JOHN R. LOW-BEER
CHARLES N. WEINSTOCK

36 WEST 66TH STREET (A/K/A 50 WEST 66TH STREET)
MANHATTAN BLOCK 1118, LOT 45

STATEMENT OF FACTS

Introduction

On behalf of Landmark West! (LW!), we submit this appeal pursuant to Section 666.6(a) of the N.Y.C. Charter and Section 1-06 of the Board of Standards and Appeals (Board) Rules of Practice and Procedure, requesting that the Board reverse the November 19, 2018 decision of the Manhattan Borough Commissioner of the Department of Buildings (DOB) approving the ZD1 Zoning Diagram, filed July 26, 2018, for a new building at 36 West 66th Street (a/k/a 50 West 66th Street) in Manhattan (Building Site). The plans violate Zoning Resolution (ZR) §§ 12-10, 82-34, and 82-36 and N.Y.C. Admin. Code § 28-103.8.

Property

The Building Site lies between West 65th and West 66th Streets and between Central Park West and Columbus Avenue in Sub-District A of the Special Lincoln Square District (Special District or SLSD). The northern portion of the zoning lot, facing 66th Street, is zoned C4-7 (R10 equivalent) and the southern portion, facing 65th Street, is zoned R8. The lot area of the C4-7 portion is 35,105 SF, and the lot area of the R8 portion is 19,582 SF.

The zoning lot is in Block 1118 and consists of Tax Lots 14, 45, 46, 47, 48, and 52. The developer of the property, West 66th Sponsor LLC (Owner), owns all of the lots except 52; the American Broadcasting Corporation Inc. (ABC) owns that lot, but sold its air rights to the Owner. The only building still standing on the zoning lot is the Armory, a New York City landmark, on Lot 52.

Project History

The history of the project is a tale of two very different towers. On October 24, 2016, the DOB approved the Owner's first plan for the property, an uncontroversial 25-story, 292-foot-tall residential mixed-use building with a community facility. At the time, the zoning lot consisted of Lots 45, 46, 47, and 48, all within the C4-7 District and the SLSD; it did not include either Lot 14 (the only R8 lot), which was then owned by the Jewish Guild for the Blind, nor Lot 52, ABC's Armory lot.

On June 16, 2016, more than four months *before* the DOB accepted the ZD1 for the 292-foot-tall building, the New York State Attorney General approved the Jewish Guild's proposal to sell Lot 14 to the Owner. And yet the Owner never told the DOB. Unbeknownst to the agency, it had been reviewing and later approving plans for a building that was not, in fact, what the Owner intended to build.

It is difficult to escape the impression that the Owner concealed this information because it wanted to move forward with demolition and excavation, and it was clear that its real plan – a decidedly immodest tower – would face considerable scrutiny, both by DOB and the public. The result would be a far longer wait to begin work on the property, and a greater opportunity for members of the community to learn more about the project and perhaps challenge it.

On November 15, 2017, the Owner acquired the final piece of its secret puzzle – the air rights to the Armory parcel. Less than two weeks later, it publicly announced the new plan: a 41-story, 775-foot-tall building, again with residential and community facility uses, but now split between the C4-7 District and the R8 District to its south (though still fully within the Special District).

The new plan featured a 161-foot-tall "interbuilding void" beginning on the 18th floor.[1] The Owner claimed the void as mechanical space, but its sole function is to propel the apartments above it to higher price points.[2]

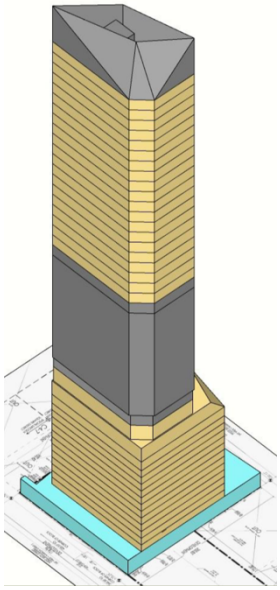

Diagram of George M. Janes

[1] "Interbuilding voids" are more accurately described as "intrabuilding voids," but the grammar ship seems to have sailed here.

The Owner submitted a post-approval amendment and a new ZD1 diagram reflecting the new plans. The DOB has not approved the amendment, but it approved the new ZD1 on July 26, 2018.

Zoning Challenge

On September 9, 2018, pursuant to RCNY § 101-15, LW! and 10 West 66th Street appealed the ZD1 decision to the Manhattan Borough Commissioner. The appeal was accompanied by a statement from planning consultant George M. Janes, also signed by Manhattan Borough President Gale Brewer and City Council Member Helen Rosenthal, among other government officials.

