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BOARD OF STANDARDS AND APPEALS

MEETING OF: **September 9, 2024**
CALENDAR NO.: **2024-15-A**
PREMISES: **280 East Houston Street, Manhattan Block 397, Lot 58**

ACTION OF BOARD — Application denied.

THE VOTE TO APPROVE —
Affirmative:.....0
Negative: Chair Chanda, Vice-Chair Scibetta, Commissioner Ottley-Brown, Commissioner Sheta, and Commissioner Yoon.....5

THE RESOLUTION —

I. The Appeal

This is an application for an interpretation concerning a final determination of the New York City Department of Buildings ("DOB"), under DOB Job No. M006476247624-I1-GC, dated February 29, 2024, stating, in pertinent part:

> New 12-story mixed-use building on current vacant lot. 2 tax lots (7503 existing-13 story mixed-use; 58 tentative 12 story new building) on single zoning lot. No change to existing development on Lot 7503.

This appeal is brought by an owner of a unit located within the subject Premises to challenge the DOB's determination to permit a reduction in the required rear yard depth (Z.R. § 23-47) and the rear yard setback requirement (Z.R. §§ 33-27 and 35-53) for the proposed new construction. Specifically, the appellant states that the subject Premises do not qualify under the ownership requirements as articulated in Z.R. § 23-52 (a), therefore making the site ineligible to be classified as a "shallow interior lot" under Z.R. § 23-52(b).

A public hearing was held on this application on July 29, 2024, after due notice by publication in *The City Record*, and then to decision on September 9, 2024.

II. Location

The Premises are a polygonal-shaped lot, located on the east side of East Houston Street, between Avenue A and Avenue B, in an R8A (C2-5) zoning district, in Manhattan. With approximately 328 feet of frontage along East Houston Street, an irregular depth ranging from 100 feet along the western lot line to 78 feet along the eastern lot line, and 15,503 square feet of lot area, the Premises are occupied by a 13-story, mixed-used residential and commercial building.

III. Premises History

On October 26, 1961, the New York City Board of Estimate (under Cal. No. 64-A) authorized the disposition of the zoning lot as a single tax lot (former tax lot 63) and identified the irregular dimensions of 544.02 feet by 100.14 feet, which are consistent with the zoning lot's current dimensions. Early evidence of the existence of former tax lot 63 stems from a 1952 Condemnation Map, when the City condemned portions of multiple lots south of the centerline of Block 397, including lots comprising the current zoning lot. A 1952 condemnation map identifies the dimensions of the condemned lots as well as the portion of Block 397 that was part of the East Houston Street widening. Specifically, this map shows the 136.07' dimension from East 2nd Street along Avenue B, which matches the present 136.1' cumulative dimensions of lots 33, 35, and 38, and the dimensions of 38.53', 4.96', 35.08', 26.32', 153.42', 0.17', and 4.5' match the current dimensions of the proposed development site.

On August 7, 1962, New York City, as the property owner, sold tax lot 63 to a private party and on August 23, 1962, that private party sold tax lot 63 to another private party, with the subject deed identifying a metes and bounds description that matches the zoning lot's approximate current dimensions and description. On September 27, 1962, DOB issued certificate of occupancy No. 56426 for a public parking lot on the site, which includes a metes and bounds description that matches the zoning lot's approximate current dimensions and description.[1]

In 2016, tax lot 63 was divided into tax lots 1301, 1302, and 1303, and when the owner of tax lots 1301, 1302, and 1303 transferred tax lot 1303 to the developer, tax lot 1303 was renumbered tax lot 58. However, tax lots 1301, 1302 and 58 continue to comprise a single zoning lot which then became the site of a new building project for the existing 13-story, commercial and residential building. In 2022, former tax lot 63 was subdivided into two tax lots. The existing building is located on a zoning lot coextensive with former tax lot 63.

[1] On July 5, 1989, DOB issued a temporary Certificate of Occupancy (No. 094444) for a 13-story residential building on the non-development site portion of the zoning lot which includes the zoning lot's current approximate dimensions and description.

