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STATEMENT OF FACTS

BSA Calendar No:

Premises: 36 West 66th Street, a/k/a 50 West 66th Street, Manhattan Block 1118, Lot 45 ("the Parcel")

Determination Challenged: Issuance of Permit No. 121190200-01-NB ("the Permit")

I. PRELIMINARY STATEMENT

Appellant LandMark West! ("LW!"), a non-profit corporation dedicated to preservation efforts for the Upper West Side of Manhattan,[1] hereby challenges, pursuant to New York City Charter §666, the issuance of the Permit to the applicant, West 66th Sponsor LLC ("the Owner"), a subsidiary of Extell Development Company, for the building to be constructed at the Parcel ("the Tower").

The Tower is planned to reach a height of approximately 775 feet – making it the tallest building on the Upper West Side by hundreds of feet, dwarfing other buildings in the vicinity – but would contain only 39 stories of residential units. Thus, a substantial portion of the Tower's height – 196 vertical feet - would be composed of empty spaces ("the Voids"), supposedly "used for mechanical equipment" and thus not counting toward floor area.

The Permit should be revoked, because the underlying plans contravene the Zoning Resolution ("ZR") in that:

a) the Owner's attempts to exempt the Voids from floor area should be rejected, as the Voids are neither "used for mechanical equipment," ZR §12-10, nor are they accessory uses to the residential uses in the Tower, ZR §22-12; and

[1] "Since 1985, LANDMARK WEST!, an award-winning non-profit, has worked to achieve landmark status for individual buildings and historic districts on the Upper West Side and to protect them from insensitive change and demolition. We are the proud stewards of more than 3,200 designated architectural and cultural landmarks from 59th to 110th Streets, Central Park to Riverside Park. We are dedicated to building community and promoting awareness of our neighborhood's special character." https://www.landmarkwest.org/mission/ (last accessed May 10, 2019).

b) Floor area calculations are contrary to two sections of the ZR which work in tandem to limit building height in the Special Lincoln Square District ("the Special District") established by ZR art. VIII, ch. 2 (ZR §§82-00 *et seq.*):
    1) The "Bulk Packing Rule," ZR § 82-34, and
    2) The "Split Lot Rule," ZR §§ 33-48 and 77-02.

The within applicant submitted an Appeals case on substantially similar grounds, Cal No. XX, which was withdrawn subsequent to approval of the Permit ("the Prior Appeal"). The within applicant respectfully resubmits the within Appeal to challenge the Permit.

II. FACTS

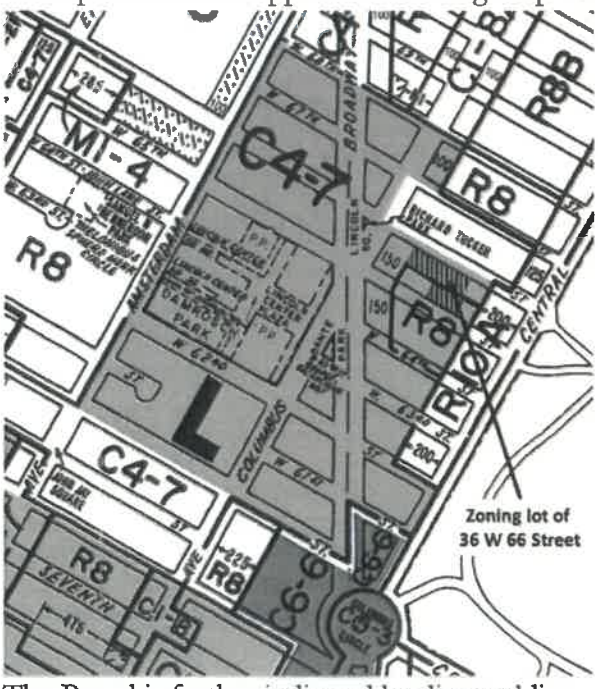
1. The Special District

The Special District was enacted in 1969. See CPC Report N 940127(A) ZRM (Dec. 20, 1993, *adopted by* the New York City Council on February 9, 1994, as amended) ("the 1993 Report") (Exhibit A hereto).

Most of the Special District is zoned C4-7 with an R10 equivalent. R10 is the highest allowed residential density in the ZR (ZR art II. ch. 3, generally). Towers are allowed in R10; ZR §23-65 *et seq.*

Parts of two blocks in the Special District are zoned R8, a lower density residential designation where towers are not allowed.

The Special District appears on Zoning Map 8c. It is marked the lighter-gray shading with the "L."



The Parcel is further indicated by diagonal lines.

In 1993, DCP reviewed zoning in the Special District generally (see its Zoning Review, May 1993, Exhibit B hereto ("the 1993 DCP Review"). The Bulk Packing Rule and the Split Lot Rule eventuated together from this review.

The 1993 DCP Review studied in particular a number of sites in the Special District. One of these was the "ABC assemblage," three smaller lots on West 66th Street comprising a campus of the ABC television network (now landmarked). The "ABC assemblage" lay entirely within the C4-7/R10 portion of the District, i.e. the vast majority of the District, where high-density development and towers are allowed.

The 1993 DCP Review did not consider any of the R8 portion of the Special District, where towers are not permitted.

As per the Owner's updated ZD1 diagram, filed with DOB on April 4, 2019 ("the 2019 ZD1")(Exhibit C), the dividing line between the C4-7/R10 portion of the Special District, and the R8 portion, runs right through the Parcel, from west to east. The portion north of the line is the former "ABC assemblage"; south of the line is a tract that, prior to the Owner's purchase of it and incorporation into the Parcel via execution of a zoning-lot merger, was the site of the Jewish Guild for the Blind, an 11-story building. The Owner demolished that building, upon information and belief, in 2017. 64% of the Parcel is north of the line and zoned C4-7/R10.

