwells, elevator or stair bulkheads, or exterior wall thickness"; and

WHEREAS, assuming mechanical space is appropriately classified as an accessory use, the Owner states that there is no reason in this appeal to depart from the Board's consideration of the specific issue in *15 East 30th Street*, where the Board determined that the floor-to-ceiling height of mechanical space was not relevant to its classification as an accessory use and where DCP had submitted testimony 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"; and

WHEREAS, contrary to Appellants' arguments regarding the characterization of DCP's citywide analysis of mechanical spaces, the Owner notes that DCP's *Residential Mechanical Voids Findings* and the record in *15 East 30th Street* both demonstrate with ample examples that mechanical spaces with similar heights to those in the New Building are "customarily found in connection" with the New Building's principal uses, and there is no reason to find that "floor space used for mechanical equipment" contemplates an analysis of volume or height to be "clearly incidental" to a principal use under ZR § 12-10; and

WHEREAS, accordingly, the Owner submits that mechanical spaces in the New Building complied with the Zoning Resolution in effect before May 29, 2019, under the Board's interpretation set forth in *15 East 30th Street*; and

<u>*Owner: Bulk Distribution*</u>

WHEREAS, the Owner states that the New Building's zoning lot complies with bulk-distribution regulations applicable in the Special District; and

WHEREAS, the Owner states that the Zoning Resolution provides 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," ZR § 82-34; and

WHEREAS, the Owner states that the New Building's zoning lot complies with this provision because the total floor area allowed on the subject zoning lot is 548,543 square feet, comprised of 421,260 square feet (12.0 FAR) in the C4-7 zoning district and 127,283 square feet (6.5 FAR) in the R8 zoning district; and

WHEREAS, the Owner states that ZR § 82-34 applies to all zoning lots in the Special District, regardless of underlying zoning district designations, so 60 percent of the total floor area on the subject zoning lot (329,126 square feet) must be located below 150 feet above curb level; and

WHEREAS, the Owner states that, because the DOB-approved drawings for the New Building reflect "at least 60 percent of the total floor area . . . below a height of 150 feet from curb level," the New Building's zoning lot complies with ZR § 82-34; and

WHEREAS, the Owner states that Appellants' argument that ZR § 82-34 only applies to the portion of the subject site within a C4-7 zoning district is unpersuasive because ZR § 82-34 applies to zoning lots throughout the entire Special District, regardless of the underlying district designations, because ZR § 82-34 states "[w]ithin the Special District" without qualification; and

WHEREAS, the Owner states that Appellant's argument that the Zoning Resolution's split-lot provisions require bulk calculations by zoning district is unavailing because the split-lot provisions apply "on a regulation-by-regulation basis," *Beekman Hill Ass'n v. Chin*, 274 A.D.2d 161 (1st Dep't 2000); and

WHEREAS, the Owner states that ZR § 82-34 applies with equal force in the portion of the subject site in the C4-7 zoning district as in the R8 zoning district—so the New Building's zoning lot is not treated as a split lot with respect to ZR § 82-34; and

WHEREAS, the Owner states that, on the other hand, because tower-coverage regulations differ for the portion of the subject site in the C4-7 zoning district from the R8 zoning district, the New Building's zoning lot is treated as a split lot for the purposes of tower-coverage regulations under ZR § 82-36, which does not apply to the portion of the subject site in an R8 zoning district, *see also* ZR § 33-48; and

WHEREAS, the Owner states that it is undisputed in this appeal that, the zoning lot is a split lot for purposes of the tower-coverage regulations, and the New Building complies with the applicable tower-coverage regulations; and

WHEREAS, the Owner states that Appellant's argument that "[w]ithin the Special District" is a reference to tower-on-a-base regulations of ZR § 23-651 is unpersuasive because tower-on-a-base regulations do not apply in C4-7 zoning districts; because there are major differences between tower-on-a-base regulations and ZR § 82-34, such as the absence in the Special District's bulk-distribution regulations of applicability only to wide-street frontage; ZR § 82-34 contains no cross reference to ZR § 23-651 or other manner of incorporation or modification; while, in contrast to ZR § 82-34, ZR § 82-36 specifically modifies the tower regulations set forth in ZR §§ 33-45, 35-64 and 23-65; and

WHEREAS, the Owner states that Appellants' arguments that the legislative history of the Special District mandates the concurrent operation of ZR §§ 82-24 and 82-36 is unavailing because the six development sites studied by the Department of City Planning in the C4-7 zoning district are irrelevant to the application of the ultimately adopted regulations; because the City Planning Commission further noted that the ultimately adopted regulations "would sufficiently regulate the resultant building form and scale even in the case of development involving zoning lot mergers"; and because the legislative history materials characterize ZR §§ 82-34 and 82-36 as "complementary," not inextricably linked; and