IV. The New York City Building Code and Charter

A. The Board's Appellate Jurisdiction under the New York City Charter

Section 666(6)(a) of the New York City Charter states that the Board shall have the power:

> [t]o hear and decide appeals from and review [. . .] except as otherwise provided by law, any order, requirement, decision or determination of the commissioner of buildings or of a deputy commissioner of buildings or any borough superintendent of buildings acting under a written delegation of power from the commissioner of buildings filed in accordance with the provisions of section six hundred forty-two or section six hundred forty-five of this charter.

B. Relevant sections of the New York City Zoning Resolution[2]

Z.R § 12-10 definitions:

> "Lot depth" is the mean horizontal distance between the front lot line and the rear lot line of a zoning lot.
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> A "rear lot line" is any lot line of a zoning lot except a front lot line, which is parallel or within 45 degrees of being parallel to, and does not intersect, any street line bounding such zoning lot.

Z.R. § 23-52:

> [In the subject R8 zoning district]
> At a height not lower than the minimum base height or higher than the maximum base height specified for the applicable district, a setback with a depth of at least 10 feet shall be provided from any street wall fronting on a wide street, and a setback with a depth of at least 15 feet shall be provided from any street wall fronting on a narrow street. Such minimum setbacks may be modified as follows:
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> (a) The depth of such required setback may be reduced by one foot for every foot that the street wall is located beyond the street line, but in no event shall a setback of less than seven feet in depth be provided, except as otherwise set forth in this Section. To allow street wall articulation, where a street wall is divided

[2] On December 5, 2024, the City of Yes for Housing Opportunity amended and consolidated multiple sections of the Zoning Resolution including provisions of the former Z.R. §§ 23-47 and 23-52 on minimum required rear yard depths in residential districts. The sections as numbered in this resolution reflect the language and numbering applicable on the date of the BSA vote.

into different segments and located at varying depths from the street line, such permitted setback reduction may be applied to each street wall portion separately.

(b) The depth of such setbacks may include the depth of recesses or outer courts in the street wall of the building base, provided that the aggregate width of any such recessed portion of a street wall with a setback less than seven feet, as applicable, does not exceed 30 percent of the aggregate width of street wall at any level.

(c) These setback provisions are optional for any building wall that either is located beyond 50 feet of a street line, or oriented so that lines drawn perpendicular to it, in plan, would intersect a street line at an angle of 65 degrees or less. In the case of an irregular street line, the line connecting the most extreme points of intersection shall be deemed to be the street line…

Z.R. § 23-52 - Minimum Required Rear Yards

[In the subject R8 zoning district], a rear yard with a depth of not less than 30 feet shall be provided at every rear lot line on any zoning lot except as otherwise provided in Sections 23-52 (Special Provisions for Shallow Interior Lots), 23-53 (Special Provisions for Through Lots) or 23-54 (Other Special Provisions for Rear Yards). Rear yards shall also be provided along portions of side lot lines as set forth in Section 23-471 (Beyond one hundred feet of a street line).

Z.R. § 23-52 (b) [3]:

(b) [In the subject R8 zoning district] if an interior lot:

(1) was owned separately and individually from all other adjoining tracts of land, both on December 15, 1961, and on the date of application for a building permit; and (2) is less than 90 feet deep at any point;

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[3] On March 22, 2016, the New York City Zoning for Quality and Affordability ("ZQA") Text Amendment revised the language of Z.R. § 23-52 regarding shallow lots to clarify:

> Zoning regulations for rear yards and lot coverage were designed with the assumption that most lots in the city are 100 feet deep. Over time, some limited changes were made to address much-shallower lots (ranging between 50 and 70 feet deep), but the dimensions in between 70 and 100 feet must continue to utilize regulations based on an assumption of a 100-foot lot depth. This causes many problems for lots that are only slightly shallow (90-95 feet deep), and generally forces new buildings to be located directly on the street line. ZQA proposes a comprehensive framework that adjusts rear yard and lot coverage requirements in concert with lot depth. Shallow lots would be permitted to provide a shallower rear yard with the change in the requirement based on the depth of the lot. The permitted coverage on interior lots would be permitted to increase in relationship to this. The proposed changes would result in more regular buildings that are more consistent with existing, older buildings.

> (2) the depth of a required rear yard, or portion thereof, for such interior lot, may be reduced by six inches for each foot by which the depth of a zoning lot, or portion thereof, is less than 90 feet. However, in no event shall the minimum depth of a required yard, or portion thereof, be reduced to less than 10 feet.

