EXHIBIT A

15 East 30th Street
BSA Cal. No. 2016-4327-A

2016-4327-A
APPLICANT – Sky House Condominium, owner.
SUBJECT – Application November 10, 2016 – Appeal challenging NYC Department of Building's determination that the Tower complies with the New York City Zoning Resolution and the New York City Housing Maintenance Code. C5-2 zoning district.
PREMISES AFFECTED – 15 East 30th Street, Block 860, Lot (s) 12, 69, 63, Borough of Manhattan.
COMMUNITY BOARD #5M
ACTION OF THE BOARD – Appeal denied.
THE VOTE TO GRANT –
Affirmative: ……0
Negative: Chair Perlmutter, Vice-Chair Chanda and Commissioner Ottley-Brown ……3
THE RESOLUTION –

WHEREAS, the determination of the Department of Buildings ("DOB"), dated March 1, 2017, acting on a public challenge to New Building Application No. 122128679, reads in pertinent part:

> The challenger's second zoning challenge pertains to the classification of the Chandler Hotel's existing use as a residential use and not a commercial use (Point II). The Chandler Hotel at 12 East 31st Street is on tax lot No. 74, which is one of six adjoining tax lots, including the subject building's tax lot No. 12, which have been merged into a single zoning lot. Per the latest Certificate of Occupancy (CO) (No. 38263) in the Department's BIS website, dated March 8, 1951, the Chandler Hotel's lawful use is a "hotel." In addition, the CO states that "[t]his building complies with Section 67 of the Multiple Dwelling Law."
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> [. . .]
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> As per the Chandler Hotel's inspection I-cards, circa 1938, from the Housing Preservation and Development's (HPD) website . . . , the Chandler Hotel is classified as a "Heretofore Erected Existing Class B" (HEXB) multiple dwelling "originally erected as [an] apartment [and] transient hotel." Per the NYS Multiple Dwelling Law's (MDL) definition in MDL § 4(9), "[a] 'class B' multiple dwelling is a multiple dwelling which is occupied, as a rule transiently, as the more or less temporary abode of individuals or families who are lodged with or without meals. This class shall include hotels . . . ." MDL § 4(12) defines hotel as "an inn having thirty or more sleeping rooms." According to the I-card issued contemporaneously with the 1951 CO, none of the units in the Chandler Hotel were identified as residential apartments. Therefore, based on the above DOB and HPD records, this public challenge is hereby denied.
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> [. . .]
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> The challenger's third zoning challenge pertains to the subject building's mechanical floor spaces' use and "unnecessary height" (Point III). The challenger does not specify which of the subject building's mechanical floor spaces will be constructed with "unnecessary height."
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> Per the Zoning Resolution's definition for "floor area" in Section ZR 12-10, "the floor area of a building shall not include . . . (8) floor space used for mechanical equipment . . . ." Per the mechanical plans approved by the Department for the building's second, third, fourth, fiftieth and fifty-first stories, those stories contain mechanical equipment throughout each story, which supports the building's mechanical systems. As such, these stories may be excluded from the building's floor area, as demonstrated on the approved zoning analysis . . . .
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> In addition, the Zoning Resolution does not regulate the floor-to-ceiling height of a building's mechanical spaces. The building's bulk, including the building's height, is limited by the applicable height and setback regulations, including the tower regulations, in the Zoning Resolution. The approved zoning analysis . . . demonstrates that the subject building's bulk complies with the tower regulations in ZR 23-65 (Tower Regulations), including ZR 23-652 (Standard Tower). Therefore, this public challenge is hereby denied.
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> [. . .]
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> The [fifth] zoning challenge pertains to the minimum required distance between the subject building and the Chandler Hotel.
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> In response, the challenger states that "I agree that the building space requirements of 23-71 are not applicable 'because the existing and proposed building are abutting on the same zoning lot and therefore considered to be one building.'"
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> In addition, the challenger cites to subdivision 2 in MDL § 28 (Two or more buildings on same lot) in the NYS Multiple Dwelling Law . . . . Because the Chandler Hotel on tax lot No. 74 and the subject building on tax lot No. 12 are located on two separate tax lots, MDL 28(2) is not applicable. Therefore, this public challenge is hereby denied; and

