2017-290-A

MEETING OF: **December 11, 2018**
CALENDAR NO.: **2017-290-A**
PREMISES: **1558 Third Avenue, Manhattan**
Block 1516, Lots 32, 37 and 138
BIN No. 1048054

ACTION OF BOARD — Appeal denied.

THE VOTE TO GRANT —
Affirmative: Commissioner Scibetta.....1
Negative: Chair Perlmutter, Vice-Chair Chanda,
Commissioner Ottley-Brown, Commissioner Sheta.....4

THE RESOLUTION —

WHEREAS, the decision of the Department of Buildings ("DOB"), dated September 28, 2017, under Zoning Challenge and Appeal Form Control No. 50662 (the "Determination"), reads in pertinent part:

> Your Zoning Challenge Appeal, received on July 3, 2017, per 1 Rules of the City of New York ("RCNY") §101-15, is hereby denied.
>
> This final determination confirms that the New York City Department of Buildings (the "Department") has received and reviewed your zoning challenge appeal, filed pursuant to 1 RCNY § 101-15, the Department's rule regarding public challenges of the Department's zoning approval for New Building [A]pplication No. 121186518.
>
> The new 31-story [sic] mixed-use building (the "subject building") in a C1-9 zoning district will be occupied by a noncommercial art gallery in community facility Use Group 3 in the building's first story and a total of 48 dwelling units in zoning Use Group 2, on floors 2 through 31. The challenger submits this zoning challenge appeal challenging two issues pertaining to the subject building, as follows:
>
> (1) In the first issue of this zoning challenge, the challenger claims that the subject building's zoning lot (composed solely of tax lot No. 37), which was created after three zoning lots (tax lot Nos. 37, 38 and 140) merged and reapportioned to the current two zoning lots (one consisting solely of tax lot No. 37 and another consisting solely of tax lot No. 138), must in fact be treated as a single zoning lot comprised of both tax lots (Nos. 37 and 138). The challenger alleges that this is based on ZR 12-10(c)'s definition for "zoning lot," which

states that "[a] 'zoning lot' is … (c) a tract of land, either unsubdivided or consisting of two or more lots of record contiguous for a minimum of 10 linear feet, located within a single block, which at the time of filing for a building permit (or, if no building permit is required, at the time of the filing for a certificate of occupancy) is under single fee ownership and with respect to which each party having any interest therein is a party in interest (as defined herein) …." The challenger states that at the time of filing for a building permit on August 1, 2014, the two lots of record (tax lot Nos. 37 and 138) were in common ownership under 180 East 88th Street Realty LLC and that such lots of record de facto formed a single zoning lot in accordance with ZR 12-10(c)'s definition for "zoning lot." The challenger further alleges that as a single zoning lot with street frontage along East 88th Street, the subject building's northern front wall faces East 88th Street and is therefore subject to the height and setback provisions in ZR 35-10 (General Provisions), as modified in ZR 35-60 (Modification of Height and Setback Regulations). The challenger claims that the "developer/owner took some steps to immunize itself from the application of category (c) [in ZR 12-10's definition for "floor area"]" by transferring ownership of tax lot 138 to Carnegie Green LLC, to which the challenger observed that "[b]oth grantor and grantee have the same address," and that on December 27, 2015, 180 East 88th Street Realty LLC and not Carnegie Green LLC filed a zoning lot declaration for tax lot No. 138 as the owner. The challenger also notes the amount of activity in May 2017 in the Office of the City Register's Automated City Register Information System in the NYC Department of Finance's ("DOF") website demonstrating the new building applicant's efforts to separate tax lot Nos. 37 and 138 into two zoning lots. However, the fact that tracts of land consist of two or more lots of record under single fee ownership does not necessarily mean that such lots of record are automatically considered a single zoning lot under ZR 12-10(c). Unless action has been taken to declare the tracts of land as a single zoning lot, they are not considered one zoning lot. Rather, an affirmative action to develop the lots together, or the recording of a Declaration of Zoning Lot Restrictions, is required for such lots to become a single zoning lot. In accordance with DOF's website, recent zoning Exhibits declaring tax lot Nos. 37 and 138 as separate zoning lots have been filed under City Register File Nos. ("CRFN") 2017000198269 and 2017000198271, respectively. The challenger does not submit evidence of zoning Exhibits filed at DOF for a single zoning lot comprised of tax lot Nos. 37 and 138. Unless the new building applicant files zoning Exhibits with the Office of the City Register declaring

> the tract of land comprised of tax lot Nos. 37 and 138 as a single zoning lot, or an application is filed to develop the lots together as a single zoning lot, each tax lot remains a separate zoning lot. As such, the subject building's northern façade that faces the adjacent zoning lot (tax lot No. 138) and does not face East 88th Street is not subject to the height and setback provisions in ZR 35-10, as modified in ZR 35-60.
>
> Therefore, issue No. 1 in this applicant's challenge is hereby denied; and

WHEREAS, this is an appeal for interpretation under Section 72-11 of the Zoning Resolution of the City of New York ("ZR" or the "Zoning Resolution") and Section 666(6)(a) of the New York City Charter, brought on behalf of Carnegie Hill Neighbors, Inc. and Friends of the Upper East Side Historic District ("Appellants"), alleging errors in the Determination pertaining to whether the subdivision of a tract of land (the "Subdivision") contravenes the "zoning lot" definition of ZR § 12-10 by rendering inapplicable certain bulk regulations to the development of a new 32-story building (the "New Building") authorized by a building permit issued by DOB on October 27, 2016, under New Building Application No. 121186518 (the "Permit"); and

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

ZONING PROVISIONS

WHEREAS, Section 12-10 of the Zoning Resolution states in part:

> "A *zoning lot* may be subdivided into two or more *zoning lots*, provided that all resulting *zoning lots* and all *buildings* thereon shall comply with all of the applicable provisions of this Resolution. If such *zoning lot*, however, is occupied by a *non-complying building*, such *zoning lot* may be subdivided provided such subdivision does not create a new *non-compliance* or increase the degree of *non-compliance* of such *building*" (emphasis in text of Zoning Resolution indicates defined terms); and

WHEREAS, zoning lots are bounded by lot lines, and buildings must be situated within the lot lines of a zoning lot, *see* ZR § 12-10 (defining "lot line" and "building"); and

WHEREAS, Section 23-65(a) of the Zoning Resolution provides, in part, that Section 23-651 of the Zoning Resolution applies to a building that is "located on a *zoning lot* that fronts upon a *wide street* and is either within 125 feet from such *wide street* frontage

along the short dimension of the *block* or within 100 feet from such *wide street* frontage along the long dimension of the *block*"[1]; and

WHEREAS, Section 23-651 of the Zoning Resolution (the "Tower-on-a-Base regulations") states in pertinent part:

> On a *wide street*, and on a *narrow street* within 125 feet of its intersection with a *wide street*, the *street wall* of the base shall occupy the entire *street* frontage of a *zoning lot* not occupied by existing *buildings*. At any height, at least 70 percent of the width of such *street wall* shall be located within eight feet of the *street line*, and the remaining 30 percent of such *street wall* may be recessed beyond eight feet of the *street line* to provide *outer courts* or balconies; and

WHEREAS, the Zoning Resolution does not define a street's "frontage," *id.*; and

WHEREAS, Section 12-10 of the Zoning Resolution defines "street wall" as a "wall or portion of a wall of a building facing a street"; and

WHEREAS, the Zoning Resolution does not define the term "facing," *id.*; and

WHEREAS, similarly, Section 23-692 of the Zoning Resolution (the "Sliver Law") contains height limits for narrow buildings, which apply to "portions of *buildings* with *street walls* less than 45 feet in width"; and

WHEREAS, the Sliver Law's height restrictions do not apply to street walls "located beyond 100 feet of a *street line*," ZR § 23-692(e)(2); and

WHEREAS, the Zoning Resolution defines a "street line" as "a *lot line* separating a *street* from other land," ZR § 12-10; and

BACKGROUND AND PROCEDURAL HISTORY

WHEREAS, the subject site is a tract of land located on the west side of Third Avenue, between East 87th Street and East 88th Street, partially in a C1-9 zoning district and partially in a C1-7 zoning district, in Manhattan; and

WHEREAS, the subject site is comprised of Tax Lots 32 and 37 ("Zoning Lot 1") and Tax Lot 138 ("Zoning Lot 2") on Block 1516 as shown on the official tax map of the City of New York; and

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[1] Sections 23-65 and 23-651 of the Zoning Resolution are applicable to certain mixed-use buildings, such as the New Building, in C1-9 zoning districts, *see* ZR § 35-64.

