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Commissioner

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July 23, 2019

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

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

Dear Honorable Members of the Board:

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

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

I. BACKGROUND

A. Description of the Proposed Building

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

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

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

B. Procedural History

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

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

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

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

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

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

II. THE PROPOSED BUILDING COMPLIES WITH THE ZR AND THE PERMIT SHOULD BE UPHELD

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

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

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

1. *Zoning Lots Divided By District Boundaries*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ZR § 12-10 defines floor area as:

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

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

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

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

ZR § 12-10 defines an accessory use as:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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III. CONCLUSION

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

Respectfully submitted,

M. J. Z.

Michael J. Zoltan

cc: Constadino (Gus) Sirakis, P.E., First Deputy Commissioner
Martin Rebholz, R.A., Borough Commissioner, Manhattan
Scott Pavan, R.A., Borough Commissioner, Development HUB
Mona Sehgal, General Counsel
Felicia R. Miller, Deputy General Counsel
Susan Amron, General Counsel, Department of City Planning
John R. Low-Beer, Esq.
(On behalf of City Club Appellants)
Stuart Klein
(On behalf of Landmark West Appellants)
David Karnovsky, Fried, Frank, Harris, Shriver & Jacobson LLP
(On behalf of West 66th Street Sponsor LLC)

Date: 7/23/19 Examiner's Name: Toni Matias

BSA Calendar #: 2019-89-A and 2019-94-A Electronic Submission: ■ Email ☐ CD

Subject Property/
Address: 36 West 66th Street, MN

Applicant Name John Low-Beer on behalf of City Club of New York and Klein Slowick, PLLC on behalf of Landmark West!

Submitted by (Full Name): Michael Zoltan, Assistant General Counsel, Department of Buildings

A) The material I am submitting is for a case currently **IN HEARING,** scheduled for 8/6/19.
The reason I am submitting this material:

- ○ Response to issues/questions raised by the Board at prior hearing
- ○ Response to request made by Examiner
- ◉ Other: _____

Brief Description of submitted material: Letter in response to Appellants' May 7, 2019 and May 14, 2019 submissions to the Board

List of items that are being voided/superseded: N/A

B) The material I am submitting is for a **PENDING** case. The reason I am submitting this material:

- ○ Response to BSA Notice of Comments
- ○ Response to request made by Examiner
- ○ Dismissal Warning Letter

Brief Description of submitted material: _____

List of items that are being voided/superseded: _____

MASTER CASE FILE INSTRUCTIONS

- ***Bind* one set of new materials in the master case file**
- ***Keep master case file in reverse chronological order* (all new materials on top)**
- ***Be sure to VOID any superseded materials (no stapling!)***
- ***Handwritten revisions to any material are unacceptable***

R. 000897

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."
>
> [. . .]
>
> 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.
>
> [. . .]
>
> 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."
>
> 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 . . . .
>
> 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.
>
> [. . .]
>
> The [fifth] zoning challenge pertains to the minimum required distance between the subject building and the Chandler Hotel.
>
> 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.'"
>
> 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.

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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
>
> (b) is a *use* which is clearly incidental to, and customarily found in connection with, such principal *use*; and
>
> (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.

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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.
Printed in Bulletin No. 39, Vol. 102.
Copies Sent
To Applicant
Fire Com'r.
Borough Com'r.

R. 000906

EXHIBIT B

CPC Report N 190230 ZRY (Residential Tower Mechanical Voids)

CITY PLANNING COMMISSION

April 10, 2019, Calendar No. 11 N 190230 ZRY

IN THE MATTER OF an application submitted by the Department of City Planning pursuant to Section 201 of the New York City Charter for an amendment of Article II, Chapter 3 and related provisions of the Zoning Resolution of the City of New York, modifying residential tower regulations to require certain mechanical spaces to be calculated as residential floor area.

This application (N 190230 ZRY) for a zoning text amendment was filed by the Department of City Planning (DCP) on January 25, 2019 to discourage the use of excessively tall mechanical floors in high-density residential tower districts. The proposal would require that mechanical floors, typically excluded from zoning floor area calculations, would be counted toward the overall permitted floor area on the zoning lot if they are taller than new specified limits or overly concentrated in portions of the building. The proposed floor area requirements would apply to residential towers in non-contextual R9 and R10 Residence Districts and their equivalent Commercial Districts, as well as Special Purpose Districts that rely on underlying floor area and height and setback regulations or that are primarily residential in character. The provision would also apply to non-residential portions of a mixed-use building if the building contains a limited amount of non-residential floor area.

BACKGROUND

The New York City Zoning Resolution allows floor space containing mechanical equipment to be excluded from zoning floor area calculations, reflecting the recognition that these spaces perform important and necessary functions within buildings. The Resolution does not specifically identify a limit to the height of such spaces. In recent years, some developments have been built or proposed that use mechanical or structural floors that are taller than is usually necessary to meet functional needs, to elevate upper-story residential units above the surrounding context so as to improve the views from these units. These spaces have been commonly described as “mechanical voids.”