WHEREAS, this is an appeal for interpretation under ZR § 72-11 and Charter § 666(6)(a), brought on behalf of Sky House Condominium ("Appellant"), owner in fee of land located in Manhattan known and designated as Block 859, Lot 7501 (11 East 29th Street), alleging errors of law pertaining to floor space

used for mechanical equipment within a building proposed at 15 East 30th Street (the "Proposed Building") and to the use classification of Hotel Chandler, an existing building located at 12 East 31st Street (the "Hotel"); and

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

WHEREAS, a public hearing was held on this appeal on July 25, 2017, after due notice by publication in *The City Record*, with a continued hearing on September 20, 2017, and then to decision on the same date; and

WHEREAS, Vice-Chair Chanda performed an inspection of the site and surrounding neighborhood; and

WHEREAS, the New York City Department of City Planning ("DCP") submitted testimony stating that there are no regulations in the Zoning Resolution controlling the height of stories with floor space used for mechanical equipment, that no inner court regulations apply to commercial hotel uses and that there are no provisions of the Zoning Resolution that would preclude the merger of two or more zoning lots in the event that such a merger would create any non-compliance with the bulk regulations of the Zoning Resolution; and

WHEREAS, New York City Councilmember Daniel R. Garodnick submitted testimony expressing concern that the idea of a "structural void," a shorthand term referring to the second, third and fourth stories of the Proposed Building and identified as mechanical floors, does not exist in the Zoning Resolution, that the DOB determination at issue in this appeal may set precedent for other developments in the City and that the proposed building may adversely affect legally mandated light and air available to Hotel Chandler; and

WHEREAS, Friends of the Upper East Side Historic Districts, The Municipal Art Society of New York and the Greenwich Village Society for Historic Preservation presented written and oral testimony in opposition to the proposed building and in support of this appeal; and

WHEREAS, DOB, Appellant, the owner of the Proposed Building (the "Owner") and the Hotel have been represented by counsel throughout this appeal; and

BACKGROUND

WHEREAS, the subject zoning lot is bounded by East 31st Street to the north, Madison Avenue to the east and East 30th Street to the south, in a C5-2 zoning district, in Manhattan; and

WHEREAS, the zoning lot has approximately 220 feet of frontage along East 31st Street, 143 total feet of non-continuous frontage along Madison Avenue, 118 square feet of frontage along East 30th Street and consists of Tax Lots 10, 12, 16, 63, 64, 67, 69, 71, 74, 1101–1107 and 90671; and

WHEREAS, the Proposed Building is under construction at 15 East 30th Street (Tax Lot 12); and

WHEREAS, 12 East 31st Street (Tax Lot 74) is occupied by the Hotel, a 13-story with cellar and sub-cellar building; and

PROCEDURAL HISTORY

WHEREAS, this appeal concerns the development of the Proposed Building, a 56-story, with cellar, mixed-use residential and commercial building; and

WHEREAS, a construction application for the Proposed Building was filed with DOB on September 11, 2014, and permits were issued in conjunction with New Building Application No. 122128679 (the "NB Application") on July 21, 2016, and subsequently renewed; and

WHEREAS, beginning February 11, 2015, numerous determinations regarding application of the Zoning Resolution to the Proposed Building were posted publicly on DOB's website in accordance with DOB's public-challenge rule, 1 RCNY § 101-15, which affords members of the public an opportunity to learn about proposed buildings early in the construction process; and

WHEREAS, by letter dated April 25, 2016, Appellant submitted a challenge to the Proposed Building, which DOB accepted in part and denied in part on June 29, 2016; and

WHEREAS, by letter dated July 14, 2016, Appellant internally appealed DOB's challenge denial to DOB's Technical Affairs Unit; and

WHEREAS, on June 29, 2016, and July 13, 2016, DOB audited the NB Application, finding open issues, which were resolved by August 4, 2016, when the NB Application passed its third audit; and

WHEREAS, post approval amendments to the NB Application were submitted and subsequently approved by DOB on August 11, 2016, and October 17, 2017; and

WHEREAS, on November 10, 2016, Appellant filed this appeal, contesting DOB's reissuance of Permit No. 122128679-01-NB for the Proposed Building on October 11, 2016; and

WHEREAS, on March 1, 2017, DOB issued the determination cited above (the "Final Determination") and Appellant filed an amendment to this appeal on March 31, 2017; and

WHEREAS, on May 5, 2017, the Board's staff instructed Appellant to notify the Hotel of this appeal because of Appellant's apparent challenge to the Hotel's CO; and

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1 ZR § 12-10 states that a "zoning lot" "may or may not coincide with a lot as shown on the official tax map of the City of New York." Here, pursuant to subdivision (d) of the "zoning lot" definition, multiple tax lots have been merged into one zoning lot pursuant to a restrictive declaration executed by each party in interest and recorded in the Conveyances Section of the New York City Department of Finance Office of the City Register (Document ID No. 2017041300245001), and the Board credits DOB's testimony that these tax lots constitute one merged zoning lot.

