CERTIFICATION

NYC Board of Standards and Appeals
250 Broadway, 29th Floor
New York, NY 10007
212-386-0009 - Phone
646-500-6271 - Fax
www.nyc.gov/bsa

APPLICATION DOCUMENT(S) CERTIFICATION

I, JOHN R. LOW-BEER, am the preparer of the Statement of Facts and Law and other submissions made on May 7, 2019 for an application relating to an appeal filed on the Board of Standards and Appeals A Calendar for 36 West 66th Street (aka 50 West 66th Street) in Manhattan, and certify, under penalty of perjury, that all of the factual information in these submissions is correct to the best of my knowledge and understanding.

I also understand that to "knowingly make or allow to be made a material false statement in any certificate, professional certification, form, signed statement, application or report that is either submitted directly to the board of standards and appeals or that is generated with the intent that the board rely on its assertions" is a violation of New York City Charter § 670 and may subject me to a civil penalty of up to $15,000 for each such false statement and that the Board may dismiss any application in connection with a final determination of such violation.

John R. Low-Beer
Attorney for Applicants

Sworn to before me this 7th day of May, 2019

MICHAEL S. GRUEN
Notary Public, State of New York
No. 02GR6347529
Qualified in Queens County
Commission Expires September 06, 2020

R. 000002

APPLICATION FORM

Board of Standards and Appeals
250 Broadway, 29th Floor
New York, NY 10007
212-386-0009 - Phone
646-500-6271 - Fax
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APPEALS (A) CALENDAR
Application Form

BSA APPLICATION NO. _____

Section A — *Applicant/ Owner*

Applicant	Owner of Record
City Club of New York *	West 66th Sponsor LLC c/o Extell Development Co.
NAME OF APPLICANT	OWNER OF RECORD
249 West 34th Street, Suite 402	805 Third Avenue
ADDRESS	ADDRESS
New York / NY / 10001	New York / NY / 10022
CITY / STATE / ZIP	CITY / STATE / ZIP
(212) 643-7050	
AREA CODE / TELEPHONE	LESSEE / CONTRACT VENDEE
AREA CODE / FAX	ADDRESS
gruen@michaelgruen.net	
EMAIL	CITY / STATE / ZIP

* see Attachment A for other applicants

Section B — *Site Data*

36 West 66th Street (aka 50 West 66th Street) — 10023
STREET ADDRESS (INCLUDE ANY A/K/A) — ZIP CODE

Between 65th and 66th Streets, between Central Park West and Columbus Avenue
DESCRIPTION OF PROPERTY BY BOUNDING OR CROSS STREETS

1118	45*	Manhattan	7	N/A
BLOCK	LOT (S)	BOROUGH	COMMUNITY BOARD NO.	LANDMARK/ HISTORIC DISTRICT

Helen Rosenthal	C4-7, R8 (Special Lincoln Square District)	8c
CITY COUNCILMEMBER (include special zoning district, if any)	EXISTING ZONING DISTRICT	ZONING MAP NUMBER

* and Lot 52 – air rights parcel

Section C — *Application Type*

☑ Dept. of Building or other Agency Appeals ☐ Variance to Building, MDL or Other Code
☐ Certificate of Occupancy Modification ☐ Waivers to GCL 35/36 ☐ Vested Rights
Date of Final Determination 4/11/19 Acting on Application No. 121190200

Section D — *Description*

Legalization ☐ Yes ☐ No ☐ In part
Appeal from Department of Buildings issuance of New Building Permit

Section E — *BSA History and Related Actions*

If "YES" to any of the below questions, please explain in the STATEMENT OF FACTS	YES	NO
1. Has the premises been the subject of any previous BSA application(s)? If yes, Prior BSA No 2018 199 A	☑	☐
2. Are there any applications concerning the premises pending before any other government agency?	☐	☑
3. Is the property the subject of any court action?	☑	☐

City Club et al. v. Extell Development Co. et al., N.Y. County Supreme Court, Index No. 154205/2019

Section G — *Signature*

I HEREBY AFFIRM THAT BASED ON INFORMATION AND BELIEF, THE ABOVE STATEMENTS AND THE STATEMENTS CONTAINED IN THE PAPERS ARE TRUE

Signature of Applicant, Corporate Officer or Other Authorized Representative

SWORN TO ME THIS 7th DAY OF May 2019

MICHAEL S. GRUEN
Notary Public, State of New York
No. 02GR6347529
Qualified in Queens County
Commission Expires September 06, 2020

Print Name — Title — NOTARY PUBLIC

R. 000004

ATTACHMENT A
BSA APPEALS APPLICATION - CITY CLUB OF NEW YORK

Additional Applicants:

James C.P. Berry
10 West 66th Street
New York, NY 10023
(917) 886-1942
jpierceberry@aol.com

Jan Constantine
10 West 66th Street
New York, NY 10023
(917) 319-1300
jconstantine@constantinecannon.com

Victor A. Kovner
27 West 67th Street
New York, NY 10023
(212) 379-5225
victorkovner@dwt.com

Agnes C. McKeon
10 West 65th Street
New York, NY 10023
(212) 724-1835
Agnes.mckeon@jurisprudence.net

Arlene Simon
27 West 67th Street
New York, NY 10023
(212) 873-9919

AFFIDAVIT OF OWNERSHIP AND AUTHORIZATION

2019-89-A 05/08/2019

NYC Board of Standards and Appeals
250 Broadway, 29th Floor
New York, NY 10007
212-386-0009 - Phone
646-500-6271 - Fax
www.nyc.gov/bsa

AFFIDAVIT OF OWNERSHIP AND AUTHORIZATION

Michael Gruen, being duly sworn, deposes and says that he resides at 27-28 Thomson Avenue, Long Island City, NY 11101; that he is the President of The City Club of New York, with offices at 249 West 34th Street, Suite 402, New York, NY 10001; and that the statement of facts in the annexed application is true.

Check one of the following conditions:

___ Sole property owner of zoning lot

___ Cooperative building

___ Condominium building

___ Zoning lot contains more than one tax lot and property owner

OWNER'S AUTHORIZATION

The owner above hereby authorizes John Low-Beer and/or Charles Weinstock to make the annexed application on behalf of The City Club of New York .

Michael Gruen
President

Sworn to before me this 7 day of May, 2019

MICHAEL F COLLINS
Notary Public - State of New York
NO. 01CO6235576
Qualified in Nassau County
My Commission Expires 3/14/2023

R. 000007

DOB DETERMINATION

2019 89 A 05/08/2019

NYC™ Buildings

Work Permit Department of Buildings

Permit Number: *121190200-01-NB*

Issued: *04/11/2019* Expires: *04/10/2020*

Address: *MANHATTAN 36 WEST 66TH STREET*

Issued to: SCOTT HAMBURG

Business: LENDLEASE(US)CONSTRUCTION

Contractor No: GC-16836

Description of Work:

NEW BUILDING - NEW BUILDING

Number of dwelling units occupied during construction: 0
Review is requested under Building Code: 2014

SITE FILL: ON-SITE

To see a Zoning Diagram (ZD1) or to challenge a zoning approval filed as part of a New Building application or Alteration application filed after 7/13/2009, please use "My Community" on the Buildings Department web site at www.nyc.gov/buildings.

Emergency Telephone Day or Night: 311 *SITE SAFETY PHONE : 212 669-7043*

Borough Commissioner:

Commissioner of Buildings:

Acting Commissioner of Buildings

This permit copy created on 05/06/2019 reflects the Commissioner(s) as of such date.

Tampering with or knowingly making a false entry in or falsely altering this permit is a crime that is punishable by a fine, imprisonment or both.

06 05/06/2019

R. 000009

OP-35A (5/10)

EXHIBIT A

CITY PLANNING COMMISSION

December 20, 1993/Calendar No. 3 N 940127 (A) ZRM

IN THE MATTER OF an application submitted by the Department of City Planning pursuant to Section 200 of the New York City Charter, for amendment of the Zoning Resolution of the City of New York, relating to Article VIII, Chapter 2, Section 82-00, to modify the use, bulk, and accessory parking and loading regulations of the Special Lincoln Square District and to reference in other sections.

Applications for amendments (N 940127 ZRM and N 940128 ZRM) to the Zoning Resolution were filed by the Department of City Planning on September 16, 1993 to amend the Special Lincoln Square District ("Special District"), located in the southern portion of Community District Seven between Central Park West, Amsterdam Avenue, and West 60th and West 68th Streets. The proposed text amendments would add additional urban design controls, modify commercial use regulations, mandate subway improvements in certain locations, amend mandatory arcade requirements, and permit public parking and curb cuts through different regulatory requirements.

The two alternative proposed text amendments are identical except for the proposed controls on arcades. Except where noted, all text changes relate to both text amendments. Application N 940127 ZRM proposes to retain the arcade as a mandated urban design requirement, with a reduced bonus from seven square feet per square foot of arcade to three square feet per square foot of arcade, and eliminate the requirement for an arcade on the north side of West 61st Street. Application N 940128 ZRM proposes to eliminate the arcade as a mandated urban design requirement and the bonus generated by the provision of such arcade.

On November 15, 1993, an alternative modification to both original applications was filed, (N 940127 (A) ZRM and N 940128 (A) ZRM) which proposes to reduce the special height limitation on Blocks 1 and 2 from 300 feet, with the penthouse provision, to 275 feet, with the penthouse provision.

On November 23, 1993, a second set of alternative modifications to the applications were filed (N 940127 (B) ZRM and N 940128 (B) ZRM) which proposes to eliminate the penthouse provision throughout the district, and to reduce the special height limitation on Blocks 1 and 2 from 300 feet, with the penthouse provision, to 275 feet, without the penthouse provision.

This report adopts with modifications one of the alternative modifications, N 940127 (A) ZRM.

RELATED ACTION

In addition to the zoning text amendment which is the subject of this report, the Department certified a zoning map amendment (C 940129 ZMM) for an area north of the Special District, along Broadway from West 68th Street to a midway point between West 71st and 72nd streets, on October 4, 1993. However, implementation of the proposed zoning text does not require action by the City Planning Commission on the proposed map change. This item is subject to ULURP regulations, and will be considered separately by the Commission.

BACKGROUND

The Department of City Planning has proposed a zoning text amendment to the Special Lincoln Square District in order to respond to planning issues relating the area's mix of uses and the form and height of new development. The Department explored these issues in its May 1993 discussion document entitled "Special Lincoln Square District Zoning Review". This report described the twenty year history of development pursuant to the Special District's controls, and recommended certain text changes. The proposed text evolved after extensive consultation with Community Board 7, the Manhattan Borough President's Office and a number of civic groups.

It was found that a series of interrelated problems affect the character of development in the Special Lincoln Square District. These issues include existing urban design

regulations and the amount of commercial use allowed in the underlying C4-7 district. With regard to land use, the great majority of developments in the Special District are predominately residential, with only limited amounts of commercial and/or community facility uses. In contrast, a project in the district now under construction will contain about 5 FAR of retail, movie and health club uses (plus another 1 FAR of below-grade, commercial use). The intensity of activity generated by this concentration of commercial uses greatly exceeds that of other buildings built in the district which average about 1 FAR of commercial use.

In terms of urban design controls, it was found that the height of buildings in the Special District needed to be regulated. 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. In addition, the mandated tower-on-a-base form along Broadway needs to be refined so that development on large sites is compatible with the district.

Existing Zoning

In the early 1960's the Lincoln Square area was redeveloped for major cultural and institutional uses, with the city facilitating site acquisition under the 1957 Lincoln Square Urban Renewal Plan. After the development of Lincoln Center and Fordham University, the areas surrounding the Urban Renewal Area experienced increased development pressure. Recognizing the unique opportunity that this presented, the City Planning Commission created the Special Lincoln Square District in 1969 to guide new growth and uses in a way that would complement the newly-sited institutions.

To achieve its objectives, the district was established to regulate ground floor uses and urban design elements, and makes floor area bonuses available by City Planning Commission Special Permit in exchange for the provision of certain public amenities. Since it was created, certain changes have been made to the district relating to public

traditional Upper West Side land use pattern found directly to the north: high density residential use with ground floor commercial uses.

Sub-district B: The district's major institutions, Lincoln Center and Fordham University, are located in the southwestern section of the district, west of Columbus Avenue between West 60th and West 68th streets.

Sub-district C: The southern portion of the district, between West 60th and West 64th streets is a center of commercial activity, due to its proximity to midtown and Columbus Circle. The area also contains offices in pre-1969 buildings, and the district's two hotels, the Mayflower on Central Park West and the Raddison Empire on West 63rd Street.

Six sites in the district were identified that could be potentially developed under existing zoning. The sites are:

1. Bank Leumi, a full-block site directly south of the Lincoln Square development between Broadway, Columbus Avenue, West 66th and West 67th Streets;
2. Tower Records/Penthouse Magazine building, a five story commercial building on Broadway, just north of Lincoln Center between West 66th and West 67th Streets;
3. Regency Theater, located at West 67th and Broadway;
4. Saloon/Chemical Bank buildings, a possible assemblage located on Broadway between West 64th and West 65th Streets;
5. Mayflower block, a full-block site bounded by Broadway, Central Park West, West 61st and West 62nd Streets, containing a vacant parcel facing Broadway and the Mayflower Hotel on Central Park West;
6. ABC assemblage, three low-rise structures located on the south side of West 66th Street, between Columbus Avenue and Central Park West.

TEXT AMENDMENT AS ORIGINALLY REFERRED

The provisions of the text amendments as originally referred include six changes to the existing zoning. It proposes a limit of the amount on overall commercial density in the northern portion of the district; commercial use restrictions for entertainment uses and requirements for retail continuity; urban design controls to regulate building form and height, and to respond to specific site conditions; requirements for subway access; and requirements for parking and loading. In terms of arcades, it proposes two alternates: the continuation of this requirement (at a reduced bonus rate) or the elimination of this requirement.

A summary of the major changes are listed below:

Underlying zoning

- Section 82-31 would limit the amount of commercial floor area allowed to 3.4 FAR in sub-district A, where residential and institutional development predominates. Section 82-311 would permit an increase in commercial use by CPC special permit.

Use Restrictions

- Section 82-23 would limit Use Groups 8 and 12, including movie theaters, to 1 FAR in all areas of the district, except Sub-district B, the area dominated by Lincoln Center.
- Eliminate Use Group L from the district.
- Sections 82-21 and 82-24 would mandate retail continuity and transparency regulations at the ground level.

Urban Design

Certain urban design changes would apply throughout the District:

- Section 82-34 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 would establish minimum tower coverage standards, and allow for the penthouse provision at the top of buildings.

The following would apply along Broadway:

- Section 82-37 would maintain the current requirement for an 85 foot high base along Broadway, with towers setback from the streetline for a minimum of 15 feet on wide streets and a minimum of 20 feet on narrow streets.
- Section 82-38 would require recesses below 85 feet for a minimum of 15 percent and a maximum of 30 percent.
- Section 82-39 would permit dormers as a permitted obstruction above 85 feet.

For the Bow Tie sites, the following would apply:

- Section 82-38 would require that these sites be developed with a streetwall building, with a setback at 150 feet of not less than 10 feet. New buildings would be built to the streetlines of West 63rd and West 66th Streets and continue around the adjoining corners for one-half of the Broadway and Columbus Avenue block frontages. The remaining portion of the Broadway frontage would provide a 85 foot streetwall.
- Section 82-38 would require two ranges of recesses: below 85 feet, recesses would be required for a minimum of 15 percent and a maximum of 30 percent of the length of the streetwall; above 85 feet, recesses would be required for a minimum of 30 percent and a maximum of 50 percent. An expression line would be required at 20 feet.
- A dormer would be permitted above 150 feet, for a minimum of 50 percent and a maximum of 100 percent of the streetwall width, reducing at a rate of 1 percent as the height of the dormer rises by a foot.

EXHIBIT B

SPECIAL LINCOLN SQUARE DISTRICT ZONING REVIEW

David N. Dinkins, Mayor
City of New York

Richard L. Schaffer, Director
Department of City Planning

May 1993
NYC DCP 93-17

JBX
F - 777

R. 000018

EXECUTIVE SUMMARY

The Special Lincoln Square District, located in the southern portion of Community District Seven between Central Park West, Amsterdam Avenue, and West 60th and West 68th streets, was established in 1969. The area is characterized by major institutions, such as Lincoln Center for the Performing Arts, and a number of relatively recent mixed-use developments along Broadway.

After evaluating more than twenty years of development pursuant to the special district's controls, the Department of City Planning has identified several outstanding planning issues relating to the mix of uses, and the form and height of development. These issues are particularly relevant to Broadway, which is the spine of the district and contains its most significant development opportunities.

The Department proposes revisions to the special district in order to guide development in a more predictable form, with a level of commercial use that is consistent with the area's overall development pattern and with building heights that are compatible with the character of the district.

The first major recommendation relates to the regulation of commercial use. The current regulations permit a maximum base of 10 FAR of either commercial or residential use within the district's C4-7 zoning. The Department proposes to reduce the allowable amount of commercial use in future as-of-right development from 10 to 3.4 FAR in those areas of the district where residential use predominates. In addition, the amount of floor area allowed for theaters and other entertainment uses (Use Group 8), is proposed to be limited in areas of the district.

The second major recommendation relates to building form. The Department proposes an envelope control that would reinforce the "tower on a base" form already mandated along Broadway. These regulations combined would result in building heights in the range of the mid-20 to 30 stories tall, which would complement the district's existing neighborhood character.

Other recommendations address additional land use and urban design issues. Principal among them is a proposed requirement for subway stair relocation or access, applicable to sites adjacent to the district's two subway stations. Modifications to the arcade, parking and off-street loading provisions are also proposed.

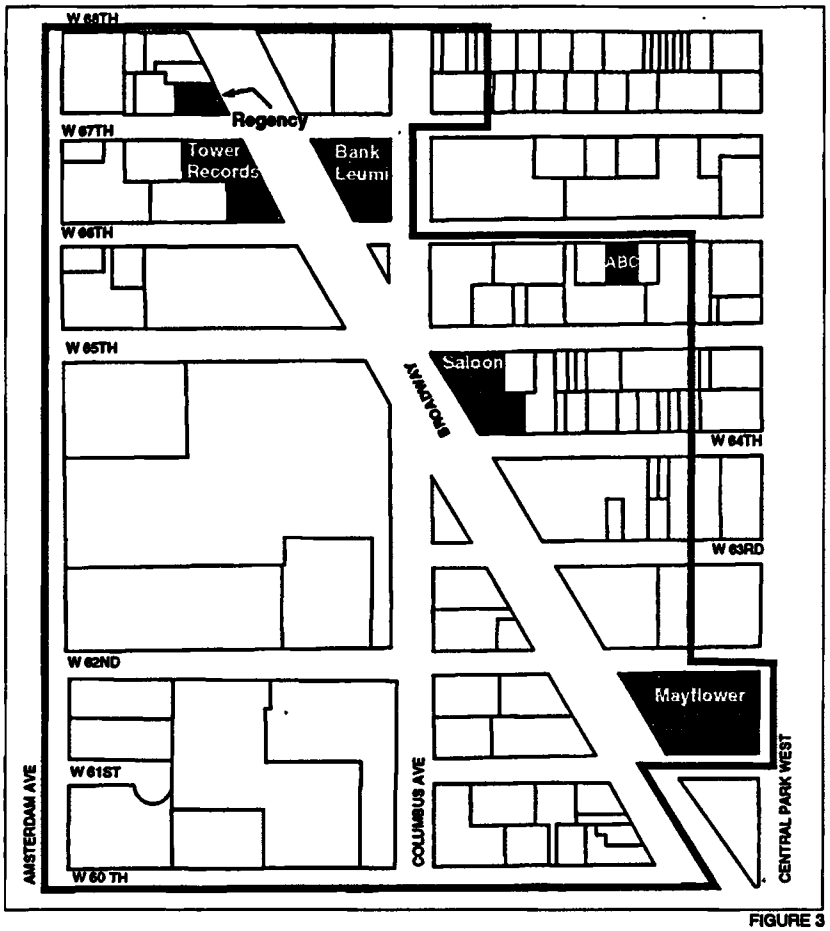


FIGURE 3

DEVELOPMENT SITES

DEVELOPMENT SITES

There are six remaining development sites in the district (Figure 3). For the purposes of this study, a property is considered a development site if it is either vacant land or contains a vacant building; contains a commercial building which is at least 50 percent under allowable FAR; or is a residential building with less than four occupied units. The sites are:

1. **Bank Leumi**, a full-block site directly south of the Lincoln Square development between Broadway, Columbus Avenue, West 66th and West 67th streets;
2. **Tower Records/Penthouse Magazine building**, a five story commercial building on Broadway, just north of Lincoln Center between West 66th and West 67th streets;

3. **Regency Theater**, located at West 67th and Broadway;
4. **Saloon/Chemical Bank buildings,** a possible assemblage located on Broadway between West 64th and West 65th streets;
5. **Mayflower block,** a full-block site bounded by Broadway, Central Park West, West 61st and West 62nd streets, containing a vacant parcel facing Broadway and the Mayflower Hotel on Central Park West;
6. **ABC assemblage,** three low-rise structures located on the south side of West 66th Street, between Columbus Avenue and Central Park West.