The Permit enables the Owner to build a tower more than half-again as large as the ZR allows – adding about 276 vertical feet to get to its outrageous height of 776 feet, through the subterfuge of adding the Voids in between residential floors. The Voids comprise purportedly non-floor area space of 20 vertical feet on the fifteenth floor; "residential amenity space," 42 feet high, on the sixteenth floor; and more "mechanical space" on the seventeenth, eighteenth, and nineteenth floors for a total of 176 vertical feet. There are additionally two "mechanical floors" on two 64 feet high and one 48 feet high The proposed building would achieve its exceptional height in substantial part by virtue of two illegalities that would add at least 276 vertical feet. Its evasion of the Bulk Packing Rule would allow The Owner to add at least five, and possibly as many as seven, residential tower floors over and above what would otherwise be allowed. Its inclusion of four largely empty mechanical spaces located above its base and below the residential floors of the tower section further increase the building's height by 196 feet. There would be three contiguous putatively mechanical floors (17, 18, and 19), two 64 feet high and one 48 feet high. Just below these, on the 16th floor, would be a "residential amenity space" 42 feet high, and below that, on the 15th floor, yet another mechanical space, 20 feet high. The 40th and 41st floors are also devoted to "mechanical space", for a total of 229 vertical feet of such non-floor area space. This is *twenty-three floors' worth of height of mechanical space* – or roughly one vertical foot of such space to every two floors of residence. One struggles to conceive of a legitimate need for so much service equipment.

These various subterfuges also enable the Owner to add at least five floors more than indicated to the top portion of the Tower which, by virtue of the Voids, float hundreds of feet higher than surrounding buildings – thus commanding astounding views of the City and beyond, and therefore justifying astronomical prices for the residential units which, not the provision of "mechanical" services to the units, is the rationale for the Voids.

2. History of the Parcel

On November 24, 2015, the Owner applied build a 25-story residential building with a community facility on the former "ABC assemblage." This building, at 292 vertical feet ("the 292ft. Building"), was as-of-right within the R10 zoning of most of the Special District, without resort to any tricks or artifice. See ZD1, filed 11/4/15 and approved 10/24/16, part of Exhibit D ("the 2016 ZD1").

On June 7, 2017, DOB issued a New Building permit for the 292ft. Building. Although excavation began shortly thereafter, it is apparent in hindsight that the Owner never intended to build it; the Prior Appeal referred to it, aptly, as a "stalking horse," to divert the attention of LW!, the public, and DOB while it planned the Tower. See ZD1, approved 7/26/18 and dated 4/15/15, part of Exhibit D ("the 2018 ZD1").

Although the Board has seen this in the Prior Appeal and likely in other applications, it is imperative that consideration again be given to the statements of Jon Kalikow, another developer of like-sized projects, in praise of the Owner's bait-and-switch here (which, presumably, unless a precedent can be set by the Board's grant of the within application and revocation of the Permit, will allow similar towers with pretextual "voids" to sprout all over the City):

> "A different developer did something smart at a site we looked at on W. 67th [sic] Street." The developer filed for a building that was "this high." Jon motioned a short length. But once he had his plans ready, he amended the tower to make it "that high." Jon motioned a taller length. "His belief and hope, and he's probably right, is that the community can't muster the resources to stop him. But these are the kinds of tricks you have to do these days, if you even hope to be successful," Jon said.
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> Betsy Kim, "Richard and Jon Kalikow Say What They're Really Thinking," *GlobeSt.com* (Feb. 20, 2018) (https://www.globest.com/2018/02/20/richard-and-jon-kalikow-say-what-theyre-really-thinking/) (Exhibit E hereto) (last accessed May 11, 2019).

On December 13, 2017, the Owner, revealing its true intentions, filed with DOB to build the Tower.[2] On July 26, 2018, DOB a ZD1. On September 9, 2018, LW! and 10 West 66th Street

[2]See http://a810- bisweb.nyc.gov/bisweb/JobsQueryByNumberServlet?passdocnumber=16&passjobnumber=121190200&requestid=18#FSup (last accessed May 11, 2019).

Corporation filed a Zoning Challenge with DOB to challenge the ZD1, pursuant to 1 RCNY §101-15 ("the Zoning Challenge") (the Zoning Challenge, with DOB's response, Exhibit F hereto).

The grounds for the Zoning Challenge were that the "mechanical space" purportedly exempt from floor area was neither mechanical space nor accessory to the residential use; and that the plans were contrary to the Split Lot and Bulk Packing Rules.

On November 19, 2018, DOB rejected the Zoning Challenge with regard to the "mechanical space" stating that "[t]he Zoning Resolution does not prescribe a height limit for building floors."

With respect to the Zoning Challenge's attack on the bulk of the Tower, DOB responded, correctly, that under the Split Lot Rules, the provision governing tower bulk and lot coverage (ZR 82-36, the "Tower Coverage Rule") can only apply to the C4-7/R10 portion of the Parcel, where towers are permitted. However, DOB then incorrectly found that that Split Lot Rules do not apply to the Bulk Packing Rule, because the Special District's version of that rule "would be applicable to all portions of a zoning lot located within the Special District regardless of zoning district designations." Ex. F.

This interpretation parroted one previously advanced by David Karnovsky, Esq., who is now counsel for the Owner, but previously had served as General Counsel of DCP. *See* December 18, 2017 email addressed to "Council Land Use, Office of Council Member Helen Rosenthal Staff," Exhibit G hereto.

DOB based its finding on that the Bulk Packing Rule for the Special District begins with the phrase "Within the Special District, ..." Because both the R8 and the C4-7/R10 portions of the lot are "within the Special District, the Bulk Packing Rule purportedly applied to both portions, notwithstanding the Split Lot Rules.

Subsequently, LW! filed the Prior Appeal (annexed hereto as Exhibit H) to attack DOB's determination regarding the Zoning Challenge. However, during the pendency of that proceeding, DOB issued a Notice of Intent to revoke its approval of the Zoning Challenge (Exhibit I hereto).

In the Notice of Intent, Exh. I, DOB opoined that the Voids contravened the ZR:"The proposed mechanical space on the 18th floor of the Proposed Building does not meet the definition of 'accessory use' of § 12-10 of the New York City Zoning Resolution. Specifically, the mechanical space with floor-to-floor height of approximately 160 feet is not customarily found in connection with residential uses."