WHEREAS, Tax Lot 32 is located on the northwest corner of East 87th Street and Third Avenue, partially in a C1-9 zoning district and partially in a C1-7 zoning district, with approximately 125 feet of frontage along East 87th Street, 101 feet of frontage along Third Avenue and 12,660 square feet of lot area, and is occupied by a six-story commercial building; and

WHEREAS, Tax Lot 37 is located on the west side of Third Avenue, between East 87th Street and East 88th Street, in a C1-9 zoning district, with approximately 39'-9" of frontage along Third Avenue, 100 feet of depth and 5,080 square feet of lot area, and is occupied by the New Building, which is under construction; and

WHEREAS, Tax Lot 138 is located on the south side of East 88th Street, between Lexington Avenue and Third Avenue, in a C1-9 zoning district, with approximately 22'-0" of frontage along East 88th Street, 10'-0" feet of depth and is vacant; and

WHEREAS, prior to 2014, former Tax Lot 140 was an existing zoning lot with 22 feet of frontage along East 88th Street, 100 feet of depth and was occupied by an existing building that has since been demolished; and

WHEREAS, by July 22, 2014, former Tax Lot 140 and former Tax Lot 38 were combined into a single tax lot (maintaining the designation as former Tax Lot 38) with frontage along East 88th Street and frontage along Third Avenue; and

WHEREAS, by November 25, 2014, former Tax Lot 138—with a depth of four feet, a width of 22 feet and frontage along East 88th Street—had been reapportioned from former Tax Lot 38, which then only had frontage along Third Avenue; and

WHEREAS, a zoning lot description and ownership statement along with a certification of parties in interest were recorded on December 20, 2014, stating that the newly configured Tax Lot 38 and newly configured Tax Lot 138 constituted a single zoning lot where all of the parties in interest were the same; and

WHEREAS, on February 24, 2015, DOB approved the Original Subdivision under Subdivision Improved Application No. 121192459, and DOB records indicate the "last action" on said application is "completed" on the same date[2]; and

[2] The same DOB records also indicate an audit with the status "notice to revoke" as of May 25, 2016; however, the Board notes that nothing in the record indicates that the revocation of any approval under Subdivision Improved Application No. 121192459 has been effectuated.

WHEREAS, by February 27, 2015, a new zoning lot description and ownership statement and a certification of parties in interest had been recorded against Tax Lot 38, which excluded Tax Lot 138 (the "Original Subdivision")[3]; and

WHEREAS, by February 27, 2015, a declaration of zoning lot restrictions, a zoning lot description and ownership statement and a certification of parties in interest, which included waivers of declaration from all parties in interest, were recorded to merge Tax Lot 37, Tax Lot 38 and Tax Lot 32 into a single zoning lot; and

WHEREAS, by March 23, 2015, new Tax Lot 38 and former Tax Lot 37 had been combined into a single Tax Lot 38; and

WHEREAS, on May 24, 2017, Tax Lot 37 and Tax Lot 138 took on their current configuration by termination of the declaration of zoning lot restrictions and recordation of a new declaration; and

WHEREAS, on October 27, 2016, under New Building Application No. 121186518, DOB approved revised plans for the New Building, authorizing the Subdivision of the subject site into Zoning Lot 1 and Zoning Lot 2, and the Permit was issued on the same date; and

WHEREAS, because of the relocation of the lot line between former 4'-0" Tax Lot 138 and former Tax Lot 38, the Subdivision simultaneously effectuated two events: subdividing former Tax Lot 38 by removing a 6'-0" parcel and merging the former 4'-0" Tax Lot 138 with said 6'-0" parcel to assemble the current 10'-0" Tax Lot 138; and

WHEREAS, as currently configured, Tax Lot 138 has 10'-0" of depth and frontage along East 88th Street, and Tax Lot 37 has approximately 39'-9" of frontage along Third Avenue and is occupied by the New Building, which is under construction; and

WHEREAS, accordingly, Zoning Lot 2 (Tax Lot 138) is an intervening tract of land between the New Building and East 88th Street; and

WHEREAS, it is undisputed that the New Building complies with the Tower-on-a-Base regulations with respect to Third Avenue, upon which Zoning Lot 1 has a "street wall" and which the New Building's Third Avenue "street wall" faces, *see* ZR §§ 23-651 and 12-10 (definitions); and

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[3] Because Tax Lot 138's current depth of 10'-0" is the subject of the Determination, the Board considers this appeal with respect to the current configuration of Tax Lot 138. No appeal with respect to the Original Subdivision, creating a zoning lot with a depth of 4'-0", was filed with the Board, so the lawfulness of the Original Subdivision is not before the Board in this appeal.

WHEREAS, on September 28, 2017, DOB issued the Determination, and Appellants commenced this appeal on October 30, 2017, seeking reversal of the Determination; and

WHEREAS, a public hearing was held on this appeal on July 17, 2018, after due notice by publication in *The City Record*, with a continued hearing on October 30, 2018, and then to decision on December 11, 2018; and

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

WHEREAS, the Department of City Planning submitted testimony in opposition to this appeal by letter dated October 18, 2018, which reads in pertinent part:

> Three zoning issues were cited by the Appellant and the Department agrees with the interpretations set forth by DOB of the relevant zoning regulations in issuing the permit. . . .
>
> The first two issues relate to zoning lots: when does a zoning lot get created and what is the required minimum size of a zoning lot in a commercial district? The definition of zoning lot in New York City Zoning Resolution (ZR) Section 12-10 sets forth in paragraphs (a) through (d) the conditions under which a zoning lot can be formed. However, it is established by interpretation, practice and documentation by previous Department Counsel that the provisions do not apply automatically to a collection of tax lots that meet any of these conditions. An affirmative action by the owners of the properties must be taken in seeking a permit or CO based on zoning calculations of the combined tax lots identified in the applications as the subject zoning lot. Therefore, the zoning lot for this development was created in the application for a building permit for this development. Since the zoning lot identified for development in such application does not incorporate adjoining tax lots, it is not part of the zoning lot for this development, regardless of the lots being owned by a single owner.
>
> The second issue relates to whether there is in the ZR a required minimum zoning lot size. The ZR allows subdivision of zoning lots only if subdivided into two or more zoning lots. As a result, the interpretation of what constitutes a required minimum lot size in the designation of a zoning lot in commercial districts rests on the interpretation of the regulation in ZR 12-10 paragraphs (c) and (d) that establishes a minimum dimension of 10 contiguous feet required to

merge adjoining tax lots to create a zoning lot. That is, in order for a tax lot to merge with another tax lot to create a zoning lot, the two tax lots must adjoin for 10 linear feet. By interpreting this regulation in the definition of zoning lot to apply to both the creation of a zoning lot from the subdivision of a tract of land as well as to the merger of formerly separate tax lots, DOB has applied a consistent approach to zoning lot dimensions. Such interpretation protects the intent of the Zoning Resolution which is to allow for the use of the tax lot in future development and clearly not to alienate any land for the purpose of undermining zoning requirements.

The third issue raised by the Appellant is whether the height regulations of Section 23-692 (known as the "sliver rule") applicable to "street walls" apply to the portion of the development on 1558 Third Avenue that is set back but visible from East 88[th] Street. The purpose of this rule is to limit the height of buildings on narrow lots fronting on the street. . . .

In order to make sense of this regulation, the building wall must be on a zoning lot that adjoins the street. Otherwise most walls of every building on a block could be determined to be "facing" a street and therefore could be subject to these height restrictions. This is not what was intended by this regulation and would be an absurd and extremely problematic outcome. The regulation also uses the term "fronts on a street" or "street frontage" (see zoning text*). In order to pinpoint the location of a street wall that "fronts on a street", although not defined in the ZR, "fronting on a street" means that the building is on a zoning lot that adjoins the street, and the street wall is the wall of the building that is closest to and faces/fronts the street on such zoning lot. The applicability of this rule for buildings based on distance from the street even on zoning lots that adjoin the street is dealt with directly in ZR Section 23-692 paragraph (e) and with through lots where a building wall beyond 100 feet of a street on a zoning lot that adjoins a street is not required to comply with the sliver rule. Therefore, the Department agrees with DOB's determination that the sliver rule applies to a building's street wall facing a street only when it is on a zoning lot that fronts on or adjoins a street.