In a ZRD2 dated November 19, 2018 and posted three days later, the Borough Commissioner affirmed his Department's earlier decision in its entirety. We now appeal.

Although Mr. Janes's statement identified five problems with the approved ZD1, the current appeal will address only three:

1. The determination that the 161-foot-tall void constitutes exempt "mechanical space" under ZR § 12-10 for the purpose of calculating "floor area."

2. The failure of the Commissioner of Buildings to consider health and safety risks, as required by N.Y.C. Admin. Code § 28-103.8.

3. The use of inconsistent definitions of "zoning lot" in calculating "tower coverage" and "bulk distribution" under ZR §§ 82-34 and 82-36.

Argument

1. Voids

a. Plain Meaning

It is well-settled that in interpreting a statute, "we must begin with the language of the statute and give effect to its plain meaning." *Simon v. Usher,* 17 N.Y.3d 625, 628 (2011). The Zoning Resolution allows developers to exclude the ""floor space used for mechanical equipment" in calculating the floor area of a building. ZR § 12-10.

The Borough Commissioner held that "[t]he Zoning Resolution does not prescribe a height limit for building floors," and thus the plans in this case are

"substantially compliant" with the mechanical exemption. ZRD2 at 1, 3.[3] This ruling ignores the fact that the void has a 161-foot ceiling that takes it out of the definition of "floor space used for mechanical equipment." It is more than obvious that this floor space will not be "*used*" for mechanical equipment, or in any event, that any such use is merely incidental to the purpose of raising the apartments above to unprecedented heights.[4]

The fiction here is obvious and unacceptable. This is not mechanical space; it is a vast and largely empty cavity, created for the sole purpose of circumventing the zoning laws.

Rather than acknowledge how the Owner will in fact be using the space, the Borough Commissioner performs a tidy, legalistic analysis of the word "floor." It can, he says, be *any* space with a ceiling, even a 161-foot-tall void. Again, as he wrote, "The Zoning Resolution does not prescribe a height limit for building floors." ZRD2 at 3. But the Borough Commissioner has strayed from the plain meaning of "floor." No comfortable English speaker would describe Grand Central Station (130 feet) or St. Patrick's Cathedral (330 feet) as one-story buildings.

Of course floors vary in height, even in the same building, but nothing that can plausibly be called a floor has risen to a height of 161 feet. The role of this Board is not to write rules, but to adjudicate individual cases. The possibility that there will be hard cases down the road cannot be a reason to decline to resolve an easy one. The void here is the tallest ever attempted in the City, and if it is permitted, we can expect yet taller ones, constrained only by the limits of engineering.

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[3] The plans also include mechanical space on the 17th and 19th floors, but the floor-to-floor height is typical.

[4] Because the Owner has declined to provide the public with more detailed building plans, it is not clear how much mechanical equipment it intends to put in the void. We know that in the past, the DOB required applicants to justify their mechanical exemptions and questioned the validity of these spaces. Attached to George Janes's September 9, 2018 Zoning Challenge is a ZRD1 dated March 12, 2010 that was reviewed by then-Manhattan Deputy Borough Commissioner Raymond Plumney. This document is the result of a DOB Notice of Objections dated January 12, 2010 in which the DOB questioned the applicant's use of the mechanical exemption. This ZRD1 is notable because the building in question is what would become known as One Fifty Seven, the tallest residential building in Manhattan at the time. The original Notice of Objections, as reported in the ZRD1, documents the DOB questioning mechanical spaces requiring the applicant to justify the spaces they were claiming as exempt. It is evidence that the DOB at one time policed the exemption, to ensure that the spaces claimed as exempt from zoning floor area actually should be exempt and that mechanical spaces were sized proportionately to their mechanical purpose.

b. Statutory Purpose

The Borough Commissioner's decision also fails "to discern and give effect to the Legislature's intention." *Avella v. City of New York*, 29 N.Y.3d 425, 434 (2017) (citations omitted). The application of the rule here requires some background.

The Special District was established in 1969 and reflected the reigning vision of city planning at the time – the "tower-in-plaza" model, exemplified by the Seagram Building on Park Avenue. Over the years, planners developed doubts about the model, and began favoring another – the "tower-on-base." It was a more contextual architecture, intended to preserve the "streetwall" and to limit the heights of buildings in the district.