ISSUES PRESENTED

WHEREAS, the two issues in this appeal are whether (1) DOB appropriately determined that floor space used for mechanical equipment within the Proposed Building could be deducted from floor area under ZR § 12-10 without limitation as to height and (2) DOB properly considered a certificate of occupancy for the Hotel in determining its legal use and occupancy and in applying bulk regulations to the Proposed Building2; and

DISCUSSION

(1) MECHANICAL SPACE

WHEREAS, Appellant, DOB and the Owner dispute whether floor space on the second, third and fourth stories of the Proposed Building may properly be deducted from floor area; and

WHEREAS, ZR § 12-10 reads in pertinent part that "the *floor area* of a *building* shall not include: . . . floor space used for mechanical equipment" and that an "*accessory use* . . . is a *use* which is clearly incidental to, and customarily found in connection with, such principal *use*"; and

WHEREAS, Appellant contends that the spaces on the second, third and fourth stories3 of the Proposed Building used for mechanical equipment are too tall to permit their exemption from floor area and that the height of those floors are too excessive and unrelated to the housing of mechanical equipment that they must be classified as their own use (a "Structural Void" 4) with the primary purpose of increasing the height of the building, which is not a permitted use in the Zoning Resolution; and

WHEREAS, the Board considers Appellant's contentions in turn but ultimately finds them unconvincing; and

(A) Height

WHEREAS, Appellant argues that the Proposed Building will contain Structural Voids rather than bona fide mechanical floor space used for mechanical equipment and that a Structural Void is not a listed—and thereby permitted—floor area deduction under the Zoning Resolution; and

WHEREAS, Appellant states that Structural Voids, masquerading as accessory building mechanicals, are designed to boost building heights, views and sales prices; and

WHEREAS, Appellant states, in a submission dated March 31, 2017, that approximately 172 feet of height, or 24 percent of the Proposed Building's volume, is devoted to accessory building mechanicals, but Appellant also states that the Structural Void proposed is 132 feet in height5; and

WHEREAS, the Owner replies that mechanical deductions constitute approximately five percent of the Proposed Building's above-grade square footage and that Appellant's figures are unsupported by calculations; and

WHEREAS, Appellant cites no provision in the Zoning Resolution restricting the height of floor space used for mechanical equipment as is at issue here,6 and Appellant states that it has found no case law or legal guidance on the topic but contends that, under *New York Botanical Garden v. Bd. of Standards & Appeals of City of New York*, 91 N.Y.2d 413, 423 (1998), the Zoning Resolution's silence as to the height permitted for accessory uses is not determinative; and

WHEREAS, Appellant also cites to *47 East 3rd Street*, BSA Cal. No. 128-14-A (May 12, 2015), where the Board stated that "DOB may take into consideration, with respect to a purported accessory use, the relative size of the purported accessory use where the size of the purported accessory use is indicative of its status as subordinate and minor in significance to said principal use"; and

WHEREAS, DOB replies that the Zoning Resolution does not contain any regulations pertaining to the floor-to-ceiling height of a building's mechanical spaces and, by letter dated July 20, 2017, DCP corroborates that there are no regulations in the Zoning Resolution controlling the height of stories with floor space used for mechanical equipment; and

WHEREAS, the Owner replies that, where the Zoning Resolution restricts floor-to-ceiling heights or overall building heights, it does so explicitly, though no such provision restricts the height of the Proposed Building under ZR § 23-65; and

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2 Appellant's revised statement of facts, dated March 31, 2017, indicates that these are the two issues on appeal. Subsequent submissions by Appellant attempt to muddy the issues by including, for instance, discussion of provisions of the Housing Maintenance Code without providing a final agency determination from DOB interpreting said provisions. Consistent with the Board's Rules of Practice and Procedure §§ 1-06.1(a) and 1-06.3(a), the Board declines to consider new arguments not presented to—and decided by—DOB in the first instance.