Following requests from communities and elected officials, DCP conducted a citywide analysis of recent construction to better understand the mechanical needs of residential buildings and to assess when excessive mechanical spaces were being used to inflate their overall height. DCP assessed the residential buildings constructed in R6 through R10 districts and their Commercial District equivalents over the past 10 years and generally found excessively tall mechanical voids to be limited to a narrow set of circumstances.

In R6 through R8 non-contextual zoning districts and their equivalent Commercial Districts, DCP assessed over 700 buildings and found no examples of excessive mechanical spaces. DCP attributes this primarily to existing regulations that generally limit overall building height and impose additional restrictions as buildings become taller through the use of sky exposure planes.

In R9 and R10 non-contextual zoning districts and their equivalent Commercial Districts, residential buildings can penetrate the sky exposure plane through the optional tower regulations, which do not impose an explicit height limit on portions of buildings that meet certain lot coverage requirements. In these tower districts, generally concentrated in Manhattan, DCP assessed over 80 new residential buildings and found that the mechanical floors of most towers exhibit consistent configurations. These typically included one mechanical floor in the lower section of the building located between the non-residential and residential portions of the building. In addition, taller towers tended to have additional mechanical floors midway through the building, or regularly located every 10 to 20 stories. In both instances, these mechanical floors range in height from 10 to approximately 25 feet. Larger mechanical spaces were generally reserved for the uppermost floors of the building in a mechanical penthouse, or in the cellar.

In contrast to these typical scenarios, DCP identified seven buildings characterized by either a single, extremely tall mechanical space, or multiple mechanical floors stacked closely together. The height of these mechanical spaces varied significantly but ranged between approximately 80 feet to 190 feet in the aggregate. In districts where tower-on-a-base regulations apply, these

spaces were often located right above the 150-foot mark, which suggests that they were intended to elevate as many units as possible while also complying with the 'bulk packing' rule of these regulations, which requires 55 percent of the floor area to be located below 150 feet. In other districts, these spaces were typically located lower in the building to elevate more residential units, which often also has the detrimental side effect of "deadening" the streetscape with inactive space.

Based on the results of this analysis, DCP is proposing a zoning text amendment for residential towers in R9 and R10 non-contextual zoning districts and their equivalent Commercial Districts, as well as Special Purpose Districts that rely on underlying floor area and height and setback regulations or that are primarily residential in character, to discourage the use of artificially tall mechanical spaces that disengage a building from its surrounding context. The amendment seeks to strike a balance between allowing functionally sized and reasonably distributed mechanical spaces in residential towers while providing enough flexibility to support changing technology and design expressions in these areas.

The amendment would require that floors occupied predominantly by mechanical spaces (those that occupy 50 percent or more of a floor) and are taller than 25 feet (whether singly or in combination) be counted as floor area. Taller floors, or stacked floors taller than 25 feet, would be counted as floor area based on the new 25-foot height threshold. A contiguous mechanical floor that is 132 feet tall, for example, would now count as five floors of floor area (132/25 = 5.28, rounded to the closest whole number equals 5). The 25-foot height is based on mechanical floors found in recently-constructed residential towers and is meant to allow the mechanical needs of residential buildings to continue to be met without artificially increasing the height of residential buildings. The provision would only apply to floors located below residential floor area. The provision would not apply to mechanical penthouses at the top of buildings where large amounts of mechanical space are typically located or to below-grade mechanical space.

Additionally, any mechanical spaces (those that occupy 50 percent or more of a floor) and are located within 75 feet of one another that, in the aggregate, add up to more than 25 feet in height would similarly count as floor area. This would address situations where non-mechanical floors are interspersed among mechanical floors in response to the new 25-foot height threshold, while still allowing sufficient mechanical space for different portions of a building. For example, a cluster of four fully mechanical floors in the lower section of a tower with a total combined height of 80 feet, even with non-mechanical floors splitting the mechanical floors into separate segments, would count as three floors of floor area, even when each floor is less than 25 feet tall and they are not contiguous. (80/25 = 3.2 rounded to the closest whole number equals 3).

The new regulation would also apply to the non-residential portions of a mixed-use building if the non-residential uses occupy less than 25 percent of the building. This would ensure that tall mechanical floors would not be attributed to non-residential uses occupying a limited portion of the building, solely to avoid the proposed regulation. The 25-foot height threshold would not apply to the non-residential portion of buildings with more than 25 percent of their floor area allocated to non-residential use, as the uses in such mixed buildings (for example, offices and community facilities) commonly have different mechanical needs than residential buildings. Finally, the regulations would also apply to floors occupied predominantly by spaces (those that occupy 50 percent or more of a floor) and are unused or inaccessible within a building. The Zoning Resolution already considers these types of spaces as floor area, but it does not provide explicit limits to the height that can be considered part of a single story within these spaces. This change would ensure that mechanical spaces and these types of unused or inaccessible spaces are treated similarly.