LANDMARKS

The special district contains three buildings designated as landmarks by the New York City Landmark Preservation Commission: the Sofia Warehouse; the First Battery Armory; and the Century Apartments. In addition, the southern portion of the Central Park West Historic District falls within the district. It should also be noted that the Lincoln Center complex, or its individual buildings, would be candidates for designation in the near future.

OTHER PLANNING INITIATIVES

Community Board 7 and Landmark West!, a community organization, are currently studying the special district in response to the Lincoln Square development and other issues that have been raised by recent developments in the district. This effort is to include recommendations regarding zoning, urban design and pedestrian conditions.

ISSUES AND RECOMMENDATIONS

LAND USE

Most of the district is zoned C4-7, which permits high density residential, commercial and community facility development with a base maximum FAR of 10, bonusable to 12. The district encourages retail uses compatible with the area by permitting those commercial uses allowed in the underlying district or listed in Use Group L. Use Group L comprises uses selected from those permitted in the C4-7 district which promote pedestrian oriented activity and serve visitors to the area. On any zoning lot fronting on Broadway, Columbus or Amsterdam avenues, the street frontage devoted to any permitted use is limited to 40 feet, unless the use is also listed in Use Group L, in which case there is no street frontage limitation.

Overall, the district can be characterized as mixed-use and conforms to the C4-7 designation: over a third of its land contains institutional uses such as Lincoln Center, Fordham University and other schools, and cultural and religious facilities. Residential use is found throughout the district, primarily in highrise apartments along Broadway, Columbus Avenue and Amsterdam Avenue, and in midrise buildings east of Broadway. Retail uses line Broadway, and occur less frequently on Columbus and Amsterdam avenues. Office uses are generally located in the southern part of the study area.

Issues

The great majority of developments in the special district are predominately residential, with only limited amounts of commercial and/or community facility uses. In contrast, the Lincoln Square project now under construction will contain about 5 FAR of retail, movie and health club uses (plus another 1 FAR of below-grade, commercial use). The intensity of activity generated by this concentration of commercial uses greatly exceeds that of more typical district buildings which average about 1 FAR of commercial use. The amount and type of commercial use permitted by the current regulations is one of the major issues that needs to be addressed.

Among the issues raised by the Lincoln Square project are the space allocated to movie theaters and the traffic generated by these and other intense commercial uses. Currently, the district contains approximately 13,000 seats in Lincoln Center's major theaters and 1,700 movie theater seats. Just south of the district is the 500-seat Paramount movie theater. The 10 movie theaters under construction in the Lincoln Square project will add 4,000 more seats by 1994. 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

In addition, an analysis of the distribution of floor area within the Broadway buildings envelopes was performed. This reveals a direct relationship between the height of the buildings and the amount of floor area located below 150 feet. For example, 1991 Broadway (263 feet) and Checquers (264 feet) are both 26 stories tall and 1995 Broadway (192 feet) is 18 stories. The amount of floor area located below 150 feet in these projects is 60, 63 and 87 percent respectively.

In comparison, when a lower percentage of bulk is located below 150 feet, buildings are higher. For instance, in 1 Lincoln Plaza (42 stories, 419 feet), 2 Lincoln Square (36 stories, 362 feet) and 30 Lincoln Plaza (32 stories, 298 feet), the corresponding amount of floor area located below 150 feet is 45, 48 and 49 percent. 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.

In order to foster a positive relationship between the tower and base and a more successful massing of a development's bulk, and to avoid excessive height, as in the Lincoln Square project, the Department proposes the following:

- Maintain the current controls requiring an 85 foot high base along Broadway, to relate to existing special district development and Lincoln Center. Towers should continue to be setback from the streetline for a minimum of 15 feet on wide streets and a minimum of 20 feet on narrow streets.
- Establish envelope controls to govern the massing and height of new buildings throughout the district. The proposed regulation would require a minimum of 60 percent of a development's total floor area to be located below an elevation of 150 feet. This regulation, "Packing-the-Bulk," results in a better relationship between the base and tower portions of buildings, producing building heights ranging from the mid-20 to 30 stories.

EXHIBIT C

ZONING CALCULATIONS

ZONING DISTRICT : C4-7 (R-10 EQUIVALENT)
R8
SPECIAL LINCOLN SQUARE DISTRICT
SUBDISTRICT A
MAP: 8C
BLOCK: 1118
LOT: 14, 45, 46, 47, 48 & 52

LOT AREA: C4-7 DISTRICT = 35,105 SF
R8 DISTRICT= 19,582 SF
TOTAL LOT AREA = 54,687 SF

NO PARKING REQUIRED WITHIN MANHATTAN CORE AS PER ZR 13-10, NONE PROVIDED

STREET TREE PLANTING AS PER ZR 26-41 & 33-03

4) ZONING FLOOR AREA

a Floor Area Permitted

	C4-7 District (R10 equivalent)		
33-122	Commercial	10 FAR	351,050.00 SF
33-123	Community Facility	10 FAR	351,050.00 SF
23-152, 23-16	Residential	10 FAR	351,050.00 SF
23-154	Inclusionary Bonus (see below)	2 FAR	70,210.00 SF
35-31	Res. with Inclusionary (see below)	12 FAR	421,260.00 SF
	Max. Total		**421,260.00 SF**
	R8 District		
23-151	Community Facility	6.5 FAR	127,283.00 SF
24-11	Residential (See I lr Calcs. Z 012)	5.92 FAR	115,925.44 SF
	Max. Total	6.5 FAR	**127,283.00 SF**
	Total All Districts		
	Commercial		351,050.00 SF
	Community Facility		478,333.00 SF
	Residential w/ Inclusionary		537,185.44 SF
	Max. Total		**548,543.00 SF**

b Inclusionary Housing Bonus in C4-7

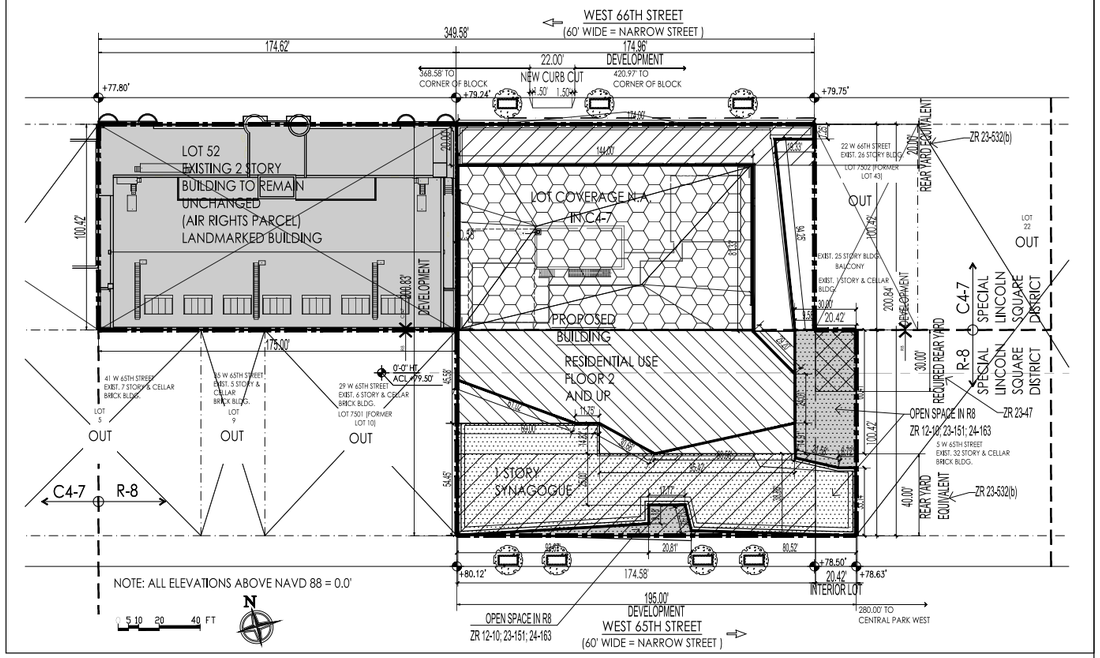
23-154	Base Residential	10 FAR	351,050.00 SF
	Max. Inclusionary Bonus	2 FAR	70,210.00 SF
	Max. Residential with Inclusionary	12 FAR	421,260.00 SF
	Low Income Floor Area Provided Off site, see IHPD Certificates and Table 1 on Z 001		70,210.00 SF
	Base Residential		351,050.00 SF
	Actual Inclusionary Bonus		70,210.00 SF
	Actual Residential with Inclusionary		421,260.00 SF

c Floor Area Proposed

C4-7 District (R10 equivalent)		
Existing Lot 52		
Commercial (See Alt 1 #120422729)	43,053.00 SF	
Proposed		
Community Facility	6,285.22 SF	
Residential	371,920.68 SF	
Total	378,205.90 SF	
C4-7 Total		
Commercial	43,053.00 SF	
Community Facility	6,285.22 SF	
Residential	371,920.68 SF	
Total	**421,258.90 SF**	
R8 District		
Proposed / R8 Total		
Community Facility	16,058.87 SF	
Residential	111,217.62 SF	
Total	**127,276.49 SF**	
Total both Zones		
Proposed Both Zones Total		
Community Facility	22,344.09 SF	
Residential	483,138.30 SF	
Total	**505,482.39 SF**	
Commercial	43,053.00 SF	
Proposed Both Zones Total	505,482.39 SF	
Total	**548,535.39 SF**	

SITE PLAN

Scale: 1/64" = 1'-0"



RESIDENTIAL FAR CALCULATIONS IN R8

12-10 Open Space shall not be included in Lot Coverage

23-151 Residential

Height Factor for Residential FAR

a. H.F. for FAR = Total Floor Area / Total Lot Coverage
H.F. for FAR = 127,276 SF / 8,899 SF = 14
F.A.R. @ H.F. 14 = 5.92

OPEN SPACE CALCULATIONS IN R8

23-151 a. Height Factor for OSR

24-153 H.F. for OSR = Residential FAR Residential Lot Coverage
H.F. for OSR = 111,218 SF / 8,899 SF = 12

b. Required Oper Space
Open Space Ratio @ H.F. 12 = 9.2 %
Min. Open Space = 111,218 X 0.092 = 10,232 SF

c. Open Space Provided = 10,635 SF Complies

d. Open Space at Grade

12-10 Open space at grade shall be accessible and usable by all residential occupants.

e. Open Space on Roof

12-10 - Open Space on roof in R8 need not be accessible

12-10 - No dimension less than 25' except that area adjoining street line or rear yard min. depth 9' and max. length min. 2 times depth (or full width of zoning lot or 50', whichever is less).

24-15 Open Space permitted on roof of community facility

COMMUNITY FACILITY COVERAGE IN R8

24-11 Max. 65% Community Facility Coverage in R8 Zone
19,582 SF X 65 % = 12,728 SF

Provided 0 SF Complies

24-12 Community Facility use below 23' may be exlcuded from Lot Coverage

LEGEND

- EXISTING BUILDING
- PROPOSED BUILDING
- REAR YARD EQUIVALENT
- REQUIRED REAR YARD
- OPEN SPACE AT ROOF IN R8
- OPEN SPACE AT GRADE IN R8
- RESIDENTIAL COVERAGE IN R8
- TOWER COVERAGE IN C4-7
- ZONING LOT LINE
- STREET TREE
- SKY EXPOSURE PLANE
- PROPERTY LINE

NYC Buildings

ZD1 Zoning Diagram

Submitted to resolve objections stated in a notice of intent to revoke issued pursuant to rule 101-15.
☐ YES ☒ NO

Location Information

House No(s) 36
Street Name West 66th Street
Borough Manhattan
Block 1118
Lot 45
Bin 1028168

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NAME (PLEASE PRINT) Luigi P. Russo
SIGNATURE DATE

REGISTERED ARCHITECT LUIGI PIO RUSSO No. 020741 STATE OF NEW YORK

P.E/R.A. SEAL (APPLY SEAL; SIGN AND DATE OVER SEAL)

Internal Use Only

BIS Doc # _____

PLAN EXAMINERS SIGN AND DATE

R. 000025

ZONING CALCULATIONS

HEIGHT & SETBACK IN BOTH ZONES

35-21 23-641	Maximum Height of Wall and Required Setbacks 20' minimum setback above 85' 2.7 : 1 Sky Exposure Plane			
	TOWER IN C4-7			
	a Lot Area in C4-7		35,105.00 SF	
82-36 (a)	b Max. Tower Coverage Permitted	35,105.00 SF X 0.4	14,042.00 SF	
	c Min. Tower Coverage Permitted	35,105.00 SF X 0.3	10,531.50 SF	
	d Proposed Tower at floors 7-15		11,579.52 SF	Complies
	Proposed Tower at floor 16		10,644.64 SF	Complies
	Proposed Tower at floor 16 E.M.R.		10,760.93 SF	Complies
	Proposed Tower at floor 17		11,082.72 SF	Complies
	Proposed Tower at floor 1 DNY ACCESS level 1		11,210.10 SF	Complies
	Proposed Tower at floor 1 DNY ACCESS level 2		11,218.18 SF	Complies
	Proposed Tower at floor 1 DNY ACCESS level 3		11,218.18 SF	Complies
	Proposed Tower at floor 18		11,218.18 SF	Complies
	Proposed Tower at floor 1 DNY ACCESS level 4		11,211.48 SF	Complies
	Proposed Tower at floor 1 DNY ACCESS level 5		11,208.86 SF	Complies
	Proposed Tower at floor 1 DNY ACCESS level 6		11,208.86 SF	Complies
	Proposed Tower at floor 19		11,208.86 SF	Complies
	Proposed Tower at floor 1 DNY ACCESS level 7		11,208.86 SF	Complies
	Proposed Tower at floor 1 DNY ACCESS level 8		11,208.86 SF	Complies
	Proposed Tower at floors 20-33		11,208.58 SF	Complies
	Proposed Tower at floors 34		11,208.86 SF	Complies
	Proposed Tower at floors 35		11,183.55 SF	Complies
	Proposed Tower at floors 36		11,156.42 SF	Complies
	Proposed Tower at floors 37		11,127.45 SF	Complies
	Proposed Tower at floor 38		11,096.54 SF	Complies
	Proposed Tower at floor 39		11,063.92 SF	Complies
	Proposed Tower at Roof (40th FL)		11,028.24 SF	Complies
	Proposed Tower at Bulkhead Roof (41st FL)		10,537.68 SF	Complies
	e Minimum Setback 20' above 85' Complies			

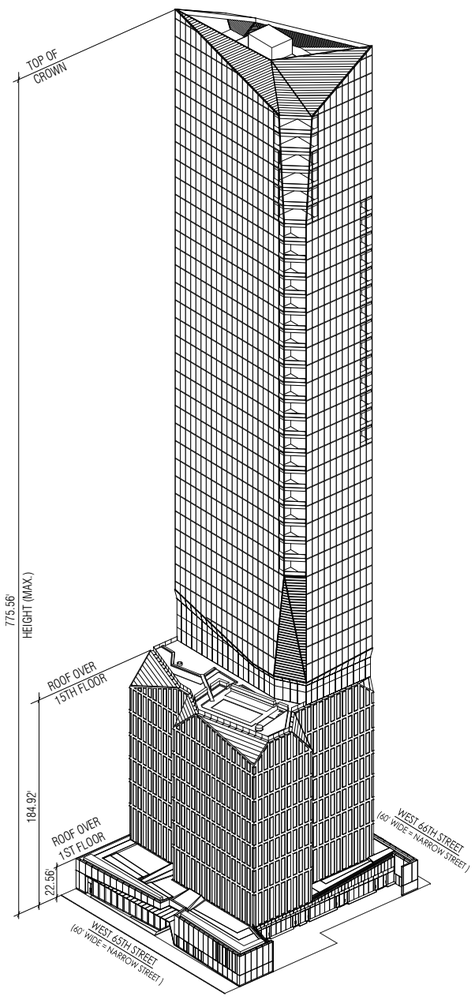
TOP 40' OF TOWER

82-36 (a)	The highest 4 stories of the tower or 40 feet, whichever is less, may cover less than 30% of the lot area if the CFA of each story does not exceed 80% of CFA of the story directly below it		
	Proposed tower at 2nd Bulkhead Roof (42nd FL)(EL 752.73')	8,311.46 SF	
	Max. 80% of Bulkhead Roof (41st FL) 80% x 10,538 SF	8,430.14 SF	Complies