The 1993 SLSD amendments were designed precisely to achieve those goals. While the amendments typified a more general trend in city planning, they were also a response to a local architectural trauma – the construction of the 545-foot-tall Millennium Tower at 101 West 67th Street. That tower – 230 feet *shorter* than 36 West 66th Street would be – startled the community and provoked many to take a stronger position on the need to manage building heights in the district.

In a report supporting the 1993 amendments, the Department of City Planning echoed that concern:

> Several buildings in the district have exceeded 40 stories in height, and are out of character with the neighborhood. Current district requirements do not effectively regulate height, nor govern specific aspects of urban design which relate to specific conditions of the Special District.

Department of City Planning, *Special Lincoln Square District Zoning Review* (May 1993) ("*1993 DCP Report*") at 3.

The Community Board had suggested a height limit of 275 feet, but the Planning Commission opted for the tower-on-base model:

> [T]he Commission believes that specific [height] limits are not generally necessary in an area characterized by towers of various heights, and that the proposed mandated envelope and coverage controls should predictably regulate the heights of new development. The Commission also believes that these controls would sufficiently regulate the resultant building form and scale *even in the case of development involving zoning lot mergers*.

City Planning Commission, *Report on Zoning Amendment of Article VIII, Chapter 2, Section 82-00,* N 940127(A) ZRM (December 20, 1993) ("*Lincoln Square CPC Report*") at 19 (emphasis added). The new regulations, the Commission suggested, "would produce building heights ranging from the mid-20 to the low-30 stories (including

penthouse floors) on the remaining development sites." *Id.*; *see 1993 DCP Report* at 14.[5]

The use of voids directly subverts the intention to restrict building height. The Borough Commissioner's decision is a green light for developers to build as high as modern engineering will permit, obliterating the height limitations that the Planning Commission and the City Council created with the 1993 amendments.

Even the current chair of the Planning Commission, Marisa Lago, has acknowledged that voids are simply an end-run around the statute. At a town hall meeting earlier this year, she told the audience, "The notion that there are empty spaces for the sole purpose of making the building taller for the views at the top is not what was intended [by the City's zoning laws]." Joe Anuta, "City Wants to Cut Down Supertalls," *Crain's New York*, February 6, 2018. The SLSD regulations represent the City's judgment about how to balance two competing interests: the Owner's right to a fair return on its investment, and the public's right to light and air and the preservation of the Special District's human scale. The decision here upsets that balance, punishing precisely the population the statute was created to protect – those who live or work there, or who like to stroll or have dinner or take advantage of Lincoln Center and the Special District's other cultural riches.

The harm inflicted by the Borough Commissioner's decision will extend well beyond Lincoln Square. Without doubt, voids have been an effective trick for architects and developers. But allowing this practice to continue would be jeopardize the integrity of many neighborhoods in this City.

2. <u>The Fire Department</u>

The use of voids also presents significant safety risks. The Construction Codes require the Buildings Commissioner to intervene when a DOB approval may create public health or safety concerns:

> Any matter or requirement essential for fire or structural safety or essential for the safety or health of the occupants or users of a structure or the public, and which is not covered by the provisions of this code or other applicable laws and rules, shall be subject to determination and requirements by the commissioner in specific cases.

N.Y.C. Admin. Code § 28-103.8. The Fire Department (FDNY) has stated publicly that voids present a real safety risk for fire operations, and yet in the seven months since the DOB learned of the FDNY's concern, it has taken no steps to address the issue.

[5] We discuss the tower-on-base model in more detail later in this statement.

The attached statement from George M. Janes, a planning consultant and the author of the Zoning Challenge here, presents the troubling history of efforts to persuade the DOB to take the void issue seriously.

Mr. Janes first contacted the FDNY in July 2017 and spoke to Captain Simon Ressner in the Office of City Planning in the agency's Bureau of Operations. Captain Ressner had never heard of this new architectural technique, but apparently he spoke about it to others in the Department, and on May 3d, the Assistant Director of the FDNY's Office of Community Affairs, Clement James Jr., prepared a long list of the agency's issues with voids:

> The Bureau of Operations has the following concerns in regards to the proposed construction @ 249 East 62 Street ("dumbbell tower"):
>
> - Access for FDNY to blind elevator shafts... will there be access doors from the fire stairs.
> - Ability of FDNY personnel and occupants to cross over from one egress stair to another within the shaft in the event that one of the stairs becomes untenable.
> - Will the void space be protected by a sprinkler as a "concealed space."
> - Will there be provisions for smoke control/smoke exhaust within the void space.
> - Void space that contain mechanical equipment... how would FDNY access those areas for operations.