A related issue the Appellant raised concerns tower on a base regulations and their applicability to the portion of the zoning lot visible from East 88th Street. The development is in a C1-9 District where tower on a base is required for buildings on wide streets where more than 25 percent of the floor area is residential (pursuant to ZR

> Section 35-64 and the criteria in ZR Section 23-65(a)). The development complies with these regulations and places a tower on a base building on the portion of the zoning lot that fronts on Third Avenue. For the same reason as the sliver rules, these regulations do not apply on East 88th Street where the zoning lot does not front on or adjoin the street.
>
> The Department notes that given the complexity and enormous variety of land and existing buildings in the city, the ZR does not, and realistically cannot, anticipate and adjust the design outcome of every development, especially given the parallel complexity and intricacy of regulations in the ZR. The Department believes that DOB correctly interpreted the applicable ZR regulations and the development at 1558 3rd Avenue complies with the regulations as set forth [in] the ZR; and

WHEREAS, Community Board 8 submitted testimony in support of this appeal, stating that the developer created a small lot solely for the purpose of evading zoning regulations, that the Zoning Resolution is designed to maintain neighborhoods, provide predictability, foster community and allow the City to remain a livable, vital place for all residents and that allowing the Subdivision to form Zoning Lot 1 and Zoning Lot 2 would enable a taller building than otherwise permitted; and

WHEREAS, Manhattan Borough President Gale A. Brewer, New York State Senator Liz Krueger, New York State Assembly Member Richard N. Gottfried, City Council Member Benjamin J. Kallos, City Council Member Margaret Chin, City Council Member Barry Grodenchik, City Council Member I. Daneek Miller, City Council Member Bill Perkins, City Council Member Keith Powers, City Council Member Antonio Reynoso, City Council Member Donovan Richards and City Council Member Carlina Rivera submitted testimony in support of this appeal, stating that the Board should prohibit the creation of unbuildable lots designed to evade zoning regulations; and

WHEREAS, Manhattan Borough President Gale A. Brewer submitted testimony in support of this appeal, stating that subdividing out a small, unbuildable lot allows the Owner to circumvent the Sliver Law and the Tower-on-a-Base regulations and that permitting a practice of subdividing lots for no discernible reason other than bending rules could lead to greater administrative confusion and more unpredictable building forms; and

WHEREAS, City Council Member Benjamin J. Kallos submitted testimony in support of this appeal, stating that the Subdivision solely serves to evade applicable zoning regulations, that the New Building in reality still faces East 88th Street and that Zoning Lot 2 is actually an integral part of the New Building; and

WHEREAS, Appellants, DOB and the Owner have been represented by counsel throughout this appeal; and

ISSUES PRESENTED

WHEREAS, there are two issues in this appeal: (1) whether the Subdivision of the subject site into Zoning Lot 1 and Zoning Lot 2 contravenes the "zoning lot" definition of ZR § 12-10 and (2) whether, if the Subdivision is valid, the New Building nevertheless has a "street wall" "facing" East 88th Street—notwithstanding the presence of an intervening tract of land (Zoning Lot 2) between the New Building and East 88th Street—that renders the Tower-on-a-Base regulations and the Sliver Law applicable to the New Building[4]; and

APPELLANTS' POSITION

WHEREAS, Appellants represent that the Subdivision is not permitted and that, even assuming the Subdivision is permitted, the Tower-on-a-Base regulations and the Sliver Law still apply to the New Building with respect to East 88th Street; and

I. SUBDIVISION NOT PERMITTED

WHEREAS, Appellants submit that the Subdivision is not permitted because the owner's sole purpose is to intentionally evade zoning regulations[5] and that, in this appeal, no other justification for the Subdivision has been asserted; and

WHEREAS, Appellants state that the Zoning Resolution prohibits the creation of a new zoning lot that results in a non-compliance; and

WHEREAS, Appellants state that the clear intent of the ZR § 12-10 "zoning lot" definition is that a zoning lot subdivision should not be employed to evade other zoning provisions and that the plain language of the Zoning Resolution and its legislative history converge in expressing that the "zoning lot" definition was never intended to result in

[4] Though the Determination does not discuss the Sliver Law directly, the applicability of the Tower-on-a-Base regulations and the Sliver Law both involve the interpretation and application of the term "street wall," and DOB has thoroughly briefed the applicability of the Sliver Law to the New Building in this appeal. Accordingly, this issue is appropriately before the Board.

[5] It should be noted that this owner-intent test, which focuses on the intent of the property owner in pursuing a zoning lot subdivision, is a distinct argument from Appellants' ancillary argument about the Zoning Resolution's statement of legislative intent.

allowing creation of a small zoning lot for the clear purpose of avoiding compliance with zoning regulations; and

WHEREAS, Appellants submit that there is an implicit owner-intent test in the Zoning Resolution that, in order to effectuate the Zoning Resolution's legislative intent, prohibits zoning lot subdivisions that solely seek to evade zoning regulations; and

WHEREAS, Appellants submit that, because Tax Lot 37 and Tax Lot 138 are owned by different entities with the same principals and the same addresses, the tract of land consisting of Tax Lot 37 and Tax Lot 138 should be treated as a single zoning lot, *see* ZR § 12-10 ("zoning lot" definition), and the Subdivision is a sham; and

WHEREAS, Appellants submit that private easements covering part of Tax Lot 138 and the Offering Plan for the 180 East 88th Street Condominium, a private disclosure document to purchasers of condominiums, further evince that the Subdivision is a sham because the separate ownership of Tax Lot 37 and Tax Lot 138 is contrary to fact; and

WHEREAS, Appellants state that a sham zoning lot subdivision that is blatantly contrary to the statutory language and intent, that creates a zoning non-compliance and that leads to absurd results is unlawful; and

WHEREAS, Appellants state that there is no New York law precisely on point but that a sham zoning lot subdivision that violates substantive provisions of zoning is a nullity; and

WHEREAS, Appellants state that, analogous to the Subdivision in this appeal, courts have upheld the City's enforcement against sham compliance with respect to advertising signs and adult establishments and that similarly the Subdivision should be voided in this appeal for circumventing the Zoning Resolution; and

WHEREAS, moreover, Appellants submit that it is implausible that Tax Lot 138 will ever be developed with a building because the New Building has been designed so that the New Building's main entrance is located within the landlocked portion of Tax Lot 37 immediately next to Tax Lot 138 and that access to the entrance to the New Building will perforce be over Tax Lot 138; and

WHEREAS, furthermore, Appellants state that, although the Zoning Resolution does not by its terms prohibit unbuildable lots, Tax Lot 138 has no independent utility and that DOB does not approve the subdivision of unbuildable lots under DOB's Operations Policy and Procedure Notice, entitled "Subdivision of Unimproved Properties," dated October 24, 1991 ("OPPN # 30/92") ("In the absence of [subdivision] review, a tax lot could be theoretically created that fails to meet the minimum requirements of law resulting in a tax lot which cannot be built in a complying or conforming manner."); and

WHEREAS, Appellants further state that the Subdivision solely seeks to circumvent the Tower-on-a-Base regulations, which allow for a consistent street wall with abutting buildings, and the Sliver Law, which generally limits the height of a building less than 45 feet wide to the width of the street on which it faces; and

WHEREAS, additionally, Appellant states that DOB's interpretation of the Zoning Resolution allowing such subdivisions would undermine much of the Zoning Resolution by allowing evasion of the street-wall continuity requirement as well as regulations regarding transparency regulations, designs standards for arcades and plazas, parking wrap requirements and yard requirements; and

WHEREAS, Appellants state that the Subdivision should be treated as a sham that should be regarded as void because its purportedly separate ownership lacks substance, because Zoning Lot 2 is unbuildable and has no value and because its creation serves no other purpose than to evade the substantive requirements of the Zoning Resolution; and

WHEREAS, accordingly, Appellants submit that the Subdivision is not permitted because the sole purpose is to intentionally evade zoning regulations; and

WHEREAS, Appellants also submit that the Subdivision contravenes the explicit legislative intent of the Zoning Resolution; and

WHEREAS, Appellants state that C1 zoning districts are "designed to provide for local shopping and include a wide range of retail stores and personal service establishments which cater to frequently recurring needs. . . . The district regulations are designed to promote convenient shopping and the stability of retail development by encouraging continuous retail frontage and by prohibiting local service and manufacturing establishments which tend to break such continuity," *see* ZR § 31-11; and

WHEREAS, Appellants state that commercial districts are established "to encourage the natural tendency of local retail development to concentrate in continuous retail frontage, to the mutual advantage of both consumers and merchants," ZR § 31-00; and