Alternatively, for zoning lots created after December 15, 1961, pursuant to Z.R. § 23-52(c), the Reduced Rear Yard Requirement may be applicable "provided that the shallow lot condition was in existence on December 15, 1961, and, subsequently, such shallow lot condition on the zoning lot, or portion thereof, has neither increased nor decreased in depth."

Z.R. § 23-33:

> For certain interior lots that are considered shallow, the rear yard requirement may be reduced by six inches (up to a minimum reduced rear yard depth of 10 feet) for every foot the maximum depth of such interior lot is less than 90 feet.

For mixed-used buildings, such as the proposed building, the applicable residential yard regulations apply to those portions of the building containing dwelling units with windows facing such yards (Z.R.§ 35-53) and the commercial yard regulations apply to the portions of the building containing commercial or community facility uses (Z.R. § 33-26). Pursuant to Z.R. §§ 23-541 and 23-542, in some instances, the rear yard requirement is removed such as for portions of zoning lots within 100 feet of an intersection or along a dimension of a block that is less than 230 feet.

C. Relevant BSA Precedent

Under BSA Cal. No. 54-97-A, the Board heard a challenge to a DOB final determination of the Z.R. § 12-10 definition of a "zoning lot" for the Premises located at 129 Garretson Avenue (Block 3319, Lot 65) in Staten Island. Specifically, the issue before the Board was a challenge brought by the owner of the Premises that it should qualify for the minimum lot width exception in Z.R. § 23-33 because the City maps indicate that Premises were a separate tax lot prior to 1961 and/or because it existed on December 15, 1961, as a tract of record and met the definition of a zoning lot under Z.R. § 12-10. On July 24, 1997, based on its review of the submitted materials, the Board found that since the Premises and adjoining lot were held in common ownership on December 15, 1961, the DOB properly determined that the special provisions for the small lots, set forth in Z.R. § 23-33, do not apply to the subject Premises because the lots are separately described in a deed and are separately assessed and taxed has no bearing on whether there is separate ownership.

Under BSA Cal. No. 47-12-A, the Board heard a challenge to a DOB final determination which denied the appellant's application because the maximum depth of the subject site, located at 22 Lewiston Street

(Block 2370, Lot 238) in Staten Island, was not less than 70 feet at all points, and, therefore, was not entitled to a reduction in the depth of the rear yard under Z.R. § 23-52. On September 11, 2012, the Board decided that because DOB's objection related to Z.R. § 23-52(a) was not part of the final determination which serves as the basis of this appeal, and because the Board deems it unnecessary to make a determination on the Z.R. § 23-52(a) issue in order to reach a decision on the merits of the subject appeal, the Board therefore finds it appropriate to limit the scope of its determination accordingly; and the Board concludes that Z.R. § 23-52 allows a reduction in the depth of the required rear yard only when the maximum depth of the zoning lot is less than 70 feet at every point.

Under BSA Cal. No. 157-12-A, the Board heard a challenge to a DOB final determination which denied the property owner's request for the subject Premises, located at 184-27 Hovenden Road (Block 9967, Lot 58) in Queens, to be developed as an "existing small lot", pursuant to Z.R. § 23-33. Specifically, the property owner brought the challenge claiming that: 1) Lot 58 was owned separately and independently from all adjoining tracts of land on December 15, 1961, and today; 2) the history of development on adjoining Lot 56 has been independent of Lot 58; and 3) the Zoning Resolution does not require that the adjacent zoning lots in common ownership be merged. On September 24, 2013, the Board granted the property owner's request and reversed the DOB's final determination finding that the subject Premises satisfies the Z.R. § 23-33 criteria for an existing small lot that can be developed. The Board determined that its ruling in the subject case is limited to the subject facts in which one spouse owned one lot and both spouses owned the adjoining undersized lot as tenants by the entirety on December 15, 1961, and it has not made a determination about any other ownership structure as the Board did not find that: 1) the fact that DOB only requires one of the two tenants by the entirety to authorize applications for building permits to be conclusive on the question of whether the two lots are owned separate and individually; or 2) as per Z.R. § 12-10(b), the ability to merge the lots, when such merger is not automatic or required, is indicative of Lot 58's failing to meet the requirements for a rear yard exception for small lots.