Email from Clement James Jr. to Holly Rothkopf, May 3, 2018. Three days later, on May 11, the DOB received a copy of the email in a Community Appeal from the Friends of the Upper East Side Historic Districts, challenging another controversial void project, 249 East 62nd Street.

In late July 2018, after Mr. Janes had an opportunity to review the new ZD1 for 36 West 66th Street, he contacted Captain Ressner again, curious to know if Ressner had heard from anyone at the DOB. He had not. This was three months after the DOB had received a copy of the Clement James email, i.e., three months after it had been put on clear notice that the FDNY – the *only* agency with the expertise to assess the risks here – had expressed serious concerns about the use of voids in New York City buildings.

On September 9, 2018, four months after the DOB saw the email, Mr. Janes submitted his statement in support of the Zoning Challenge here. The statement went into considerable detail about these fire risks, and recounted the full history of his efforts to engage the agency. Remarkably, the Borough Commissioner did not even mention the issue in his ZRD2.

Finally, on December 4, 2018, fully seven months after the DOB had learned of the the FDNY's concerns, representatives from the two agencies met. The DOB had still

taken no substantive steps to address the risks, and apparently had no plans to develop a broader policy – for example, to draft rules or procedures regarding when it should ask the FDNY to review particular applications, or when it should notify it about any new materials or new construction practices that pose potential safety risks.

It is simply unfathomable that the DOB has taken no action, either in further reviewing permit applications or in drafting more general intergovernmental policies. This is not a design question; it is a public safety question. The Board should order the DOB to halt all further work on 36 West 66th Street until the Fire Department has an opportunity to review a complete set of plans and determines that this building is safe.

3. Tower Coverage and Bulk Packing

a. The Rules and Their History

The tower-on-base model regulates height through two rules that independently arc toward the same goal of limiting height: "bulk packing" and "tower coverage."

The bulk packing rule states: "Within the Special District, at least 60 percent of the total #floor area# permitted on a #zoning lot# shall be within #stories# located partially or entirely below a height of 150 feet from #curb level#." ZR § 82-34.

The tower coverage rule states: "At any level at or above a height of 85 feet above #curb level#, a tower shall occupy in the aggregate: (1) not more than 40 percent of the #lot area# of a #zoning lot#; and (2) not less than 30 percent of the #lot area# of a #zoning lot#...." *Id*. § 82-36(a).

Although these tower-on-base rules do not impose specific height limits, they are certainly intended to limit height. As the Planning Department has said: "The height of the tower [is] effectively regulated by using a defined range of tower coverage (30 to 40%) together with a required percentage of floor area under 150 feet (55 to 60%)." City Planning Commission, *Report on Zoning Amendment,* N 940013 ZRM*,* December 20, 1993 ("*Tower-on-Base CPC Report*")

The Special Lincoln Square District has its own variant of the tower-on-base regulations, but it is clear that the intent of the regulations is the same:

> [I]n order to control the massing and height of development, envelope and floor area distribution regulations should be introduced throughout the district. These proposed regulations would introduce tower coverage controls for the base and tower portions of new development and require a minimum of 60 percent of a development's total floor area to be located below an elevation of 150 feet. This would produce building heights ranging from the mid-20 to the low-30 stories (including penthouse floors) on the remaining development sites.

> . . . [T]he Commission believes that . . . the proposed mandated envelope and coverage controls should predictably regulate the heights of new development. The Commission also believes that these controls would sufficiently regulate the resultant building form and scale even in the case of development involving zoning lot mergers."

Lincoln Square CPC Report at 19.

To understand how these rules work, it is useful to look at the example of Millennium Tower, the building that caused the public outcry leading to their enactment. That building has ten movie theaters and a high-ceilinged lobby in its base, uses that generate relatively little floor area in relation to their height. This allows more of the building's floor area to be placed in the tower portion of the building. As the Planning Department's 1993 *Special Lincoln Square District Zoning Review* explained:

> Due to the fact that theaters typically require double height or higher spaces, theater complexes are relatively hollow spaces, containing less floor area than residential or other commercial spaces would normally have in the same volume. These hollow spaces result in significantly taller and more massive buildings than those of the same FAR that do not contain theaters.

Department of City Planning, *Special Lincoln Square District Zoning Review* (1993) at 8-9; *see also id.* at 14 ("In an extreme case, the new Lincoln Square building will rise to 46 stories or 525 feet in height, with only 42 percent its bulk located below 150 feet. This is largely due to almost 125,000 square feet of movie theater uses, which create hollow spaces that substantially add to the mass and height of the building."). The bulk packing rule is intended to prevent this allocation of an excessive portion of the available FAR to the tower portion of a building.