The Notice also stated that DOB had rescinded its denial of LW!'s Zoning Challenge, thus mooting the Prior Appeal.

The Notice did not, however, reconsider whether the Owner's methodology for calculating the required floor area below 150 feet and the floor area allowed in the tower portion of the building violated the Bulk Packing Rule.

By letter dated January 25, 2018, the Owner objected to DOB's Notice of Intent, stating that it was inconsistent with DOB's earlier approval of voids and rejection of a challenge in the case of 15 East 30th Street, and with the BSA's affirmation of that decision in BSA Calendar No. 2016-4327-A.

On April 4, 2019, DOB reversed itself yet again: it withdrew its Notice of Intent to Revoke, approved a slightly revised Zoning Diagram, Exh. C, and, on April 11, 2019, for the first time, issued the Permit, Exhibit J.

Apparently in response to safety objections by the Fire Department, the Owner redesigned the Voids with three contiguous smaller ones totaling 176 feet, 16 feet more than the original 160-foot void. These are below the tower apartments and immediately above the 42-foot-high residential amenity space and another 20-foot-high mechanical space. The aggregate 196 vertical feet of mechanical spaces sandwiched into the middle of the building below the tower portion would be the most ever inserted into any building in the City, and far, far taller than necessary for any mechanical equipment. *See* Dep't of City Planning, Residential Mechanical Voids Findings ("Mechanical Voids Findings") (Apr. 2018, updated Feb. 2019) (Exhibit K attached).

3. The Bulk Packing Rules and the Tower Coverage Rule

In a "Discussion Document" titled "Regulating Residential Towers and Plazas" produced in 1993, year, DCP observed that "objections to towers have centered around their height" as well as "the erosion of streetwall character," noting that "apartments on the 30th floor typically are priced 30 percent more than identical units on the 10th floor." *See* DCP, "Regulating Residential Towers and Plazas: Issues and Options: A Discussion Document" (1989) ("Discussion Document"), at 7 (Exhibit L hereto).

DCP proposed to replace the "tower-on-a-plaza" form of building with a new form, the "tower-on-a-base," with "specified controls on the amount of floor area that could be massed in the tower portion" of a building. It introduced "packing-the-bulk" and minimum tower coverage as two complementary tools to regulate height. The Bulk Packing Rules would "require that a minimum percentage of the total floor area of the zoning lot be located at elevations less than 150 feet above the curb level. " This would ensure that buildings are not too top-heavy. The Tower Coverage Rule would require that any tower cover a minimum percentage of its lot area, making towers squatter and less needle-like, and keep the number of tower stories constant regardless of lot size.

However, the City did not act on this proposal until 1993. In the Special District, the 545-foot-tall Millennium Tower at 101 West 67th Street, announced in 1992 – obscenely tall, but still 230 feet shorter than the Tower - outraged the community[3] and prompted action by the city.

The 1993 DCP Review stated, Exh. A, at 3:

> 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.

The Discussion Documbent, Exh. L, described the inversely proportional relationship between too-low lot coverage and too-tall buildings:

> 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.

These amendments, together with other proposed sections intended to promote appropriately contextual development, were intended to limit building height not only in the Special District, but throughout Manhattan's high-density residential neighborhoods. The amendments included the Bulk Packing and Tower Coverage Rules as well as other rules designed to preserve the street wall and promote contextual development. They were approved by the CPC in two different versions, one for the Special Lincoln Square District and another for Manhattan's high density (R9 and R10) residential districts generally. ZR §§ 82-34 and 82- 36 (Special District rules); ZR § 23-651 (general rules).

The Special District's version of the Bulk Packing Rule, ZR § 82-34, 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.

This Rule differs in minor ways from the rule enacted for Manhattan's R9 and R10 districts generally. Compare ZR §§ 82-34 with ZR § 23-651(a)(2).

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[3] Emily Bernstein, "Upper West Side; New Tower Rules Come up Short," New York Times (Dec. 26, 1993), at 5 (https://www.nytimes.com/1993/12/26/nyregion/neighborhood-report- upper-west-side-new-tower-rules-come-up-short.html?searchResultPosition=1).

The Special District's version of the Tower Coverage Rule, § 82-36(a), 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....

The Bulk Packing and Tower Coverage Rules (together, the "Tower-on-a-Base Rules") govern the distribution of the allowable square footage within an envelope, the size of which is determined by the size of the lot and the FAR applicable to that area.

The Bulk Packing Rule ensures that, of the total allowable floor area that could otherwise go into the tower, 60 percent will be in the base, below 150 feet. Thus each square foot of floor area required for the base is one square foot less that can go into the tower, limiting the tower's bulk and height. The Tower Coverage Rule requires that the tower portion of the building cover at least 30 percent of the zoning lot area.

When applied correctly, these two rules ensure that the number of stories in the tower portion of the building (i.e., the portion above 150 feet) remains constant regardless of lot size.

A simplified hypothetical shows how the two rules work together to achieve that result. Consider a 10,000 square-foot lot in a tower-on-a-base district zoned C4-7, where the allowable square footage is 10 FAR. A hypothetical developer can put a maximum of 100,000 square feet on this lot. The Bulk Packing Rule requires that 60 percent of that, or 60,000 feet, be in the base, below 150 feet, leaving 40,000 square feet for the tower portion of the tower- on-a-base. Under the Tower Coverage Rule, the footprint of the tower above the base must cover at least 30 percent of the lot area, i.e., at least 3,000 square feet. At 3,000 square feet per floor, and with 40,000 square feet available for the tower, the developer can build a 13.3 story tower on top of its 150-foot high base.

If the lot is now quadrupled in size, to 40,000 square feet, then the allowable square footage is 400,000 square feet. Sixty percent of that, or 240,000 square feet, must be below 150 feet, leaving 160,000 square feet for the tower. Again, the footprint of the tower above the base must cover at least 30 percent of the lot area, which is now four times the previous size, i.e., 12,000 square feet. At 12,000 square feet per floor, and with 160,000 square feet available for the tower, the developer can still build only a 13.3 story tower.