V. Arguments on Appeal

A. The Appellant's Arguments

The appellant brings this subject challenge with respect to the proposed building's compliance with rear yard requirements and notes that the development of the proposed building would result in loss of adequate light, air, and the well-being of the surrounding community.

First, the appellant argues that the subject zoning lot is ineligible to utilize the reduced rear yard requirements of the special shallow interior lot provision as per Z.R. § 23-52. Here, the appellant explicitly

states that the ownership criteria specified in Z.R. § 23-52 (b)(1) has not been met and, therefore, disqualifies the subject zoning lot from the rear yard reduction for lot shallowness. This argument is predicated on the requirement in the provision for the subject lot to have been "owned separately and individually from all other adjoining tracts of land, both on December 15, 1961, and on the date of application for a building permit." The appellant directly argues that Z.R. § 23-52 is inappropriate on the basis that the interior lot was not owned separately and individually from all other adjoining tracts of land on the date of application for a building permit and was not individually owned on December 15, 1961. In support, the appellant referenced the August 7, 1962, deed and notes that former lot 63 was acquired through a public auction facilitated by the City and concludes that Premises were apparently in foreclosure held by the City and not owned by any private entity or individual on December 15, 1961. Through the existence of the deed and public auction, the appellant posits that the property was not in the possession of any individual or entity that could have independently and separately owned it from adjoining parcels, as it was held by the City of New York pending sale at public auction. Furthermore, the appellant claims that the absence of a private owner of former lot 63 on December 15, 1961, precludes the property from satisfying the ownership prerequisites required for any reduction in rear yard requirements based on the shallowness of the lot under Z.R. § 23-52(b)(1).[4]

Along this same line of reasoning, the appellant describes the Premises' ownership status at the time of application for the subject permit as also disqualifying as it argues that this dual requirement is

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[4] Accordingly, the appellant argues that if a zoning lot that existed on December 15, 1961, was held of record by the same owner who also owned any adjacent lot on the same block, Z.R. § 23-52(b)(1) does not allow for a reduction in rear yard requirements. The appellant cites BSA Cal. No. 157-12-A stating that the relevant standard is the question of common ownership, not discrete ownership. The appellant concedes that BSA Cal. No. 157-12-A concerns Z.R. § 23-33, which governs undersized lots, it concerned the issue of the same requirement of separate and individual ownership as a prerequisite:

> WHEREAS, the Board does not see any support in the text for DOB's position that "owned separately and individually" means that in order to satisfy Z.R. § 23-33, the ownership of the two lots must be disconnected or completely distinct such that the lots could not have been developed together per the ZR §12-10(b) definition of "zoning lot" …
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> WHEREAS, the Board notes that it determined the Garretson Avenue case [BSA Cal. No. 54-97-A] based on those facts failing to satisfy requirements of Z.R. § 23-33 and not based on its statement that Z.R. § 23-33's intent is to prohibit an owner who could have developed combined lots from developing an existing small lot.

pivotal in determining the property's eligibility for modifications to rear yard setbacks due to lot shallowness. Here, the appellant contends that on December 23, 2021, the date when the new building application was submitted to the DOB, the lot's ownership was segregated from adjoining properties but lacked the individual ownership status required by the Zoning Resolution because the lot comprised three, separate condominium tax lots under two, distinct entities. Specifically, the appellant claims that the subject lot was owned in fact by an unincorporated association of condominium owners. Additionally, the appellant posits that by June 17, 2022, an ownership by tenancy in common was established for Lot 1303 and involved several entities.

Moreover, the appellant argues that the reconfiguration of Lot 1303, dated August 8, 2022, marked a significant change in the property's configuration and further complicating its eligibility for rear yard reductions. The appellant describes that after the recording of an amended declaration dated February 16, 2022, Lot 1303 was removed from the condominium and subdivided into Lot 58. Lots 58 and 1301/1302 entered into a Zoning Lot Development Agreement ("ZLDA") providing for transfer of development rights within the zoning lot, dated April 8, 2022, and recorded on April 13, 2022. On February 29, 2024, when the NB Building Permit Application was issued, Lot 58 was owned by four tenants in common, alongside lots 1301 and 1302, remaining under the common ownership, and, therefore, the appellant contends that the non-individual ownership disqualifies it from the Z.R. § 23-33 exceptions and necessitates an adherence to a standard 30-foot rear yard requirement.