The proposal would apply to towers in R9 and R10 Residence Districts and their equivalent Commercial Districts. The proposal would also apply to Special Purpose Districts that rely on underlying tower regulations for floor area as well as height and setback regulations, and sections of the Special Clinton District and the Special West Chelsea District that impose special tower regulations. These Special Districts are:

- Special West Chelsea District: Subdistrict A
- Special Clinton District: R9 District and equivalent Commercial Districts that do not have special height restrictions, as well as C6-4 Districts in the 42nd Street Perimeter Area
- Special Lincoln Square District: C4-7 Districts
- Special Union Square District: C6-4 Districts
- Special Downtown Jamaica District: "No Building Height Limit" area as shown on Map 5 of Appendix A in Article XI, Chapter 5
- Special Long Island City District: Court Square Subdistrict

ENVIRONMENTAL REVIEW

This application (N 190230 ZRY) was reviewed pursuant to the New York State Environmental Quality Review Act (SEQRA) and the SEQRA regulations set forth in Volume 6 of the New York Code of Rules and Regulations, Section 617.00 et. seq. and the New York City Environmental Quality Review (CEQR) Rules of Procedure of 1991 and Executive Order No. 91 of 1977. The designated CEQR number is 19DCP110Y. The lead agency is the City Planning Commission.

After a study of the potential environmental impact of the proposed actions, a Negative Declaration was issued on January 28, 2019. On April 9, 2019, a Revised Environmental Assessment Statement (EAS) was issued which describes and analyzes proposed City Planning Commission modifications to the Proposed Action. The Revised EAS concludes that the proposed CPC modifications would not result in any new or different significant adverse environmental impacts and would not alter the conclusions of the EAS. A Revised Negative Declaration was issued on April 9, 2019. The Revised Negative Declaration reflects the modifications assessed in the Revised EAS and supersedes the Negative Declaration issued January 28, 2019.

PUBLIC REVIEW

This application (N 190230 ZRY) was duly referred on January 28, 2018, to 13 Community Boards (one in the Bronx, 10 in Manhattan, and two in Queens), to Manhattan and Queens Borough Boards, and to the Bronx, Manhattan and Queens Borough Presidents for information and review in accordance with the procedure for referring non-ULURP matters.

Community Board Review

All 13 Community Boards adopted resolutions regarding the proposed zoning text amendment, many of which included comments on the proposal and recommendations for modifications. The complete resolutions received from all Community Boards are attached to this report.

Bronx

On March 6, 2019, Community Board 4 voted to recommend approval.

Manhattan

On February 26, 2019, Community Board 1 voted 37 in favor, 1 opposed and 0 abstention on a resolution to recommend approval with conditions.

On February 26, 2019, Community Board 2 voted unanimously on a resolution to disapprove with conditions.

On February 27, 2019, Community Board 3 voted on a resolution to recommend approval, with recommendations.

On March 7, 2019, Community Board 4 voted 37 in favor, 0 opposed and 1 abstention on a resolution to recommend disapproval with conditions.

On February 15, 2019, Community Board 5 voted 26 in favor, 0 opposed and 1 abstention on a resolution to recommend disapproval with conditions.

On February 15, 2019, Community Board 6 voted 32 in favor, 0 opposed and 1 abstention on a resolution to recommend approval with recommendations.

On March 5, 2019, Community Board 7 voted 38 in favor, 1 opposed and 0 abstention on a resolution to recommend approval with conditions.

On February 22, 2019, Community Board 8 voted 39 in favor, 0 opposed and 1 abstention on a resolution to recommend approval with recommendations.

On February 21, 2019, Community Board 10 voted 25 in favor, 0 opposed and 0 abstention on a resolution to recommend approval.

On February 21, 2019, Community Board 11 voted 31 in favor, 0 opposed and 1 abstention on a resolution to recommend approval.

While this application was not referred out to Community Board 12, the Board passed a resolution on the matter on February 28, 2019 and voted 38 in favor, 0 opposed and 0 abstention to recommend approval.

Queens

On March 8, 2015, Community Board 2 voted 29 in favor, 0 opposed and 0 abstentions to recommend approval.

On March 20, 2019, Community Board 12 voted 35 in favor, 0 opposed and 0 abstentions on a resolution to recommend approval.

Most Community Boards expressed support for the proposed approach to limiting mechanical voids but maintained that more could be done to restrict their size and frequency within buildings. Around one-third of Community Boards voted to approve with conditions or

recommendations that encouraged a stricter mechanical space height limit of 12 to 15 feet (versus 25 feet) and a more restrictive clustering interval of 100 to 200 feet (versus 75 feet). Some Community Boards called for additional restrictions to establish a percentage limit on the total amount of mechanical space permitted in a building. Three Community Boards indicated that the regulation should apply more broadly, to all zoning districts, mixed-use buildings, and commercial buildings. About half of the Community Boards indicated that the regulation should also apply to unenclosed voids (including, stilts, outdoor spaces, and terraces). Seven Community Boards, including those that denied with conditions, called for an expansion of the geographic scope of the regulation to include Central Business Districts and other Special Purpose Districts. Overall, these Boards were supportive of the proposal but wanted more limitations on mechanical spaces as part of a broader concern for building heights, as evidenced by discussion by some members about limiting floor to ceiling heights and amenity spaces.