WHEREAS, the Owner states that, ultimately, Appellants take issue with the Zoning Resolution as it exists, which is beyond the purview of this appeal; and

WHEREAS, in post-hearing submissions, the Owner notes that the Zoning Resolution explicitly defines its provisions' applicability, indicating that "[w]ithin the Special District" means what it says: ZR § 82-34 applies throughout the entire Special District; and

WHEREAS, in support of this contention, the Owner notes numerous other instances where the Zoning Resolution qualifies its provisions' applicability in the Special District—such as to certain subdistricts, certain street frontages, certain zoning districts and certain enumerated exceptions—indicating that the absence of similar qualification in

ZR § 82-34 indicates that the bulk-distribution regulations do apply throughout the Special District; and

WHEREAS, the Owner states that there is no qualification in ZR § 82-34 that it only applies to towers and not to development subject to height-and-setback regulations, such as the portion of the New Building located in the R8 zoning district; and

WHEREAS, the Owner states that there is no merit to Appellants' contention that "[w]ithin a Special District" merely highlights the minor differences between ZR § 23-651 and ZR §§ 82-34 and 82-36 because, when the Zoning Resolution modifies underlying zoning district regulations, it specifically states so through the use of cross references; and

WHEREAS, the Owner states that, unlike ZR § 23-651, ZR §§ 82-34 and 82-36 are separate sections in the Zoning Resolution that are applied separately and do not, by their express language, apply to the same zoning districts; and

WHEREAS, the Owner states that, because the language of the text of ZR § 82-34 is clear and unambiguous, its plain meaning constitutes the best evidence of legislative intent, and no examination of legislative history is necessary to determine legislative intent; and

WHEREAS, the Owner states that, notwithstanding the clarity of the text, Appellants' analysis of the legislative history is fatally flawed because soft sites studied in conjunction with the 1994 amendments do not override ZR § 82-34's applicability throughout the Special District, because the predictability of the 1994 text amendments' applicability was the subject of wide dispute and because any unpredictable—but lawfully compliant—results must be addressed legislatively by amending the Zoning Resolution; and

WHEREAS, the Owner states that, contrary to Appellant's contention that DOB's interpretation of ZR § 82-34 increases the height of the New Building, the height of the New Building is actually reduced by having 60 percent of its total floor area located below 150 feet above curb level, and ZR § 82-34 operates as intended, even if not to the extent Appellants would prefer; and

WHEREAS, in support of this contention, the Owner provided comparative architectural diagrams showing that, without the Special District's bulk-distribution regulations, a 43-story, 839-foot tower could be developed on the subject zoning lot or a 30-story, 470-foot community-facility tower could be built in the R8 portion of the subject zoning lot; however, with the Special District's bulk-distribution regulations, only the 39-story, 775-foot New Building on the subject zoning lot or a 350-foot, 22-story community-facility tower in the R8 portion of the subject zoning lot are allowed; and

WHEREAS, the Owner states that, additionally, the Zoning Resolution contains no express limitation on the number of stories permitted in the Special District, and the City Planning Commission specifically rejected a special-district-wide height limitation of 275 feet; and

WHEREAS, accordingly, the Owner submits that the New Building's zoning lot complies with bulk-distribution regulations applicable in the Special District and that this appeal should be denied; and

CONCLUSION

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

WHEREAS, in response to concerns from Appellants and the community regarding the height of development within the City, the Board notes that, while it has the power "to hear and decide appeals from and to review interpretations of this Resolution" under ZR § 72-01(a), the Board does not have the power to zone, *see* City Charter § 666; and

WHEREAS, accordingly, insofar as Appellants 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; and

WHEREAS, based on the foregoing, the Board finds that Appellants have not substantiated a basis to warrant departure from its decision in *15 East 30th Street* in that the Zoning Resolution in effect prior to May 29, 2019, did not regulate the floor-to-ceiling heights of "floor space used for mechanical equipment" in exempting such mechanical space from floor-area calculations, ZR § 12-10, and the Board finds that Appellants have failed to demonstrate that the Zoning Resolution treats the New Building's zoning lot as a split lot with respect to the Special District's bulk-distribution regulations and that Appellants have failed to demonstrate that the New Building's zoning lot does not comply with bulk-distribution regulations applicable in the Special District under ZR § 82-34.

Therefore, it is Resolved, that the building permit issued by the Department of Buildings on June 7, 2017, as amended and reissued April 11, 2019, under New Building Application No 121190200, shall be and hereby is *upheld* and that this appeal shall be and hereby is *denied*.

CERTIFICATION

This copy of the Resolution
dated September 17, 2019
is hereby filed by
the Board of Standards and Appeals
dated October 15, 2019

Carlo Costanza
Executive Director