As the envelope grows bigger, the square footage in the tower and base grow proportionately, but the Tower Coverage Rule applied over the larger lot broadens and extends the tower's floorplates, keeping its height constant regardless of lot size. But this mechanism. can only work if the total allowable floor area, bulk below 150 feet, and tower coverage are all calculated based on the same area.

On the other hand, consider the result of using the Owner's methodology on a split lot with 10,000 sf in a C4-7/R10 district and 30,000 sf in an R8 district. The bulk packing calculation would be based on the entire 40,000 sf lot but tower coverage calculation would be based only on a smaller, 10,000 sf portion of the lot. There would be 100,000 sf allowable on the tower portion of the lot but the tower floors would only be 3,000 sf each. The required base could be entirely in the R8 portion of the zoning lot, leaving all the allowable 100,000 sf on the C4 - 7/R10 portion of the lot available for the tower. The result would be a 33.3 story tower (100,000 divided by 3,000) – over two and a half times the allowed number of stories – on top of a 150-foot high base.

The two reports accompanying these two sets of amendments make clear that the purpose of this legislation was to limit building heights to "the low-30 stories," equivalent, at that time, to perhaps 350 feet. The report for the Special District noted that a City Planning discussion document issued earlier that same year had "found that the height of buildings in the Special District needed to be regulated"; that "[c]urrent district requirements do not effectively regulate height"; and that, "[s]everal buildings in the district have exceeded 40 stories in height, and are out of character with the neighborhood. " 1993 CPC Report, Exh. A, at 3.

The Report stated the Commission's belief that the Bulk Packing and Tower Coverage Rules "should predictably regulate the heights of new development," and "would sufficiently regulate the resultant building form and scale even in the case of development involving zoning lot mergers," so as to "produce building heights ranging from the mid-20 to the low-30 stories. . . on the remaining development sites" in the Special District. Id. at 19. The DCP report for the high-density residential districts elsewhere in Manhattan contained similar language. Exhibit A-1 (CPC Report N 940013 ZRM, dated Dec. 20, 1993, at 2-3, 5, 11-12)

III. THE OWNER'S MISAPPLICATION OF THE BULK PACKING RULE VIOLATES ZR ¶¶ 82-34, 77-02 AND 33-48

The Zoning Resolution's split lot provisions mandate that the rules applicable to each portion of a split lot apply to that portion only. Therefore, the Tower Coverage Rule applies to the C4-7 portion of its lot only. However, DOB, following Mr. Karnovsky's interpretation, Exh. G, would except the Bulk Packing Rule from the rules generally applicable to split lots because of the prefatory phrase "Within the Special District," which, they say, must be read to mean "Everywhere within the Special District":

> 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.

However, this vague introductory phrase does not overrule the split lot provisions. To read it as doing so is to presume that the CPC and the City Council intended an absurd result. Rather, as the

context and legislative history show, this phrase was intended to distinguish the Special District from other high- density residential districts, where the Bulk Packing Rule takes a slightly different form. As between two interpretations of the rule, one that makes nonsense of it and is inconsistent with its context and history and another that allows it to work as intended and is consistent with both context and history, the choice is obvious.

1. Applying the Bulk Packing Rule Where No Towers Are Allowed Negates the Rule and Leads to Absurd Results

The Tower-on-a-Base Rules form an integrated, interlocking mechanism that relies on lot area and FAR, bulk packing and tower coverage, to allocate bulk within the building's envelope between the tower and the base. As noted above, this mechanism can work only if the total allowable floor area, tower coverage and bulk packing are calculated based on a common denominator: one lot size, one FAR and one set of rules applicable to the entire envelope. Only in this way can it keep the number of tower floors constant even as lot size varies.

Both the Split Lot Rules, discussed below, and the logic of this mechanism dictate that the common denominator in this case must be that portion of the lot in which towers are allowed. That is the area in which the Owner in fact proposes to put its tower. The Owner correctly calculated the total allowable floor area for the tower-on-a-base portion of the lot. This is the envelope within which its tower must fit. It also correctly calculated the minimum coverage requirement for the tower as 30 percent of that area.

However, when the Owner did its bulk packing calculation, it did not calculate the amount permissible in the tower as 40 percent of the FAR allowed in the tower-on-a-base portion of its lot, but rather as 40 percent of the FAR allowed on the entire lot. Taking advantage of the split lot situation, it fulfilled the requirement of "60-below-150" with floor area much of which is outside the envelope, in the portion of its zoning lot where towers are not allowed. This not only does not reduce the floor area of the tower, but actually allows The Owner to add to it.

This erroneous methodology negates the rule's purpose. To work right, the calculation must be zero-sum: the total square footage of the tower and base must add up to the total allowed on C4-7 portion of the lot. Thus, assuming there is no space left within the C4-7 envelope, adding 60 square feet to the base must reduce the square footage in the tower by 60 square feet. But if those 60 square feet are added from outside the envelope, from the R8 portion, they do not force any reduction in the square footage of the tower. To the contrary, adding 60 square feet outside the envelope actually frees up 60 square feet within the C4-7 portion, allowing the developer to actually add 40 square feet to the tower. This is the opposite of what the rule is supposed to do: to force into the base a percentage of the total allowable square footage that could otherwise go into the tower.

The Owner's own 2019 Zoning Diagram shows how its tower fails to comply with the required 60/40 ratio between tower and base. All the numbers in what follows are taken from the Owner's 2019 ZD1. Exh. D. The amount allowed on the C4-7 portion of the lot is 421,260 square feet. That same document shows a building base with 329,132 square feet and a tower with 219,403 square feet, adding up to 548,535 square feet. The result of the Owner's mix-and-match approach is that instead of 60/40, the ratio of the base to the tower is 48/52 ratio. Only 48 percent of the bulk is in the base and a majority, 52 percent, is in the tower. This is an inversion of the correct ratio. Moreover, the Tower-on-a-Base Rules' basic requirement that the total square footage of the tower and the base not exceed the total allowable square footage is not met. The square footage of the tower and the base (548,535) adds up to 30 percent more than the allowed 421,269. The excess tower square footage (50,899) increases the height of the tower, while the excess base square footage is in a district where towers are not allowed. It might as well be on the moon for all the effect it has on the Tower.