Borough Board Review

This application (N 190230 ZRY) was referred to the Manhattan and Queens Borough Boards. The Manhattan Borough Board held a public hearing on February 21, 2019, to discuss the proposal but did not adopt a resolution. The Queens Borough Board did not adopt a resolution.

Borough President Review

This application (N 190230 ZRY) was referred to the Bronx, Manhattan, and Queens Borough Presidents. This application was considered by the Manhattan Borough President, who issued a letter dated March 8, 2019, recommending approval of the application with conditions to:

- Increase the clustering threshold to 90 feet from 75 feet.
- Remove the rounding provision for calculating the floor area for mechanical spaces that exceed the 25-foot threshold.
- Expand the applicability of the application to unenclosed voids.
- Expand the geographic scope to include the block bounded by West 56th Street, south side of West 58th Street, Fifth Avenue, and Sixth Avenue.

The Bronx and Queens Borough Presidents did not issue recommendations.

City Planning Commission Public Hearing

On February 27, 2019 (Calendar No. 1), the City Planning Commission scheduled a public hearing on this application (N 190230 ZRY) for March 13, 2019. The hearing was duly held on March 13, 2019 (Calendar No. 40). There were 23 speakers in favor of the application and 18 speakers in opposition.

Speakers in favor included the Manhattan Borough President; the Manhattan District 5 Council Member; a representative of the Manhattan District 6 Council Member; a representative of the State Assembly Member for District 67; representatives from Manhattan Community Board 5 and 7; Manhattan neighborhood associations; landmark and cultural groups; community groups; Manhattan preservation groups; and Manhattan residents.

Speakers in opposition included industry practitioners such as engineers and architects; attorneys from land use law firms; representatives of industry associations; representatives of an Upper West Side Jewish congregation; and a Manhattan preservation group.

Both speakers in favor and those opposed expressed the sentiment that the overuse of mechanical space to create excessive voids of 80 to 190 feet is egregious and inappropriate. All speakers agreed that the issue of excessive voids could and should be addressed. Elected officials, Community Board representatives, neighborhood associations, and community groups supported the goal of this application but expressed that it could go further in limiting mechanical space, expanding applicability across the city, implementing an overall percentage cap on mechanical space, and including unenclosed voids. Many speakers expressed concern that the application would still provide opportunities for excessive mechanical voids and offered recommendations to reduce the 25-foot threshold to 12 feet, and to increase the clustering threshold from 75 feet to between 100 and 200 feet. A few stated that, based on the study data DCP provided, most mechanical spaces in existing buildings averaged 12 feet in height. Some community members stated that there was not

enough justification for the 25 feet of mechanical height per 75 feet of building height provision in the application and therefore felt that the proposed regulations would not be restrictive enough to address the issue.

Industry professionals, including architects and engineers, said that they did not support excessive mechanical voids used solely to raise the height of buildings but many of them expressed concern that the proposed thresholds do not align with industry best practices. Experts stated that the 25-foot threshold would be too limiting for efficient mechanical equipment needs and that oftentimes mechanical space needs compete with occupiable space needs. They stated that the 25-foot threshold would further strain the ability to ensure adequate space for mechanical equipment. One speaker from the Department of Buildings Mechanical Code Committee indicated that the NYC Energy Code requirements are moving toward greater building efficiency and energy conservation. He noted that for efficient use of heating and cooling systems, a building's heat recovery system requires large heat exchangers that transfer heat and moisture from the exhaust to the supply air. He and other speakers indicated that the ductwork and piping required for these systems could exceed 25 feet in height. Engineers who spoke also noted that traditionally mechanical spaces would only be located in the cellar or on the roof of buildings, but that industry practices are moving toward locating mechanical equipment throughout the building for better flood resiliency and energy efficiency. Speakers noted that high-efficiency boiler plants, fire protection water tanks, and stormwater recovery tanks are all examples of mechanical equipment that could require space taller than 25 feet. The majority of professionals, when asked, estimated that 30 to 35 feet would be a more reasonable threshold.

Some individuals who spoke in opposition indicated that the 30-day referral period was too short and that the Commission should take more time to engage with industry experts before moving forward with the text amendment. Further, representatives from an industry association expressed concern over the lack of a grace period or grandfathering provision for existing, ongoing projects. Representatives indicated that this proposal should take into consideration projects that would be affected in the midst of their development, having based their plans and investments on the

mechanical space and floor area provisions in the Zoning Resolution today. A supplemental written testimony from this association stated that existing developments with mechanical voids have consistently complied with the Zoning Resolution as affirmed by Department of Buildings (DOB) interpretations and the Board of Standards and Appeals (BSA) decisions. The testimony also referenced a letter from DCP to BSA, confirming that the Zoning Resolution does not explicitly regulate the heights of mechanical space, in response to a specific building proposal before the BSA in 2017. The association further stated that ongoing and proposed development projects have appropriately relied on this precedent and should not be disrupted by this proposal.

The City Planning Commission received over 100 written comments and testimonies echoing support, concerns, and comments in line with those raised at the public hearing.