BULK DISTRIBUTION BELOW 150' IN HEIGHT

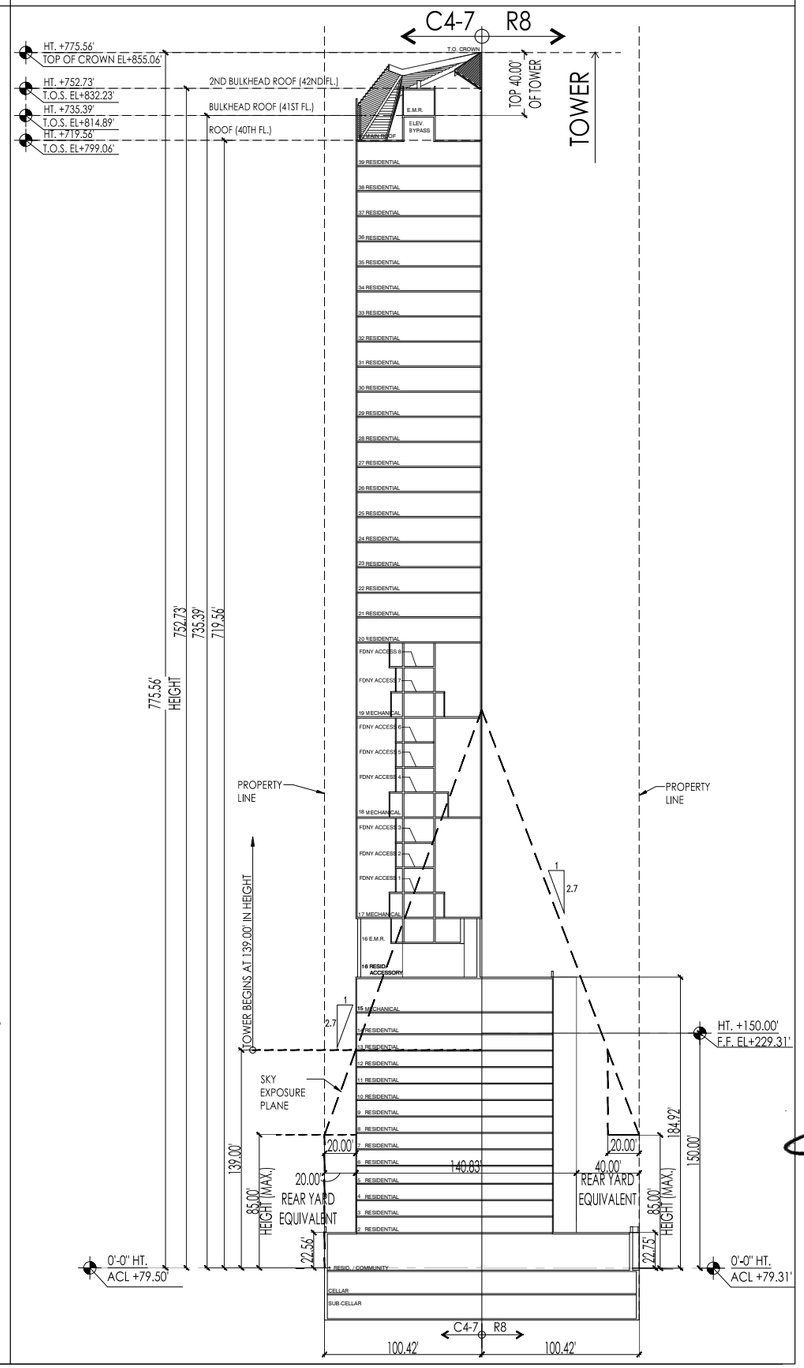
82-34	Total Permitted Floor Area		548,543.00 SF	
	Min. Required FA Below 150'	548,543.00 SF X 0.6	329,125.80	
	14th Floor - Finished Floor			
	Floor Elevation		228.98 Ft	
	Floor Height in C4-7 Through Lot Portion 1		149.48 Ft	
	Floor Height in R8 Through Lot Portion 2		149.67 Ft	
	Provided			
	Existing Building		43,053.00 SF	
	New Building Floors 1-14 (See Floor Area Table)		286,078.92 SF	
	Total Below 150'		329,131.92 SF	Complies

AXONOMETRIC DIAGRAM
Scale: NTS



LEGEND
- SKY EXPOSURE PLANE
- PROPERTY LINE

SECTION DIAGRAM
Scale: NTS



NYC Buildings

ZD1 Zoning Diagram

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☐ YES ☒ NO

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Internal Use Only

BIS Doc #

PLAN EXAMINERS SIGN AND DATE

R. 000026

2019-037A 05/08/2019

Buildings

ZD1 Zoning Diagram

Must be typewritten.
Sheet 3 of 3

ZD1 Sheet 3 of 3

1 Applicant Information *Required for all applications.*

Last Name Russo	First Name Luigi	Middle Initial
Business Name SLCE Architects, LLP		Business Telephone (212) 979-8400
Business Address 1359 Broadway, 14th Floor		Business Fax (212) 979-8387
City New York	State NY Zip 10018	Mobile Telephone
E-Mail lrusso@slcearch.com		License Number 020741

2 Additional Zoning Characteristics *Required as applicable.*

Dwelling Units 127 Parking area sq. ft. Parking Spaces: Total Enclosed

3 BSA and/or CPC Approval for Subject Application *Required as applicable.*

Board of Standards & Appeals (BSA)

- ☐ Variance — Cal. No. ____ — Authorizing Zoning Section 72-21
- ☐ Special Permit — Cal. No. ____ — Authorizing Zoning Section ____
- ☐ General City Law Waiver — Cal. No. ____ — General City Law Section ____
- ☐ Other — Cal. No. ____

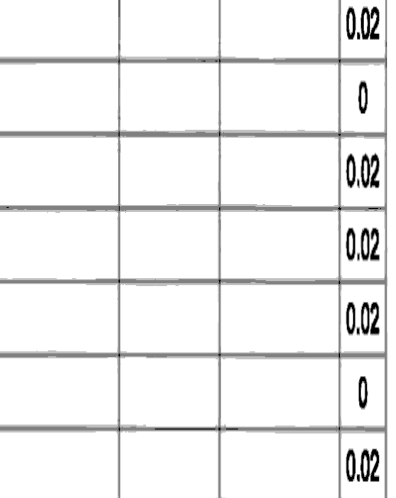
City Planning Commission (CPC)

- ☐ Special Permit — ULURP No. ____ — Authorizing Zoning Section ____
- ☐ Authorization — App. No. ____ — Authorizing Zoning Section ____
- ☐ Certification — App. No. ____ — Authorizing Zoning Section ____
- ☐ Other — App. No. ____

4 Proposed Floor Area *Required for all applications. One Use Group per line.*

Floor Number	Building Code Gross Floor Area (sq. ft.)	Use Group	Zoning Floor Area (sq. ft.) Residential	Community Facility	Commercial	Manufacturing	FAR
SUB	27,754.56	2	0				0
SUB	9,359.07	4		0			0
CEL	28,108.47	2	0				0
CEL	9,004.88	4		0			0
001	9,384.46	2	8,989.42				0.16
001	22,344.09	4		22,344.09			0.41
MEZ1	1,604.41	2	969.95				0.02
MEZ1	2,002.10	4		0			0
002	20,478.30	2	19,510.36				0.36
003	20,478.30	2	19,515.75				0.36
004	20,478.30	2	19,516.25				0.36
005	20,478.30	2	19,513.47				0.36
006	20,478.30	2	19,526.06				0.36
007-008	40,956.60	2	39,052.12				0.71
009-011	61,434.90	2	58,570.35				1.07
012-014	61,434.90	2	58,571.10				1.07
015	20,478.25	2	0				0
016	10,644.64	2	7,899.31				0.14
016 E.M.R.	1,967.77	2	1,279.99				0.02
017	10,216.56	2	0				0
FDNY AC 1	993.13	2	896.07				0.02
FDNY AC 2	993.13	2	892.47				0.02
FDNY AC 3	993.13	2	896.07				0.02
018	10,240.54	2	0				0
FDNY AC 4	993.13	2	892.47				0.02
FDNY AC 5	993.13	2	892.47				0.02
FDNY AC 6	993.13	2	892.47				0.02
019	10,917.09	2	0				0
FDNY AC 7	993.13	2	892.47				0.02
FDNY AC 8	1,317.36	2	1,216.71				0.02
020-026	75,402.50	2	72,769.87				1.33
027-030	43,087.15	2	41,495.43				0.76
031	10,771.79	2	10,372.49				0.19
032-033	21,543.58	2	20,747.98				0.38
034	10,173.91	2	9,849.63				0.18
035	10,667.73	2	10,353.45				0.19
036	11,156.42	2	10,832.14				0.20
037	11,127.45	2	10,803.17				0.20
038	11,096.54	2	10,747.41				0.20
039	10,625.28	2	4,781.38				0.09
ROOF (40)	3,914.45	2	0				0
BH RF (41)	920.79	2	0				0
Totals	669,011.64		483,138.3	22,344.09			9.24

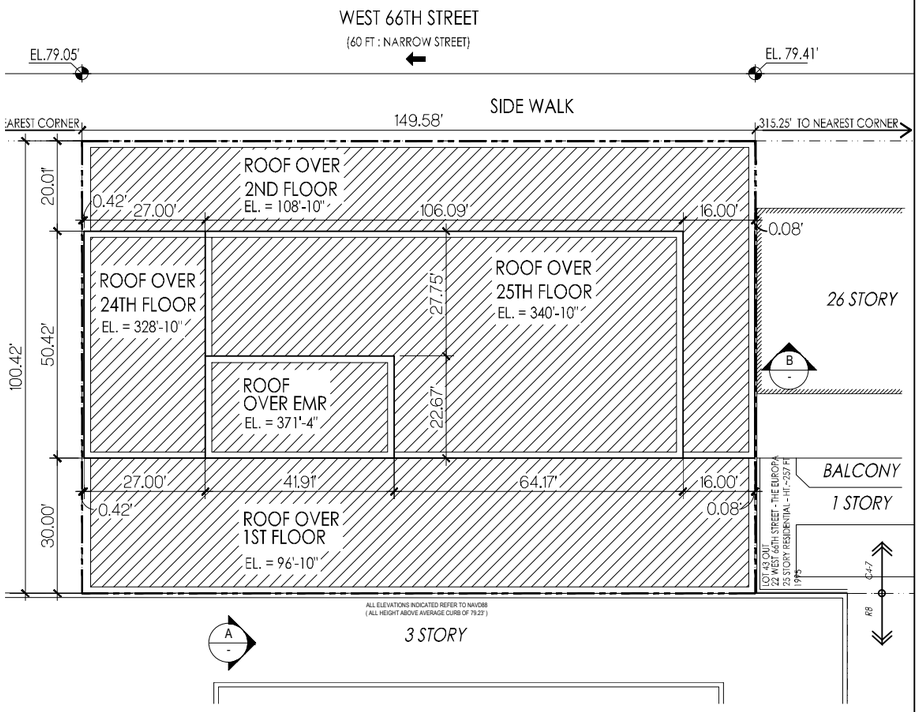
Total Zoning Floor Area	505,482.39



R. 00002 07/09

EXHIBIT D

SITE PLAN
Scale: 1/32" = 1'-0"



ZONING CONSIDERATION

ZONE	C4-7 / R10 Eq.	Map 8D, Special Lincoln Square District Subdistrict A
SITE AREA	15,021 SF	Block: 1118, Lot: 45, 46, 47, 48
MAX. BASE FAR	10	
MAX. BASE ZONING FLOOR AREA	150,210 SF	
INCLUSIONARY HOUSING INCREASE	20% 30,042 SF	ZR 82-32 (a)
TOTAL ALLOW. ZONING FLOOR AREA	180,252 SF	
PERMITTED COMMERCIAL FLOOR AREA	100,000 SF	ZR 82-31
MAXIMUM TOWER COVERAGE	45% 6,759 SF	ZR 23-65
MINIMUM TOWER COVERAGE	30% 4,506 SF	ZR 82-36 (a) (2)
MAXIMUM STREET WALL	85 FT	
MINIMUM SETBACK ABOVE STREETWALL	20 FT	NARROW STREET. ZR 82-36 (b)
MINIMUM BULK DISTRIBUTION MINIMUM FLOOR AREA BELOW 150 FT.	60% 108,151 SF	BELOW 150 FT. ZR 82-34

LEGEND

C4-7/ R-10 EQUIVALENT -
(SPECIAL LINCOLN SQUARE
DISTRCT - SUB DISTRICT A)

PROPOSED BUILDING

ZONING LOT

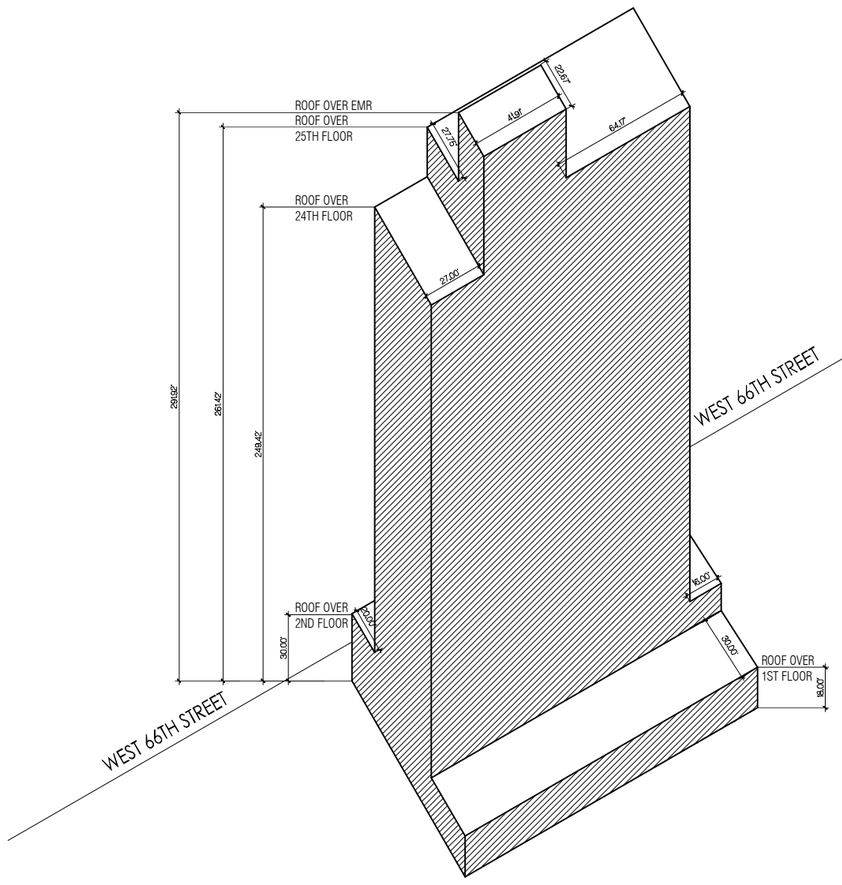
AXONOMETRIC DIAGRAM
SCALE: 1/64" = 1'-0"

STANDARD SETBACK REQUIREMENT AS PER ZR 82-36 (b):

20' MINIMUM SETBACK ABOVE STREETWALL

REQUIREMENT SETBACK:

FRONT: 20'-0"
REAR: 30'-0"
SIDE: NOT REQUIRED



Buildings

ZD1 Zoning Diagram

Location Information

House No(s) 36
Street Name West 66th Street

Borough Manhattan
Block 1118
Lot 45
Bin 108168

For additional zoning characteristics, see Section 12 of the PW1.

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NAME (PLESE PRINT)
Luigi P. Russo

SIGNATURE DATE

REGISTERED ARCHITECT LUIGI P. RUSSO No. 020741 STATE OF NEW YORK

P.E/R.A. SEAL (APPLY SEAL; SIGN AND DATE OVER SEAL)

Internal Use Only

BIS Doc # _____

PLAN EXAMINERS SIGN AND DATE

R. 000029

Buildings

ZD1 Zoning Diagram

Must be typewritten.
Sheet 1 of 2

1 Applicant Information *Required for all applications.*

Last Name Russo | First Name Luigi | Middle Initial
Business Name SLCE Architects, LLP | Business Telephone (212) 979-8400
Business Address 1359 Broadway, 14th Floor | Business Fax (212) 979-8387
City New York | State NY | Zip 10018 | Mobile Telephone
E-Mail lrusso@slcearch.com | License Number 020741

2 Additional Zoning Characteristics *Required as applicable.*

Dwelling Units | Parking area sq. ft. | Parking Spaces: Total | Enclosed

3 BSA and/or CPC Approval for Subject Application *Required as applicable.*

Board of Standards & Appeals (BSA)

- ☐ Variance — Cal. No. _____ — Authorizing Zoning Section 72-21
- ☐ Special Permit — Cal. No. _____ — Authorizing Zoning Section _____
- ☐ General City Law Waiver — Cal. No. _____ — General City Law Section _____
- ☐ Other — Cal. No. _____

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- ☐ Special Permit — ULURP No. _____ — Authorizing Zoning Section _____
- ☐ Authorization — App. No. _____ — Authorizing Zoning Section _____
- ☐ Certification — App. No. _____ — Authorizing Zoning Section _____
- ☐ Other — App. No. _____

4 Proposed Floor Area *Required for all applications. One Use Group per line.*

Floor Number	Building Code Gross Floor Area (sq. ft.)	Use Group	Zoning Floor Area (sq. ft.) Residential	Community Facility	Commercial	Manufacturing	FAR
SC1	15,021		-				
CEL	15,021		-	-			
001	14,962		6,161	3,299	5,442		0.99
002	10,492			10,492			0.70
003	6,684		6,429				0.43
004	6,684		6,429				0.43
005	6,684		6,429				0.43
006	6,684		6,429				0.43
007	6,684		6,429				0.43
008	6,684		6,429				0.43
009	6,684		6,429				0.43
010	6,684		6,429				0.43
011	6,684		6,429				0.43

ZD1 Sheet 2 of 2

4 Proposed Floor Area *Required for all applications. One Use Group per line.*

Floor Number	Building Code Gross Floor Area (sq. ft.)	Use Group	Zoning Floor Area (sq. ft.) Residential	Community Facility	Commercial	Manufacturing	FAR
012	6,684		6,429				0.43
013	6,684		6,429				0.43
014	6,684		6,429				0.43
015	6,684		6,429				0.43
016	6,684		6,429				0.43
017	6,684		6,429				0.43
018	6,684		6,429				0.43
019	6,684		6,429				0.43
020	6,684		6,429				0.43
021	6,684		6,429				0.43
022	6,684		6,429				0.43
023	6,684		6,429				0.43
024	6,684		6,429				0.43
025	5,633		5,424				0.36
ROF	956		-				
BULKHEAD	956		-				
Totals	210,089		153,023	13,791	5,442		11.47

Total Zoning Floor Area 172,256

07/09

R. 000030

2019-89-A 05/08/2019

DEPT OF BLDGS 121190200 Job Number

ES555372378 Scan Code

ZONING CALCULATIONS

ZONING DISTRICT : C4-7 (R-10 EQUIVALENT)
R8
SPECIAL LINCOLN SQUARE DISTRICT
SUBDISTRICT A
MAP: 8C
BLOCK: 1118
LOT: 14, 45, 46, 47, 48 & 52

LOT AREA: C4-7 DISTRICT = 35,105 SF
R8 DISTRICT = 19,582 SF
TOTAL LOT AREA = 54,687 SF

NO PARKING REQUIRED WITHIN MANHATTAN CORE AS PER ZR 13-10, NONE PROVIDED

STREET TREE PLANTING AS PER ZR 26-41 & 33-03

4) ZONING FLOOR AREA

a. Floor Area Permitted

C4-7 District (R10 equivalent)

33-122	Commercial	10 FAR	351,050.00 SF
33-123	Community Facility	10 FAR	351,050.00 SF
23-152, 23-16	Residential	10 FAR	351,050.00 SF
23-154	Inclusionary Bonus (see below)	2 FAR	70,210.00 SF
35-31	Res. with Inclusionary (see below)	12 FAR	421,260.00 SF
	Max. Total		**421,260.00 SF**

R8 District

23-151	Community Facility	6.5 FAR	127,283.00 SF
24-11	Residential (See HF Calcs. Z-013)	5.92 FAR	115,925.44 SF
	Max. Total	6.5 FAR	**127,283.00 SF**

Total All Districts

Commercial	351,050.00 SF
Community Facility	478,333.00 SF
Residential w/ Inclusionary	537,185.44 SF
Max. Total	**548,543.00 SF**

b. Inclusionary Housing Bonus in C4-7

23-154	Base Residential	10 FAR	351,050.00 SF
	Max. Inclusionary Bonus	2 FAR	70,210.00 SF
	Max. Residential with Inclusionary	12 FAR	421,260.00 SF
	Low Income Floor Area Provided		70,210.00 SF
	Off-site, see HPD Certificates and Table 1 on Z-001		
	Base Residential		351,050.00 SF
	Actual Inclusionary Bonus		70,210.00 SF
	Actual Residential with Inclusionary		421,260.00 SF

c. Floor Area Proposed

C4-7 District (R10 equivalent)