The appellant concludes that separate and individual ownership does not revolve around discrete ownership of adjoining tracts of land as separate tax lots or lots of record, but instead, concrete proof that there was no common ownership of lots adjacent to the zoning lot with shallow lot conditions as absence of "common ownership" is not satisfied when an individual or entity discretely owns two separate adjacent lots. As an example, the appellant submitted a Zoning Resolution Determination Form ("ZRD1"), issued on January 3, 2018, which denied a request for a rear yard reduction in an R3A district where one of two tax lots comprising a zoning lot had a depth of 70 or more feet at the maximum depth, expressly relying on the BSA Cal. No. 47-12-A, and stating:

> The applicant's submitted drawings indicate that the existing zoning lot is comprised of tax lot #20 and tax lot #22. The applicant indicates that the tax lot #20 portion of this zoning lot is greater than 70 feet deep. The applicant further indicates that the tax lot #22 portion of this zoning lot is less than 70 feet deep and requests that this portion be treated as a "shallow lot" which permits a reduction in depth of the required rear yard pursuant to Z.R. § 23-52. Z.R. § 23-52(a) Special Provisions for Shallow Interior Lots, states in relevant part, In [an R3A

> district], if an #interior lot#: (2) is less than 70 feet deep at any point; (1) was owned separately and individually from all other adjoining tracts of land, both on December 15, 1961, and on the date of application for a building permit; and the depth of a required #rear yard# for such #interior lot# may be reduced by one foot for each foot by which the maximum depth of such #zoning lot# is less than 70 feet. On any #interior lot# with a maximum depth of 50 feet or less, the minimum depth of required #rear yard # shall be ten feet. The applicant did not submit proof that the interior lot "was owned separately and individually from all other adjoining tracts of land, both on December 15, 1961, and on the date of the application for a building permit." While the applicant states that such zoning lot is a Z.R. § 12-10(a) zoning lot, the applicant did not discuss when such lot was created. Since the applicant did not establish that the zoning lot was owned separately and individually from all other adjoining lots on 1961 and on the date of the job application, the depth of the required rear yard for such zoning lot may not be reduced.

As such, the appellant posits that according to BSA Cal. No. 47-12-A, the Board held that a rear yard reduction may be permitted only when the maximum depth of the zoning lot is less than 70 feet at every point, and, therefore, the depth of the required rear yard may not be reduced. Here, the appellant concludes that the rear yard reduction pursuant to Z.R. § 23-52(a) cannot be applied because the property owner did not demonstrate that the interior lot was owned separately and individually from all other adjoining tracts of land, on December 15, 1961, and the entire interior lot is not less than 70 feet deep.

Next, the appellant points out language in Z.R. § 23-52(c), which concerns lots created after December 15, 1961, and states that for those lots, the reduction in rear yard requirement is available only if the shallow lot condition was present on December 15, 1961, and did not either increase or decrease in depth at any point thereafter and concludes that the legislative intent of this subsection is that if the shallow lot condition decreases but is still less than 90 feet, the reductions should be available. Here, the appellant notes that the subject zoning lot perimeter has not changed since December 15, 1961, and, therefore, it does not qualify under Z.R. § 23-52(c), as this paragraph applies to zoning lots first created after December 15, 1961, most likely through zoning lot merger or zoning lot subdivision, which is not the case here.

Moreover, the appellant argues that even if the subject zoning lot qualifies for bulk exemptions for being classified as a shallow lot, DOB misapplied the calculation of required rear yard depths. First, the appellant states that as per Z.R. § 23-52's method for calculating the required rear yard depths for interior lots, especially when such lots are less than 90 feet in depth, the depth of a required rear yard may be proportionately reduced by 6 inches for each foot the lot is less than 90

feet. Here, the appellant debates the architect's approach to segment the property and utilize measurements that ran perpendicular to the rear lot line. The appellant, instead, claims that the minimum rear yard depth must still meet or exceed 10 feet, and the architect's error lies in the miscalculated angular dimensions, which results in a deeper lot than its actual size and the encroachment of the building's footprint into the space that should have been designated as the rear yard as it does not account for the varying angles of the rear property line as perceived from the street. Instead, the appellant contends that the correct method to measure the rear yard depth, as per NYC zoning regulations, is to draw lines perpendicular to the front property line, not the rear lot line. The appellant further represents that in the DOB-approved plans, the project architect has divided the property into sections and measured rear yard depths using lines that run perpendicular to the rear lot line. As rebuttal, the appellant submitted a diagram which illustrates purported accurate, minimal rear yard setbacks for the subject property in two locations on the building, where the condition forms a triangle, 79'-8 1/8" along its length by 5'-1" wide, assuming a total area of approximately 202 square feet of the building footprint.