Removing the excess square footage from the tower and leaving everything else unchanged would reduce the height of the tower by *at least five* floors. At 16-foot floor-to- floor heights, that adds up to 80 feet, and would bring the building's height down from 775 feet to 695 feet.

This is simple arithmetic. The Zoning Diagram shows 21 tower residential floors, but two (floors 16 and 39) have significantly less floor area than the others, so to be fair to The Owner, they were excluded from the calculation of average tower floor size. The 19 full-size residential floors have 197,972 sf of floor area. Dividing by 19 yields the average size of a residential floor in the tower: 10,420 sf. The excess floor area in the tower is 50,899 sf. Dividing this by the average floor size (10,419 sf) gives the number of floors that would have to be removed from the tower portion of the building: 50,899 / 10,419 = 4.9 floors. Of course, one cannot remove 4.9 floors, so The Owner would have to remove 5 floors.

We say "at least five floors" because in order to put the full allowable square footage into its tower, The Owner would also have to put the full allowable square footage into its base. For every 6 sf in the base, the Owner can place 4 sf in the tower, up to the maximum allowed. However, if the Owner cannot build the base out to the maximum allowed, the tower will also be proportionately smaller. Although it may be theoretically possible to fit 252,761 square feet (60% of the maximum allowable square footage of 421,260) into the base, as a practical matter this will prove to be challenging on this site, because half of the area of the base is occupied by the landmarked Armory, and without a Certificate of Appropriateness from the Landmarks Preservation Commission, The Owner cannot build over the Armory.

By the Owner's logic, given a large enough R8 portion, it could satisfy the "60 below 150" requirement for the base entirely with floor area from that portion, allowing the tower in C4-7/R10 to grow until it fills the entire envelope of floor area allowed within that portion. If it did so, it could have a building with a 40-story tower. (The maximum allowable square footage on this portion of

the lot is 421,260 sf. Dividing that number by the average residential floor square footage of 10,419 sf yields 40.43 stories.)With the Owner's 16-foot floor-to-floor heights, 40 stories add up to 640 feet of tower height. The tower could start at 150 feet, making it 790 feet high. Adding the 229 feet of mechanical space that DOB has now approved for the building would bring the total height to 1,019 feet – about three times the "low 30 stories" in height that the drafters of the Tower-on-a-Base Rules stated would be the maximum!

2. The Owner's Interpretation Violates ZR §§ 77-02 and 33-48, Which Dictate How Zoning Applies to Split Lots

The ZR recognizes that the rules within each district form an integrated whole that regulates building form. That is why the drafters included specific provisions, ZR §§ 77-02 and 33-48, that dictate that when a zoning lot is split between two districts, the rules of each portion of the lot apply to that portion and to that portion alone. Thus, ZR § 77-02 provides:

> Whenever 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.

Section 33-48 applies this same rule to the precise situation here, stating specifically that the split-lot rule of ZR § 77-02 applies whenever a zoning lot is divided by a boundary between a district to which the provisions of Section 33-45 (Tower Regulations) apply and a district to which such provisions do not apply.

These rules flatly prohibit what the Owner has done, and DOB has ratified, here, and they are not overridden by the phrase "Within the Special District, . . ."

3. The Prefatory Phrase, "Within the District, . . ." Does Not Mean What DOB and The Owner's Counsel Say It Means

All that DOB and the Owner are left with are three words, "Within the Special District, . . ." which they claim, in defiance of both the statute and ordinary English, means "Everywhere within the Special District." The words themselves do not say that, and it is implausible to suggest that the drafters would have written a provision so critical, and so directly contrary to the general rule -- and above all, so nonsensical -- in such an offhanded and vague manner.

Rather, this phrase must be read as distinguishing the District's rule, ZR § 82- 34, from the Bulk Packing Rule applicable in Manhattan's other high-density residential districts, ZR § 23-651(a)(2), which the Commission approved on the same day. The general version differs from the Special District version in that it is slightly less demanding, and also more complex: the required percentage

of floor area below 150 feet starts at 55 percent and increases to 59.5 percent as tower lot coverage decreases from 40 percent to 31 percent.

ZR § 23-65(a)(2) illustrates the complementary but inverse relationship between bulk packing and tower coverage: the greater the tower coverage, the less bulk packing is required to keep tower height within the intended limits. For this relationship to work, however, both rules must be applied to the same area. Extell's mix and match tactic would illegally give it the best of both worlds.

The legislative history provides further evidence that the phrase "Within the Special District" was not intended to make the rule applicable to the R8 portion of the Special District. In its preparatory work for the tower-on-base rules for the Special Lincoln Square District, the City Planning Department had identified six, and only six, sites as "soft" sites where development might occur. 1993 CPC Report, at 6 (Exh. A).; *see also* 1993 DCP Zoning Review, at 7-8 (including map showing potential development sites) (Exh. B). None of those sites was in the 5.3 percent of the District's area that is zoned R8.

One of those sites, the "ABC assemblage," is part of the Owner's zoning lot. However, the City Planning Department did not envision that a developer might one day add to the ABC assemblage by purchasing the Jewish Guild site and demolishing the 11-story building on that lot. This was no doubt because that building was then only 21 years old, and moreover used all or virtually all the development rights on its lot.

31 ZR § 23-65(a)(2) illustrates the complementary but inverse relationship between bulk packing and tower coverage: the greater the tower coverage, the less bulk packing is required to keep tower height within the intended limits. For this relationship to work, however, both rules must be applied to the same area. The Owner's mix and match tactic would illegally give it the best of both worlds. 32 1993 CPC Report, at 6 (Exh. A).; see also 1993 DCP Zoning Review, at 7-8 (including map showing potential development sites) (Exh. B).