Existing Lot 52

Commercial	43,053.00 SF
(See Alt. 1 #120422729)	

Proposed

Community Facility	6,350.89 SF
Residential	371,855.27 SF
Total	378,206.16 SF

C4-7 Total

Commercial	43,053.00 SF
Community Facility	6,350.89 SF
Residential	371,855.27 SF
Total	**421,259.16 SF**

R8 District

Proposed / R8 Total

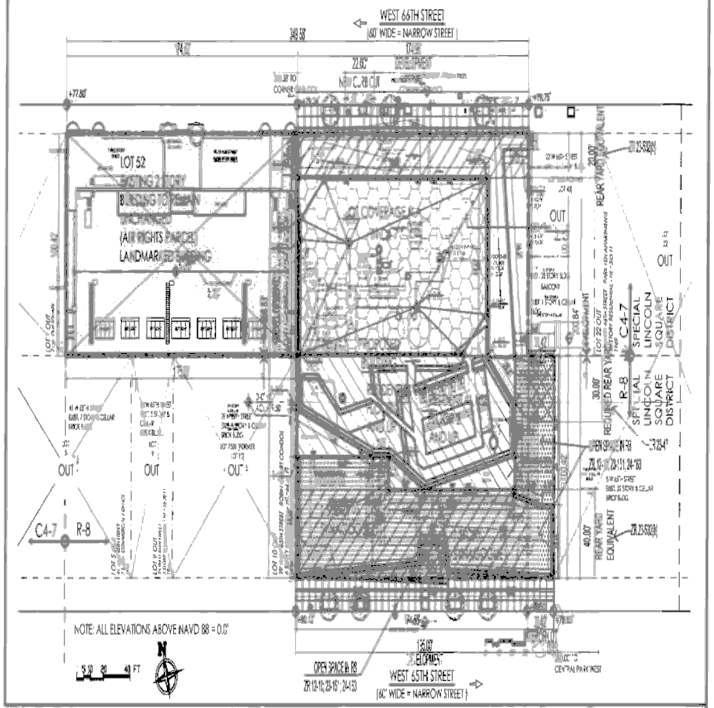
Community Facility	16,054.60 SF
Residential	111,227.78 SF
Total	**127,282.38 SF**

Total both Zones

Commercial	43,053.00 SF
Community Facility	22,405.49 SF
Residential	483,083.05 SF
Total	**548,541.54 SF**

SITE PLAN

Scale: 1/64" = 1'-0"



RESIDENTIAL FAR CALCULATIONS IN R8

12-10 Open Space shall not be included in Lot Coverage

23-151 Residential

Height Factor for Residential FAR

a. H.F. for FAR = Total Floor Area / Total Lot Coverage

H.F. for FAR = 127,282 SF / 8,899 SF = 14

F.A.R. @ H.F. 14 = 5.92

OPEN SPACE CALCULATIONS IN R8

23-151 a. Height Factor for OSR

24-163 H.F. for OSR = Residential FAR Residential Lot Coverage

H.F. for OSR = 111,228 SF / 8,899 SF = 12

b. Required Open Space

Open Space Ratio @ H.F. 12 = 9.2 %

Min. Open Space = 111,228 X 0.092 = 10,233 SF

c. Open Space Provided = 10,635 SF Complies

d. Open Space at Grade

12-10 Open space at grade shall be accessible and usable by all residential occupants.

e. Open Space on Roof

12-10 - Open Space on roof in R8 need not be accessible

12-10 - No dimension less than 25' except that area adjoining street line or rear yard min. depth 9' and max. length min. 2 times depth (or full width of zoning lot or 50', whichever is less).

24-16 Open Space permitted on roof of community facility

COMMUNITY FACILITY COVERAGE IN R8

24-11 Max. 65% Community Facility Coverage in R8 Zone

19,582 SF X 65 % = 12,728 SF

Provided 0 SF Complies

24-12 Community Facility use below 23' may be excluded from Lot Coverage

LEGEND

- EXISTING BUILDING
- PROPOSED BUILDING
- REAR YARD EQUIVALENT
- REQUIRED REAR YARD
- OPEN SPACE AT ROOF IN R8
- OPEN SPACE AT GRADE IN R8
- RESIDENTIAL COVERAGE IN R8
- TOWER COVERAGE IN C4-7
- ZONING LOT LINE
- STREET TREE
- SKY EXPOSURE PLANE
- PROPERTY LINE
- TCB TOP OF BEAM WITHIN NON-OCCUPIABLE SPACE

NYC Buildings

ZD1 Zoning Diagram

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☐ YES ☒ NO

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NAME (PRINT) Luigi P. R

SIGNATURE DATE

REGISTERED ARCHITECT LUIGI P. ROSA 026741 STATE OF NEW YORK

P.E./R.A. SEAL (APPLY SEAL; SIGN AND DATE OVER SEAL)

Internal Use Only

BIS Doc # _____

PLAN EXAMINERS SIGN AND DATE

R. 000031

ZONING CALCULATIONS

HEIGHT & SETBACK IN BOTH ZONES

35-21 / 23-641 — Maximum Height of Wall and Required Setbacks
20' minimum setback above 85'
2.7:1 Sky Exposure Plane

TOWER IN C4-7

a.	Lot Area in C4-7	35,105.00 SF	
82-36 (a)	b. Max. Tower Coverage Permitted	35,105.00 SF X 0.4 =	14,042.00 SF
	c. Min. Tower Coverage Permitted	35,105.00 SF X 0.3 =	10,531.50 SF
	d. Proposed Tower at floors 7-15	11,579.52 SF	Complies
	Proposed Tower at floor 16	10,644.64 SF	Complies
	Proposed Tower at floor 17	10,770.66 SF	Complies
	Proposed Tower at floor 18	11,092.68 SF	Complies
	Proposed Tower at floor 19	11,206.89 SF	Complies
	Proposed Tower at floors 20-33	11,206.57 SF	Complies
	Proposed Tower at floors 34	11,206.51 SF	Complies
	Proposed Tower at floors 35	11,183.32 SF	Complies
	Proposed Tower at floors 36	11,156.28 SF	Complies
	Proposed Tower at floors 37	11,127.40 SF	Complies
	Proposed Tower at floor 38	11,097.02 SF	Complies
	Proposed Tower at floor 39	11,064.13 SF	Complies
	Proposed Tower at floor 40	11,028.24 SF	Complies
	Proposed Tower at floor 41	10,538.00 SF	Complies
	e. Minimum Setback 20' above 85'		
	Complies		

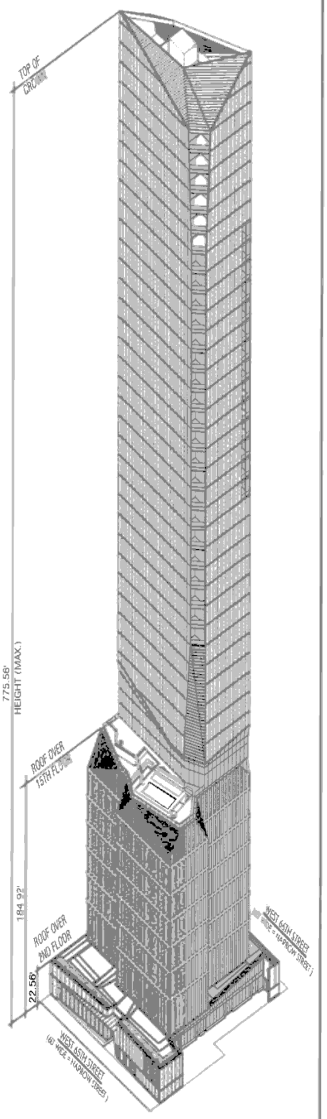
TOP 40' OF TOWER

82-36 (a)	The highest 4 stories of the tower or 40 feet, whichever is less, may cover less than 30% of the lot area if the GFA of each story does not exceed 80% of GFA of the story directly below it.		
	Proposed tower at 42nd Floor, Bulkhead (Ht. 752.73')		8,311.00 SF
	Max. 80% of 41st Floor	80% x 10,538 SF =	8,430.40 SF Complies

BULK DISTRIBUTION BELOW 150' IN HEIGHT

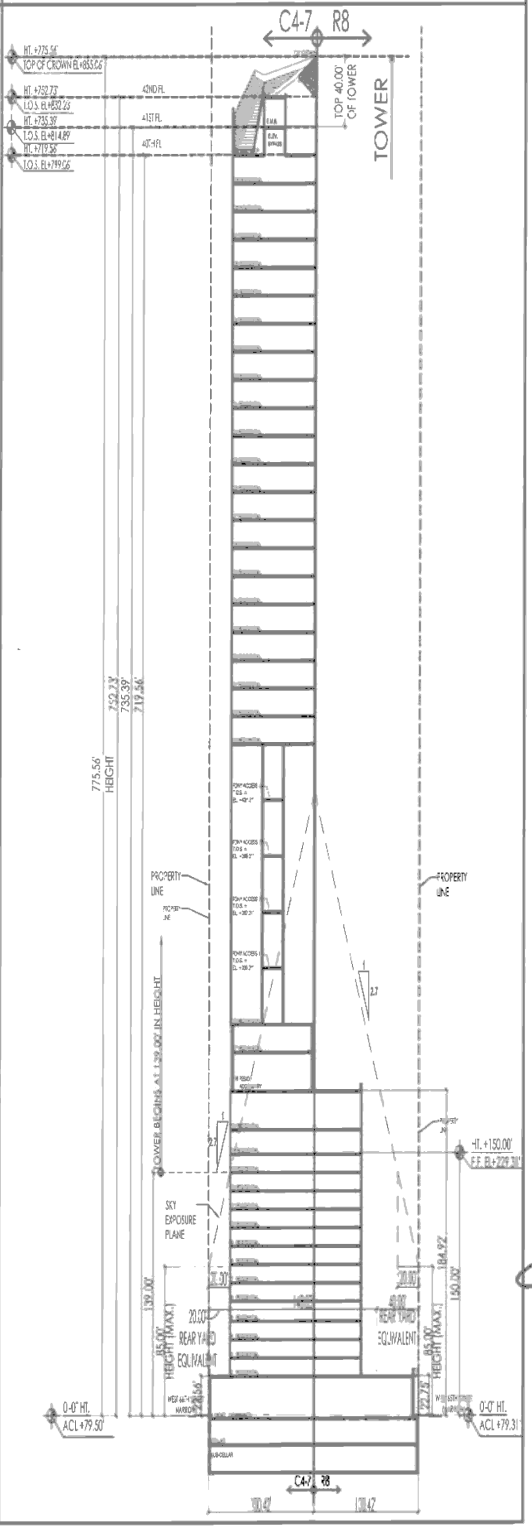
82-34	Total Permitted Floor Area		548,543.00 SF
	Min. Required ZFA Below 150'	548,543.00 SF X 0.6 =	329,125.80
	14th Floor - Finished Floor		
	Floor Elevation		228.98 Ft
	Floor Height in C4-7/ Through Lot Portion 1		149.48 Ft
	Floor Height in R8/ Through Lot Portion 2		149.67 Ft
	Provided:		
	Existing Building		43,053.00 SF
	New Building Floors 1-14 (See Floor Area Table)		286,076.04 SF
	Total Below 150'		329,129.04 SF Complies

AXONOMETRIC DIAGRAM
Scale: NTS



LEGEND
— — SKY EXPOSURE PLANE
PROPERTY LINE

SECTION DIAGRAM
Scale: NTS



NYC Buildings

ZD1 Zoning Diagram

Submitted to resolve objections stated in a notice of intent to revoke issued pursuant to rule 101-15.
☐ YES ☒ NO

Location Information

House No(s) 36
Street Name West 66th Street
Borough Manhattan
Block 1118
Lot 45
Bin 1028168

Falsification of any statement is a misdemeanor and is punishable by a fine or imprisonment, or both. It is unlawful to give to a city employee, or for a city employee to accept, any benefit, monetary or otherwise, either as a gratuity for properly performing the job or in exchange for special consideration. Violation is punishable by imprisonment or fine or both. I understand that if I am found after hearing to have knowingly or negligently made false statement or to have knowingly or negligently falsified or allowed to be falsified any certificate, form, signed statement, application, report or certification of the correction of a violation required under the provisions of this code or of a rule of any agency, I may be barred from filing further applications or documents with the Department.

NAME (PLEASE PRINT) Luigi P. [illegible]
SIGNATURE DATE

REGISTERED ARCHITECT LUIGI P. [illegible] No. 035741 STATE OF NEW YORK

P.E./R.A. SEAL (APPLY SEAL; SIGN AND DATE OVER SEAL)

Internal Use Only

BIS Doc # _____

PLAN EXAMINERS SIGN AND DATE

R. 000032

NYC Buildings

ZD1 Zoning Diagram

Must be typewritten.
Sheet 2 of 2

1 Applicant Information *Required for all applications.*

Last Name Russo | First Name Luigi | Middle Initial
Business Name SLCE Architects, LLP | Business Telephone (212) 979-8400
Business Address 1359 Broadway, 14th Floor | Business Fax (212) 979-8387
City New York | State NY | Zip 10018 | Mobile Telephone
E-Mail lrusso@slcearch.com | License Number 020741

2 Additional Zoning Characteristics *Required as applicable.*

Dwelling Units 127 | Parking area sq. ft. | Parking Spaces: Total | Enclosed

3 BSA and/or CPC Approval for Subject Application *Required as applicable.*

Board of Standards & Appeals (BSA)

- ☐ Variance — Cal. No. _____ — Authorizing Zoning Section 72-21
- ☐ Special Permit — Cal. No. _____ — Authorizing Zoning Section _____
- ☐ General City Law Waiver — Cal. No. _____ — General City Law Section _____
- ☐ Other — Cal. No. _____

City Planning Commission (CPC)

- ☐ Special Permit — ULURP No. _____ — Authorizing Zoning Section _____
- ☐ Authorization — App. No. _____ — Authorizing Zoning Section _____
- ☐ Certification — App. No. _____ — Authorizing Zoning Section _____
- ☐ Other — App. No. _____

4 Proposed Floor Area *Required for all applications. One Use Group per line.*

Floor Number	Building Code Gross Floor Area (sq. ft.)	Use Group	Zoning Floor Area (sq. ft.) Residential	Community Facility	Commercial	Manufacturing	FAR
SUB	27,751.62	2B	0				0
SUB	9,362.04	4A		0			0
CEL	27,721.93	2B	0				0
CEL	9,391.64	4A		0			0
001	9,370.60	2	8,923.74				0.16
001	22,405.49	4A		22,405.49			0.41
MEZ1	1,691.49	2	910.32				0.02
MEZ1	2,020.23	4A		0			0
002	20,478.30	2	19,507.39				0.36
003	20,478.30	2	19,509.56				0.36
004	20,478.30	2	19,509.56				0.36
005	20,478.30	2	19,509.56				0.36
006	20,478.30	2	19,531.26				0.36

ZD1 Sheet 2 of 2

4 Proposed Floor Area *Required for all applications. One Use Group per line.*

Floor Number	Building Code Gross Floor Area (sq. ft.)	Use Group	Zoning Floor Area (sq. ft.) Residential	Community Facility	Commercial	Manufacturing	FAR
007-008	40,956.60	2	39,062.52				0.71
009-014	122,869.80	2	117,206.64				2.14
015	17,402.80	2	0				0
016	10,644.64	2B	7,746.54				0.14
017	6,637.02	2	0				0
018	10,240.55	2	0				0
FDNY AC 1	334.25	2	334.25				0.01
FDNY AC 2	334.25	2	334.25				0.01
FDNY AC 3	334.25	2	334.25				0.01
FDNY AC 4	334.25	2	334.25				0.01
019	10,916.98	2	0				0
020-026	78,459.99	2	75,739.86				1.38
027-031	56,042.85	2	54,076.90				0.99
032-033	22,417.14	2	21,631.76				0.40
034	11,208.58	2	10,883.73				0.20
035	11,183.38	2	10,858.54				0.20
036	11,156.28	2	10,831.50				0.20
037	11,127.40	2	10,802.62				0.20
038	11,097.02	2	10,747.10				0.20
039	10,626.00	2	4,756.95				0.09
040	928.55	2	0				0
041	927.82	2	0				0
Totals	658,286.81		483,083.05	22,405.49			9.24

Total Zoning Floor Area	505,488.54

07/09

R. 000033

EXHIBIT E

GlobeSt.com

Richard and Jon Kalikow Say What They Really Think

The top Gamma Real Estate executives are betting on the Southeast and beef about the Sutton Place drama.

By **Betsy Kim** | February 20, 2018 at 08:03 AM

From left: Richard Kalikow, Jon Kalikow and Jay Neveloff (moderating talk)

NEW YORK CITY—Gamma Real Estate has a hard money lending business, making short-term loans of up to $200 million secured by real estate and owns a commercial bank. They have developed more than 10 million square feet of office property and more than 10,000 residential units.

The Dakota Pipeline

Jon Kalikow, the president of Gamma Real Estate, described fracking as “one of the most exciting plays around 2011.” He and his father, Richard Kalikow, the CEO and chairman of the company, presented at Anchin’s Construction & Development Forum’s “Fireside Chat,” on

Thursday. “Not because we know a lot about the oil drilling business, but we know if you were going to have a flood of people out there, they would need places to live.”

For a few years, the North Dakota multifamily properties were very lucrative, rivaling prices of New York City. However, when the oil prices fell and people left, valuations dropped and institutional loans dried up. So, now Gamma is “weathering the storm” in the Dakota plains.

Although Gamma has recently been under a firestorm of headlines for 3 Sutton Place in New York City, the concentration of their residential portfolio is in the Southeast.

Betting on the Southeast

According to government projections 35% of the population will live in the Southeast in the next 35 to 40 years including the retirees who move, Jon noted.

He also pointed to higher taxes that people pay in the Northeast. As Florida has no state income tax, Jon anticipates a flood of people moving there from the Northeast for that reason, alone.

Jon credited “right-to-work” laws, which weaken unions by prohibiting unionized workplaces from requiring union membership or payment of dues, with boosting the regional economy. He stressed six or seven car companies recently moved to the Southeast including a BMW plant in South Carolina, which is now the leading US automobile exporter. All southeastern states have “right-to-work” laws.

He described Atlanta as the central transportation hub, with the largest port following New York, Newark, Los Angeles and Long Beach. He praised the city’s leadership for gentrifying its downtown and for streamlining governmental processes, such as building permits.

Richard noted the Port of Savannah is growing faster due to the widening of the Panama Canal. “Out of the three biggest ports, it’s the only non-union port,” he said. “Nobody wants their goods tied up for a week or two like when there was a strike in Los Angeles.”

Charlotte, Orlando, Tampa, Austin and Dallas are cities with generational legs, said Jon. “We absolutely think the college graduating community, many who had focused on Wall Street as the easy place for wealth are now more likely focused on these jurisdictions in the Southeast, mostly because of quality of life and cost.”

For Amazon HQ2, Richard predicted Atlanta, Newark or DC would be picked, pointing to ports and interstate airport access.

Jon believes Atlanta or Dallas will be selected due to their transportation. Plus, Atlanta’s large and educated population would work at rates significantly cheaper than in DC or New York, he said, then discounted Newark anticipating the required tax incentives would be back breaking.