WHEREAS, Appellants state that the legislative history confirms the intent of the clear language of these provisions in that the City Planning Commission developed the Tower-on-a-Base regulations specifically to reinforce the street wall scale: "[M]any blocks in neighborhoods with an established streetwall character have had this context eroded by towers that are set back from the streetline in plazas and rise without setback. . . . Recent high density residential development, particularly on the east side of Manhattan, has all too frequently been out of scale with its context. The streetwall scale and neighborhood context have been eroded as towers have become increasingly taller and thinner. This text change would create a new building form that would reinforce the established neighborhood character. . . . The plaza erodes the streetwall character of neighborhoods," City Planning Commission Report No. N 940013 ZRM; and

WHEREAS, Appellants state that the New Building and approval of the Subdivision would disrupt the continuity of frontage and prevent the development of a potential retail site in direct violation of these provisions of the Zoning Resolution; and

WHEREAS, accordingly, Appellants submit that the Subdivision contravenes the legislative intent of the Zoning Resolution by eliminating continuous retail frontage; and

II. APPLICABILITY OF TOWER-ON-A-BASE REGULATIONS AND THE SLIVER LAW

WHEREAS, notwithstanding the foregoing, Appellants submit that, even if the Board were to find the Subdivision lawful, the Tower-on-a-Base regulations and the Sliver Law would still apply to the New Building with respect to East 88th Street; and

A. Tower-on-a-Base Regulations

WHEREAS, Appellants submit that the Tower-on-a-Base regulations still apply to the New Building with respect to East 88th Street; and

WHEREAS, Appellants state that, under ZR § 23-651(b)(1)(i), "the *street wall* of the [*building*] base shall occupy the entire *street* frontage of a *zoning lot* not occupied by existing *buildings*" and that this provision applies along East 88th Street because the New Building "is located on a *zoning lot* that fronts upon a *wide street* and is either within 125 feet from such *wide street* frontage along the short dimension of the *block* or within 100 feet from such *wide street* frontage along the long dimension of the *block*," ZR § 23-65; and

WHEREAS, Appellants state that these provisions apply to the New Building because the street wall of its base facing East 88th Street is within 125 feet of the intersection of Third Avenue and East 88th Street but that said street wall of the New Building's base is not "located within eight feet of the *street line*," ZR § 23-651(b)(1)(i); and

WHEREAS, Appellants state that the Zoning Resolution does not define the words "facing the street," "on a narrow street" and "street frontage," so the fact that Zoning Lot 1 purportedly does not itself abut East 88th Street is irrelevant because the Tower-on-a-Base regulations are still applicable to the New Building; and

WHEREAS, Appellants state that Tower-on-a-Base regulations were enacted because the City Planning Commission determined that "[t]he plaza erodes the streetwall character of neighborhoods"; that "many blocks in neighborhoods with an established streetwall character have had this context eroded by towers that are set back from the streetline in plazas and rise without setback. . . . Recent high density residential development, particularly on the east side of Manhattan, has all too frequently been out of scale with its context. The streetwall scale and neighborhood context have been eroded as towers have

become increasingly taller and thinner. This [Tower-on-a-Base] text change would create a new building form that would reinforce the established neighborhood character," City Planning Commission Report No. N 940013 ZRM at 2, 11, 12; and that "[t]he proposed combination of streetwall controls, floor area distribution, tower coverage and articulation credits work together to ensure a flexible building design which will enhance streetscapes, reinforce neighborhood character, and still allow for reasonable tower development," City Planning Commission Report No. N 940013 ZRM at 7; and

WHEREAS, Appellants state that DOB's interpretation of these provisions could be used to negate the Tower-on-a-Base regulations entirely; and

WHEREAS, accordingly, Appellants submit that, even with the Subdivision, the Tower-on-a-Base regulations still apply to the New Building with respect to East 88th Street; and

B. Sliver Law

WHEREAS, Appellants state that the Sliver Law still applies to the New Building with respect to East 88th Street; and

WHEREAS, Appellants state that the Sliver Law sets stringent height limits "on portions of buildings with street walls less than 45 feet in width," which limits extend back 100 feet from the street line, ZR § 23-692; and

WHEREAS, Appellants state that the plain language of the Sliver Law make them applicable to the New Building because they apply to "portions of buildings with street walls less than 45 feet in width," ZR § 23-692, and the portion of the New Building that faces East 88th Street is 22 feet in width; and

WHEREAS, Appellants state that a "street wall" is a "wall or portion of a wall of a building facing a street," ZR § 12-10; that a "street line" is a "lot line separating a street from other land," ZR § 12-10; that a street wall is not necessarily along the street line, but only facing that line; and that a street wall can be more than 100 feet from a street line, *see* ZR § 23-692(e)(2); and

WHEREAS, Appellants state that the New Building is situated on a corner lot, so the maximum height of the portion of the New Building with street walls less than 45 feet in width is "the width of the widest street on which it fronts, or 100 feet, whichever is less," ZR § 23-692; that the widest street on which the New Building fronts is Third Avenue, which is more than 100 feet in width; that the height of the portion of the New Building governed by the Sliver Law (the portion facing, and within 100 feet of, East 88th Street) cannot exceed 100 feet; and that as designed that portion of the New Building rises 32 stories and 623 feet in height—exceeding the 100-foot limit; and

WHEREAS, Appellants state that, under ZR § 23-692, the 100-foot height limit applies 100 feet southward from the street line along East 88th Street, which affects the portion of the New Building facing East 88th Street and within 100 feet of East 88th Street (approximately 1,200 square feet per floor); and

WHEREAS, accordingly, Appellants submit that, even with the Subdivision, the Sliver Law is applicable to the New Building with respect to East 88th Street; and

DOB'S POSITION

WHEREAS, DOB submits that the Subdivision is permitted and that, with the Subdivision, neither the Tower-on-a-Base regulations nor the Sliver Law applies to the New Building with respect to East 88th Streeet; and

I. SUBDIVISION PERMITTED

WHEREAS, DOB submits that the Subdivision is permitted because it complies with the Zoning Resolution's applicable subdivision regulations; and

WHEREAS, DOB states that the Subdivision does not create a non-compliance, as required by the ZR § 12-10 "zoning lot" definition; and

WHEREAS, DOB states that the configurations of Zoning Lot 1 and Zoning Lot 2 are proper because a zoning lot with a depth of 10 feet is permitted by the Zoning Resolution; and

WHEREAS, DOB states that the Zoning Resolution does not explicitly state the minimum dimensions for a zoning lot but that it would be absurd to interpret the Zoning Resolution such that any tract of land, regardless of its ability to be developed, could constitute a zoning lot; accordingly, DOB submits that a deeper analysis into the Zoning Resolution supports its position that a tract of land containing at least a 10-foot dimension adjacent to another zoning lot could be subdivided from a tract of land to form a valid zoning lot; and

WHEREAS, DOB states that it would also be absurd to not have a minimum zoning lot dimension because applicants could create 1-inch by 1-inch zoning lots, thereby creating many zoning lots in the City that could never be developed; and

WHEREAS, DOB states that zoning lot subdivisions require the resulting tracts of land to be developable zoning lots because a "*zoning lot* may be subdivided into two or more *zoning lots*, provided that all resulting *zoning lots* and all *buildings* thereon shall comply with all of the applicable provisions of this Resolution," ZR § 12-10; that each subdivided tract of land must be capable of being developed as its own zoning lot because

zoning lots can only be formed "at the time of filing for a building permit," ZR § 12-10 ("zoning lot" definition); and that a zoning lot subdivision that results in a tract of land that cannot complete the requirements of forming a zoning lot (filing for a building permit to develop or enlarge) is not a permitted subdivision; and

WHEREAS, DOB states that, because a lot with a depth of four feet and a width of 22 feet would not be developable, it would therefore not be permitted[6]; and

WHEREAS, DOB states that, because zoning lots can consist of multiple lots of record contiguous for a minimum of 10 linear feet under paragraphs (c) and (d) of the ZR § 12-10 "zoning lot" definition, a 10-foot-deep dimension is permitted because that is the minimum dimension required for merging zoning lots; and

WHEREAS, DOB states that neither Zoning Lot 1 nor Zoning Lot 2 is undevelopable, so the Subdivision would meet an implicit developability test; and

WHEREAS, accordingly, based on the foregoing, DOB submits that the Subdivision complies with applicable zoning regulations and is therefore permitted; and

II. APPLICABILITY OF TOWER-ON-A-BASE REGULATIONS AND THE SLIVER LAW

WHEREAS, DOB submits that, with the Subdivision, neither the Tower-on-a-Base regulations nor the Sliver Law apply to the New Building with respect to East 88th Street; and

A. Tower-on-a-Base Regulations

WHEREAS, DOB submits that, with the Subdivision, the Tower-on-a-Base regulations do not apply to the New Building with respect to East 88th Street because Zoning Lot 1, within which the New Building is constructed, has no frontage along East 88th Street, and the New Building has no street wall with respect to East 88th Street; and

WHEREAS, DOB states that the northern wall of the New Building is not subject to the Tower-on-a-Base regulations because they only apply to buildings on zoning lots that are adjacent to streets without any intervening land in between, *see* ZR §§ 23-65 and 23-651; and

[6] The Board notes that the issue of whether the Zoning Resolution contains an implicit developability test is not before the Board in this appeal, so the Board does not consider or reach any conclusion as to whether a zoning lot must be developable or whether there is an implicit minimum dimension for a zoning lot.