Moreover, the appellant states that the commercial space within the development does not comply with the 20-foot rear yard setback requirement, as mandated by Z.R. §§ 33-27 and 35-53 for mixed-use buildings in commercial districts, which mandate a 20-foot rear yard setback. Z.R. § 33-27 permits a reduced rear yard requirement for shallow lots of less than 70 feet in depth but, only if, at no point does the depth of the zoning lot reach 70 feet in depth, and at the point of maximum depth, such depth must be under 70 feet. Here, the appellant concludes that the language in Z.R. § 33-27 is akin to the original provision of Z.R. § 23-52 prior to the 2016 amendment and underscores the reduction in rear yard depth based on the "maximum depth" of the zoning lot being less than 70 feet, which, the appellant argues, has not been met by this project given the zoning lot's maximum depth exceeding this threshold.

B. DOB's Arguments in Opposition

As per the legislative intent of the Zoning Resolution, DOB states that the purpose of Z.R. § 23-52(b) is to allow development of a shallow interior lot that cannot meet the ordinary rear yard requirements of Z.R. § 23-47, and that could not have been developed as a single zoning lot, with a compliant rear yard, on December 15, 1961. In response to the appellant's arguments, DOB states that the subject zoning lot qualifies for a rear yard with reduced depth under Z.R. § 23-52(b) because: (1) it was owned separately and individually from all other adjoining tracts of land, both on (a) December 15, 1961, and on the (b) date of application for the subject permit and, (2) portions of the zoning lot are less than 90 feet deep. DOB starts by setting forth that the

standard minimum depth for rear yards is articulated in Z.R § 23-47 and continues by referencing Board of Estimate Resolution 64-A, dated October 16, 1961, along with an August 23, 1962, deed. Together, DOB states that these two documents provide the best information about ownership of the tax lots on December 15, 1961. The resolution states that the City of New York owned then-tax lot 63 on October 16, 1961, that the lot was undeveloped and that the City authorized sale of the lot at public auction by deed dated August 23, 1962, making the City of New York the sole owner of tax lot 63 on December 15, 1961. Here, DOB categorically asserts that no additional documents provide information about ownership of tax lot 63 from 1961-1962.

DOB retorts, in response to the appellant's claim that tax lot 63 was not owned "individually" on December 15, 1961, such as that only a private owner can meet the requirements of Z.R. § 23-52(b), by stating that the Zoning Resolution contains no requirement that the individual owner be a private owner, or that ownership by the City disqualifies an owner from being eligible for the rear yard reduction in Z.R, § 23-52(b). Furthermore, DOB argues that Z.R. § 23-52(b) does not mention private ownership, only that the lot "was owned separately and individually from all other adjoining tracts of land, both on December 15, 1961, and on the date of application for a building permit." To appellant's concurrent claim that Lot 63 is not owned "separately" so as to qualify for a rear yard reduction under Z.R. § 23-52(b) because the City owned tax lot 63 and the adjacent land to the west that became tax lot 65 ("Lot 65") and, thus, did not own tax lot 63 separately for purposes of Z.R. § 23-52(b)(1). However, DOB notes that the City's possible ownership of Lot 65 is irrelevant for purposes of Z.R. § 23-52(b), which aims to allow development of the shallow interior lot at issue. Moreover, to the appellant's assertion that ownership ahead of a sale is not "fee ownership," DOB affirms that "fee ownership" is not mentioned in Z.R. § 23-52(b).