3 Appellant states in a letter dated August 8, 2017, that it does not address whether the fiftieth and fifty-first stories of the Proposed Building are primarily used for accessory building mechanicals in this appeal, but Appellant does not state what differentiates those stories from the second, third and fourth stories contested here.

4 The Board notes that "structural void" is a shorthand term, not one found or defined in the Zoning Resolution.

5 Presumably this discrepancy results from Appellant's inclusion or exclusion of the fiftieth and fifty-first stories from its calculations.

6 The Owner submits that the Zoning Resolution does regulate the height of mechanical equipment in the limited context of height restrictions for permitted obstructions under ZR §§ 23-62(g), 33-42(f) and 43-42(e), but those sections are inapplicable in this appeal.

WHEREAS, 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

(B) Accessory Use

WHEREAS, Appellant additionally argues that a Structural Void does not constitute a lawful accessory use and, thus, the excessive heights of the second, third and fourth floors are not permitted by the Zoning Resolution; and

WHEREAS, pursuant to ZR § 12-10, an "accessory use":

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

WHEREAS, Appellant posits that the Structural Void proposed on the second, third and fourth stories of the Proposed Building will hold only limited amounts of mechanical equipment that are not proportional to the size of the space or consistent with current standards for apartment buildings; and

WHEREAS, DOB and the Owner reply that the space at issue will be used for mechanical equipment, which is a lawful accessory use because the mechanical equipment proposed is "clearly incidental to" and "customarily found in connection with" the principal use of the Proposed Building under ZR § 12-10; and

WHEREAS, DCP states that, regardless of floor-to-ceiling height, any space devoted to accessory mechanical equipment is considered a lawful accessory use; and

WHEREAS, the Board notes that, under *New York Botanical Garden*, 91 N.Y.2d 413, 420 (1998):

> Whether a proposed accessory use is clearly incidental to and customarily found in connection with the principal use depends on an analysis of the nature and character of the principal use of the land in question in relation to the accessory use, taking into consideration the over-all character of the particular area in question . . . . This analysis is, to a great extent, fact-based . . . [and] one that will clearly benefit from the expertise of specialists in land use planning; and

WHEREAS, accordingly, the Board considers whether the proposed mechanical equipment is "clearly incidental to" and "customarily found in connection with" the principal use of the Proposed Building under ZR § 12-10; and

(i) Clearly Incidental

WHEREAS, despite the Board's request to do so, Appellant provided no testimony from a mechanical engineer evaluating whether the amount of floor space used for mechanical equipment in the Proposed Building is excessive or irregular, and, in its submission dated August 8, 2017, Appellant states that it "does not intend to hire an engineer or enter into a technical argument about what really constitutes mechanical space"; and

WHEREAS, at hearing, Appellant stated that, after searching, Appellant was unable to find someone willing and qualified to testify on the record evaluating the amount of floor space used for mechanical equipment in the Proposed Building; and

WHEREAS, instead, Appellant urges DOB to employ its discretion, as upheld in *9th & 10th St. L.L.C. v. Bd. of Standards & Appeals of City of New York*, 10 N.Y.3d 264 (2008), to require specific proof that floor space denoted on the approved plans as being used for mechanical equipment could be put to that use; and

WHEREAS, DOB states that, based upon its review, the architectural and mechanical plans for the Proposed Building show mechanical space sufficient to justify its exemption from floor are as follows: the second floor contains an emergency generator and switchboard, cooling towers, primary cold-water pumps, secondary condenser water-loop pumps, an expansion tank, heat exchangers and an air separator; the third floor has a cogeneration power plan, a precipitator, boilers, hot-water pumps, an air separator, an expansion tank, heat exchangers, part of the indoor-cooling towers from the second floor and other equipment; and the fourth floor includes domestic hot-water pumps, domestic-water heat-exchanger units, air-handler units, fan units and other equipment; and

WHEREAS, DOB and the Owner represent that, here, DOB has no reason to doubt that the mechanical space can be used as proposed, especially in light of composite mechanical plans for the Proposed Building illustrating the mechanical equipment proposed for the second, third and fourth stories; and

WHEREAS, the Board credits DOB's review of the proposed plans and finds that, unlike *9th & 10th St. L.L.C.*, there is no reason to suspect that floor spaces designated as being used for mechanical equipment on the approved plans will not be put to such use; and