3 Sutton Place – Now at the Board of Standards and Appeals

Joseph Beninati’s Bauhouse Group borrowed $147 million from Gamma to develop 3 Sutton Place and defaulted. Gamma foreclosed on the property and acquired it for $98 million including air rights.

Several lawsuits were filed including Beninati’s 26-count lawsuit against Gamma. Philip Pilevsky, the CEO of Philips International, sued Gamma to try to stop the foreclosure. Gamma then sued Pilevksy for tortious interference of Beninati’s contract with Gamma.

These lawsuits were mere subplots. The main drama occurred when community members learned of Beninati’s plans to build a 950-foot, 87-story tower as the R-10 zoning put no height limitation in place. Gamma then planned to build a 700-foot, 67-story tower.

A community group, **East River Fifties Alliance**, backed by New York city council members Ben Kallos and Dan Garodnick, Manhattan borough president, Gale Brewer, and state senator, Liz Krueger, advocated capping building heights at 260 feet, between 51st and 59th streets, east of First Avenue. On Nov. 30, the New York city council voted 45-0 in favor of the rezoning. It did not grandfather 3 Sutton to allow an exception.

Gamma had poured concrete, but then their work was stopped. However, the buildings department allowed them to finish the foundations citing safety reasons. Gamma is appealing to the Board of Standards and Appeals for authorization to construct its tower as planned.

“What happened here sets a precedent that is unfathomable in this city. What you need now to grandfather zoning is a building permit and a complete foundation, which is unheard of,” said Richard. “In every other jurisdiction in America, usually when you have a building permit, you have grandfathered zoning and here in New York if you had zoning, it was sacrosanct. That doesn’t exist anymore since this project.”

Jon noted, “A different developer did something smart at a site we looked at on W. 67th 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.

EXHIBIT F

NYC Buildings

ZRD2: Zoning Challenge with response

121190200 Job Number

SC620325809 Scan Code

Must be typewritten.

DECISION (To be completed by a Buildings Department official)

Review Decision: ☒ Challenge Denied ☐ Challenge Accepted, Follow-Up Action(s) Required (indicate below)

☐ Issue notice of intent to revoke

☐ Issue stop work order

Applicable Zoning Section(s): ZR 12-10(Definitions) Floor Area, ZR 82-34, ZR 82-36, ZR 77-02, ZR 23-851(b)(2)

Comments:

Page 1 of 3

The current approved and permitted application is for a 25 story residential, mixed use new building with Community Facility on an interior zoning lot located entirely within C4-7 and the Special Lincoln Square District. The referenced posted ZD1 form (scan dated 7/26/2018), is associated with proposed post approval amendment (PAA) Document 16. It shall be noted that PAA Document 16 remains in disapproved status as there are unresolved Department issued objections. This scope is not yet accepted as part of the currently permitted application.

The amended scope in PAA document 16 proposes a 775 foot tall, 41 story building containing residential and community facility uses located on an enlarged zoning lot containing an existing 2-story landmark building (air-rights parcel). The proposed new zoning lot is split between an R-8 district and C4-7 district within the Special Lincoln Square District. The lot area is 19,582sf in the R-8 portion and 35,105 sf in the C4-7 portion. The challenger's reference the proposed scope in PAA Document 16 and the challenge points and Department response are below.

1. The Challenger cites errors in the Zoning Diagram (ZD1), such as the number of floors indicated in the chart under Item 4 (Proposed Floor area), etc.

Response to Item 1: No ZR Section is cited in this portion of the Challenge. However, the applicant will be advised to make any necessary corrections to the zoning diagram (ZD1).

2. The Challenger states that the project in the posted ZD1 includes "oversized inter-building voids" used for accessory mechanical space.

Response to Item 2: No ZR Section is cited in this portion of the Challenge. However, it is assumed the challenger is referring to floor 18, as indicated in the ZD1. Floor 18 is proposed mechanical space with a vertical distance of approximately 160 feet to the top of floor 19. The Zoning Resolution does not prescribe a height limit for building floors.

This portion of the Challenge is denied.

Name of Authorized Reviewer (please print):

Title (please print):

Authorized Signature: REVIEWED BY Scott D. Pavan, RA Borough Commissioner Date: Time:

Issuers: write signature, date, and time on each page of the challenge forms; and attach this form .

Challenge Denied

Date: 11/19/2018

6/09

R. 000040

NYC Buildings

ZRD2: Zoning Challenge with response

Scan sticker will be affixed by Department staff

Must be typewritten.

DECISION (To be completed by a Buildings Department official)

Review Decision: ☒ Challenge Denied ☐ Challenge Accepted, Follow-Up Action(s) Required (indicate below)

☐ Issue notice of intent to revoke

☐ Issue stop work order

Applicable Zoning Section(s): ZR 12-10(Definitions) Floor Area, ZR 82-34, ZR 82-36, ZR 77-02, ZR 23-851(b)(2)

Comments:

Page 2 of 3

3. The Challenger states that Tower Coverage (ZR Section 82-36) and Bulk distribution (ZR Section 82-34) are incorrectly calculated using portions of the zoning lot and not the entire zoning lot. The Challenger also states the applicant's incorrect interpretation of ZR 77-02 contributes to this error.
Response to Item 3: The proposed new zoning lot in the referenced ZD1 is located entirely within the Special Lincoln Square District, and is also split by a district boundary line between an R-8 district and C4-7 district (R10 equivalent). The portion of the proposed building that qualifies as a tower is located within the C4-7 portion of the zoning lot.

Section 82-34 (Bulk Distribution) states that "within the Special District, at least 60% of the total floor area on the zoning lot be located partially or entirely below a height of 150 feet from curb level."
A review of the proposed PAA Document 16 indicates compliance with this requirement, as Section 82-34 would be applicable to all portions of a zoning lot located within the Special District regardless of zoning district designations. Per Section 82-35 (Height and Setback Regulations) "all buildings [in the Special District] shall be subject to height and setback regulations of the underlying districts." As part of the height and setback regulations of the underlying districts, Section 33-48 (Special Provisions for Zoning Lots Divided by District Boundaries) addresses the specific issue of split lot conditions, and states in part, "...whenever a zoning lot is divided by a boundary between a district to which the provisions of Section 33-45 (Tower Regulations) apply and a district to which such provisions do not apply, the provisions set forth in Article VII, Chapter 7 shall apply." Section 77-02 (Zoning Lots not Existing Prior to Effective Date or Amendment of Resolution) states in part, "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." As such, Section 33-45, a provision that is applicable to C4-7 district is to be applied to the portion of the zoning lot within the C4-7 district.

Name of Authorized Reviewer (please print):

Title (please print):

Authonzed Signature: [redacted] Date: Time:

Issuers: write signature, date, and time on each page of the [redacted] attach this form .

Challenge Denied
Date: 11/19/2018

6/09

R. 000041

NYC Buildings

ZRD2: Zoning Challenge with response

Scan sticker will be affixed by Department staff

Must be typewritten.

DECISION (To be completed by a Buildings Department official)

Review Decision: ☒ Challenge Denied ☐ Challenge Accepted, Follow-Up Action(s) Required (Indicate below)

☐ Issue notice of intent to revoke

☐ Issue stop work order

Applicable Zoning Section(s): ZR 12-10(Definitions) Floor Area, ZR 82-34, ZR 82-36, ZR 77-02, ZR 23-851(b)(2)

Comments:

Page 3 of 3

Section 82-36 (Special Tower Coverage and Setback Regulations) states in part, "the requirements of Sections 33-45 (Tower Regulations) or 35-64 (Special Tower Regulations for Mixed Buildings) for any building, or portion thereof, that qualifies as a "tower" shall be modified as follows:... a tower shall occupy in the aggregate:....not more than 40 percent of the lot area of a zoning lot...; and ...not less than 30 percent of the lot area of a zoning lot." Section 82-36 specifically modified Section 33-45 to include specific tower regulations for the Special Lincoln Square District, but did not negate the need to comply with the rest of the regulations of the underlying district as per Section 82-35. As such, Section 33-48 remains applicable, and the "zoning lot" referenced in Section 82-36 pertains only to the portion of the zoning lot within the C4-7 district.
A review of the proposed PAA Document 16 indicates compliance with tower coverage because the special tower coverage regulations would only be applicable in those portions of the Special District where towers are permitted, in this case the C4-7 portion of the zoning lot.
Therefore based on the above, this portion of the challenge is denied.
4. The Challenger claims that "Areas claimed for mechanical exemptions should be proportionate to their mechanical use."
Response: No ZR Section is cited in this portion of the Challenge. A review of the proposed PAA Document 16 indicates the proposed mechanical deductions are substantially compliant.
This portion of the Challenge is denied.
5. The Challenger claims that pursuant to Section 23-851 (b) the small inner court [along the northeast edge of the C4-7 portion of the zoning lot] is too small."

Response: A review of the proposed PAA Document 16 indicates an open area located along this side lot line. Per ZR Sections 33-51 and 24-61, minimum dimensions of courts and minimum distance between windows and walls or lot lines shall apply only to portions of buildings used for community facility use containing living accommodations with required windows. The portion of the proposed building in question will contain a house of worship (UG 4 Community Facility). Therefore, the above court regulations do not apply. The proposed open area along the northeast edge of the C4-7 portion of the zoning lot complies with Section 33-25(a)(Minimum Required Side Yards). In addition, the one-story portion of the building located in the rear yard equivalent along the front lot line is a permitted obstruction pursuant to Section 33-23.
This portion of the Challenge is denied.

Name of Authorized Reviewer (please print):

Title (please print):

Authorized Signature: REVIEWED BY Scott D. Pavan, RA Borough Commissioner Date: Time:

Issuers: write signature, date, and time on each page of the challenge forms; and attach this form .

Challenge Denied
Date: 11/19/2018

6/09

NYC Buildings

Zoning Challenge and Appeal Form

(for approved applications)

Must be typewritten

1 Property Information *Required for all challenges.*

BIS Job Number 121190200 BIS Document Number 18

Borough Manhattan House No(s) 36 Street Name West 66th Street

2 Challenger Information *Optional.*

***Note to all challengers:** This form will be scanned and posted to the Department's website.*

Last Name Janes First Name George Middle Initial M

Affiliated Organization Prepared for: Landmark West! & 10 West 66th Street Corporation

E-Mail george@georgejanes.com Contact Number 917-612-7478

3 Description of Challenge *Required for all challenges.*

***Note:** Use this form only for challenges related to the Zoning Resolution*

Select one: ☒ Initial challenge ☐ Appeal to a previously denied challenge (denied challenge must be attached)

Indicate total number of pages submitted with challenge, including attachments: 38 *(attachment may not be larger than 11" x 17")*

Indicate relevant Zoning Resolution section(s) below. *Improper citation of the Zoning Resolution may affect the processing and review of this challenge.*

12-10 Floor Area, 82-34, 82-36, 77-02 and 23-851(b)(2)

Describe the challenge in detail below: (continue on page 2 if additional space is required)

Please see attached.

***Note to challengers:** An official decision to the challenge will be made available no earlier than 75 days after the Development Challenge process begins. For more information on the status of the Development Challenge process see the Challenge Period Status link on the Application Details page on the Department's website.*

ADMINISTRATIVE USE ONLY	REVIEWED BY: Scott [redacted] Borough [redacted]		
Reviewer's Signature:	Date:	Time:	WO#:

Challenge Denied

Date: 11/19/2018

6/09

GEORGE M.
JANES &
ASSOCIATES

250 EAST 87TH STREET
NEW YORK, NY 10128

[redacted]

T: 646.652.6498
F: 801.457.7154
E: george@georgejanes.com

September 9, 2018

Rick D. Chandler, P.E., Commissioner
Department of Buildings
280 Broadway
New York, NY 10007

RE: Zoning Challenge
36 West 66th Street
Block 1118, Lot: 45
Job No: 121190200

Dear Commissioner Chandler:

At the request of the 10 West 66th Street Corporation and Landmark West!, a community-based organization that promotes responsible development on the Upper West Side, I have reviewed the zoning diagram and related materials for the new building under construction at 36 West 66th Street (AKA 50 West 66th Street). My firm regularly consults with land owners, architects, community groups and Community Boards on the New York City Zoning Resolution and I have been a member of the American Institute of Certified Planners for the past 21 years.

Summary of findings
There are several deficiencies in the drawings and design. Review of issue 2 should be expedited, as it relates to building safety.

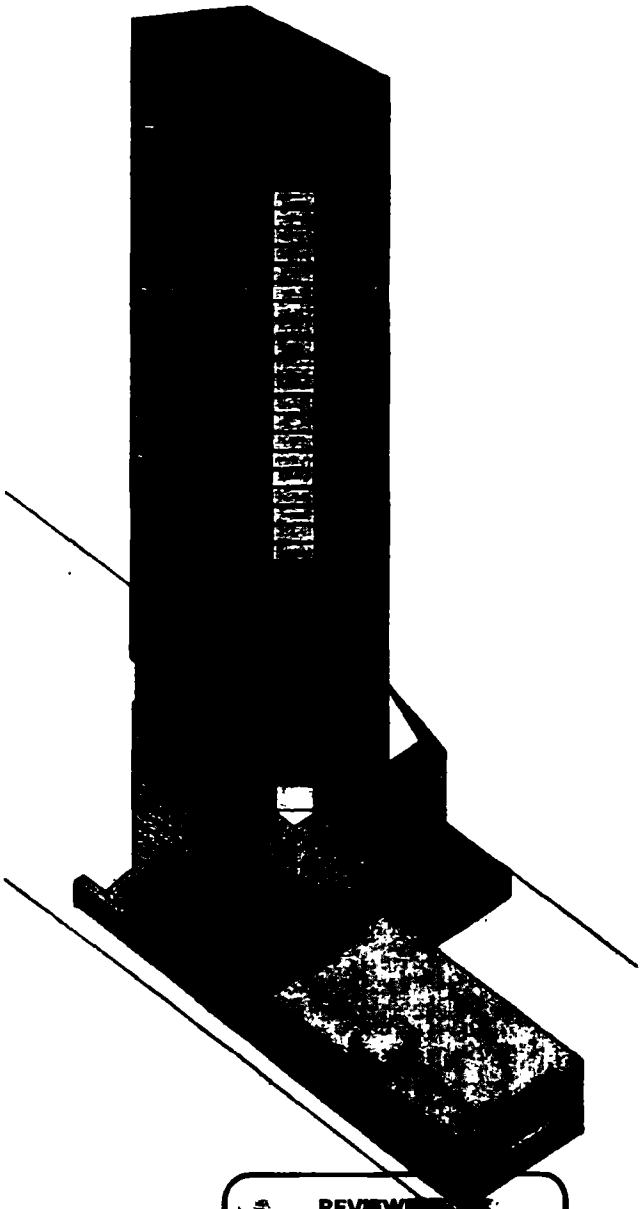
1) The ZD1 is not current and has errors. A new ZD1 or ZD1A should be filed.
2) The FDNY has unanswered questions regarding the safety of interbuilding voids. The Commissioner should not approve an unsafe building.
3) Tower coverage and bulk packing are calculated on different parts of the zoning lot. They must be linked.
4) Areas claimed for mechanical exemptions should be proportionate to their mechanical use.
5) The small inner court is too small.

Summary of the July 26, 2018 ZD1
The building is proposed in the midblock between Central Park West and Columbus Avenue on a zoning lot that is part through and part interior between West 66th and West 65th Streets. The entire lot is in the Special Lincoln Square District (SLSD). The northern part of the zoning lot is zoned C4-7 (an R10 equivalent) and the southern part is zoned R8. The northern portion contains the Armory, a commercial building (a New York City landmark) that is proposed to stay. The proposed development includes a residential tower with a community

REVIEWED BY
Borough Commissioner
Challenge
Denied
Date: 11/19/2018

facility in the first floor. The southern portion is developed with an R8 height factor building, also with a community facility in the first floor.

The proposed building has an atypically large mechanical void. The following is a 3D model of the proposed building and the building to stay on the zoning lot, based upon information provided in the ZD1:



Approximate building mass through

REVIEWED
Scott D
ner

Challenge Denied
Date: 11/19/2018

The mechanical portions of the proposed building are shown in gray, residential in yellow, commercial in pink, and community facility in blue. A large interbuilding void starts on the 18th floor and extends 161 feet to the next story, the use of which is claimed to be accessory building mechanical. While there may be some mechanical equipment placed on the floor of this space, it appears that the primary use of the floor is to increase the height of the tower floors above it. There are also mechanical floors on the 17th and 19th floors but these have more typical floor-to-floor heights.

The building is also notable for the large size of the base below the tower. At over 20,000 SF with a maximum dimension of 165 by 140 feet, it leaves about 1/3 of the floor area of each residential floor more than 30 feet from any possible window. We engaged an expediter to get more detailed building plans so that we could examine how this space, and the spaces claimed as mechanical are being used. The expediter was informed that no more detailed plans regarding the above grade portion of the building were publicly available. Therefore these comments are limited to that information which is available, the ZD1 and the PW1A.

1. The ZD1 is inconsistent and either incorrect or out of date

The ZD1 section drawing shows a 42nd floor, which appears to be a roof level. There is neither a 42nd floor, nor a roof level shown in the Proposed Floor Area table. Further, the Proposed Floor Area table reads that the project proposed is 9.24 FAR. This is an error, as it omits all existing floor area to remain on the zoning lot while counting the lot area of the entire zoning lot. The actual proposed FAR is 10.03 (548,541 ZFA proposed / 54,687 SF of lot area). The difference is not trivial and amounts to over 43,000 ZFA that is missing from the table.

More substantially, however, a PW1A (dated August 28, posted August 30) describes changes to the building that are material to the ZD1 and the zoning approval. These changes include the elimination of the 40th and 41st floors and changes to the configuration of the synagogue portion of the 1st floor mezzanine. The previous PW1 identified this mezzanine as mechanical space accessory to the community facility use and the ZD1 shows this space as having no zoning floor area. This new PW1A identifies it as "vacant" space. As defined by ZR12-10, zoning floor area would include vacant space, while accessory mechanical space is not. Accordingly, the MEZ1 4A line of the Proposed Floor Area table in the ZD1 is incorrect and the ZD1 understates the amount of zoning floor area being proposed.[1] Considering the proposal is using all the floor area generated by the zoning lot, any exempt gross floor area reclassified as zoning floor area will cause the building to no longer comply with FAR and be out of compliance.

REVIEWED BY
Scott D. Pavan, RA
Borough Commissioner

[1] The PW1A also shows the "Synagogue Mezzanine" (page 4) has six dwelling units, which appears to be an error, but if this is true, then the zoning floor area reported in the ZD1 is vastly incorrect.

Challenge Denied
Date: 11/19/2018

At minimum, a new ZD1 (or a ZD1A) that demonstrates FAR compliance with this additional zoning floor area, corrects the mezzanine in the table, removes the 40th and 41st floors, adjusts floor area sums in the Proposed Floor Area table, includes existing floor area to remain in the Proposed Floor Area table, updates the section, plan and elevation to describe the building being proposed, and incorporates any other changes not detailed herein, is required. Alternatively, if the DOB agrees that the floor area in the synagogue mezzanine should be classified as zoning floor area, then it should issue an intent to revoke the zoning approval.

2. **The FDNY has unanswered questions regarding the safety of interbuilding voids. The Commissioner should not approve any unsafe building.**

The proposed building has an "interbuilding void,"[2] which is a large empty area that may be nominally used for accessory building mechanical purposes, but which is mostly empty space not intended for habitation. In the past, both the Department and the BSA have approved such spaces, which according to those interpretations may be of unlimited size.