WHEREAS, DOB states that, in particular, ZR § 23-65(a) states that it only applies to a building that "is located on a *zoning lot* that fronts upon a *wide street* and is either within 125 feet from such *wide street* frontage along the short dimension of the *block* or within 100 feet from such *wide street* frontage along the long dimension of the *block*"—in other words, the Tower-on-a-Base regulations only apply to buildings located on zoning lots that front upon a wide street; and

WHEREAS, DOB states that, because Zoning Lot 1 has no frontage along East 88th Street, the Tower-on-a-Base regulations do not apply to the New Building; and

WHEREAS, DOB states that the Tower-on-a-Base regulations were introduced to replace the previous tower-in-a-plaza regime; that studies had shown that tower-in-a-plaza designs often failed to produce the public benefit originally intended since plaza designs frequently discouraged public use; that City Planning Commission Report No. N 940013 ZRM indicates that the Tower-on-a-Base regulations were meant to "set a middle ground between contextual buildings and tower development"; and that "the height of residential towers and the effect of zoning lot mergers on building scale would become more predictable, resulting in buildings likely to range in height from 28 to 33 stories"; and

WHEREAS, DOB states that the Tower-on-a-Base regulations emphasize the term "frontage," which is tied to a zoning lot's juxtaposition with a street and that City Planning Commission Report No. N 940013 ZRM frequently refers to the term "street line," which is defined as "a *lot line* separating the *street* from other land," ZR § 12-10; and

WHEREAS, DOB states that the New Building will contain 32 stories, which is directly in line with the above range envisioned by the City Planning Commission when enacting the Tower-on-a-Base regulations; and

B. Sliver Law

WHEREAS, DOB states that, with the Subdivision, the Sliver Law does not apply to the New Building with respect to East 88th Street; and

WHEREAS, DOB states that the northern wall of the proposed building is not subject to the Sliver Law, *see* ZR § 23-692; and

WHEREAS, DOB states that the northern wall of the proposed building is not a "street wall," ZR § 12-10; and

WHEREAS, DOB states that City Planning Commission Report No. N 830112 ZRY, explaining the Sliver Law, supports DOB's interpretation that "street walls" must front on streets; and

WHEREAS, DOB states that Appellant's interpretation of ZR § 23-692 would lead to absurd results; and

WHEREAS, DOB states that the Sliver Law was introduced to prohibit excessive heights for narrow buildings on small lots which, by virtue of their small lot size, contained limited street frontage and that City Planning Commission Report No. N 830112 ZRY indicates that there had been an increase in high-rise buildings built on small lots with "lack of opportunity to assemble large construction sites"; and

WHEREAS, DOB states that the Sliver Law accomplishes this goal by limiting excessive heights for certain small frontage lots and that, although the term "frontage" is not defined in the Zoning Resolution, frontage is commonly understood to be tied to a lot's juxtaposition to a street; and

WHEREAS, DOB states that Zoning Lot 1 is not the type of small zoning lot addressed by the Sliver Law and, more importantly, does not contain any narrow street frontage along East 88th Street because the zoning lot line ends ten feet south of East 88th Street; and

WHEREAS, accordingly, DOB submits that, with the Subdivision, neither the Tower-on-a-Base regulations nor the Sliver Law apply to the New Building with respect to East 88th Street; and

OWNER'S POSITION

WHEREAS, the Owner submits that the Subdivision is permitted and that, with the Subdivision, neither the Tower-on-a-Base regulations nor the Sliver Law apply to the New Building with respect to East 88th Street; and

I. SUBDIVISION PERMITTED

WHEREAS, the Owner states that the Subdivision is permitted because it complies with the Zoning Resolution's requirements for zoning lot subdivisions, because there is no applicable minimum lot size, because there is no owner-intent test and because common ownership does not create a de facto zoning lot; and

WHEREAS, with respect to requirements for zoning lot subdivisions, the Owner states that, in particular, the Zoning Resolution states that a "*zoning lot* may be subdivided into two or more *zoning lots*, provided that all resulting *zoning lots* and all *buildings* thereon shall comply with all of the applicable provisions of this Resolution," ZR § 12-10; and

WHEREAS, the Owner states that the City Planning Commission Report, No. N 760226 ZRY, discussing the 1977 amendments to the Zoning Resolution's "zoning lot" definition, notes that, under paragraph (d) of the revised definition, a zoning lot, once established, would remain in effect "until such time as the zoning lot is subdivided in

accordance with existing zoning lot subdivision rules" and that "[t]hese rules preclude any subdivisions creating noncompliance with any applicable provisions of the zoning"; and

WHEREAS, the Owner states that neither the text of the "zoning lot" definition in ZR § 12-10 nor its legislative history provides any authority for disallowing a zoning lot subdivision based on speculation about a future development; and

WHEREAS, the Owner states that the Zoning Resolution's standard for zoning lot subdivisions was met when the zoning exhibits required by the Zoning Resolution were recorded against the subject site and were accepted by DOB; and

WHEREAS, the Owner states that Tax Lot 37 and Tax Lot 138 were established as separate zoning lots under a declaration of zoning lot subdivision and restrictions, dated May 24, 2017, and recorded May 26, 2017; and

WHEREAS, the Owner states that, with regard to Tax Lot 37, a zoning lot declaration dated May 25, 2017, was recorded on May 26, 2017, at CRFN 2017000198267, declaring Tax Lot 37 and Tax Lot 32 to be a single zoning lot; and

WHEREAS, the Owner states that ZR § 71-00 obliges DOB to "administer and enforce" the Zoning Resolution, and New York City Charter § 645(d) states that the Commissioner of DOB "shall review and certify any proposed subdivision of a zoning lot with any building thereon, in order to ensure that the subdivision will not result in the violation of the applicable zoning laws"; and

WHEREAS, the Owner states that DOB expressly approved the Subdivision on June 13, 2017, pursuant to Subdivision Improved Application No. 121203642, thereby confirming there were no zoning non-compliances created by the Subdivision; and

WHEREAS, accordingly, the Owner submits that the Subdivision complies with the Zoning Resolution's requirements for zoning lot subdivisions; and

WHEREAS, with respect to the applicability of a minimum lot size, the Owner states that, at the subject site, there is no minimum lot size for zoning lots that do not contain a residential building; that, in contrast, in residential zoning districts, no residential building is permitted on a zoning lot with a total lot area or lot width below explicitly stated minimums, *see* ZR §§ 23-32; and that, for instance, in R3 through R10 zoning districts, there are a minimum lot area of 1,700 square feet and a minimum width of 18 feet required for zoning lots containing residential buildings; and

WHEREAS, the Owner states that Appellants would have the Board impose an analogous—but nonexistent—minimum lot size requirement for an unimproved zoning lot; however, no such zoning provision exists; and

WHEREAS, the Owner states that there is no requirement in the Zoning Resolution that a zoning lot must be able to accommodate the development of a new building; and

WHEREAS, the Owner states that DOB's Operations Policy and Procedure Notice, entitled "Department of Buildings Documentation Required by Department of Finance for Final Tax Lots," dated December 9, 1992 ("OPPN # 30/92"), does not support the proposition that zoning lots must be buildable and instead states: "The Department of Finance does not require an applicant to submit evidence of the certification or approval of the subdivision (for example, a PW-1 or Certificate of Occupancy) from the Department of Buildings in order to obtain final tax lots for unimproved land"; and

WHEREAS, the Owner states that there is no logic to requiring that a tax lot be "buildable" where there is no obligation under the Zoning Resolution or any other provision of law that the tax lot actually be developed with buildings (rather than used to support an open use); and

WHEREAS, the Owner states that DOB's Operations Policy and Procedure Notice, entitled "Subdivision of Unimproved Properties," dated October 24, 1991 ("OPPN # 30/92"), has been superseded by OPPN # 30/92 and, in any event, requires no more than that tax lots resulting from a subdivision meet "the minimum requirements of law," which Tax Lot 138 does do since there is no requirement with respect to a minimum lot area; and