WHEREAS, the Owner submits sworn affidavits from Fatma M. Amer, former First Deputy Commissioner for DOB with more than 25 years of experience in technical positions, stating that composite mechanical plans for the Proposed Building

demonstrate that the second, third and fourth stories will be used solely for mechanical equipment with no other uses; and

WHEREAS, the Owner additionally cites *246 Spring Street*, BSA Cal. No. 315-08-A (Oct. 5, 2010), where the Board upheld DOB's determination that the specific floor-area deductions taken for swimming pool service process equipment spaces and electric meter rooms were proper; and

WHEREAS, the Board credits DOB's review of the specific mechanical equipment proposed and, in the absence of contradicting testimony or evidence from a licensed and appropriately experienced engineer, the Board has no basis upon which to question the evidence in the record suggesting that the floor space on the second, third and fourth stories of the Proposed Building is "clearly incidental" to the principal use of the Proposed Building, in satisfaction of subdivision (b) of the "accessory use" definition in ZR § 12-10; and

(ii) Customary Connection

WHEREAS, at hearing, Appellant stated that large spaces used for mechanical equipment are not unique to this building and can be found in dozens of buildings currently planned, under construction and recently built in the City; and

WHEREAS, Appellant further stated that, on 57th Street in Manhattan, there is another building under construction with multiple stories devoted to mechanical equipment, totaling approximately 390 feet or 27 percent of that building's height, though Appellant did not specify how much floor space was used for such mechanical equipment; and

WHEREAS, the Owner states that other buildings within the City have been constructed using similar floor-area deductions for mechanical space, including 220 Central Park South, 520 Park Avenue, 111 West 57th Street, 217 West 57th Street and 432 Park Avenue in Manhattan; and

WHEREAS, at hearing, the Board noted that, on the same street as the Proposed Building, a similar building was completed within the past year that featured four interstitial mechanical floors and also discussed the similarity of the building located at 432 Park Avenue, Manhattan, to the Proposed Building; and

WHEREAS, Friends of the Upper East Side Historic Districts states that a building under construction at 180 East 88th Street, Manhattan, contains a three-story space used for mechanical equipment that is exempt from floor area, though no mention is made of the specific amount of floor space deducted; and

WHEREAS, The Municipal Art Society of New York states that several developments—including 217 West 57th Street, Manhattan, with 350 feet of its height devoted to mechanical space and an unspecified amount of floor space thereby exempted—contain tall mechanical spaces that extend heights, improve views and increase prices; and

WHEREAS, in response to concerns from Appellant and the community regarding the applicability of this appeal to other development within the City, the Board notes that, while it has the power, among other things, "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* Charter § 666; and

WHEREAS, accordingly, 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; and

WHEREAS, the Board notes that whether the amount of mechanical equipment proposed for the Proposed Building is customarily found in connection with mixed-use buildings similar to the Proposed Building is "a fact-based determination," *New York Botanical Garden v. Bd. of Standards & Appeals of City of New York*, 91 N.Y.2d 413, 421 (1998); and

WHEREAS, in response to an inquiry from the Board regarding whether a standard percentage of floor space dedicated to mechanical equipment has been interpreted as reasonable for similar developments and, thus, properly exempt from floor-area calculations, DOB states that mechanical floor space deductions are evaluated on a case-by-case basis and that the deduction of floor space on the second, third and fourth stories of the Proposed Building is consistent with its evaluation of mechanical floor space in comparable mixed-use developments in the City; and

WHEREAS, based upon the foregoing, the Board finds that, in accordance with the "floor area" and "accessory use" definitions of ZR § 12-10, DOB properly classified the floor space identified for the placement of mechanical equipment in the Proposed Building as a permissible accessory use and properly deducted that floor space from the calculation of floor area; and

(2) OCCUPANCY OF THE HOTEL

WHEREAS, Appellant, DOB and the Owner dispute the Hotel's legal occupancy under the Multiple Dwelling Law as of 1951 and today, the Hotel's legal use under the Zoning Resolution and the affect that the Hotel's legal occupancy and use have on the applicability of certain bulk regulations to construction of the Proposed Building, specifically with regards to distance between buildings; and

WHEREAS, the Board considers each contention in turn, but ultimately finds none of Appellant's arguments persuasive; and

(A) Legal Occupancy in 1951

WHEREAS, Appellant states that, according to the CO, the Hotel "is used for hotel rooms"7; and

7 Appellant also argues that the CO is "largely illegible and unconvincing of the [Hotel's] status in 1951." The Board does not find the CO illegible, especially in light of the fact that Appellant, DOB and the Owner have all concluded that the CO permits occupancy for a class B hotel.