Interbuilding voids are still a novel construction technique and at 161 feet floor-to-floor this one is the largest ever proposed. When the Special Lincoln Square District was adopted in 1993, such a concept was never considered because it was inconceivable. There is a substantial record regarding the design and adoption of the Special Lincoln Square District, which tells us that the district regulations were adopted, in part, to "control height" "in response to the issues raised by the height and form of recent developments."[3] The tallest of these "recent developments" was 545 feet,[4] which is over 200 feet shorter than the current proposal. New York City codes do not directly address interbuilding voids or their use, and developers, the DOB and the BSA have interpreted them just as they would any other mechanical floor.

But interbuilding voids are not just another mechanical floor. They are a new building technique that are not well addressed in any of our regulations. Just because they contain a nominal amount of mechanical equipment does not mean that they should be treated as any other mechanical floor. This is especially true since the Fire Department of the City of New York (FDNY) has expressed questions regarding the safety of this new construction technique. Once those concerns were expressed, all approvals of buildings using the technique should have been suspended until the FDNY questions were answered and stop work orders for buildings under construction should have been issued.

[2] "Intra-building void" would like[illegible] more accurate term, but the phrase "interbuilding void" now appears to be commonly [illegible] and continues its use.
[3] N 940127 (A) ZRM, December 20, [illegible]
[4] The Millennium Tower at 101 West 67th Street.

REVIEWED BY
Scott [illegible]
Challenge Denied
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It does not matter that the technique may be legal under zoning. The New York City Building Code clearly grants the Commissioner the powers to override an approval if there is an issue of "safety or health":

> Any matter or requirement essential for the fire or structural safety of a new or existing building or essential for the safety or health of the occupants or users thereof or the public, **and which is not covered by the provisions of this code or other applicable laws and regulations, shall be subject to determination and requirements by the commissioner in specific cases.**[5] [**Emphasis** added]

The FDNY's concerns

In 2017, I brought the concept of interbuilding voids to the attention of the FDNY. At that time, the Bureau of Operations - Office of City Planning was unfamiliar with this new building technique. I provided drawings in the hope that these drawings could be examined with a consideration for both fire safety and fire operations. Later, on May 3, 2018, the FDNY expressed the following concerns about a building with a large interbuilding void on East 62nd Street:

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.

These concerns and questions appear informal because they were sent out as an email by the FDNY Office of Community Affairs rather than a formal memorandum from the FDNY. I contacted the Bureau of Operations to confirm their accuracy, which that office did.

On August 31, 2018, I called Captain Simon Ressner, the person who put the FDNY's safety concerns in writing, asking him the status of the FDNY's concerns regarding interbuilding voids. He informed me that the FDNY has had no communication with the DOB since the DOB was informed of the FDNY's safety concerns. He also said that the FDNY had some communication with the Department of City Planning, where the FDNY's concerns were acknowledged, but no answers were provided.

REVIEWED BY
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[5] §28-103.8

Further, Captain Ressner told me that the FDNY had not been asked to comment on the West 66th Street building, and, indeed, only knew of its existence because I sent the ZD1 to him. When asked about the parts of the ZD1 for West 66th Street labeled "FDNY access," he informed me that he could not make a determination as to the adequacy of these spaces based upon so little information. He would need to see full building plans, which, according to our expediter, are not available to the public.

As a citizen of the City of New York, I have to say that this lack of communication or concern over FDNY's questions is shocking. All New Yorkers expect our City agencies to be working together and sharing information, but in this case it appears that the following is true:

1. A new building technique (the void) is introduced;
2. No one from the DOB informs the FDNY;
3. A private citizen brings this to the FDNY's attention;
4. FDNY expresses concern and asks several questions, in writing, regarding the safety of fire operations within the void;
5. Those questions are met with silence from the DOB;
6. DOB continues to approve buildings with the same technique, which are even larger and more extreme.

Most issues involving zoning challenges are technical and esoteric, impacting an element of form or use. While these issues are important, they almost never involve possible physical harm. The FDNY's questions rise to a completely different level. This is a question of building safety, a fundamental role of government, which has been left unanswered. The DOB should have never granted an approval to a building where the FDNY has expressed questions regarding fire safety and operations.

Building code §28-103.8 anticipates situations that are not well addressed in the Zoning Resolution, Building Code, and/or Construction Code and provides the Commissioner of Buildings the ability, indeed the obligation, to make a determination on this construction technique as an issue of public safety. Simply, safety trumps zoning, as it should.

Other agencies are also recognizing that interbuilding voids are a problem but not for the same reasons the FDNY has expressed. In a January 2018 town hall event, the Mayor and Chair of CPC Marissa Lago stated that interbuilding voids were a problem and that DCP was working with the Department of Buildings to find a solution. In May and September of 2018, I met with the head of the Manhattan office of DCP and her staff to discuss voids, what they are, and where they become problematic from an urban design and bulk perspective, and I understand that City Council land use [redacted] similar meetings and concerns. All agree that vast, oversized voids [redacted] 66th Street are a problem and that they undermine the intent of the bulk regulations in the Zoning Resolution, while not

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providing any public benefit. Council Member Rosenthal and Manhattan Borough President Brewer have both repeatedly and publicly voiced their concern about this technique as a loophole around zoning's bulk regulations that does nothing to improve the quality or amount of housing in the City.

But most importantly, this novel technique may not be safe. Our codes give Commissioner Chandler the authority to act to protect safety, and act he must.

3. Tower coverage and bulk packing are calculated on different parts of the zoning lot. They must be linked.

While the tower portion of a building constructed under the tower-on-base regulations has no height limit, height is *effectively* regulated by linking tower coverage to the "bulk packing" rule. We know this because the City Planning Commission (CPC) stated as much in their approval of the tower-on-base regulations:

> "The height of the tower would be 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%)."[6]

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

> "Furthermore, in 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.
>
> In response to the Community Board's concern that a height limit of 275 feet should be applied throughout the district, the Commission believes that specific 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."[7]

The key components of the tower-on-base regulations (tower coverage and floor area under 150 feet (the so-called bulk packing rule)) only function as intended when they are applied over the same lot area. Because this zoning lot is split by a zoning district boundary, the applicant, relying upon ZR 77-02, decided that tower coverage is calculated on the C4-7 portion of the zoning lot (35,105 SF), while the area under 150 feet is calculated on the entire zoning lot (54,687 SF), regardless of zoning district.

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Borough Commissioner

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[6] N 940013 ZRM
[7] N 940127 (A) ZRM

The applicant's reading of 77-02 is in error. While ZR 82-34 instructs that floor area under 150 feet should be calculated on the entire zoning lot, it does not also follow that tower coverage (82-36) should be calculated on a different portion of the zoning lot, as such a reading is contrary to the purpose of the tower-on-base regulations and leads to absurd results.

A basic principle of statutory construction is that the same phrase or term should be given a consistent meaning when interpreting a statute. In the applicant's interpretation, the term "zoning lot" means a large area (54,687 SF) under 82-34 (bulk packing) and a small area (35,105 SF) under 82-36 (tower coverage). Not only does this interpretation violate this basic principle that the same words should have the same meaning, it is also in conflict with the intent of the statute as detailed in the CPC findings.

Another bedrock principle of legislative construction, going back over 100 years,[8] is that legislatures do not intentionally act irrationally or promote absurd results.

> "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); City of Buffalo v. Roadway Transit Co., 303 N.Y. 453, 460-461 (1952); Flynn v. Prudential Ins. Co., 207 N.Y. 315 (1913).

It bears repeating: "A bad result suggests a wrong interpretation." In the context of the tower-on-base building form, the interpretation the applicant has proposed produces a bad result which goes against the intent of the regulations. Perhaps the best evidence for the bad result is the current application, which produces a building over 200 feet taller than the Millennium Tower, the 545-foot tower that created the impetus to adopt the amendments to the Special District. These amendments were, in part, intended to control building height and to prevent additional buildings like Millennium Tower. But more than that, if the applicant's interpretation was actually correct, and all floor area under 150 feet on the zoning lot counts as area under 150 feet, while tower coverage only counts in the R10 equivalent portion of the zoning lot, then this building could have easily been more absurd and more contrary to the intent of the special district regulations; the applicant appears to be showing restraint by not fully exploiting the loophole their 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

[8] This concept has been repeatedly affirmed in more recent years in both land use and other contexts. For example, in *Matter of Jamie J.*, 30 N.Y.3d 275 (2017), decided less than one year ago, the Court of Appeals wrote [illegible] not adopt 'vacuum-like' readings of statutes in 'isolation with absolute [illegible] is 'contrary to the purpose and intent of the underlying statutory [illegible] conflict with other operative features of the statute's core overview procedures."

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and are in the R8 zoning district. Using the applicant's logic and interpretation of the SLSD and 77-02, the applicant could have expanded their zoning lot to include these sites,[9] which would have added approximately 45,000 SF of existing floor area under 150 feet.[10] 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 applicant 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 being below 150 feet in the bulk packing calculations. The net effect of such an action would be to allow the tower to increase by two stories or 32 feet.[11]

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 CPC wrote in their 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*." [Emphasis added.]

If the applicant's interpretation were 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.

[9] With the consent of the owners of lots 9 and 10.

[10] The ZD1 interprets the 60% rule as 60% of the maximum allowable floor area on the lot, not the floor area permitted. The text of 82-34, however, instructs "60 percent of the total #floor area# permitted," which is not necessarily the maximum floor area allowed, and less floor area may be permitted than the maximum allowed. In the case of this building, the applicant's interpretation, while in error, is not material since the building is proposed at the maximum floor area allowed. In this hypothetical scenario, however, floor area permitted would require a literal interpretation of the text: the total floor area for which a permit is, or will be, granted.

[11] A 45,000 SF increase in area under 150 feet would mean that 40% of that area, or 18,000 SF, could be moved from the base of the proposed building into the tower over 150 feet, effectively allowing the tower to increase another two floors or 32 feet using 16 feet FTF heights. The height of the base can be maintained by shrinking the floor plate of the base, which would result in a better floor plate for residential use or by keeping the same floor plate and raising floor-to-floor heights by less than one foot per floor in the base.

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Scott D. Pavan, RA
Borough Commissioner

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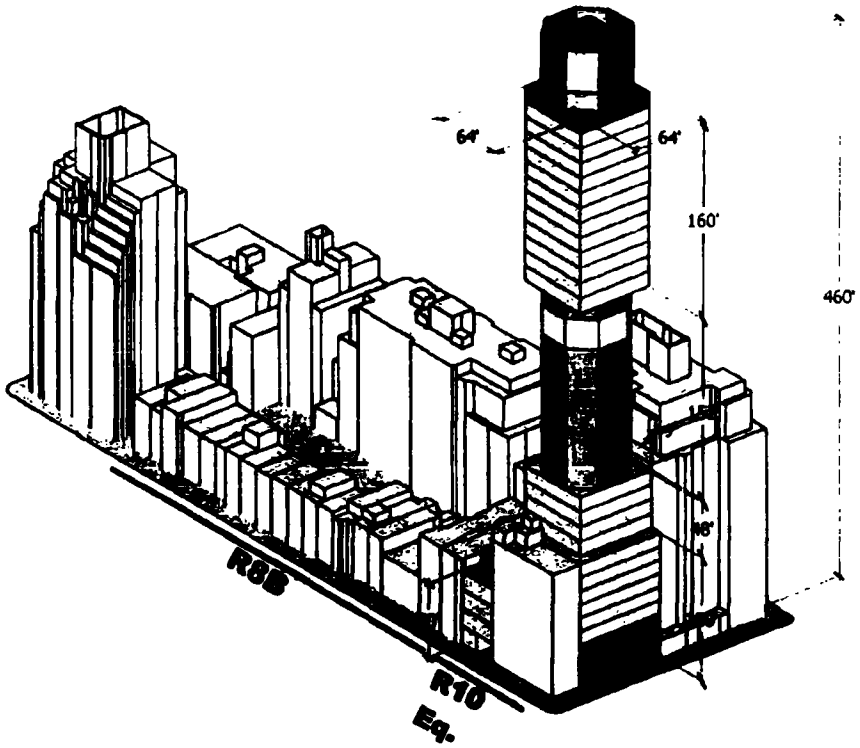
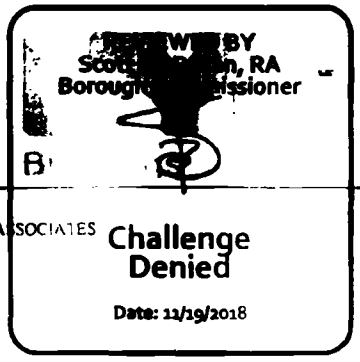
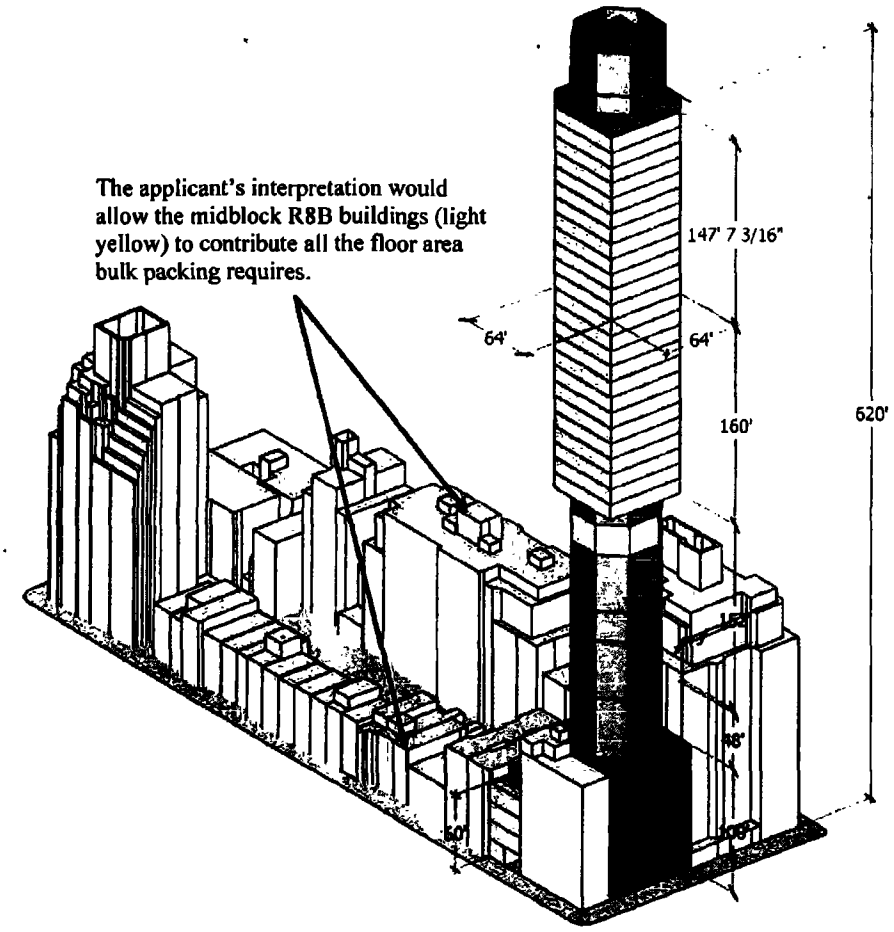


Actual tower-on-base proposal at 249 E. 62nd Street

This is another R10 equivalent tower-on-base building with a massive void. Here, the R10 equivalent portion of the lot extends only 100 feet 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 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:





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 their building.

While the absurdity of the result of this interpretation is self-evident, it must also be said that there is no [illegible] or design rationale for zoning text to be read as such. The 30% minimum tower coverage standard came out of DCP

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studies from 30 years ago[12] that found that older towers from the 1960s and 70s were largely at or near the 40% maximum coverage. Towers from the 1980s were smaller, averaging just 27% with some extreme cases as low as 20%. The record shows the 30% 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% on its zoning lot. At its smallest, it covers just 19%. It must cover between 30% and 40% of the zoning lot, which means it should be between 16,406 SF and 21,875 SF. The tower coverage is too small; the approval should be revoked.

4. Areas claimed for mechanical exemptions should be proportionate to their mechanical use.

The DOB has the responsibility to determine that spaces claimed as exempt from zoning floor area because they are used for mechanicals are, in fact, used for accessory building mechanicals and are reasonably proportionate to their use. If they are not, then the DOB must ask the applicant to redesign these spaces. Considering the size of the 18th floor, at 161 feet floor-to-floor, it seems unlikely that any such review took place.

We know that, in the past, the DOB required applicants to justify their mechanical exemptions and questioned the validity of these spaces. I am attaching a ZRD1 dated 3/12/2010 that was reviewed by then Manhattan Deputy Borough Commissioner Raymond Plumney. This document is the result of a DOB Notice of Objections dated 1/12/2010[13] where 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. This was a vital function that the DOB served in the past and there has been no statute that required a change in policy. As this building demonstrates, the DOB needs to police spaces that applicants are claiming are exempt to ensure that they are appropriate to the exemption. If it does not, the exemption is abused, which undermines the Zoning Resolution's bulk regulations. The DOB should reexamine the spaces claimed as exempt and require that they be proportionally sized for their mechanical purpose; if they are not, the DOB should revoke the approval.

---

[12] Regulating Residential Tow[illegible] Options, 1989; and Special Lincoln Square District Zoning Revi[illegible]
[13]The original Notice of Objections w[illegible]quested [illegible] the Freedom of Information Law in October 2017. It has [illegible]ot yet been pro[illegible]

REVIEWED BY [illegible] Borough Commissioner

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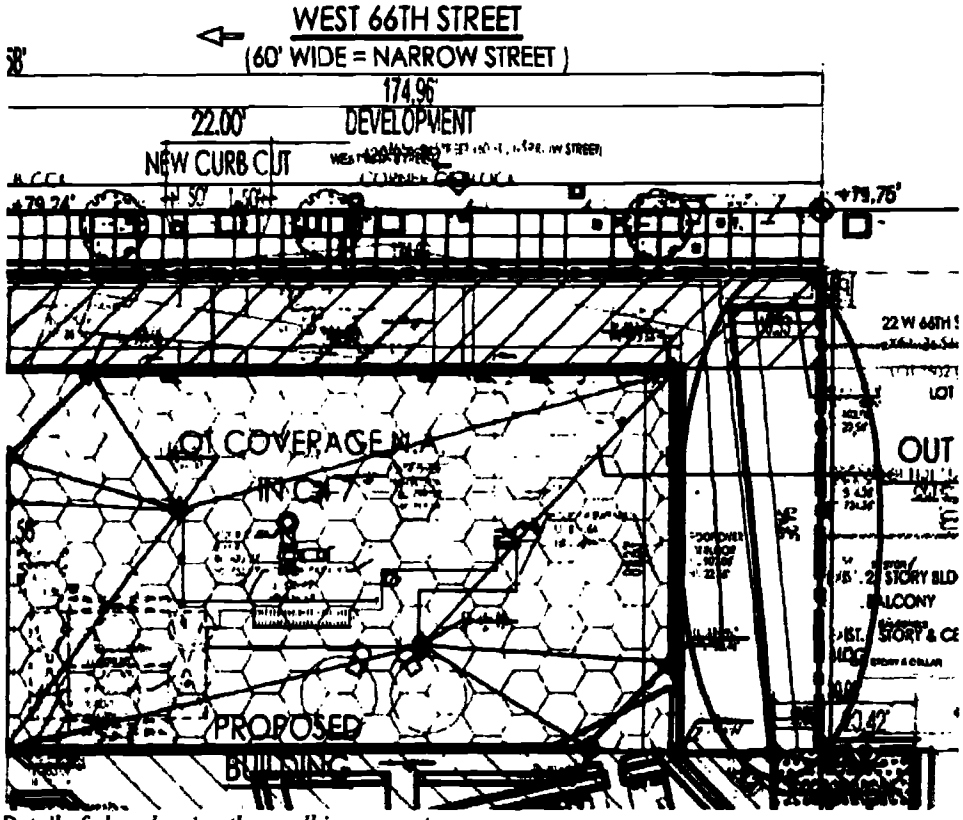
5. The small inner court is too small.