WATERFRONT REVITALIZATION PROGRAM CONSISTENCY REVIEW

This application was reviewed by the Department of City Planning for consistency with the policies of the New York City Waterfront Revitalization Program (WRP), as amended, approved by the New York City Council on October 13, 1999 and by the New York State Department of State on May 28, 2002, pursuant to the New York State Waterfront Revitalization and Coastal Resources Act of 1981 (New York State Executive Law, Section 910 et seq.). The designated WRP number is 18-161.

This action was determined to be consistent with the policies of the WRP.

CONSIDERATION

The City Planning Commission believes that this application for a zoning text amendment (N 190230 ZRY), as modified herein, is appropriate.

DCP's proposal is to limit the practice of constructing artificially tall mechanical spaces that disengage residential buildings from their surrounding context while also maintaining the flexibility needed to support reasonably sized and distributed mechanical spaces. The Commission

agrees these are worthy goals and notes that even many who have raised concerns about the proposal have been supportive of its overall intent and approach. DCP undertook a yearlong study to review and analyze existing building conditions to inform this application. Therefore, the Commission finds that the proposal addresses community concerns while also recognizing the importance of design flexibility and architectural expression.

A primary issue raised by the Community Boards and members of the public, and echoed in written testimony, was that the proposed regulation does not fully address concerns that buildings may use mechanical spaces to be taller. Many called for stricter provisions and an overall cap on the percentage of mechanical space allowed in a building. The Commission notes that mechanical space is essential to the functionality of a building and requires flexibility based on a building's size and use. To implement a more restrictive or prohibitive rule to control the dimension or quantity of mechanical space would unduly hinder a building's capacity to operate and support occupants. The Commission finds that the approach to discourage excessive voids by providing a height and clustering threshold above which mechanical space will count as floor area is an appropriate mechanism to limit the nonproductive use of voids while allowing the flexibility to address mechanical needs. The Commission notes that this provision is not an outright prohibition on excessively tall mechanical space, rather it is an effective disincentive.

Many community groups and neighborhood associations called for a reduction of the 25-foot threshold of mechanical space excluded from floor area to 12 to 15 feet and an increase in the permitted 75-foot clustering interval to 90 to 200 feet. The Commission recognizes that the 25/75-foot thresholds were recommended by DCP based on industry expert consultations and extensive review of over 700 buildings permitted or constructed within the past 10 years. Overall, this study found that the thresholds offer reasonable flexibility while still addressing the excessive mechanical voids concern. The Commission also notes that the tallest voids, found in seven proposed or existing buildings in Manhattan, have heights ranging from 80 to 190 feet. The Commission recognizes that testimony by several engineers and an architectural association confirmed that it is highly unlikely that a residential building would need mechanical space that is

more than around 30 to 35 feet tall. Therefore, the Commission does not find harm in limiting the opportunity to exempt artificially tall mechanical spaces. DCP also reviewed City-led affordable housing projects as an example of reasonable mechanical space clustering, finding that a 90-foot interval was used for building efficiency purposes rather than for increased building heights. The Commission therefore believes that the 75-foot interval clustering threshold would provide sufficient flexibility and is appropriate.

The Commission also heard testimony submitted by industry practitioners (including architects and engineers, industry associations, and a cultural and design organization) that indicated that the proposed 25-foot threshold was too restrictive. Practitioners noted that industry best practices for future energy conservation, resiliency, and sustainability require flexible mechanical space. The Commission heard that mechanical equipment needed for energy conservation practices may require more than 25 feet in height and that the engineering industry already competes for mechanical space within buildings. The Commission notes that practitioners do not support the overuse of mechanical space solely to artificially raise building heights, nor do they take issue with the proposed clustering threshold. However, the Commission recognizes the industry's concerns regarding the 25-foot threshold as too constraining for mechanical needs. The Commission also heard suggestions from practitioners and associations that a 30- to 35-foot threshold would allow reasonable flexibility for mechanical needs both today and in the future. The Commission believes that it is important that this text amendment not hinder a resilient or energy efficient building, and recognizes the need to maintain flexibility so that changes to NYC Energy or Building Code requirements are not impeded by this text amendment.

The Commission therefore modifies the proposed zoning text amendment to increase the 25-foot threshold to 30 feet before counting mechanical space toward floor area. This change will allow appropriate flexibility to meet energy efficient and resiliency standards without requiring a building to equally offset important occupiable space. The Commission notes that the zoning text amendment does not prohibit the use of mechanical space beyond 30 feet if necessitated by unique building circumstances. Mechanical space of any height is still permitted, though it will be counted

as floor area when exceeding the threshold. The preceding considerations account for this modification from 25 to 30 feet.