The Millennium Tower is also relatively slender, which further contributes to the available FAR being placed at higher elevations, and the resulting very tall – or so it was thought at the time – tower. The tower coverage rule, requiring that a tower cover at least 30 percent of the zoning lot, was intended to ensure that towers would be shorter and squatter rather than taller and slenderer. This was made explicit by the Planning Department in its 1989 report *Regulating Residential Towers and Plazas*:

> Additional objections to towers have centered around their height. . . . The original prototype of the residential tower entailed a 30 to 32 story building with tower coverage approaching the 40 percent standard. However, more recent buildings have been built at a coverage of 27 percent on the average, with the most extreme constructed at 20 percent. This lower tower coverage translates into buildings that are most recently ranging from 25 to 50 stories, averaging 40.

Department of City Planning, *Regulating Residential Towers and Plazas* at 7, 16-17.

The Special District's bulk packing and tower coverage rules were enacted together in 1993, and they work together to limit height the height of towers. They have no application to other building forms.

b. The Bulk Packing and Tower Coverage Rules Apply Only to the Tower Portion of the Lot

The difficulty in this case arises because the Owner's zoning lot spans two districts: a portion of it is in a C4-7 District, and another portion is in an R8 District. Towers are allowed in C4-7 Districts, but not in R8s. So the Owner decided to apply the tower coverage rule only to that portion of the zoning lot where towers are allowed. However, it applied the bulk packing rule to the entire zoning lot.

The diagrams below show the whole zoning lot and the portions of it in the C4-7 district.

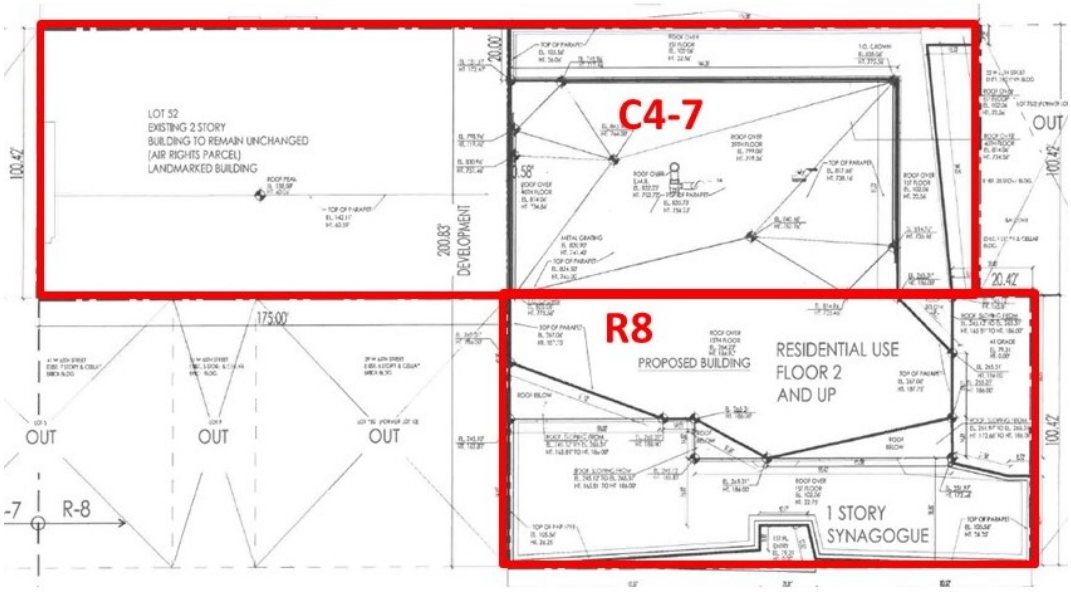


Diagram of George M. Janes

The result of the Owner's mix and match approach is a much taller building than would be allowed if both rules were applied to the same lot area. These key components of the tower-on-base regulations can only function as intended when they are applied over the same lot area. The correct approach here is to apply both rules to the tower portion of the lot only. By allowing the relevant bulk to be in completely unrelated buildings on a portion of the lot where no tower can be built, the DOB is essentially saying that the bulk packing rule does not apply to this tower at all. If that rule as well as the tower coverage rule were both calculated based only on the C4-7 portion of the zoning lot where tower rules apply, as they should be, the tower portion of this building would likely be shorter as more floor area would have to be taken out of the area above 150 feet and put into the building base.

Appellants have not seen complete building plans, as they have not been approved and are not available to the public. However, it appears that the Owner is arguing that under the rules governing split lots, the tower coverage rule applies only to the C4-7 portion of the zoning lot. The basis for this argument was provided in a December 18, 2017 email from David Karnovsky, the Planning Department's former General Counsel and now one of the Owner's attorneys.