WHEREAS, DOB and the Owner represent that the permissible occupancy of the Hotel is technically as a class B hotel,8 as defined in the Multiple Dwelling Law ("MDL"), and further emphasize that the definition of "class B" multiple dwelling in MDL § 4(9) indicates that such dwelling is occupied "as a rule transiently"; and

WHEREAS, the Board finds that, as authorized under the CO in 1951, the legal occupancy of the Hotel was as a class B hotel—a multiple dwelling designed to be occupied, as a rule transiently, as an inn having more than thirty sleeping rooms; and

(B) Current Legal Occupancy and Use

(i) Legal Occupancy under the Multiple Dwelling Law

WHEREAS, Appellant argues that the legal use of the Hotel in 1951 is irrelevant to this appeal, and that it is its current use, allegedly contrary to the CO, that dictates the applicability of certain bulk regulations to the Proposed Building; and

WHEREAS, in response, DOB directs the Board's attention to Charter § 645(e), which reads in relevant part:

> [E]very certificate of occupancy shall, unless and until set aside, vacated or modified by the board of standards and appeals or a court of competent jurisdiction, be and remain binding and conclusive upon all agencies and officers of the city . . . as to all matters therein set forth, and no order, direction or requirement affecting or at variance with any matter set forth in any certificate of occupancy shall be made or issued by any agency or officer of the city . . . unless and until the certificate is set aside, vacated or modified . . . upon the application of the agency, department, commission, officer or member thereof seeking to make or issue such order, direction or requirement; and

WHEREAS, accordingly, DOB argues that because the CO is binding as to matters set forth therein, it would be improper for DOB to look beyond the CO to determine the Hotel's legal occupancy; and

WHEREAS, the Board notes that DOB has not filed an appeal with the Board to set aside, vacate or modify the CO and that nothing in the record indicates that the CO was temporary, has otherwise expired as a matter of law or been superseded; and

WHEREAS, accordingly, the Board finds that the CO is currently in effect and that the Hotel's current legal occupancy remains class B hotel, as defined in the Multiple Dwelling Law and stated therein; and

(ii) Legal Use under the Zoning Resolution

(a) Apartment Hotel

WHEREAS, Appellant alleges that currently, the legal primary use of the Hotel is residential because the Hotel meets the definition of "apartment hotel" under ZR § 12-109; and

WHEREAS, ZR § 12-10 defines a "residence," in pertinent part, as "one or more *dwelling units* or *rooming units* . . . . A *residence* may, for example, consist of . . . multiple dwellings . . . or *apartment hotels*. However, *residences* do not include: (a) such transient accommodations as *transient hotels*"; and

WHEREAS, ZR § 12-10 defines an "apartment hotel," in pertinent part, as:

> [A] *building* or part of a *building* that is a Class A multiple dwelling as defined in the Multiple Dwelling Law, which:
> (a) has three or more *dwelling units* or *rooming units*;
> (b) has one or more common entrances serving all such units; and
> (c) provides one or more of the following services: housekeeping, telephone, desk, or bellhop service, or the furnishing or laundering of linens; and

WHEREAS, Appellant does not apply the Multiple Dwelling Law's definition of "Class A multiple dwelling"10 and instead presents records from the New York City Department of Finance ("DOF"), argues that they indicate that the Hotel contains rent-regulated residential units11 and cites *Nutter v. W&J Hotel Company*, 171 Misc. 2d 302 (N.Y.C. Civil Ct. 1997) for the proposition that rent-stabilized units in hotels are treated as permanent residences under the New York Rent Stabilization Law ("RSL"); and

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8 MDL § 4 states in relevant part: "9. A 'class B' multiple dwelling is a multiple dwelling which is occupied, as a rule transiently, as the more or less temporary abode of individuals or families who are lodged with or without meals. This class shall include hotels, lodging houses, rooming houses, boarding houses, boarding schools, furnished room houses, lodgings, club houses, college and school dormitories and dwellings designed as private dwellings but occupied by one or two families with five or more transient boarders, roomers or lodgers in one household. . . . 12. A 'hotel' is an inn having thirty or more sleeping rooms."