The Commission received written testimony and heard from some industry representatives who called for exempting structural support features, such as beams, braces, and trusses, that can be located within mechanical spaces. The Commission notes that these features can vary widely from building to building, and that exempting them could incentivize the use of larger support structures solely to inflate building heights. The Commission also notes that a typical floor height is measured from the top of a floor slab to the top of the floor slab above, whereas the mechanical space height in the proposed text amendment will be measured from the top of a floor slab to the bottom of a floor slab above. This allows for a clear 30-foot (formerly 25-foot) threshold that does not include portions of the floor slab above, which could reduce the amount of space available for mechanical equipment. The Commission therefore believes that the proposed mechanical space height measurement is appropriate and allows for optimal space to incorporate mechanical equipment and support structures without the need to create additional exemptions. Further, in response to suggestions from the Department of Buildings and practitioners, DCP has recommended a series of technical clarifications to the text amendment so that it more clearly meets the stated intent. The Commission agrees that these modifications are appropriate.

Some industry representatives expressed concern over the proposed formula for calculating the mechanical space in excess of the 30-foot threshold counted towards floor area. Representatives stated that the proposed text is too strict when counting mechanical space toward floor area by not allowing the first 30 feet to be excluded. The Commission believes that the formula as modified – to include the first 30 feet when a mechanical space exceeds the threshold, divided by 30 feet and rounded to the nearest integer – provides an appropriate disincentive to discourage any excessive contiguous set of mechanical floors. For example, if the mechanical space were 60 feet tall (30 feet above the threshold), which would be considered excessive based on DCP's study, the total number of floors to be counted as floor area is two under the proposed formula (60 feet/30 = 2 floors). However, if the first 30 feet were excluded from the total contiguous space of 60 feet, the

total number of floors to be counted would be one (60 feet - 30 feet/30 = 1). The Commission believes that excluding the first 30 feet would run counter to the goals of this proposal by reducing the disincentive to use artificially tall mechanical spaces. The Commission therefore supports the current proposal to count the first 30 feet when a mechanical floor exceeds the threshold.

Some industry practitioners and organizations expressed concern over the 30-day public referral period, deeming it too short to thoughtfully consider the details of this proposal. The Commission notes that all 13 Community Boards received presentations on the proposal and submitted resolutions. In addition, the Commission received over 100 written comments and testimony following the public hearing. The Commission notes that the development of this proposal involved significant public engagement with community groups and elected officials to understand the extent of the mechanical voids issue beginning in late 2017. DCP staff also met with industry associations and experts to understand the technical needs for mechanical spaces throughout the yearlong study period to inform the proposal. In addition to public outreach, the mechanical voids issue garnered significant attention through press coverage from late 2017 to the present. DCP also received over 200 letters during the year regarding mechanical voids and the proposed text amendment. The extensive public awareness and participation throughout the yearlong process made for an engaged referral period and therefore, the Commission believes that the 30-day referral period was appropriate.

In written testimony, a representative from an industry association called for a grace period or grandfathering provision to accommodate pre-development and ongoing projects that may contain mechanical spaces exceeding the proposed threshold. The testimony argues that these projects have relied on existing zoning regulations, DOB interpretations, and BSA decisions. The testimony also references a 2017 DCP letter to BSA. While previous interpretations did not prohibit the seven examples of excessive mechanical voids found in DCP's study, the Commission, upon analysis, finds this practice to serve no purpose other than to artificially elevate residential units above surrounding context in a way that is inconsistent with the intended purpose of excluding necessary mechanical space from floor area calculations. The Commission believes that the proposed zoning

text amendment addresses this practice in an appropriate way. Due to the extended period of engagement prior to the referral period as discussed above, land owners and practitioners have been aware of and informed that changes to the Zoning Resolution regarding mechanical space were imminent. The Commission therefore believes that a grace period or grandfathering provision is not necessary for this proposal.

The public also raised concerns about the proposal's geographic scope. Testimony and Community Board resolutions indicated that the text amendment should apply to residential and mixed-use buildings in currently excluded Special Purpose Districts, namely those that are considered central business districts. Other testimony and resolutions went further, recommending that the proposed regulation apply to non-residential buildings and other lower-density residential zoning districts. The Commission notes that DCP is evaluating residential buildings in central business districts throughout the city. The Commission further notes that the earlier study and consultations with industry experts confirmed that non-residential buildings include uses that vary widely, which requires a differing range of mechanical equipment needs that affect the size of mechanical floors in mixed-use buildings where residential uses are not the most prevalent use. Therefore, the Commission believes that this proposal is not appropriately applied to non-residential buildings. DCP's study focused on medium- to high-density residential zoning districts and their commercial equivalents, including R6 to R10 districts. The study found no use of excessive mechanical voids in R6 through R8 districts due to applicable existing bulk controls in the Zoning Resolution, including the sky exposure plane and lot coverage requirements. The Commission recognizes that, due to existing bulk limitations in R6 through R8 zoning districts, the construction of excessive mechanical spaces is highly unlikely, obviating a need to extend the proposal to these districts.