Mr. Karnovsky reasoned that although the language of the tower coverage rule is phrased in terms of "the lot area of a zoning lot," "the phrase 'of the zoning lot' [as used in the Zoning Resolution] *always* refers only to that portion of the zoning lot located within the zoning district to which the regulation applies. . . . This is not merely a matter of informal administrative practice or a matter of convenience; it is a result mandated by ZR 77-02, which states in relevant part that '[w]henever a zoning lot is divided by a boundary between two or more districts . . . each portion of such zoning lot shall be regulated by all the provisions applicable to the district in which such portion of the zoning lot is located.'" According to Mr. Karnovsky, whether a particular "set of zoning regulations" applies to a split lot "depends on whether the regulations in question apply in both portions of the zoning lot or in one portion only." Because towers cannot be built in R8 districts, Mr. Karnovsky continues, the tower coverage rule only applies to the C4-7 portion of the zoning lot and does not apply to the R8 portion.

So far, so good. Appellant agrees. But now we come to the flaw in Mr. Karnovsky's argument: According to him and the Borough Commissioner, this reasoning applies to the tower coverage rule, ZR § 82-36(a), but not to the bulk packing rule, ZR § 82-34, because, as Mr. Karnovsky put it, "unlike the tower regulations of ZR § 82-34, which apply only in the C4-7 portion of the zoning lot, ZR § 82-34 applies to all zoning lots in the Lincoln Square Special District, irrespective of their zoning designation."

Mr. Karnovsky purports to find a basis for this distinction in the language of ZR § 82-34, but he does not point to any relevant difference in language, nor is there one. The only authority he cites for distinguishing these two provisions is a passing reference in the *Lincoln Square CPC Report*, "describing proposed ZR § 82-34 as an urban design change that would apply 'throughout the district . . . to govern the massing and height of new buildings.'"

This purported distinction between the two rules finds no support in the Report he cites. His suggestion that the few words he quotes from it only referenced the bulk packing rule and not the tower coverage rule is not accurate. As is evident even from the passage he quotes, the Report is clear in describing both the bulk packing rule and the tower coverage rule as two inseparable pieces of a package intended to limit and shape towers in the Special District. It is worth quoting the passage again here:

> [I]n order to control the massing and height of development, envelope and floor area distribution regulations should be introduced throughout the district. These proposed regulations would introduce tower coverage controls for the base and tower portions of new development and require a minimum of 60 percent of a development's total floor area to be located below an elevation of 150 feet. This would produce building heights ranging from the mid-20 to the low-30 stories (including penthouse floors) on the remaining development sites.
>
> . . . . The Commission also believes that these controls would sufficiently regulate the resultant building form and scale even in the case of development involving zoning lot mergers."

Lincoln Square CPC Report at 18-19 (emphasis added). This passage references both rules in the same sentence. It makes crystal clear that the tower coverage and bulk packing rules were proposed as a package intended to control tower height and enacted together as parts of that same package of amendments. If one of the rules applies "throughout the district," they both do.[6]

There is absolutely no basis to distinguish between the tower coverage rule and the bulk packing rule with respect to their applicability to this zoning lot. Neither is applicable or relevant to R8 districts or to the R8 portion of this lot. Both are designed specifically to regulate towers. Therefore both apply only to the C4-7 portion of Owner's lot, and the DOB erred in applying the bulk packing rule to the entire lot rather than only to the C4-7 portion of it.

c. DOB's Interpretation Leads to Absurd Results

Not only is there no affirmative basis to argue that one of these rules applies to the tower portion of the lot and the other applies to the entire lot. Additionally, the Owner's and the DOB's interpretation of how these two provisions apply leads to results that negate the Legislature's purpose of limiting building heights. "The Legislature is presumed to have intended that good will result from its laws, and a bad result suggests a wrong interpretation. . . . Where possible a statute will not be construed so as to lead to . . . absurd consequences or to self-contradiction." McKinney's Statutes § 141; *see City of Buffalo v. Roadway Transit Co.*, 303 N.Y. 453, 460-461 (1952); *Flynn v. Prudential Insurance Co.*, 207 N.Y. 315 (1913).