Next, DOB counters appellant's claim that the City created tax lot 63 prior to December 15, 1961, for the purpose of auctioning tax lot 63 and that such ownership does not qualify as "ownership" as required by Z.R. § 23-52(b)(1) by noting that the appellant fails to support its claim that because the City did not own tax lot 63 because the City did not exercise its control over tax lot 63 and could make no other use of the property. Legal ownership over a property permits authorizations of sale of said property and is not transferred until the sale is complete. DOB contends that the City: 1) must have owned tax lot 63 if the City was able to sell it; 2) could have rescinded its authorization to sell tax lot 63; and 3) then made any use of the property in perpetuity, but the fact that the City chose not to occupy the property has no bearing on ownership.[5]

[5] DOB argues that in BSA Cal. No. 54-97-A, the Board provided this purpose for an analogous provision (Z.R. § 23-33) applicable to substandard sized lots,

DOB further elucidates its process clarifying that upon having determined that the lot is eligible for the special provision for shallow interior lots, it had to evaluate whether the new building plans complied with the reduced rear yard requirement pursuant to Z.R. § 23-52(b) by reviewing the ZD1 Zoning Diagram. Here, DOB states that the project architect measured the dimensions of the rear yard by segmenting the lot and taking measurements perpendicular to the rear lot line, a method allowed by DOB and used in the past. As the depth of the lot determines the magnitude of the rear yard reduction, if an applicant overstates the depth of the lot, the result is that the applicant would have taken a lesser rear yard reduction and provided a larger rear yard requirement than is required.[6]

In the Z.R. § 12-10 definition of "rear yard line," the depth of a rear yard is measured perpendicular to the rear yard line. The distance between two parallel lines (in this case, the rear lot line and the rear yard line) is measured by drawing a line connecting the two parallel lines and perpendicular to both parallel lines. While Z.R. § 23-43 states that the depth of a rear yard should be measured perpendicular to the lot lines, it does not state whether the depth of a rear yard should be measured perpendicular to the front lot line, the rear lot line, or a side lot line. Whether the depth of a lot is greater when measuring from the front line or measuring from the rear line depends on the shape of the lot and whether the longer end is a front lot line or a rear lot line. In some cases, measuring from the front lot line will result in greater lot depth and in some cases measuring from the rear yard line will result in greater depth.

In support, DOB submitted an illustration of the zoning lot with the back and front lot lines reversed, so that the front yard line is now the back yard line, and the back yard line abuts East Houston Street. In this hypothetical reversed zoning lot, measuring depth perpendicular from the front lot line will be longer because that measurement is the same as measuring from the rear yard line in the actual zoning lot. As such, DOB determined that the proposed building

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in this case small lots instead of narrow lots. The Board stated that "the exception in Z.R. § 23-33 is narrowly drafted so that the new frontage and area requirements will not be circumvented by an owner who could have developed the combined lots in conformance with the new zoning requirements at the time the zoning requirements were enacted."

[6] In response to appellant's argument that "between the front lot line and the rear lot line" means a measurement perpendicular to the front lot line, DOB points to the plain language of the Zoning Resolution, which does not state that depth of a lot should be measured perpendicular to the front lot line. Additionally, the Z.R. § 12-10 definition of "lot depth" addresses the depth of a lot and not the depth of a yard. Appellant claims that rear yard depth should be measured by drawing a line perpendicular to the front lot line, not the rear lot line, but measuring the rear yard depth by drawing a line perpendicular to the front lot line is not the method provided by the Zoning Resolution.

is compliant with the reduced shallow lot requirement, because the measurement technique is allowed by the Zoning Resolution and is consistent with measurement techniques allowed by the Department in the past.

VI. Board Review

After review of the materials in evidence, the Board concludes that the appellant misinterpreted and misapplied the relevant sections of the Zoning Resolution and BSA precedent. The Board agrees that the purpose of the Zoning Resolution's reduced rear yard requirement is to allow for a reduction in the required rear yard when the lot is too shallow to satisfy the full 30-foot requirement, and Z.R. § 23-52 focuses on the ability and requirement of a zoning lot to provide rear yards.