WHEREAS, the Owner states that, notwithstanding the absence of any buildability requirement, a new building that complies with the Zoning Resolution could be developed on Lot 138—specifically, a one-story commercial building for use as a coffee vendor, cellphone retailer, newsstand or other similarly small retail establishment; and

WHEREAS, accordingly, the Owner submits that there is no minimum lot size or other implicit developability requirement that would prohibit the Subdivision; and

WHEREAS, with respect to Appellants' asserted owner-intent test, the Owner states that there is no basis in the Zoning Resolution for an implicit owner-intent test; and

WHEREAS, the Owner states that, contrary to Appellants' assertions about an owner-intent test, the Zoning Resolution permits a property owner to subdivide a zoning lot freely—provided that the subdivision does not result in any zoning non-compliance at the time it is made and provided that the proper legal instruments are recorded; and

WHEREAS, the Owner states that the Zoning Resolution employs an objective test for zoning lot subdivisions and that there is no basis in the "zoning lot" definition or elsewhere in the text of the Zoning Resolution for Appellants' asserted owner-intent test; and

WHEREAS, the Owner states that zoning lots are merged and subdivided in the City of New York repeatedly over time, as building patterns change and as old buildings

make way for new buildings; that zoning lots, once established, are not set in stone and may be subdivided freely to accommodate new development, subject only to the Zoning Resolution's requirement that a zoning lot subdivision not create a noncompliance; and

WHEREAS, the Owner submits that Section 71-00 of the Zoning Resolution provides that DOB "shall administer and enforce" its provisions; and

WHEREAS, the Owner notes that Appellants cite no authority for the proposition that the Zoning Resolution instructs DOB to speculate about the future subjective intent of an applicant for subdivision approval or a building permit; and

WHEREAS, the Owner notes that, in administering and enforcing the Zoning Resolution with respect to subdivision or construction applications, DOB receives plans of existing zoning-lot configurations and plans of proposed zoning-lot configurations; and

WHEREAS, the Owner notes that Appellants cite no zoning provision instructing DOB to receive, investigate or analyze private, contractual arrangements—including offering plans—or indicating that such documents would be a proper basis for withholding approval of an application to subdivide a zoning lot or for refusing to issue a building permit; and

WHEREAS, the Owner submits that there is no requirement that a zoning lot ever be developed with a new building, considering that the Zoning Resolution permits open uses; and

WHEREAS, the Owner submits that any owner-intent test envisaged by Appellants would be impracticable—if not impossible—for DOB to implement as part of its review of subdivision or construction applications; and

WHEREAS, the Owner states that the subject site has been subdivided in order to ensure the New Building's compliance with zoning regulations, as required by DOB; and

WHEREAS, the Owner states that Appellants cite no authority for the proposition that a zoning lot subdivision have a "legitimate land use purpose"; and

WHEREAS, accordingly, the Owner submits that there is no basis for an implicit owner-intent test; and

WHEREAS, with respect to whether common ownership creates a de facto zoning lot and Appellants' assertions about "sham" subdivisions, the Owner states that the Zoning Resolution does not automatically treat two adjacent parcels as a single zoning lot merely because they are in the same ownership and that therefore there is no basis for the Subdivision to be considered a sham; and

WHEREAS, the Owner states that considering the Subdivision a sham would violate the bedrock zoning principal that zoning be based on the characteristics of a particular property—not on the identity of the property owner; and

WHEREAS, accordingly, based upon the foregoing, the Owner submits that the Subdivision is permitted; and

II. APPLICABILITY OF TOWER-ON-A-BASE REGULATIONS AND THE SLIVER LAW

WHEREAS, the Owner submits that, with the Subdivision, neither the Tower-on-a-Base regulations nor the Sliver Law apply to the New Building with respect to East 88th Street; and

A. Tower-on-a-Base Regulations

WHEREAS, the Owner submits that the Tower-on-a-Base regulations do not apply to the New Building with respect to East 88th Street; and

WHEREAS, more specifically, the Owner states that the Tower-on-a-Base regulations, which are applicable along East 88th Street, do not apply to the New Building because the New Building does not have a street wall or a base built along East 88th Street; and

WHEREAS, the Owner states that the Tower-on-a-Base regulations only apply to a building that is "located on a *zoning lot* that fronts upon a *wide street* and is either within 125 feet from such *wide street* frontage along the short dimension of the *block* or within 100 feet from such *wide street* frontage along the long dimension of the *block*," ZR § 23-65(a), and require affected buildings to be built with street walls that are located within eight feet of the applicable street line, for 70 percent of their width; and

WHEREAS, the Owner states that, under ZR § 23-651, "On a *wide street*, and on a *narrow street* within 125 feet of its intersection with a *wide street*, the *street wall* of the base shall occupy the entire *street* frontage of a *zoning lot* not occupied by existing *buildings*. At any height, at least 70 percent of the width of such *street wall* shall be located within eight feet of the *street line*, and the remaining 30 percent of such *street wall* may be recessed beyond eight feet of the *street line* to provide *outer courts* or balconies"—which is, by its terms, only applicable to a zoning lot's "street frontage" and a "street wall" facing a "street line"; and

WHEREAS, the Owner states that the New Building complies with the Tower-on-a-Base regulations with respect to Third Avenue, upon which the Zoning Lot has a "street wall" and which the New Building's Third Avenue "street wall" faces, *see* ZR §§ 23-651 and 12-10 (definitions); and

WHEREAS, the Owner states that Appellants' urge an impossible result: because Zoning Lot 1 has no frontage on East 88th Street and because the depth of Zoning Lot 1 is 10 feet, the New Building's northern wall cannot be located within 8 feet of the street line along East 88th Street because to do so would situate the New Building on more than one zoning lot; and

WHEREAS, accordingly, the Owner submits that the Tower-on-a-Base regulations do not apply to the New Building with respect to East 88th Street; and

B. Sliver Law

WHEREAS, the Owner submits that the Sliver Law does not apply to the New Building with respect to East 88th Street; and

WHEREAS, more specifically, the Owner states that the Sliver Law does not apply to the New Building because Zoning Lot 1 has no street frontage on East 88th Street, and, more particularly, the New Building cannot have a "street wall" with regard to East 88th Street because its zoning lot does not have a "street line" on East 88th Street, as those terms are defined in ZR § 12-10; and

WHEREAS, the Owner states that the provisions of ZR § 23-692 apply to "portions of buildings with street walls less than 45 feet in width"; that ZR § 12-10 defines a "street wall" as a "wall or portion of a wall of a building facing a street"; and that the term "facing" is not defined in the Zoning Resolution; and

WHEREAS, the Owner states that zoning compliance for floor area, height and setback, yards and other regulations is measured based on the parameters of a zoning lot and that many regulations measure compliance with reference to a zoning lot's "street line," which is defined as "a lot line separating a street from other land" under ZR § 12-10; and

WHEREAS, the Owner states that it would be absurd to assert that the New Building faces East 88th Street when the zoning lot has no frontage on East 88th Street because it would subject a zoning lot to the height and setback regulations of each of the streets bounding the block on which it is located—regardless of the presence of any intervening lots, buildings or other structures located between the zoning lot and the applicable street line; and

WHEREAS, the Owner states that the term "street wall" is only definable regarding a particular "street line," and the Sliver Law's restrictions do not apply to street walls "located beyond 100 feet of a street line," ZR § 23-692(e)(2), a provision that is not comprehensible without regard to a specific street line; and

WHEREAS, the Owner states that, without reference to a particular street line, there is no reference point for measuring the width of the applicable street wall, but, even under Appellant's asserted interpretation of the Sliver Law, the New Building's street wall "facing" East 88th Street would be the entire northern wall of the New Building, which is 100 feet in width, and therefore not subject to the Sliver Law limitations on the height of a building less than 45 feet in width; and

WHEREAS, accordingly, the Owner submits that the Sliver Law does not apply to the New Building with respect to East 88th Street; and

DISCUSSION

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

WHEREAS, the Board first considers whether the Subdivision, which splits the subject site into Zoning Lot 1 (with the New Building and frontage along Third Avenue) and into Zoning Lot 2 (with frontage along East 88th Street), is permitted by the Zoning Resolution's applicable zoning lot subdivision regulations; and

WHEREAS, next, assuming the Subdivision is permitted, the Board considers whether the Tower-on-a-Base regulations and the Sliver Law still apply to the New Building with respect to East 88th Street; and

WHEREAS, based on the record in this appeal and as discussed herein, the Board finds that Appellants have failed to demonstrate that the Subdivision is invalid and that Appellants have failed to demonstrate that the Tower-on-a-Base regulations or the Sliver Law still apply to the New Building; and