9 Contradictorily, Appellant states in its submission dated August 8, 2017, "The Hotel is a transient hotel and a multiple dwelling." The Board notes that apartment hotels and transient hotels are mutually exclusive primary uses but considers Appellant's argument to be that the Hotel is primarily used as an apartment hotel.

10 Nor does Appellant apply the Zoning Resolution's definitions of "dwelling unit" or "rooming unit" under subdivision (a) of the "apartment hotel" definition set forth in ZR § 12-10. However, Appellant does state that the Hotel has a common entrance on 30th Street in response to subdivision (b) of the definition of "apartment hotel" and submitted a printout from the Hotel's website and states that the Hotel provides services listed under subdivision (c).

11 However, under the heading "Annual Property Tax Detail," the DOF property tax statement indicates that the Hotel is "Tax class 4 – Commercial Property."

WHEREAS, in response, DOB points out that hotels subject to rent regulation include "[a]ny Class A or Class B multiple dwelling" under 9 NYCRR § 2520.6; thus, Appellant's reference to the RSL proves unpersuasive as determinative of the Hotel's proper use classification; and

WHEREAS, both DOB and the Owner submit that the presence of an incidental number of rent-regulated units within the Hotel would not convert the Hotel into a class A multiple dwelling and, thus, residential; and

WHEREAS, the Board notes that, in administering and enforcing the Zoning Resolution, neither DOB nor the Board is "required to blindly import a definition" from other statutes with varying purposes, *see Appelbaum v. Deutsch*, 66 N.Y.2d 975, 977 (1985); and

WHEREAS, the Board does not credit Appellant's suggestion that the Hotel's tax classification or the treatment of rent-stabilized units under the RSL as determinative of the Hotel's legal primary use; and

WHEREAS, rather, the Board looks to the definitions section of the Multiple Dwelling Law, which is directly referenced in the relevant text of the Zoning Resolution, and notes that MDL § 4(8)(a) states in pertinent part:

> A "class A" multiple dwelling is a multiple dwelling that is occupied for permanent residence purposes. This class shall include . . . all other multiple dwellings except class B multiple dwellings. A class A multiple dwelling shall only be used for permanent residence purposes. For the purposes of this definition, "permanent residence purposes" shall consist of occupancy of a dwelling unit by the same natural person or family for thirty consecutive days or more . . . ; and

WHEREAS, the Owner emphasizes that, under MDL § 4(8)(a), a class A multiple dwelling "shall only" be used for permanent residence purposes; and

WHEREAS, the Board notes that, because the Hotel's current legal occupancy is class B multiple dwelling while class A multiple dwellings include "all other multiple dwellings except class B multiple dwellings" under MDL § 4(8)(a), the Hotel cannot be a "Class A multiple dwelling as defined in the Multiple Dwelling Law" in accordance with the "apartment hotel" definition of ZR § 12-10; and

WHEREAS, accordingly, the Board finds that the Hotel is not an apartment hotel under ZR § 12-10; and

(b) Transient Hotel

WHEREAS, DOB and the Owner contend that the Hotel is instead a commercial12 building and classified as a transient hotel under ZR § 12-10; and

WHEREAS, ZR § 12-10 states in relevant part, "A 'transient hotel' is a *building* or part of a *building* in which: (a) living or sleeping accommodations are used primarily for transient occupancy, and may be rented on a daily basis"13; and

WHEREAS, Appellant states in its submission dated July 21, 2017, that the Hotel is primarily used "as a transient Class B multiple dwelling"14; and

WHEREAS, the Board notes that ZR § 12-01(f) states, "The phrase 'used for' includes 'arranged for', 'designed for', 'intended for', 'maintained for', 'or occupied for'"; and

WHEREAS, as stated above, the Board finds that the Hotel's current certificate of occupancy indicates that the Hotel is designed and arranged for occupancy, as a rule transiently, as an inn having more than thirty sleeping rooms; and

WHEREAS, the Board notes that nothing in the record indicates that the Hotel has been unlawfully altered from its legal occupancy as a class B hotel; and

WHEREAS, to the contrary, the Board notes that the Hotel's website indicates that the Hotel is actively being operated and advertising rooms for short-term, transient occupancy; and

WHEREAS, accordingly, the Board finds that the primary use of the Hotel is consistent with the "transient hotel" definition in ZR § 12-10 and that the Hotel is, therefore, a commercial building; and