The absurd results that follow from the Borough Commissioner's application of ZR § 77-02 to this case are evident. This building itself is over 200 feet taller than the Millennium Tower, the 545-foot building that created the impetus to adopt the 1993 amendments to the Special District. But if the applicant's interpretation is correct, this building could have easily

[6] Because the Special District is zoned almost entirely C4-7, these tower rules are in fact applicable throughout most of the District. This zoning lot is among the few zoned R8 in the District.

been yet more absurd and more contrary to the intent of the Special District regulations than the current plans, and the applicant is showing restraint by not fully exploiting the loophole its interpretation creates.

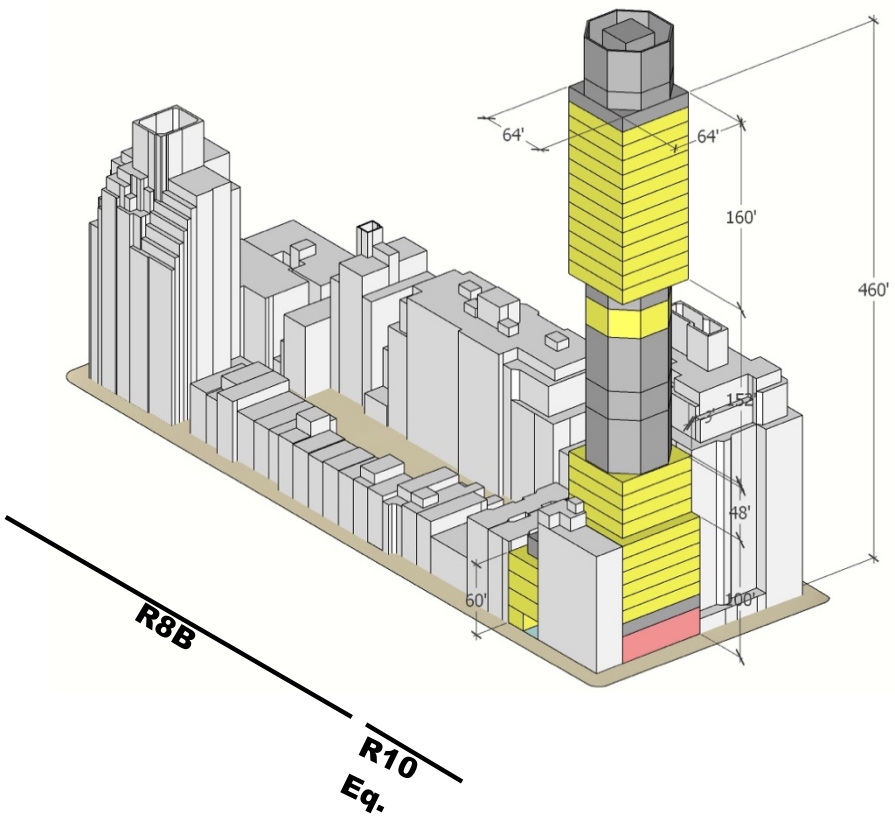
For example, directly to the west and south of the subject zoning lot, there are Lots 9 and 10, which contain existing buildings that are both entirely below 150 feet and are in the R8 District. Using the Owner's logic and interpretation of the SLSD and ZR § 77-02, the applicant could have expanded its zoning lot to include these sites, which would have added approximately 45,000 SF of existing floor area under 150 feet. This zoning lot merger would have required no transfer of floor area, or "air rights," and would not change anything about these existing buildings or materially impair their development potential, other than keeping any future development to less than 150 feet. Their existing floor area would just be used in the tower-on-base calculations, which would have allowed the Owner to construct an even taller building.

Such a paper transaction would have allowed the 45,000 SF floor area in these existing buildings to be counted as below 150 feet in the bulk packing calculations. The net effect of such an action would have been to allow the tower to increase by two stories or 32 feet.[7]

Using the applicant's interpretation, the larger the zoning lot with existing buildings under 150 feet, the taller the tower can go, as long as those existing buildings are in a non-tower zoning district (not R9 or R10, or their commercial equivalents). Yet the Planning Commission wrote in its findings about the impact of zoning lot mergers on the tower-on-base form in Lincoln Square: "The Commission also believes that these controls would sufficiently regulate the resultant building form and scale *even in the case of development involving zoning lot mergers*" *1993 DC* (emphasis added).

If the applicant's interpretation is correct, then there is no way that this CPC belief could be accurate. To demonstrate an even more absurd example of the applicant's interpretation, consider the following tower-on-base building proposed at 249 East 62nd Street.