The ground level open space shown below is not a side yard because it does not extend to the front yard line. It is surrounded by building walls and a lot line, so therefore, it must be an inner court. While the numbers are hard to read on the ZD1, it appears that the plan shows the narrowest dimension for this small inner court to be just over nine feet.



Detail of plan showing the small inner court

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Scott D. Pavan, RA
Borough Commissioner

GEORGE M. JANES & ASSOCIATES Challenge Denied

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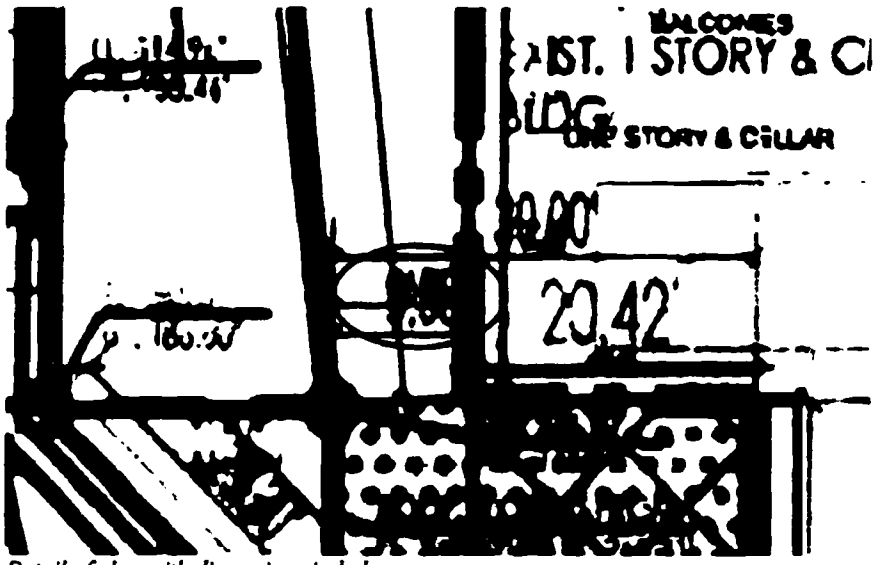

Detail of plan with dimension circled

The number shown appears to be 9.58 feet but that dimension is not taken at the narrowest location. ZR 23-851(b)(2) requires that this inner court be at least 10 feet wide. The zoning approval should be revoked.

Final thought: a self-imposed hardship

On October 24, 2016, the DOB gave this applicant an approval for a different building on the C4-7 portion of the zoning lot, which allowed the applicant to proceed with demolition and excavation. More than four months *prior* to DOB's 2016 approval, the Attorney General of the State of New York approved the sale of the Jewish Guild for the Blind (which is the former owner of the R8 portion of the zoning lot along West 65th Street) to the owner of this development. In November of 2017, a new design for the current zoning lot was announced to the public and shown to elected officials and neighbors. At this time, zoning approval was still not sought. During the 18 months between the initial zoning approval and the July 26, 2018 zoning approval, demolition, excavation and construction of the foundation continued, all based on an approval for a building no one intended to build. This clever exercise at obfuscation has allowed construction to progress far beyond what would be typical at this point in the approval process.

While not directly applicable to the Zoning Resolution, this issue matters because courts, the Board of Standards and Appeals, and perhaps the DOB, all care to varying degrees about the hardship their decisions can create, especially for developers who have already invested significant financial resources. If a building is substantially constructed and an error in the approval is found, the more likely the error and the building will be allowed to stand, especially if a court is involved. In this [illegible] substantial progress the applicant made on construction is [illegible] to the 18 months of construction activity between the DOB's initial approval of a building that was never intended to be

built, and its approval of this current proposal. Had the applicant filed for zoning approval in 2016 when the NYS Attorney General approved their acquisition, or even when the proposal was shown to the public in November 2017, this challenge would have been filed much earlier in the construction process. Any hardship created because of a correction of an error in the approval is entirely self-imposed and should not be a consideration for any administrative or legal entity.

Close
Thank you for consideration of these issues and your efforts to make New York City a better place. If you have any questions, please contact me directly at george@georgejanes.com.

Sincerely,

George M. Janes, AICP, George M. Janes & Associates

For

Sean Khorsandi, Executive Director, Landmark West!

And

John Waldes, President, 10 West 66th Street Corporation

With support from:

Gale Brewer, Manhattan Borough President

Helen Rosenthal, New York City Council Member

REVIEWED BY
Scott D. Pavan, RA
Borough Commissioner
Challenge
Denied
Date: 11/19/2018

Brad Hoylman

Brad Hoylman, New York State Senator

Richard N. Gottfried, Member of New York State Assembly

Attachments: ZD1, PW1A for 36 West 66th Street, ZRD1 9631

CC: Bill de Blasio, New York City Mayor
Corey Johnson, New York City Council Speaker
Edith Hsu-Chen, Director, Manhattan DCP
Erik Botsford, Deputy Director, Manhattan, DCP
Beth Lebowitz, Director, Zoning Division, DCP
Captain Simon Ressner, Fire Department, City of New York
Raju Mann, Director, Land Use, New York City Council
Roberta Semer, Chair, Community Board 7

[redacted]
Borough Commissioner

GEORGE M. JANES & ASSOCIATES

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ZONING CALCULATIONS

SITE PLAN

ZD1 Zoning Diagram

NYC Buildings

Challenge Denied

Date: 11/19/2018

REVIEWED BY Borough Commissioner's Office

Scott G. Pavlides, RA

Location Information

House No(s) 36

Street Name West 66th Street

Borough Manhattan

Block 1118

Lot 45

Bin 1028168

Submitted to resolve objections stated in a notice of intent to revoke issued pursuant to rule 101-15. ☐YES ☒NO

Fabrication of any statement is a misdemeanor and is punishable by a fine or imprisonment, or both. It is unlawful to give to a city employee or to accept any benefit, monetary or otherwise, either as a gratuity for properly performing his job or in exchange for special consideration. Violation is punishable by imprisonment or fine or both. I understand that if I am found after hearing to have knowingly or negligently made false statement or to have knowingly or negligently falsified or allowed to be falsified any certificate, form, signed statement, application, report or construction of the commission of a violation required under the provisions of this code or of a rule of any agency, I may be barred from filing further applications or documents with the Department.

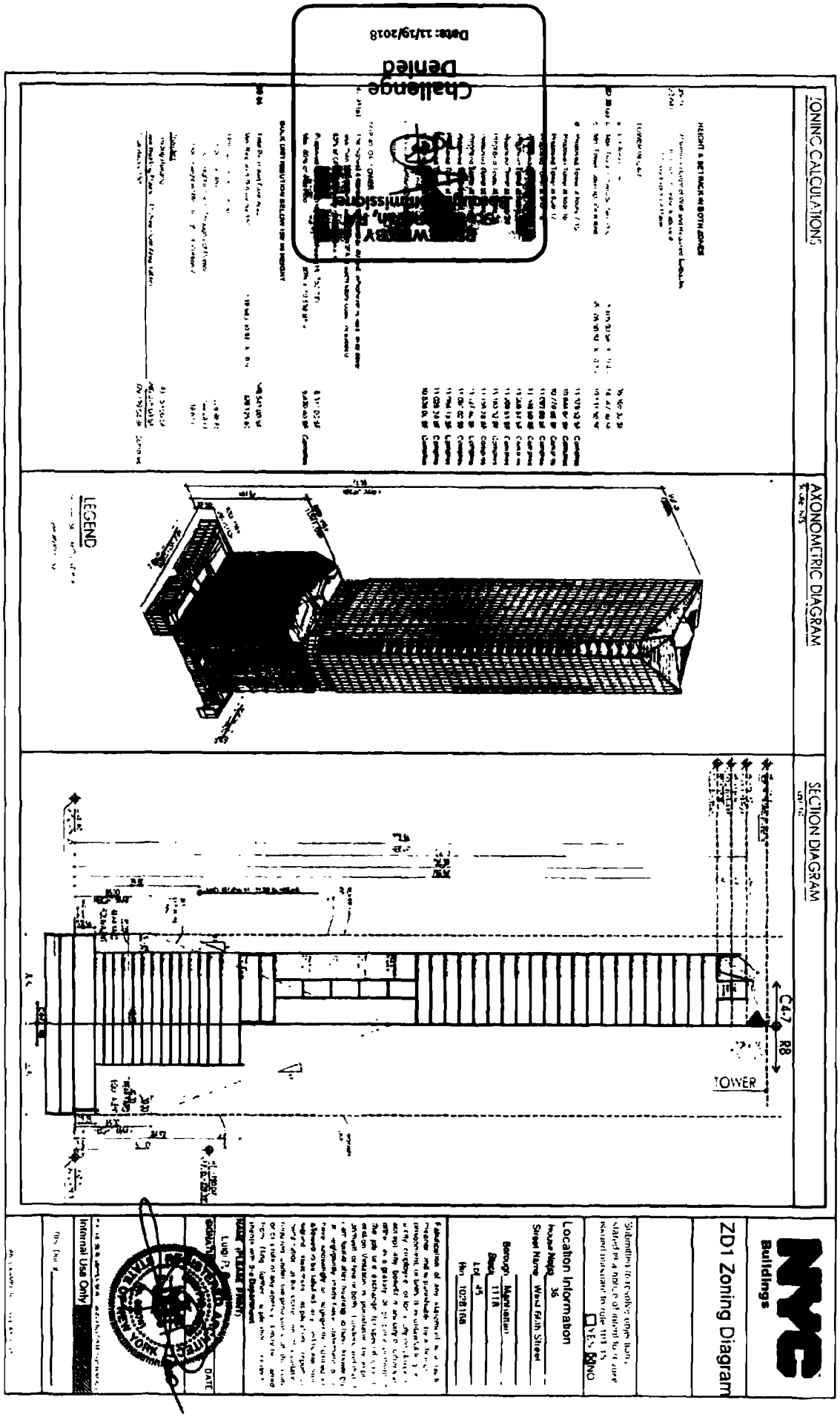
NAME (PLEASE PRINT) Luigi P. Pennacchi

SIGNATURE DATE

Internal Use Only

BIS Doc #

PLAN EXAMINER SIGN AND DATE


ZONING CALCULATIONS
AXONOMETRIC DIAGRAM
SECTION DIAGRAM
LEGEND
C4-7
R8
TOWER
NYC Buildings
ZD1 Zoning Diagram
Location Information
Borough Manhattan
Block 1118
Lot 45
BIN 1078108
Internal Use Only
Challenge Denied
Date: 11/19/2018

NYC Buildings

ZD1 Zoning Diagram

Must be typewritten
Sheet 2 of 2

ZD1 Sheet 2 of 2

1 Applicant Information *Required for all applications*

Last Name Russo First Name Luigi Middle Initial

Business Name SLCE Architects, LLP Business Telephone (212) 979-8400

Business Address 1359 Broadway, 14th Floor Business Fax (212) 979-8387

City New York State NY Zip 10018 Mobile Telephone

E-Mail lrusso@slcearch.com License Number 020741

2 Additional Zoning Characteristics *Required as applicable*

Dwelling Units 127 Parking area sq. ft Parking Spaces Total Enclosed

3 BSA and/or CPC Approval for Subject Application *Required as applicable*

Board of Standards & Appeals (BSA)

Variance Cal. No Authorizing Zoning Section 72-21

Special Permit Cal. No. Authorizing Zoning Section

General City Law Waiver Cal. No General City Law Section

Cal. No.

City Planning Commission (CPC)

Special Permit ULURP No Authorizing Zoning Section

Authorization App. No Authorizing Zoning Section

Certification App. No Authorizing Zoning Section

App. No

Challenge Denied
Date: 11/19/2018

4 Proposed Floor Area *Required for all applications One Use Group per line*

Floor Number	Building Code Gross Floor Area (sq. ft.)	Use Group	Zoning Floor Area (sq. ft.) Residential	Community Facility	Commercial	Manufacturing	FAR
SUB	27,751.62	2B	0				0
SUB	9,362.04	4A		0			0
CEL	27,721.93	2B	0				0
CEL	9,391.64	4A		0			0
001	9,370.60	2	8,923.74				0.16
001	22,405.49	4A		22,405.49			0.41
MEZ1	1,691.49	2	910.32				0.02
MEZ1	2,020.23	4A		0			0
002	20,478.30	2	19,507.39				0.36
003	20,478.30	2	19,509.56				0.36
004	20,478.30	2	19,509.56				0.36
005	20,478.30	2	19,509.56				0.36
006	20,478.30	2	19,531.28				0.36

4 Proposed Floor Area *Required for all applications One Use Group per line*

Floor Number	Building Code Gross Floor Area (sq. ft.)	Use Group	Zoning Floor Area (sq. ft.) Residential	Community Facility	Commercial	Manufacturing	FAR
007-008	40,956.60	2	39,062.52				0.71
009-014	122,869.80	2	117,206.64				2.14
015	17,402.80	2	0				0
016	10,644.84	2B	7,748.54				0.14
017	6,837.02	2	0				0
018	10,240.55	2	0				0
FDNY AC 1	334.25	2	334.25				0.01
FDNY AC 2	334.25	2	334.25				0.01
FDNY AC 3	334.25	2	334.25				0.01
FDNY AC 4	334.25	2	334.25				0.01
019	10,916.98	2	0				0
020-026	78,459.99	2	75,739.86				1.38
027-031	56,042.85	2	54,076.90				0.99
032-033	22,417.14	2	21,631.76				0.40
034	11,208.58	2	10,883.73				0.20
035	11,183.38	2	10,858.54				0.20
036	11,156.28	2	10,831.50				0.20
037	11,127.40	2	10,802.62				0.20
038	11,097.02	2	10,747.10				0.20
039	10,626.00	2	4,756.95				0.09
040	928.55	2	0				0
041	927.82	2	0				0
Totals	658,286.81		483,083.05	22,405.49			9.24

Total Zoning Floor Area	505,488.54

07/08

EXHIBIT G

December 18, 2017
Email from David Karnovsky to Council Land Use, Office of Council Member Helen Rosenthal Staff

All:

Thank you for meeting last week to discuss the Extell development on West 66th Street. Below is the additional information you requested, as well as a response to the issue raised why minimum and maximum tower lot coverage has been calculated on the basis of the lot area of the C4-7 portion of the zoning lot only.

A. **Addresses of Off-Site Affordable Housing Units**

33 West End Avenue

40 Riverside Boulevard

B. **BSA Appeal Re Mechanical Spaces**

Interpretive Appeal No. 2016-4327-A,
15 East 30th Street, Manhattan
Block 860, Lot 12, 63, 67, and 69

C. **Mechanical Deductions on Occupied Tower Floors**

The tower floor plates vary slightly in size. Some illustrations:

10th Floor: ZFA 11,035/ Deductions 544.41

20th Floor: ZFA 10,844.45/ Deductions 364.12

38th Floor: ZFA 10,800.41/ Deductions 296.30

D. **ZR 82-34 Bulk Distribution**

Total Permitted Floor Area: 548,539

Minimum Required Floor Area Below150 Feet: 329,124

Provided Below 150 Feet: 329,200

E. **Calculation of Tower Lot Coverage/ZR 77-02**

Raju and Dylan suggested at our meeting on Thursday that the calculation of tower lot coverage under ZR 82-36 should be based on the entire zoning lot, inclusive of the R8 portion, citing to the language of ZR 82-36 (a) (1) and (2) which refers to the 'lot area of the zoning lot.' For the reasons discussed below, this approach would be inconsistent with the clear and consistent application of the split lot rules under the Zoning Resolution.

To begin with, it is important to note that the language of ZR 82-36 is no different from many other provisions of the Zoning Resolution which use the phrase "of the zoning lot" to specify requirements of, or limitations upon, development. In addition to tower regulations, these include, for example, street wall regulations and lot coverage regulations. As used throughout the Zoning Resolution, the phrase "of the zoning lot" *always* refers only to that portion of the zoning lot located within the zoning district to which the regulation applies. For example, street wall requirements in contextual districts frequently specify that street walls are required along the "full wide street frontage of the zoning lot." This does not mean that street walls are required for a portion of the wide street frontage of a zoning lot located in a non-contextual district, but rather only in the portion of the zoning lot governed by the contextual district.

Like ZR 82-36, all other provisions of the Zoning Resolution governing tower lot coverage base the calculation on the lot area "of the zoning lot' (see e.g., ZR 23-65, 23-651, 33-45, 33-454, 33-455,35-63) , and tower lot coverage under those provisions is always measured only over the portion of the zoning lot to which the tower regulations apply.

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 and such zoning lot did not exist on December 15, 1961, or any applicable subsequent amendment thereto, *each portion of such zoning lot shall be regulated by all the provisions applicable to the district in which such portion of the zoning lot is located…"* (emphasis added). Here, the zoning lot was only recently established, and the provisions of ZR 77-02 therefore apply.

As interpreted and applied by DOB and BSA (and as upheld by the courts in the Beekman Hill Assoc. v Trump litigation) the split-lot provisions of ZR 77-02 quoted above are applied on a regulation by regulation basis; in other words, a zoning lot may be viewed as a split lot for purposes of applying one set of zoning regulations and as a single zoning lot for other purposes. The distinction depends on whether the regulations in question apply in both portions of the zoning lot or in one portion only.

Here, the tower regulations applicable to the Extell site (ZR 33-45 and ZR 35-64, as modified by ZR 82-36)) apply only to the portion of the zoning lot located in a C4-7 district. There is no ability to construct a tower in the portion of the Extell zoning lot mapped R8 (development of a tower in the R8 portion of a split lot is only possible under the conditions set forth in ZR 77-29, which plainly do not apply). Accordingly, the calculation of tower lot coverage is measured on the basis of the portion of the zoning lot governed by the tower regulations, i.e., the C4-7 portion.

It is important to note that this is not an issue of 'first impression'. The split lot condition found at the Extell site, with only one portion of the zoning lot located in a tower zone, exists in many locations on the Upper East Side, Upper West Side and elsewhere, where the zoning lot is divided between a Tower zone and an R8-B, R8 or R7-2 district. In these situations, tower lot coverage has consistently been calculated based on the lot area of the tower zone portion of the zoning lot only.

At the meeting, it was pointed out that the calculation of bulk distribution under ZR 82-34 is based on the floor area of the entire zoning lot and an argument was made that the same should therefore apply to the calculation of tower lot coverage. However, unlike the tower regulations of ZR 82-36, 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 district designation. This is clear both under the language of ZR 82-34 as well as in the CPC Report approving the 1993 amendments to the Lincoln Square Special District regulations which added ZR 82-34. See CPC Report N 940127 (A), dated December, 20 1993, 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.." Unlike in the case of ZR 82-36, the split lot rules therefore do not apply to the calculation of bulk distribution on the Extell site under ZR 82-34 because the regulations of that section apply to both the R8 and C4-7 portions of the zoning lot.