In further support of his argument, see Exh. G, Mr. Karnovsky cited the 1993 CPC Report that accompanied the Tower-on-a-Base Rules, asserting that it "describ[ed] 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 does not support his argument; it fatally undermines it. Contrary to the Owner's counsel, those words in the Report refer not only to ZR § 82-34 (the Bulk Packing Rule), but also to ZR § 82-36 (the Tower Coverage Rule), which Mr. Karnovsky agrees does not apply to the R8 portion of the Owner's zoning lot.

The paragraph quoted by the Owner's counsel reads, in full, as follows:

Urban Design

Certain urban design changes would apply throughout the district:

• Section 82-34 [the Bulk Packing Rule] would establish envelope controls to govern the massing and height of new buildings by requiring a minimum of 60 percent of a development's total floor area to be located below an elevation of 150 feet.
• Section 82-36 [the Tower Coverage Rule] would establish minimum tower coverage standards, and allow for the penthouse provision at the top of buildings.

1993 CPC Report, Exh. A, at 7-8.

The underlined words are those quoted by Mr. Karnovsky. The full quote makes clear that he has misstated their meaning, and that if the Bulk Packing Rule applies "throughout the district," so does the Tower Coverage Rule." Another passage from the same report also makes clear that the Bulk Packing Rule and the Tower Coverage Rule are two inseparable pieces of a package intended to limit and shape towers "throughout the District":

> [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.

Id. at 18-19 (underlining added). Again, if one of the rules applies "throughout the district," they both do. There is 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 the R8 portion of this lot.

Yet, as Mr. Karnvosky correctly argues, Exh. G, the Tower Coverage Rule does not apply to the R8 portion of the Special District. If it did, it would drastically reduce the height of the Owner's tower.

In reality, the phrase "throughout the district" was meant only to distinguish the Bulk Packing Rule from other provisions – ZR §§ 82-37, 82-38, 82-39, and 82-40 – discussed immediately afterward in the Report that apply only to specific portions of the District. Thus, the paragraph quoted by Mr. Karnovsky begins, "Certain urban design changes would apply throughout the District:". The next paragraph begins with, "The following would apply along Broadway:". The one after that begins with, "For the Bow Tie sites, the following would apply:". And the one after that begins with, "On the Mayflower Block, the following would apply, in addition to the controls applicable to Broadway

sites:". Below each of these prefatory clauses, each successive paragraph contains bullet points summarizing the various new zoning provisions applicable to each location. Id. at 7-9. It is obvious, then, that the phrase "throughout the district" used with reference to the Bulk Packing and Tower Coverage Rules merely contrasts the area of applicability of those rules ("throughout the district") to the areas of applicability of the other rules (respectively, "along Broadway," "for the Bow Tie sites," and "on the Mayflower block").

The broader legislative history of the Tower-on-a-Base Rules also makes clear that the Owner's interpretation is wrong. As stated above, those rules were intended to limit height to "the low-30 stories," to prevent another Millennium Tower, the West 67th Street tower that reached its unexpected height with the help of very high ceiling heights in the movie theaters in its base. This was, as DCP observed,

> an extreme case [that] 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.
>
> Exhibit D, p. 14.

The Tower here would be almost half as tall again as the Millennium Tower. And indeed, given a big enough R8 portion, under the Owner's interpretation it could have been *1,019 feet high*, almost *double* the height of the Millennium Tower. Surely, an interpretation that does nothing to restrict height was not what the Legislature intended.

Finally, even if the prefatory phrase "Within the Special District, . . ." gives rise to ambiguity, which it does not, the statute could not be interpreted to negate the legislature's purpose in enacting it. Long v. Adirondack Park Agency, 151 A.D.2d 189, 194 (3d Dep't 1989*), aff'd,* 76 N.Y.2d 416 (1990) ("Adherence to the letter will not be suffered to 'defeat the general purpose and manifest policy intended to be promoted'") (*citing* Surace v. Danna, 248 N.Y. 18, 21 (1928) (Cardozo, J.)); Abood v. Hospital Ambulance Services, Inc., 30 N.Y.2d 295, 298 (1975) ("the literal language of the statute, where it does not express the statute's manifest intent and purpose, need not be adhered to"); Local Gov't Assistance Corp. v. Sales Tax Asset Receivable Corp., 2 N.Y.3d 524, 536-37 (2004) ("Statutes must be construed to effectuate the intent of the Legislature… [T]he failure to make that intent plain in the statute. . . cannot serve to void the Act."); Matter of Jamie J., 30 N.Y.3d 275, 283-84 (2017) ("courts should not adopt 'vacuum-like' readings of statutes in 'isolation with absolute literalness' if such interpretation is 'contrary to the purpose and intent of the underlying statutory scheme").

IV. EXTELL'S PURPORTED MECHANICAL SPACES VIOLATE SECTIONS 22-12 AND 12-10 OF THE ZONING RESOLUTION

The Owner's aggregate 196 feet – nearly 20 conventional floors – of purported mechanical spaces below the residential tower floors make up fully one-quarter of the height of its building. These spaces violate both use and bulk restrictions in the Zoning Resolution.

These floors do not fall within any Use Group in the Zoning Resolution. The Owner's ZD1, however, claims that they fall within the Zoning Resolution's Use Group 2, which allows residential uses and "accessory uses." ZR § 22-12.

"Accessory uses" is a defined term in the Zoning Resolution: "An 'accessory use': (a) is a use conducted on the same zoning lot as the principal use . . . ; and (b) is a use which is clearly incidental to, and customarily found in connection with, such principal use . . . ." ZR § 12-10.

These spaces violate the use restrictions because they are not a use "customarily found in connection with residential uses," and therefore do not fit within the Zoning Resolution's definition of "accessory use." New York courts have not hesitated to review agency determinations that a so-called accessory use is in fact "customary." See, e.g., Gray v. Ward, 74 Misc.2d 50, 55 (Sup. Ct. Nassau Co. 1973), *aff'd on opinion below,* 44 A.D.3d 597 (2d Dep't 1974) (overruling zoning board determination that heliport is accessory use for shopping center); Exxon Corp. v. BSA, 128 A.D.2d 289 (1st Dep't 1987) (overruling zoning board determination that convenience store is not accessory use for gas station).