During the public review process, requests were submitted for the proposed regulation to include unenclosed voids. Mechanical spaces are captured by the basic definition of "floor area" and are then subject to a specific exclusion from floor area in the current Zoning Resolution, based on their mechanical function. The proposed text amendment effectively limits the terms of the specific exclusion for mechanical spaces. Unenclosed spaces – volumes that are not part of a building –

are not considered floor area under any circumstances. An effort to count unenclosed spaces as "floor area" would represent a fundamental shift in the concept of floor area, which is one of the most basic and consequential definitions in the Zoning Resolution. Unenclosed spaces exist in myriad shapes and configurations, serving a range of purposes including providing light, air, and open space. Unenclosed spaces have been used over the past century to enhance building design, as occurs in the Manhattan Municipal Building loggia, the landmarked Citicorp and Sony buildings, the recent buildings at the Domino site in Brooklyn, and many others. The Commission notes that changes intended to address concerns about tall unenclosed spaces would draw in a wide range of other, important considerations, and are beyond the scope of the proposed action.

Community Boards and community groups expressed concerns, outside the purview of this proposal, regarding tall building heights as a result of large floor-to-ceiling heights in residential units and amenity spaces, and through zoning lot mergers. The Commission notes that this proposal is not about building height; rather it addresses the recent practice of constructing artificially tall mechanical spaces in a manner that was never intended by the Zoning Resolution. The Commission agrees that mechanical voids are an appropriate issue to address through the Zoning Resolution by counting them as floor area over a specified threshold. However, residential units and amenity spaces are already regulated by floor area in the Zoning Resolution. The Commission does not believe it appropriate to regulate the heights of occupiable spaces within buildings that are already counted as floor area.

The Commission has carefully considered the recommendations and comments received during the public review of the application for the zoning text amendment (N 190230 ZRY), and believes that the proposed zoning text, as modified, is appropriate.

RESOLUTION

RESOLVED, that the City Planning Commission finds that the action described herein will have no significant adverse impact on the environment; and be it further

RESOLVED that the City Planning Commission, in its capacity as the City Coastal Commission, has reviewed the waterfront aspects of this application and finds that the proposed action is consistent with WRP policies; and be it further

RESOLVED, by the City Planning Commission, pursuant to Section 200 of the New York City Charter, that based on the environmental determination, and the consideration described in this report, the Zoning Resolution of the City of New York, effective as of December 15, 1961, and as subsequently amended, is further amended as follows:

Matter underlined is new, to be added;

Matter ~~struck out~~ is to be deleted;

Matter within # # is defined in Section 12-10;
* * * indicates where unchanged text appears in the Zoning Resolution.

ARTICLE II
RESIDENCE DISTRICT REGULATIONS

Chapter 3
Residential Bulk Regulations in Residence Districts

* * *

23-10
OPEN SPACE AND FLOOR AREA REGULATIONS

R1 R2 R3 R4 R5 R6 R7 R8 R9 R10

* * *

Special #open space# and #floor area# provisions are set forth in Section 23-16 (Special Floor Area and Lot Coverage Provisions for Certain Areas) for standard tower and tower-on-a-base #buildings# in R9 and R10 Districts, as well as for certain areas in Community District 7 and Community District 9 in the Borough of Manhattan, and Community District 12 in the Borough of Brooklyn. Additional provisions are set forth in Sections 23-17 (Existing Public Amenities for Which Floor Area Bonuses Have Been Received) and 23-18 (Special Provisions for Zoning Lots Divided by District Boundaries or Subject to Different Bulk Regulations).

* * *

23-16
Special Floor Area and Lot Coverage Provisions for Certain Areas

The #floor area ratio# provisions of Sections 23-14 (Open Space and Floor Area Regulations in R1 Through R5 Districts) and 23-15 (Open Space and Floor Area Regulations in R6 Through R10 Districts), inclusive, shall be modified for certain areas, as follows:

(a) For standard tower and tower-on-a-base #buildings# in R9 and R10 Districts

(1) In R9 Districts, for #zoning lots# where #buildings# are #developed# or #enlarged# pursuant to the tower-on-a-base provisions of Section 23-651, the maximum #floor area ratio# shall be 7.52, and the maximum #lot coverage# shall be 100 percent on a #corner lot# and 70 percent on an #interior lot#.

(2) In R9 and R10 Districts, for #zoning lots# containing a #building# that is #developed# or #enlarged# pursuant to the applicable tower regulations of Section 23-65 (Tower Regulations), inclusive, any floor space used for mechanical equipment provided pursuant to paragraph (8) of the definition of #floor area# in Section 12-10 (DEFINITIONS), and any floor space that is or becomes unused or inaccessible within a #building#, pursuant to paragraph (k) of the definition of #floor area# in Section 12-10, shall be considered #floor area# and calculated in accordance with the provisions of this Section, provided that such floor space:

(i) occupies the predominant portion of a #story#;

(ii) is located above the #base plane# or #curb level#, as applicable, and below the highest #story# containing #residential floor area#; and

(iii) exceeds an aggregate height of 30 feet in #stories# located within 75 vertical feet of one another within a #building#.

For the purpose of applying this provision, the height of such floor space shall be measured from the top of a structural floor to the bottom of a structural floor directly above such space. In addition, the number of #stories# of #floor area# such space constitutes within the #building# shall be determined by aggregating the total height of such floor spaces, dividing by 30 feet, and rounding to the nearest whole integer.