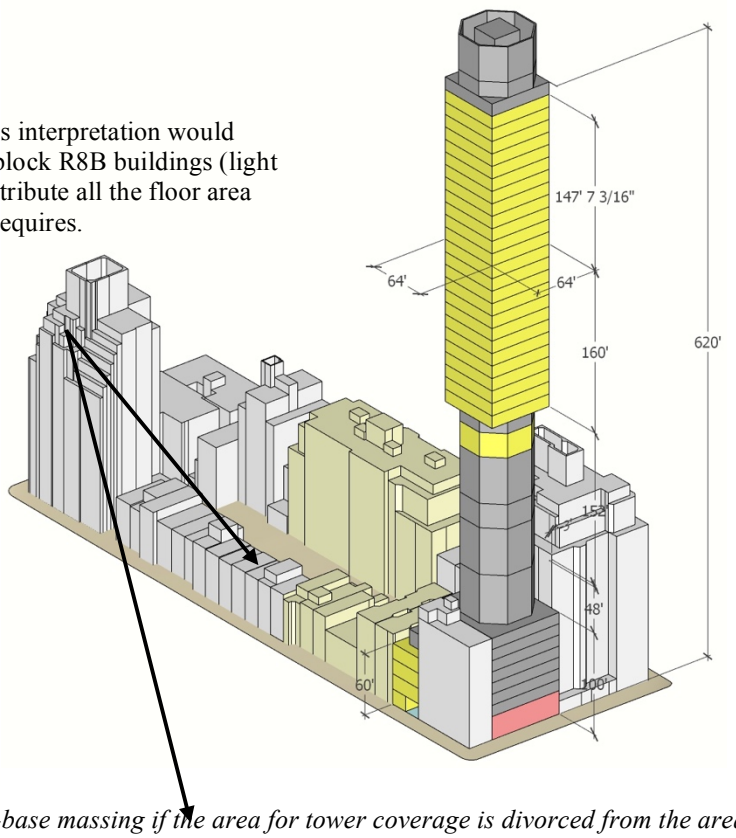
[7] The 45,000 SF increase in area under 150 feet would mean that 40 percent of that area, or 18,000 SF, could be moved from the base of the proposed building into the tower above 150 feet, effectively allowing the tower to increase another two floors or 32 feet using 16 feet FTF heights.



Actual tower-on-base proposal at 249 E. 62nd Street

This is another R10 equivalent tower-on-base with a massive void. Here, the R10 equivalent portion of the lot extends only 100 feet in from the wide street the tower faces. If all floor area on the zoning lot under 150 feet can be counted for bulk packing outside the R10 equivalent portion of the lot, and the tower coverage is only counted on the R10 equivalent portion of the zoning lot, then the zoning lot can be expanded to cover much of the block. If that is done, then *all* floor area under 150 feet, with the exception of the ground floor of the new building, will be in buildings to stay on the lot. This zoning lot would require no transfer of development rights and would not impair the future development potential of the existing developments in the height-limited mid-blocks. The following shows how such a building might be massed out:

The applicant's interpretation would allow the midblock R8B buildings (light yellow) to contribute all the floor area bulk packing requires.



Possible tower-on-base massing if the area for tower coverage is divorced from the area for bulk packing

The existing buildings added to the zoning lot are shown in light yellow in the midblock. They contribute substantially all the floor area under 150 feet that this new building needs so that the floor area generated on its own lot can be placed at levels higher than 150 feet. In the prior example, there were 13 residential floors over 150 feet. With this interpretation and large zoning lot, 26 residential floors in the main portion of the building are over 150 feet. This example shows expanded mechanical floors acting as a platform to raise the building to 150 feet so that the height can be maintained. It could have just as easily been a single floor designed to be 150 feet floor-to-floor, which while sounding absurdly unrealistic, is actually 11 feet shorter than what the applicant is actually proposing on the 18th floor of its building.

While the absurdity of the results of this interpretation is self-evident, it must also be said that there is no reasonable planning or design rationale for zoning text to be read as such. The 30 percent minimum tower coverage standard came out of previously quoted DCP studies from 30 years ago that found that older towers from the 1960s and 1970s were largely at or near the 40 percent maximum coverage. Towers from the 1980s were smaller, averaging just 27 percent, with some extreme cases as low as 20 percent. The record could not be clearer that the 30 percent minimum on tower coverage, linked with bulk packing, was intended to act as a control on tower height. At its largest (11,580 SF), the tower proposed on West 66th Street has a coverage of 21 percent on its zoning lot. At its smallest, it covers just 19 percent. The statute requires it to cover between 30 and 40 percent of the zoning lot, which means it should be between 16,406 SF and 21,875 SF.

Conclusion

The Borough Commissioner's decision to affirm the approval of the ZD1 should be reversed.

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_____/s/_____
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