WHEREAS, lastly, a minority of the Board finds that the Subdivision is not permitted by the Zoning Resolution and that this appeal should therefore be granted; and

I. SUBDIVISION PERMITTED

WHEREAS, the Board finds that Appellants have failed to demonstrate that the Subdivision does not comply with any provision of the Zoning Resolution taking into consideration legislative intent, the definition of a "zoning lot," the lack of an owner-intent test and the absence of any developability issue in this appeal; and

A. Role of Legislative Intent

WHEREAS, the Zoning Resolution sets forth its statement of legislative intent for regulations applicable in commercial zoning districts in Chapter 1 of Article III; and

WHEREAS, with respect to the general purposes of commercial zoning districts, Section 31-00 of the Zoning Resolution provides in pertinent part:

> The Commercial Districts established in this Resolution are designed to promote and protect public health, safety and general welfare. These general goals include, among others, . . . (b) to provide appropriate space and, in particular, sufficient depth from a street, to satisfy the needs of modern local retail development, including the need for off-street parking spaces in areas to which a large proportion of shoppers come by automobile, and to encourage the natural tendency of local retail development to concentrate in continuous retail frontage, to the mutual advantage of both consumers and merchants; . . . (i) to provide freedom of architectural design, in order to encourage the development of more attractive and economic building forms, within proper standards . . . and (k) to promote the most desirable use of land and direction of building development in accord with a well-considered plan, to promote stability of commercial development, to strengthen the economic base of the City, to protect the character of the district and its peculiar suitability for particular uses, to conserve the value of land and buildings, and to protect the City's tax revenues; and

WHEREAS, Appellants' arguments that "continuous retail frontage" would be negatively affected by the Subdivision and by the New Building are unpersuasive and unavailing, ZR §§ 31-00 and 31-11—especially considering that the New Building does not propose any retail use anywhere near East 88th Street and that the New Building has streetwall continuity along Third Avenue; and

WHEREAS, furthermore, nothing in the record indicates that "continuous retail frontage" would be impeded by this appeal in light of the developability of Tax Lot 138 as a one-story commercial building, suitable for use as a newsstand or other retail establishment that "cater[s] to frequently recurring needs," ZR § 31-11; and

WHEREAS, the Board does favorably acknowledge Appellants' citations to the Zoning Resolution's stated purposes, which are part of the text of the Zoning Resolution; and

WHEREAS, however, Appellants assert that allowing the Subdivision and the New Building would undermine the Zoning Resolution's stated purposes to such an extent as to constitute a rationale sufficient and specific enough to demand denial or revocation of the Permit; and

WHEREAS, in so insisting, Appellants essentially treat the Zoning Resolution's stated purposes—even those which are not relevant or applicable to the New Building—as

conditions precedent to the approval of a subdivision application or issuance of a building permit; and

WHEREAS, the Board would not, as urged by Appellants, import into the Zoning Resolution's statement of legislative intent any conditions precedent to the issuance of a building permit, and Appellants have cited no authority standing for the contrary; and

WHEREAS, reading the Zoning Resolution's statement of legislative intent as a condition precedent to the issuance of a building permit would essentially eviscerate as-of-right development in the City, allowing the denial—or revocation—of a building permit wherever DOB determines that a particular building would not, for instance, be in the "general welfare," ZR § 31-00, notwithstanding its compliance with explicitly applicable provisions of the Zoning Resolution; and

WHEREAS, besides being administratively untenable at a DOB plan-examination level, such a result and its attendant uncertainty would be in direct contravention of the Zoning Resolution's own stated purposes, which seek "to promote stability" and "freedom of architectural design," ZR § 31-00; and

WHEREAS, accordingly, the Board finds that the Zoning Resolution's statements regarding legislative intent are not conditions precedent to the issuance of a building permit but rather to be read in harmony with the Zoning Resolution's substantive requirements, found elsewhere in the zoning text and meant to effectuate the Zoning Resolution's general purposes; and

B. "Zoning Lot" Definition

WHEREAS, the Zoning Resolution specifically provides, in the "zoning lot" definition, ZR § 12-10, the following in pertinent part:

> A *zoning lot* may be subdivided into two or more *zoning lots*, provided that all resulting *zoning lots* and all *buildings* thereon shall comply with all of the applicable provisions of this Resolution. If such *zoning lot*, however, is occupied by a *non-complying building*, such *zoning lot* may be subdivided provided such subdivision does not create a new *non-compliance* or increase the degree of *non-compliance* of such *building*; and

WHEREAS, the Board notes that the "may" in the phrase "may be subdivided" is "permissive," ZR § 12-01(c) (rules applying to zoning text); and

WHEREAS, the Zoning Resolution permissively allows subdividing a zoning lot "provided that all resulting *zoning lots* and all *buildings* thereon shall comply with all of the applicable provisions of this Resolution," ZR § 12-10; and

WHEREAS, accordingly, Zoning Lot 1 and Zoning Lot 2 must each—individually, rather than as an aggregate tract of land—comply with the Zoning Resolution after their subdivision into separate zoning lots, and any buildings located on Zoning Lot 1 and any buildings located on Zoning Lot 2 must also comply with the Zoning Resolution; and

WHEREAS, nothing in the record indicates the Zoning Resolution imposes a minimum lot area for commercial uses in the subject zoning districts; and

WHEREAS, the Board finds that the subject site has been subdivided into two zoning lots in accordance with the applicable subdivision provision in the ZR § 12-10 "zoning lot" definition—namely, that Zoning Lot 1 and Zoning Lot 2 "and all *buildings* thereon . . . comply with all of the applicable provisions" of the Zoning Resolution[7]; and

C. No Owner-Intent Test

WHEREAS, the Board finds no basis in the "zoning lot" definition or elsewhere in the text of the Zoning Resolution for Appellants' asserted owner-intent test; and

WHEREAS, Section 71-00 of the Zoning Resolution provides that DOB "shall administer and enforce" its provisions; and

WHEREAS, Appellants cite no authority for the proposition that the Zoning Resolution instructs DOB to speculate about the future subjective intent of an applicant for subdivision approval or a building permit; and

WHEREAS, in administering and enforcing the Zoning Resolution with respect to subdivision or construction applications, DOB receives plans of existing zoning-lot configurations and plans of proposed zoning-lot configurations; and

WHEREAS, Appellants cite no zoning provision instructing DOB to receive, investigate or analyze private, contractual arrangements—including offering plans—or indicating that such documents would be a proper basis for withholding approval of an application to subdivide a zoning lot or for refusing to issue a building permit; and

WHEREAS, the Board notes that, in practice, zoning lot subdivisions often occur prior to the filing of New Building applications and apply to vacant lots or to zoning lots with one or more existing buildings to be demolished, and it may be months or years before construction drawings for a new building are filed—while subsequent zoning lot mergers with adjacent parcels not subject to the subdivision have taken place in the interim; and

[7] No party asserts in this appeal that the presence of a six-story commercial building on Tax Lot 32 creates a new non-compliance or increases the degree of any existing non-compliance with respect to the Subdivision.

WHEREAS, there is no requirement that a zoning lot subdivision be contemporaneous with—or even close in time to—the development of a new building; and

WHEREAS, nor is there a requirement that a zoning lot ever be developed with a new building, considering that the Zoning Resolution permits open uses; and

WHEREAS, because there is no basis in the text of the Zoning Resolution for any owner-intent test as to zoning lot subdivisions, the Board expresses no opinion as to the analogy suggested by Appellants with respect to sham compliance with advertising-sign or adult-establishment regulations; and

WHEREAS, accordingly, the Board finds that, beyond having no basis in the text of the Zoning Resolution, any owner-intent test envisaged by Appellants would be impracticable—if not impossible—for DOB to implement as part of its review of subdivision or construction applications; and

D. No Developability Issue

WHEREAS, the Board notes that, because Zoning Lot 2 (Tax Lot 138) can support the development of a one-story commercial building, even if said development is unlikely to occur, whether the Zoning Resolution permits or prohibits zoning lot subdivisions that would create undevelopable tracts of land is purely hypothetical in this appeal; and

WHEREAS, because a theoretical subdivision that attempts to create an undevelopable zoning lot is not before the Board in this appeal, the Board need not—and does not, as Appellants asserts the Board must—consider whether the Zoning Resolution imposes an implicit developability requirement on the subdivision of zoning lots in this appeal; and

WHEREAS, additionally, though not before the Board, in light of the above discussion about the absence of any owner-intent test, it is unclear from the record that it would be possible or practicable to formulate or implement a developability requirement; and