* * *

Chapter 4
Bulk Regulations for Community Facilities in Residence Districts

* * *

24-10
FLOOR AREA AND LOT COVERAGE REGULATIONS

* * *

24-112
Special floor area ratio provisions for certain areas

The #floor area ratio# provisions of Section 24-11 (Maximum Floor Area Ratio and Percentage of Lot Coverage), inclusive, shall be modified for certain areas as follows:

(a) in R8B Districts within Community District 8, in the Borough of Manhattan, the maximum #floor area ratio# on a #zoning lot# containing #community facility uses# exclusively shall be 5.10; ~~and~~

(b) in R10 Districts, except R10A or R10X Districts, within Community District 7, in the Borough of Manhattan, all #zoning lots# shall be limited to a maximum #floor area ratio# of 10.0~~.~~; and

(c) in R9 and R10 Districts, for #zoning lots# containing a #building# that is #developed# or #enlarged# pursuant to the applicable tower regulations of Section 23-65 (Tower

Regulations), inclusive, the provisions of paragraph (a)(2) of Section 23-16 (Special Floor Area and Lot Coverage Provisions for Certain Areas) shall apply:

(1) to only the #residential# portion of a #building# where less than 75 percent of the total #floor area# of such #building# is allocated to #residential use#; and

(2) to the entire #building# where 75 percent or more of the total #floor area# of such #building# is allocated to #residential use#.

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ARTICLE III
COMMERCIAL DISTRICT REGULATIONS

Chapter 5
Bulk Regulations for Mixed Buildings in Commercial Districts

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35-35
Special Floor Area Ratio Provisions for Certain Areas

* * *

35-352
Special floor area regulations for certain districts

In C1 or C2 Districts mapped within R9 and R10 Districts, or in #Commercial Districts# with a residential equivalent of an R9 or R10 District, for #zoning lots# containing a #building# that is #developed# or #enlarged# pursuant to the applicable tower regulations of Section 35-64 (Special Tower Regulations for Mixed Buildings), the provisions of paragraph (a)(2) of Section 23-16 (Special Floor Area and Lot Coverage Provisions for Certain Areas) shall apply:

(a) to only the #residential# portion of a #building# where less than 75 percent of the total #floor area# of such #building# is allocated to #residential use#; and

(b) to the entire #building# where 75 percent or more of the total #floor area# of such #building# is allocated to #residential use#.

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ARTICLE IX
SPECIAL PURPOSE DISTRICTS

* * *

Chapter 6
Special Clinton District

* * *

96-20
PERIMETER AREA

* * *

96-21
Special Regulations for 42nd Street Perimeter Area

* * *

(b) #Floor area# regulations

* * *

(2) #Floor area# regulations in Subarea 2

* * *

(3) Additional regulations for Subareas 1 and 2

In Subareas 1 and 2, for #zoning lots# containing a #building# that is #developed# or #enlarged# pursuant to the applicable tower regulations of Section 35-64 (Special Tower Regulations for Mixed Buildings), the provisions of paragraph (a)(2) of Section 23-16 (Special Floor Area and Lot Coverage Provisions for Certain Areas) shall apply:

(i) to only the #residential# portion of a #building# where less than 75 percent of the total #floor area# of such #building# is allocated to #residential use#; and

(ii) to the entire #building# where 75 percent or more of the total #floor area# of such #building# is allocated to #residential use#.

* * *

Chapter 8
Special West Chelsea District

* * *

98-20
FLOOR AREA AND LOT COVERAGE REGULATIONS

* * *

98-22
Maximum Floor Area Ratio and Lot Coverage in Subareas

* * *

98-221
Additional regulations for Subdistrict A

In Subdistrict A, for #zoning lots# containing a #building# that is #developed# or #enlarged# pursuant to the applicable tower regulations of Section 98-423 (Special Street wall location, minimum and maximum base heights and maximum building heights), the provisions of paragraph (a)(2) of Section 23-16 (Special Floor Area and Lot Coverage Provisions for Certain Areas) shall apply:

(a) to only the #residential# portion of a #building# where less than 75 percent of the total #floor area# of such #building# is allocated to #residential use#; and

(b) to the entire #building# where 75 percent or more of the total #floor area# of such #building# is allocated to #residential use#.

* * *

The above resolution (N 190230 ZRY), duly adopted by the City Planning Commission on April 10, 2019 (Calendar No. 11), is filed with the Office of the Speaker, City Council, and the Borough President, in accordance with the requirements of Section 197-d of the New York City Charter.

MARISA LAGO, *Chair*
KENNETH J. KNUCKLES, Esq., *Vice-Chairman*
DAVID BURNEY, ALLEN P. CAPPELLI, Esq., ALFRED C. CERULLO, III, MICHELLE R. de la UZ, JOSEPH I. DOUEK, RICHARD W. EADDY, HOPE KNIGHT, ANNA HAYES LEVIN, LARISA ORTIZ, RAJ RAMPERSHAD, *Commissioners*

ORLANDO MARIN, *Commissioner,* VOTING NO