(C) Applicability of Bulk Regulations

WHEREAS, Appellant argues that certain bulk regulations15 applicable to residential buildings apply to the Hotel and were not properly considered in DOB's evaluation of the NB Application and, thus, the Final Determination was in error; and

WHEREAS, in particular, Appellant argues that MDL § 28 precludes construction of the Proposed Building, and MDL § 28(2) reads in relevant part:

> Except as otherwise provided . . . for dwellings erected, enlarged, converted or altered pursuant to plans filed prior to December fifteenth, nineteen hundred sixty-one in accordance with the provisions of

12 ZR § 12-10 states, "A 'commercial' *use* is any *use* listed in Use Group[] 5." Transient hotels and accessory uses are listed in Use Group 5 under ZR § 32-14 and are, therefore, commercial uses.

13 None of the other elements of the "transient hotel" definition of ZR § 12-10 as they apply to the Hotel are disputed in this appeal.

14 The Board again notes that this statement contradicts Appellant's argument that the Hotel is an apartment hotel.

15 By letter from Appellant to DOB dated July 14, 2016, as referenced in the Final Determination, Appellant states, "I agree that the building space requirements of 23-71 are not applicable 'because the existing and proposed buildings are abutting on the same zoning lot and therefore considered to be one building.'" Accordingly, the Board declines to consider the applicability of ZR § 23-71 in this appeal since Appellant apparently conceded this point before DOB. Appellant has also not challenged any bulk regulations of the Zoning Resolution applied by DOB in the Final Determination, including ZR §§ 23-532 and 23-65.

subdivision one of section twenty-six, if any building or dwelling is placed on the rear of the same lot with a multiple dwelling or a multiple dwelling is placed anywhere on the same lot with another building, there shall be left between the two buildings an open space unoccupied from the ground up and at least forty feet in depth, measured in the direction from one building to the other for the first one hundred twenty-five feet above the curb level, and eighty feet above that point; and

WHEREAS, both DOB and the Owner state that MDL § 28(2) does not apply because said provision relates to multiple buildings on a single tax lot, not zoning lot, and the Proposed Building and the Hotel are located on two separate tax lots; and

WHEREAS, additionally, the Owner notes that MDL § 4(31) states, "A 'lot' is a parcel or plot of ground which is or may be occupied wholly or in part by a dwelling, including the spaces occupied by accessory or other structures and any open or unoccupied spaces thereon, but not including any part of an abutting public street or thoroughfare"; and

WHEREAS, comparing the "lot" definition in MDL § 4(31) with the "zoning lot" definition in ZR § 12-10, the Board notes that the definitions differ in scope and purposes16; and

WHEREAS, the Board finds Appellant's conclusory conflation of the "lot" definition in MDL § 4(31) with the "zoning lot" definition in ZR § 12-10 unpersuasive; and

WHEREAS, the Board credits DOB's interpretations, especially in light of DOB's extensive experience administering complex zoning lot mergers; and

WHEREAS, based on the above, the Board finds MDL § 28(2) is inapplicable to the Proposed Building; and

CONCLUSION

WHEREAS, the Board has considered all of Appellant's arguments on appeal and finds them to be without merit; and

WHEREAS, for the foregoing reasons, the Board finds that DOB appropriately permitted floor space used for mechanical equipment within the Proposed Building to be deducted from floor area under ZR § 12-10 without limitation as to height and that DOB properly determined that the Hotel constitutes a commercial building occupied as a class B hotel, as defined in MDL § 4, and used as a transient hotel under ZR § 12-10 in applying bulk regulations to the Proposed Building.

Therefore it is Resolved, that the determination of the Department of Buildings, dated March 1, 2017, acting on a public challenge to New Building Application No. 122128679, shall be and hereby is *upheld* and that this appeal shall be and hereby is *denied*.

Adopted by the Board of Standards and Appeals, September 20, 2017.

16 For instance, MDL § 4(31) states that a lot "may be occupied wholly or in part by a dwelling," but ZR § 12-10 contains no reference to residences in the "zoning lot" definition. Likewise, ZR § 12-10 states that a "zoning lot" "may or may not coincide with a lot as shown on the official tax map of the City of New York," but MDL § 4(31) contains no such disclaimer.

A true copy of resolution adopted by the Board of Standards and Appeals, September 20, 2017.
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