The property owner must demonstrate that the accessory use has "commonly, habitually and by long practice been established as reasonably associated with the primary use." Gray, 74 Misc.2d at 55 (*citing* Town of Harvard v. Maxant, 275 N.E.2d 347 (Mass. S.J.C. 1971) (emphasis added).

The Voids do not come close to meeting that high standard, and so on January 14, 2019, DOB issued a Notice of Intent to Revoke its prior approval of the Owner's 2018 Zoning Diagram:

> The proposed mechanical space on the 18th floor of the Proposed Building does not meet the definition of "accessory use" of § 12-10 of the New York City Zoning Resolution. Specifically, the mechanical space with floor-to-floor height of approximately 160 feet is not customarily found in connection with residential uses.
>
> Notice of Intent to Revoke, Exh. I.

DOB has not yet explained why, less than three months after issuing this Notice, it again reversed itself and approved a slightly tweaked new ZD1. There is certainly nothing in the new plan that explains the turnabout; it simply replaces a single 160-foot void with three contiguous smaller ones – 48, 64, and 64 feet in height totaling 176 feet in height. The combined height of these three spaces plus the fourth 20-foot high space is 196 feet – 25.3 percent of the building's 775-foot height.

Adding the 33 feet of mechanical space at the top of the building, the total is 229 feet – a ludicrous 30 percent of the building's height. This volume is two-thirds as big as the 292-foot-high building the Owner pretended to be building for two years.
Presumably, however, DOB was responding to the Owner's argument, in a January 25, 2019 letter to DOB, that DOB and BSA had previously approved such voids in the case of a building on 15 East 30th Street.[4] The BSA's decision concerning that building, BSA Cal. No. 2016-4327-A, was based in part on the appellant's failure to provide any evidence or expert testimony in support of its claim that such voids were truly "irregular," despite the Board's request that it do so.

Since that decision, the DCP has provided decisive confirmation for this claim. In 2018, it conducted a survey of the mechanical space of 796 residential buildings constructed in R6 through R10 districts between 2007 and 2017. The Department found that "[o]nly a few TOB [tower-on-base] buildings had a mechanical floor below the highest residential floor (exclusive of cellars)," and although many non-TOB towers had one or more mechanical floors below it, "their typical height was 12-15 feet...." Exh. K, at 11.

"Larger mechanical spaces were generally reserved for the uppermost floors of the building in a mechanical penthouse, or in the cellar below ground" – where they were not simply being deployed to boost the expensive apartments above them. U DCP, Environmental Assessment Statement, Residential Mechanical Voids Text Amendment (Jan. 25, 2019, revised Apr. 9, 2019) Attachment A, at 2 (annexed hereto as Exhibit N). It was these anomalous buildings – far from "customary" – that provoked the agency to introduce new legislation prohibiting them. The proposed restrictions, now before the City Council, would clearly not allow the building here. In any event, Appellants believe that Cal. No. 2016-4327-A was wrongly decided and should be reversed.

In its January 25, 2019 letter, the Owner did not even try to claim that the voids in its proposed building are "customary." Instead, it argued that they are not a "use," based on the fact that they need not count as "floor area" under the bulk -- not use -- provisions of the statute. However, DOB had not contended that these spaces are separate "uses" but rather that they purport to be, but are not in fact, "accessory" to the residential uses of the building. The Owner itself has conceded this point, listing these spaces in its ZD1 as falling within Use Group 2, which is for residential uses other than single-family homes.

Moreover, The Owner's argument is a non-sequitur. Why should the claimed exclusion of these spaces from the definition of "floor area" mean that they need not fit within a Use Group? The statute provides a definition of "use," and despite the Owner's efforts to argue otherwise, it strongly supports the argument that mechanical space qualifies under either independent criterion:

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[4] Letter from David Karnovsky to Martin Rebholz, R.A., and Scott Pavan, R.A. (Jan. 25, 2019), at 3 (Exh. M).

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

ZR § 12-10.

Whether one accepts the Owner's description or Appellants', the space here plainly qualifies as a use. According to the Owner, it will be "designed," "arranged," "intended," "maintained," and "occupied" for the purpose of providing necessary mechanical equipment. According to Appellants -- more accurately -- it will be "designed," "arranged," "intended," "maintained," and "occupied" for the purpose of boosting the heights of the tower apartments above it. In both instances, however, the space remains a "use." In both instances too, it qualifies under the alternative test as an "activity" or "operation" "carried on" in the building.

In addition to arguing that these supposed mechanical spaces are not accessory uses, the Owner claims that they are permissible as "space used for mechanical equipment," as provided for in ZR § 12-10. As already stated, that section excludes such space from the definition of "floor area" for the purposes of calculating FAR, the basic measure of bulk in the Zoning Resolution. To qualify for the exclusion, however, the space must actually be "used for mechanical equipment." ZR § 12-10 (emphasis added).

Nothing in the Owner's public documents supports its claim that this space is necessary to house mechanical equipment. The Owner does not even try ot feign an attempt to justify the subject 48- or 64- foot tall clearance voids as necessary for the operation of the mechanical equipment. The subject mechanical equipment is not described, nor is any technical data about this equipment given to either the DOB or the court in the related action brought by the not-for-profit The City Club of New York, eponymously entitled The City Club of New York v Extell Development Company, pending in New York State Supreme Court, New York County, Index No. 154215/2019.

In its opposition filing, Extell, parent of the Owner, remains silent on the nature of the mechanical equipment or its operational characteristics that could clarify its spatial requirements and describe how the cavernous volumetric cubic footage is tied to the optimal technical exploitation of the subject equipment.

The pretextual nature of the "technical" need for the limitless high voids above the mechanical equipment is exposed upon a review of the April 4 ZD1. The July 26, 2018 ZD1 contained a 160-foot void. It has now been replaced by three smaller voids in response to the concerns raised by the Fire Department over the ability to fight a fire in what can essentially become a 160-foot high oven. The staircases and the connections that the Owner had to place within the void to mollify the Fire Department has eaten up valuable FAR. In response, the Owner converted a residential floor on

the upper level of the base of the structure into mechanical equipment space (for a schematic side-by-side comparison of the mechanical equipment voids exhibited in respective ZD1s, please see Exhibit N). This is despite the fact that the alterations needed to satisfy the Fire Department are not said to have displaced the mechanical equipment in the void. The mechanical equipment was moved simply to make up for the lost FAR. The void remained.