E. Conclusion

WHEREAS, based upon the foregoing, the Board finds that the Subdivision is permitted by the Zoning Resolution in accordance with applicable subdivision regulations, *see* ZR § 12-10 ("zoning lot" definition); and

II. APPLICABILITY OF TOWER-ON-A-BASE REGULATIONS AND THE SLIVER LAW

WHEREAS, because the Board finds Appellants' arguments that the Subdivision is not permitted by the Zoning Resolution unpersuasive, the Board next considers

Appellants' assertions that, even were the Subdivision valid, the Tower-on-a-Base regulations and the Sliver Law apply to the New Building with because the New Building purportedly has a street wall facing East 88th Street; and

WHEREAS, as discussed herein, the Board does not find the Tower-on-a-Base regulations or the Sliver Law applicable to the New Building with respect to East 88th Street; and

A. Tower-on-a-Base Regulations

WHEREAS, the Board finds that Appellants have failed to demonstrate that the Tower-on-a-Base regulations apply to the New Building with respect to East 88th Street, *see* ZR § 23-65; and

WHEREAS, Section 23-65 of the Zoning Resolution provides in pertinent part:

> The Tower-on-a-Base regulations of Section 23-651 shall apply to any such *building* that:
>
> (1) contains more than 25 percent of its total *floor area* in *residential use*; and
>
> (2) is located on a *zoning lot* that fronts upon a *wide street* and is either within 125 feet from such *wide street* frontage along the short dimension of the *block* or within 100 feet from such *wide street* frontage along the long dimension of the *block*.
>
> If a portion of such *building* is *developed* or *enlarged* with a tower the entire *zoning lot* shall be subject to the provisions of Section 23-651 (Tower-on-a-Base); and

WHEREAS, in other words, the Tower-on-a-Base regulations only apply to a zoning lot that "fronts" on a wide street, ZR § 23-65; and

WHEREAS, the Zoning Resolution does not define the term "front" but evinces through its provisions the relationship of a zoning lot to the surrounding street system as well as the adjacency intrinsic to the meaning of a zoning lot's frontage; and

WHEREAS, a zoning lot is defined, in part, as "tract of land . . . located within a single *block*," and a block is defined, in part, as "a tract of land bounded by . . . *streets*," ZR § 12-10; and

WHEREAS, a zoning lot is accordingly defined with relation to the City's street system, and, by virtue of its location within a block, a zoning lot may be "bounded by" one or more streets, ZR § 12-10; and

WHEREAS, here, Zoning Lot 1 has a lot line coincident with the westerly boundary of Third Avenue, which is more than 75 feet wide, and accordingly "fronts" on Third Avenue, a wide street, *see* ZR § 23-65; and

WHEREAS, because the New Building "contains more than 25 percent of its total *floor area* in *residential use*" and because Zoning Lot 1 "fronts upon" Third Avenue, all of Zoning Lot 1 is subject to the Tower-on-a-Base regulations, *see* ZR § 23-65; and

WHEREAS, however, the Tower-on-a-Base regulations do not apply to the New Building in the manner Appellants purport; and

WHEREAS, Section 23-651 of the Zoning Resolution states, in part:

> [T]he *street wall* of the base shall occupy the entire *street* frontage of a *zoning lot* not occupied by existing *buildings*. . . . [T]he width of such *street wall* shall be located within eight feet of the *street line*; and

WHEREAS, a "street line" is defined, in part, as "a *lot line* separating a *street* from other land," ZR § 12-10—indicating that a zoning lot's boundary may be coincident with the boundary of a street; and

WHEREAS, a "street wall" is defined as "a wall or portion of a wall of a *building* facing a street," ZR § 12-10; and

WHEREAS, a "building" is defined, in part, as "any structure which . . . is located within the *lot lines* of a *zoning lot*," ZR § 12-10; and

WHEREAS, just as zoning lots do not traverse streets, a building is confined to a zoning lot's "lot lines"—defined as the "boundar[ies] of a *zoning lot*," ZR § 12-10; and

WHEREAS, the Board finds that, because of the intervening tract of land between Zoning Lot 1 and East 88th Street, the New Building is not designed with "a wall or portion of a wall . . . facing" East 88th Street, ZR § 12-10; and

WHEREAS, the Board finds no merit in the assertion that any of the New Building's walls or portions of walls face East 88th Street; and

WHEREAS, the Board notes that interpreting "facing" to disregard intervening buildings or other intervening tracts of land and to apply to every wall of a building would mean the building is "facing" in all directions, rendering every wall of a building a street wall, and nothing in the record indicates that the "street wall" definition is meant to—or should—apply in such a manner; and

WHEREAS, the Board finds that the New Building is not designed with "a wall or portion of a wall . . . facing" East 88th Street, ZR § 12-10, so the New Building is not designed with any "street wall" with respect to East 88th Street; and

WHEREAS, accordingly, the Board finds that Appellants have failed to demonstrate that the Tower-on-a-Base regulations apply to the New Building with respect to East 88th Street; and

B. Sliver Law

WHEREAS, the Board further finds that Appellants have failed to demonstrate that the Sliver Law applies to the New Building with respect to East 88th Street; and

WHEREAS, Section 23-692 of the Zoning Resolution (height limitations for narrow buildings or enlargements) states, in pertinent part:

> [P]ortions of *buildings* with *street walls* less than 45 feet in width shall not be permitted above the following height[]: . . . 100 feet; and

WHEREAS, as discussed above, the Board finds that no portion of the New Building has a "street wall" with respect to East 88th Street since the New Building is not designed with any wall "facing" East 88th Street, ZR § 12-10, and Appellants' urging otherwise is without merit; and

WHEREAS, furthermore, assuming for the sake of argument that Appellants' asserted interpretation of the "street wall" definition applies, the Board finds that the New Building's street wall "facing" East 88th Street would more appropriately be measured as the entire northern wall of the New Building, which is approximately 100 feet in width, so the New Building would not be subject to the Sliver Law's limitations; and

WHEREAS, the Board finds that no height limit set forth in ZR § 23-692 applies to the New Building; and

WHEREAS, accordingly, the Board finds that Appellants have failed to demonstrate that the Sliver Law applies to the New Building with respect to East 88th Street; and

III. MINORITY POSITION

WHEREAS, a minority of the Board finds that the Subdivision is not permitted by the Zoning Resolution; and

WHEREAS, a minority of the Board finds that subdividing a zoning lot should not be permitted where the sole purpose is to intentionally evade zoning regulations and that, in this appeal, no other justification for the Subdivision has been asserted; and

WHEREAS, a minority of the Board finds it implausible that Tax Lot 138 will ever be developed with a building because the New Building has been designed so that the New Building's main entrance is located within the landlocked portion of Tax Lot 37 immediately next to Tax Lot 138; and

WHEREAS, in particular, to enter the New Building, it appears that one must traverse Tax Lot 138, through a garden, past the concierge and mail room to the elevator bay; and

WHEREAS, on the other hand, the New Building has no concierge along Third Avenue and instead appears to have its service entrance with bicycle storage or package deliveries along Third Avenue; and

WHEREAS, because it does not appear that Tax Lot 138 will ever be developed separately from Tax Lot 37 and no justification for the Subdivision has been proffered other than the intentional evasion of zoning regulations, a minority of the Board finds that the Subdivision is not permitted; and

WHEREAS, therefore, a minority of the Board finds that this appeal should therefore be granted; and

CONCLUSION

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

WHEREAS, in response to concerns from Appellants and the community regarding the applicability of this site-specific appeal to the development of other buildings 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* City Charter § 666; and

WHEREAS, accordingly, insofar as Appellants or members of the community take issue with provisions of the Zoning Resolution—or absence thereof—as enacted, that grievance falls outside the scope of the Board's authority to review this appeal; and

WHEREAS, for the foregoing reasons, a majority of the Board finds that Appellant has failed to demonstrate that the Subdivision of the subject site into Zoning Lot 1 and Zoning Lot 2 contravenes applicable provisions for zoning lot subdivisions or that the Tower-on-a-Base regulations or the Sliver Law applies to the New Building with respect to East 88th Street.

Therefore, it is Resolved, that the decision of the Department of Buildings, dated September 28, 2017, under Zoning Challenge and Appeal Form Control No. 50662, shall be and hereby is *upheld* and that this appeal shall be and hereby is *denied*.

Adopted by the Board of Standards and Appeals, December 11, 2018.

CERTIFICATION

This copy of the Resolution
dated December 11, 2018
is hereby filed by
the Board of Standards and Appeals
dated March 14, 2019

Carlo Costanza
Executive Director