First, the Board finds that the zoning lot is eligible for the reduced rear yard requirement pursuant to Z.R. § 23-52(b) because common ownership with Lot 65 on December 15, 1961, does not affect the findings under the subsection. The Board notes that the purpose of the separate ownership requirement is to ensure that the owner of a zoning lot does not profit from creating or exacerbating a shallow lot condition by failing to create a Z.R. § 12-10(b) zoning lot that could provide a 30-foot rear yard by declaring two or more adjoining parcels a single zoning lot. Because the appellant raises the issue of how common ownership and being owned "separate and individually" held affects the applicability of Z.R. § 23-52, the Board distinguishes its decisions in BSA Cal. No 54-97-A (Garrettson Avenue) involving "adjoining tracts of land" where the abutting tracts of land had one owner pre-December 15, 1961 and its decision in BSA Cal. No. 157-12-A (Hovenden Road) where the subject lot was owned separately and individually from abutting tracts of land from the facts in the subject application. Here, the Board states that it is not persuaded that the text of the Zoning Resolution has a plain meaning of "practical, effective or even common" ownership, as it has previously found in BSA Cal. No. 157-12-A. Therefore, the Board concludes that the subject zoning lot was in common ownership with Lot 65 to the west, and, as according to City maps, this area is far beyond the shallow lot condition taking advantage of the reduced rear yard requirement and does not affect the zoning lot's shallow lot condition.

Second, pursuant to Z.R. § 23-52(c), the Board finds that because the zoning lot was created after December 15, 1961, and because the shallow lot condition existed prior to December 15, 1961, and has not been increased or decreased since that date, the subject zoning lot is eligible to take advantage of the reduced rear yard requirement. On December 15, 1961, a zoning lot could have consisted of either: a) a Z.R. § 12-10 zoning lot consisting of just former Lot 63 or, b) a Z.R. § 12-10 zoning lot consisting of former Lot 63 and Lot 65, which was an adjoining tract of land under common ownership, and the current

zoning lot was created by the property owner's acquisitions which occurred after December 15, 1961.

Third, the Board examined the submitted plans to assess the appellant's argument that the proposed building's rear yard does not comply with the reduced rear yard requirement because the maximum dimension of portions of the lot, specifically the depth of the interior lot and minimum rear yard, were improperly calculated. Here, the appellant alleges that measurement of the depth must be taken by drawing a line perpendicular to the front lot line (East Houston Street) until the rear lot line is reached ("Front Line Calculation"). For zoning lots in R8 zoning districts, once it is determined that the zoning lot is eligible to take advantage of the reduced rear yard requirement, Z.R. § 23-52(b) permits the rear yard requirement to be reduced by six inches (up to a minimum reduced rear yard depth of 10 feet) for every foot the depth of such interior lot is less than 90 feet. Z.R. § 23-43 states that the measurement of a yard shall be measured perpendicular to lot lines, and in the case of rear yards, the measurement would be taken from the rear lot line.

The Board determined based on common practice before the DOB that the maximum depth should be taken by drawing a line perpendicular to the rear lot line until the front lot line is reached ("Rear Line Calculation"). By using the Front Lot Line Calculation, the maximum dimensions of the zoning lot with depths shallower than 90 feet appear larger and thus the required yard would be allotted a smaller reduction. The Board agrees that the proper way to calculate the appropriate rear yard depth is by measuring the mean, average, or middle dimension of the lot from the rear lot line—the same lot line from which the required rear yard is to be provided—to provide relief from unduly burdensome rear yard depth requirements.

Moreover, the Board states that Z.R. § 23-52 does not use the term "lot depth" at all, instead, qualifying "the depth of a zoning lot." Because of its irregular shape, the subject zoning lot has multiple rear lot lines that each have their own mean depth when measured to the street line. The most eastern rear lot line has a mean depth of 54' -4", the middle rear lot line has a mean depth of 75'-0", and the western rear lot line has a portion with a mean depth of 82'-4". Because these mean depths are smaller than 90 feet and the reduced rear yard requirement of six inches per one foot below a depth of 90 feet, the reduced rear yard requirement would be 12'-2" from the eastern rear lot line, 22'-6" from the middle rear lot line, and 26'-2" from the western rear lot line. As shown on the approved plans and on the diagram extracted from the approved plans, the proposed building would provide complying rear yards of 12'-6" from the eastern rear lot line, 22'-6" from the middle rear lot line, and 26'-6" from the western rear lot line.

VII. The Decision

Based upon the foregoing, the Board finds that the DOB determination and issuance of the permit under DOB Job No. M0064762476 24-I1-GC shall be upheld.

Therefore, it is Resolved, that the Board of Standards and Appeals does hereby *deny* this appeal.

Adopted by the Board of Standards and Appeals, September 9, 2024.

CERTIFICATION

This copy of the resolution dated September 9, 2024 is hereby filed by the Board of Standards and Appeals on February 13, 2025.

Carlo Costanza
Executive Director