What is more, the use of the word composition "mechanical equipment voids" is a sort of a misnomer. There can be no mechanical void per se. The term "void" presupposes the absence of matter--emptiness. It is merely a void in space of any number of vertical feet that an architect can select to not use. There is nothing to stop the Owner from building a residential floor and use up the FAR at a reasonable height, say 20, 25 or 30 above the mechanical equipment. Going beyond the clearance that is specified by the manufacturer for the operation of the equipment, the Owner feels that the Zoning Resolution has no say in the height at which it can start building livable space. Hence the idea of the void. The logical extension of Kranovsky's argument is that the Owner can build a 1,000-foot high structure with a floor of apartments at the highest point, suspended in mid-air above the voids of choice, as long as at the bottom of the bottomless pit there is a water boiler and an HVAC system. Such view of accessory use language in the ZR is fatuous on its face.

The fact that the statute does not itself draw a specific line between permissible and impermissible floor height is hardly determinative. The Court of Appeals, analyzing whether a 480-foot radio tower qualified as an accessory use on a university campus, wrote, "The fact that the definition of accessory radio towers contains no such size restrictions supports the conclusion that the size and scope of these structures must be based upon an individualized assessment of need." N.Y. Botanical Garden v. BSA, 91 N.Y.2d 413 (1998). The New York County Supreme Court made the same point: "Since there is no specific definition of 'mechanical equipment' in the Zoning Resolution or any definitive finding by DOB on this issue, it demands administrative determination in the first instance." Educ. Constr. Fund v. Verizon New York, 36 Misc.3d 1201(A) (Sup. Ct. N.Y. Co. 2012), *aff'd,* 114 A.D.2d 529 (1st Dep't 2014). In other words, the question must be resolved based on the facts of the individual case.

In this vein, the BSA ruled that the DOB appropriately restricted the floor area of the cellar to qualify as accessory to residential use in the Matter of Chaya Schron and Eli Schron, BSA Cal. No. 14-11-A (a copy of decision is annexed hereto as Exhibit O). In that appeal, the BSA, in reliance on the Botanical Garden decision, accepted the principle that "where the ZR does not provide a size limitation, the appropriate limitations is based on an 'individualized assessment of the need" for the accessory use . . ." The BSA used the Botanical Garden "assessment of the need" analysis "in balancing the historical and practical purpose of accessory cellars with the policy considerations within the definition of accessory use." In so doing, the BSA upheld the DOB's restriction that residential cellars not exceed 49 percent of the floor area of the home, despite the fact that no spatial or area size limitation was present in the text of the Zoning Resolution. The BSA found that "size can be a rational and consistent form of establishing the accessory nature of certain uses . . ." The

BSA noted that "the ZR sets limits on above grade floor area, which counts towards zoning floor area and so it is reasonable to limit the below grade floor space, which is not addressed within bulk regulations as it does not count towards bulk, but does contribute to the home's overall occupation of space."

The Owner's mechanical void is not only contrary to the plain language of the Zoning Resolution, but also contrary to the purpose of the 1993 tower-on-a-base amendments. No one in 1993 anticipated that a developer might insert enormous volumes of empty space in its building solely to make it higher. As the Chair of the Planning Commission, Marisa Lago, acknowledged at a town hall meeting last year, any further regulation of mechanical voids, such as the legislative proposal now before the City Council, would be a clarification, not new law[5]: "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 (Feb. 6, 2018), at 2 (Exhibit Q hereto).

To achieve the purpose of the 1993 tower-on-a-base amendments, the space housing the mechanical equipment, as accessory use exclusion to bulk, needs to be given its commonly accepted meaning of covering only footprint area and volumetric space, or spatial clearance, necessary for optimal operation of the equipment as per the manufacturer's guidelines. The principle of the "commonly accepted meaning" that does not require definition in the Zoning Resolution was adopted by the BSA in the Matter of Benjamin Shaul, Magnum Management, BSA Cal. No. 67-07-A (a copy of decision is annexed hereto as Exhibit P).

In that appeal, the BSA encountered a conundrum of the word "height" in the context of the Sliver Law limitations. The word "height" was not defined in the Zoning Resolution. A developer betted that the absence of the definition created an ambiguity as to whether the limitations on the vertical height of the building could be defeated by setting back penthouses deep out of sight from the street view. The DOB adopted the "penthouse" trick, erroneously believing that as height limitations under the Sliver Law were merely aesthetic in purpose, the "word" height meant "visual" height, as opposed to "actual" height. The BSA disapproved of such a gallingly twisted logic, and adopted a definition of the word height as the vertical distance from curb to the highest roof level. The BSA relied on a common sense principle that where the Zoning Resolution uses a word that has an accepted common meaning, no discrete definition is required.

This common sense approach and the need to effectuate the 1993 tower-on-a-base amendments limiting tower heights, must result in the only accurate conclusion that can be reached here. At the time of the 1993 tower-on-a-base amendments, every building in New York City had areas with mechanical equipment in it. If the intent of the drafters of the 1993 amendments was to limit the height of towers in the special districts, as well as throughout the city, accessory use for mechanical equipment should cover only area and space necessary for the placement and use of the mechanical

[5] For review of proposed 2019 Zoning Resolution Amendment, concercning resindential Tower Mechanical Voids, please see Exhibit M.

equipment. All other voids that a developer elects to leave undeveloped should be counted towards the FAR. In essence, if a developer decides not to develop a "void", it should bear the expense of its election.

V. CONCLUSION

Because the Owner's plans for 36 West 66th Street violate both the letter and the purpose of the Zoning Resolution, Appellant respectfully requests that the Board revoke the Permit.

Dated: New York, New York
April 13, 2018

Yours, etc.,

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