In short, calculating the tower lot coverage of the Extell building under ZR 82-36 on the basis of a 'denominator' which includes the R8 portion of the zoning lot would be wholly inconsistent with the split lot rules of Article 7, Chapter 7 and contrary to years of precedent under which tower coverage has been determined based solely on the portion of a split lot governed by the tower regulations. Accordingly, the calculation of minimum and maximum permitted tower lot coverage on the Extell site is a lawful and proper application of the Zoning Resolution.

The above reflects an understanding of the Zoning Resolution that is shared by the agencies and our colleagues in the land use bar. Since this is a somewhat informal overview of the points we wish to make in more detail, we would welcome the opportunity to discuss this further with you, as well as provide examples of tower developments built consistent the methodology we describe. Michael Parley, Ivan Schonfeld and I are available to meet early this week to have a technical discussion among the land use professionals. Once we have gathered documentation concerning precedent buildings, we would be glad to meet again and review further after the holidays.

We understand the importance you attach to determining whether the building is as of right, and think it important for us to fully vet this issue with you so that your conclusions are based on full information. We hope you agree and will take us up on the offer to meet again and continue our dialogue.

Best

David Karnovsky

David Karnovsky
Partner

Fried, Frank, Harris, Shriver & Jacobson LLP
One New York Plaza, New York, NY 10004
friedfrank.com

EXHIBIT H

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]

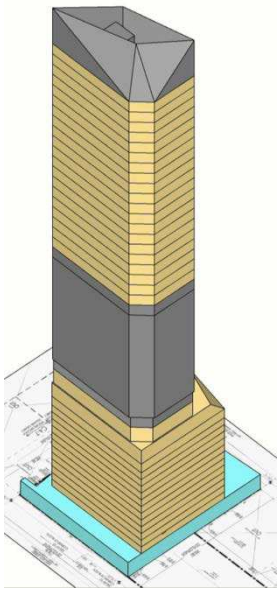


Diagram of George M. Janes

[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.

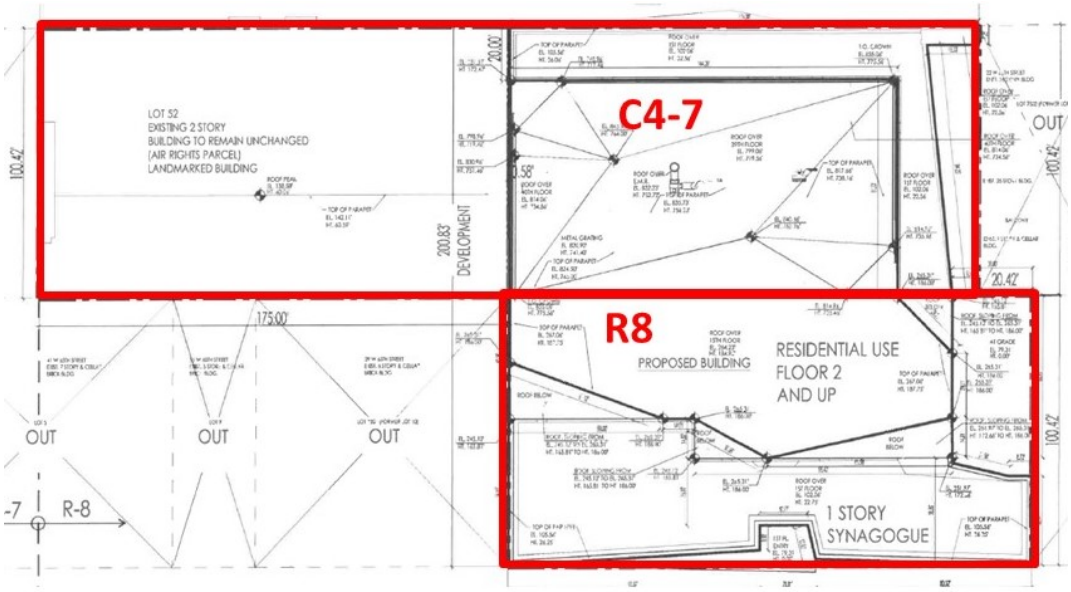


Diagram of George M. Janes

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.

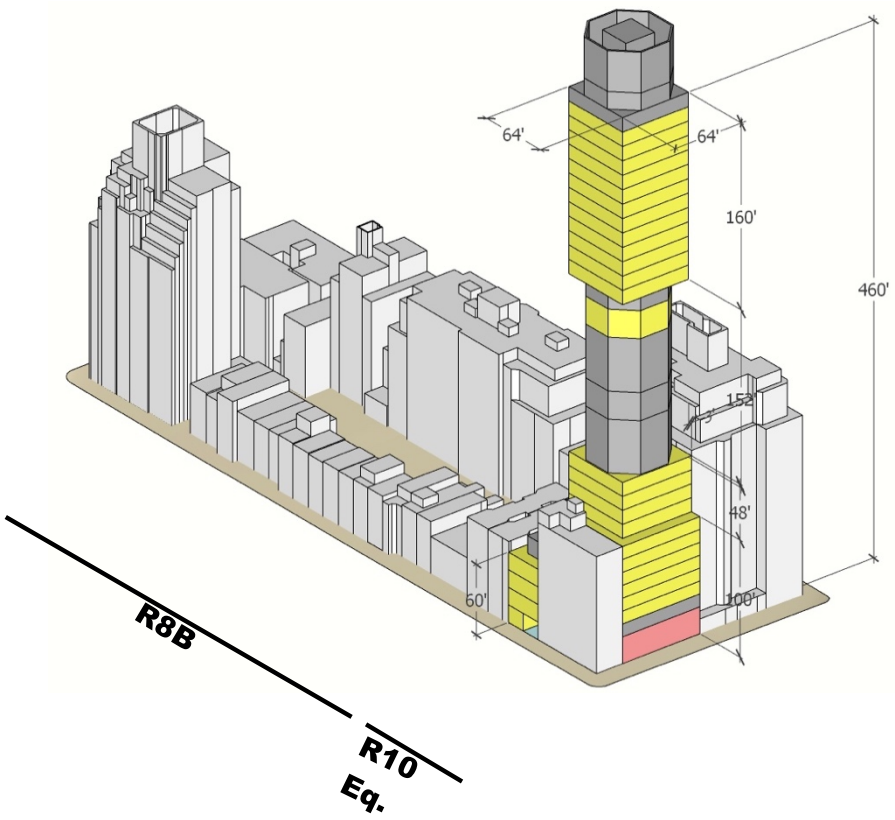
For example, directly to the west and south of the subject zoning lot, there are Lots 9 and 10, which contain existing buildings that are both entirely below 150 feet and are in the R8 District. Using the Owner's logic and interpretation of the SLSD and ZR § 77-02, the applicant could have expanded its 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.

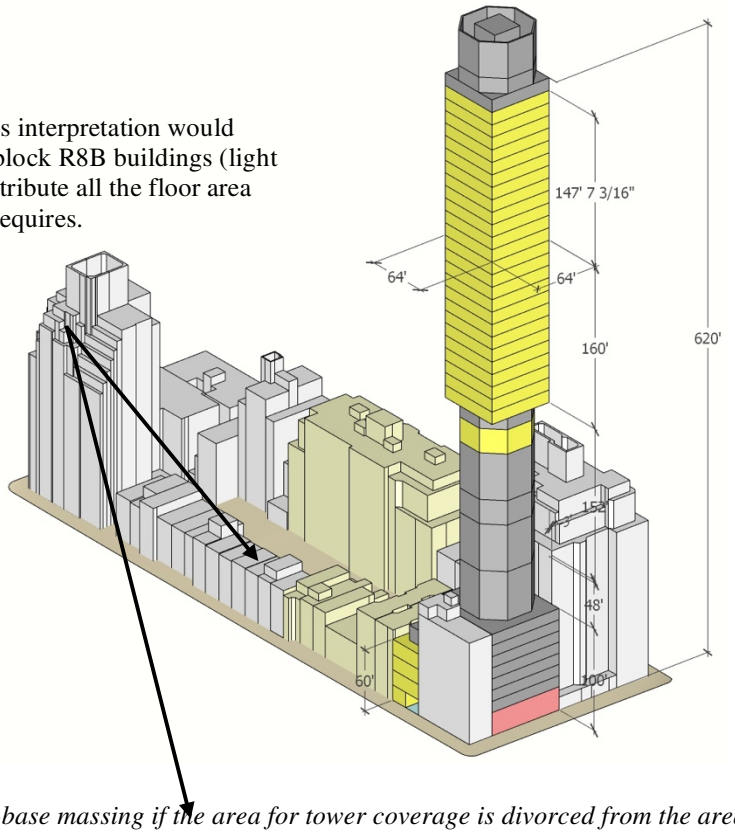
[7] The 45,000 SF increase in area under 150 feet would mean that 40 percent of that area, or 18,000 SF, could be moved from the base of the proposed building into the tower above 150 feet, effectively allowing the tower to increase another two floors or 32 feet using 16 feet FTF heights.



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.

Dated: December 19, 2018

_____/s/_____
JOHN R. LOW-BEER
415 8th Street
Brooklyn, NY 11215
(718) 744-5245
jlowbeer@yahoo.com

_____/s/_____
CHARLES N. WEINSTOCK
8 Old Fulton Street
Brooklyn, NY 11201
(323) 791-1500
cweinstock@mac.com

EXHIBIT I

NYC Buildings

Rick D. Chandler, P.E.
Commissioner

Martin Rebholz
Borough Commissioner
Manhattan Office

280 Broadway, 3rd Fl.
New York, NY 10007
x@buildings.nyc.gov

+1 212 393 2615 tel
+1 646 500 6170 fax

January 14, 2019

Luigi Russo (Applicant)
SLCE Architects, LLP
1359 Broadway
New York, NY 10018

David Rothstein (Owner)
West 66th Sponsor LLC
805 Third Avenue
New York, NY 10022

Re: INTENT TO REVOKE APPROVAL
36 West 66th Street, New York, NY 10023
Block: 1118, Lot 45
NB Job Application Number: 121190200 (the "Proposed Building")

To Whom It May Concern,

The Department of Buildings (the "Department") intends to revoke the approval of construction documents in connection with the NB job application referenced above, pursuant to Section 28-104.2.10 of the Administrative Code of the City of New York ("AC"), within fifteen calendar days of the posting of this letter by mail unless sufficient information is presented to the Department to demonstrate that the approval should not be revoked. Specifically, the Department intends to revoke the approval of the Zoning Diagram ("ZD1") approved and posted on the Department's website on July 26, 2018 (the "Subject ZD1"). The Subject ZD1 is in connection with Post Approval Amendments ("PAA") 15 through 18 for the Proposed Building which have not been approved.

Pursuant to AC § 28-104.2.10, the Department may revoke approval of construction documents for failure to comply with the provisions of the AC, other applicable laws or rules, or whenever a false statement or misrepresentation of material fact in the submittal documents upon the basis of which the approval was issued, or whenever any approval or permit has been issued in error.

The Department intends to revoke the approval of the Subject ZD1 for the following reasons set forth in the attached objections. 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 a floor-to-floor height of approximately 160 feet is not customarily found in connection with residential uses.

NYC Buildings

Accordingly, the ZRD2 issued on November 19, 2018, in response to a public challenge pursuant to 1 RCNY § 101-15, of the Subject ZD1, is hereby rescinded. An approved ZD1 shall be posted at the time of the approval of the associated PAA.

In order to prevent revocation of the approval upon the expiration of the fifteen-day notice period, you must contact the Development HUB office immediately to schedule an appointment to present information to the Department demonstrating that the ZD1 approval should not be revoked. Your response may be deemed unresponsive if the architect or engineer of record fails to attend the appointment.

Sincerely,

Martin Rebholz, RA
Borough Commissioner

Martin Rebholz, R.A.
Borough Commissioner

MR/po

Cc: John Raine, Deputy Borough Commissioner
Calvin Warner, Chief Construction Inspector
Rodney Gittens, Deputy Borough Commissioner
Premises File

NYC Development Hub
Department of Buildings
80 Centre Street
Third Floor
New York, New York 10013
nycdevelopmenthub@buildings.nyc.gov

Notice of Comments

Owner: David Rothstein
West 66th Sponsor LLC
805 Third Ave. NY, NY 10022

Applicant: Luigi Russo
SLCE Architects, LLP
1359 Broadway NY, NY 10018

Date: 01/14/19
Job Application #: **121190200**
Application Type: NB
Premises Address: 36 West 66 St.
Zoning District: C4-7
Block: 1118 **Lot:** 45 **Doc(s):**

Examiner's Signature: Marguerite Baril Job Description: NB

Obj. #	Doc #	Section of Code	Comments	Date Resolved	Comments
1	16	ZR 12-10	The proposed mechanical space on the 18th floor does not meet the definition of "accessory use" as per ZR 12-10 (b). Specifically, mechanical space with a floor-to-floor height of approximately 160 feet is not customarily found in connection with residential uses.		

1

PER-12 (6/05)
R. 000087

EXHIBIT J

NYC Department of Buildings

Work Permit Data

Premises: 36 WEST 66 STREET MANHATTAN **Filed At: 36 WEST 66TH STREET MANHATTAN**

BIN: 1028168 Block: 1118 Lot: 45 **Job Type: NB - NEW BUILDING**

View Permit History | Printable (PDF) version of this Permit

DOB NOW: *Inspections*

Job No:	121190200			**Fee:**	STANDARD
Permit No:	121190200-01-NB	**Issued:**	04/11/2019	**Expires:**	04/10/2020
Seq. No.:	06	**Filing Date:**	04/10/2019 RENEWAL	**Status:**	REISSUED
Work:	NEW BUILDING - NEW BUILDING	**Proposed Job Start:**	06/07/2017	**Work Approved:**	05/09/2017

Related fence job no.: 121190200

Use: R-2 - RESIDENTIAL: APARTMENT HOUSES **Landmark:** NO **Stories:** 41

Site Fill: ON-SITE

Review is requested under Building Code: 2014

Total Number of Dwelling Units at Location: 127

Number of Dwelling Units Occupied During Construction: 0

Adding more than three stories: No

Removing one or more stories: No

Performing work in 50% or more of the area of the building: No

Demolishing 50% or more of the area of the building: No

Performing a vertical or horizontal enlargement adding more than 25% of the area of the building: No

Mechanical equipment other than handheld devices to be used for demolition or removal of debris to be used: No

Altering 10% or more of the existing floor surface area of the building: No

Approved work includes concrete: Yes

Concrete work has been completed: No

Requesting concrete exclusion now: No

Work includes 2,000 cubic yards or more of concrete: Yes

Site Safety Rule : SOURCE REQUIRED ITEM

Issued to: SCOTT HAMBURG

GC SAFETY REGISTRATION: GC 016836

Business: LENDLEASE(US)CONSTRUCTION
200 PARK AVE NEW YORK NY 10166

Phone: 212-592-6806

Site Safety Manager: GEORGE W ZIMMERMAN.JR

License No: M002514

Business:

Phone: 718-234-8547

2062 62ND STREET 2ND FLOOR BROOKLYN NY 11204

Concrete Subcontractor

Applicant/contractor performing the concrete work for this permit: Yes

CONCRETE CONTRACTOR: JOHN O LOMBARDI
Business: CIVETTA COUSINS JV, L.L.C
1100 EAST 156TH STREET BRONX . NY

GC SAFETY REGISTRATION
Registration No: 000625 - GC
Phone: 718 - 991 - 5100

CONCRETE SAFETY MANAGER: VALON ADEMAJ
Business: CIVETTA COUSINS JV, LLC
1100 EAST 156TH STREET BRONX NY

CONCRETE SAFETY MANAGER
Registration No: 002355 - CS
Phone: 718 - 991 - 5100

If you have any questions please review these Frequently Asked Questions, the Glossary, or call the 311 Citizen Service Center by dialing 311 or (212) NEW YORK outside of New York City.

EXHIBIT K

RESIDENTIAL MECHANICAL VOIDS FINDINGS

Building Permits Issued b/w 2007 and 2017

R6 through R10 Districts

April 2018

(Updated: February 2019)

R6/R7/R8 Study

- Between 2007 and 2017, 718 new building permits were issued within the study area
- 49 out of the 718 buildings exceeded the optimum ***height factor*** heights of 21 stories in R8, 15 stories in R7, or 13 stories in R6
- None exhibited large mechanical voids

SUMMARY OF DETAILED STUDY FINDINGS

District/ Bulk	# of Buildings Surveyed	Large voids
R8/HF	10	0
R7/HF	17	0
R6/HF	22	0

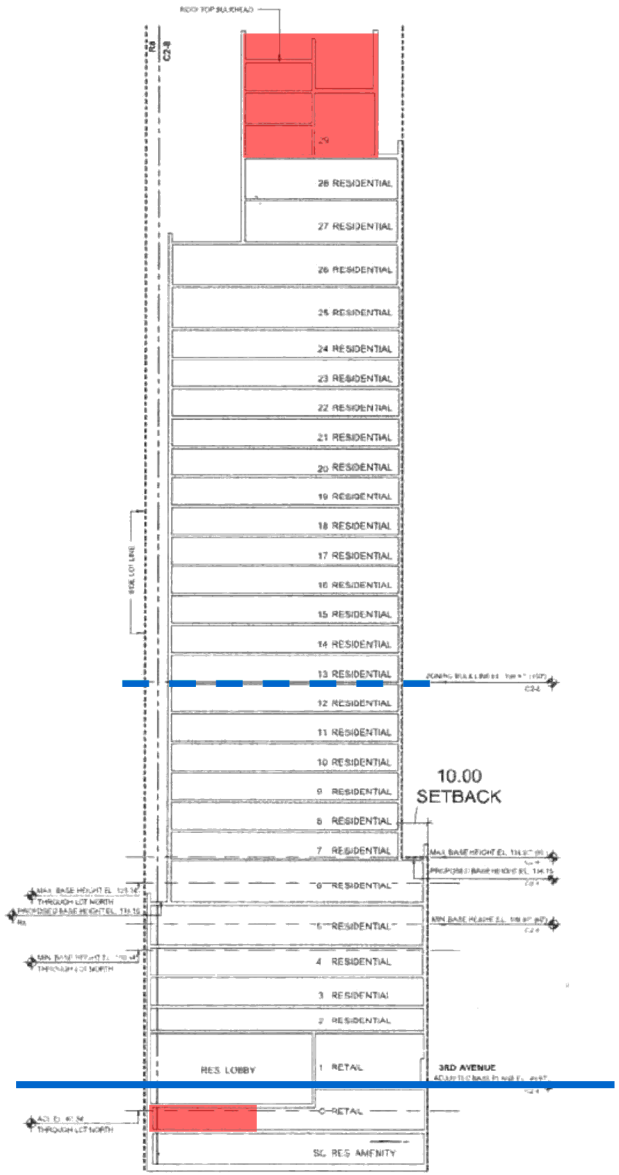
R9/R10 Study

- Taller buildings in these districts are called *towers* whose bulk is controlled by setbacks, lot coverage, etc.
- Between 2007 and 2017, 78 new building permits were issued
- 46 buildings exceeded the contextual Quality Housing heights of 21 stories in R10, or 14 stories in R9
- 10 of those buildings were NYC sponsored or special permit projects
- The remaining 36 building permits were carefully reviewed
- One 2018 building permit with visible mechanical voids issue was added to the study

SUMMARY OF DETAILED STUDY FINDINGS

District/ Bulk	# of Buildings Surveyed	Large Voids
R10/TOB	12	1
R10/ST	24	6
R9/ST	1	0
Overall	37	7

Typical Residential Tower
C2-8(R10)/TOB: 1681 Third Avenue



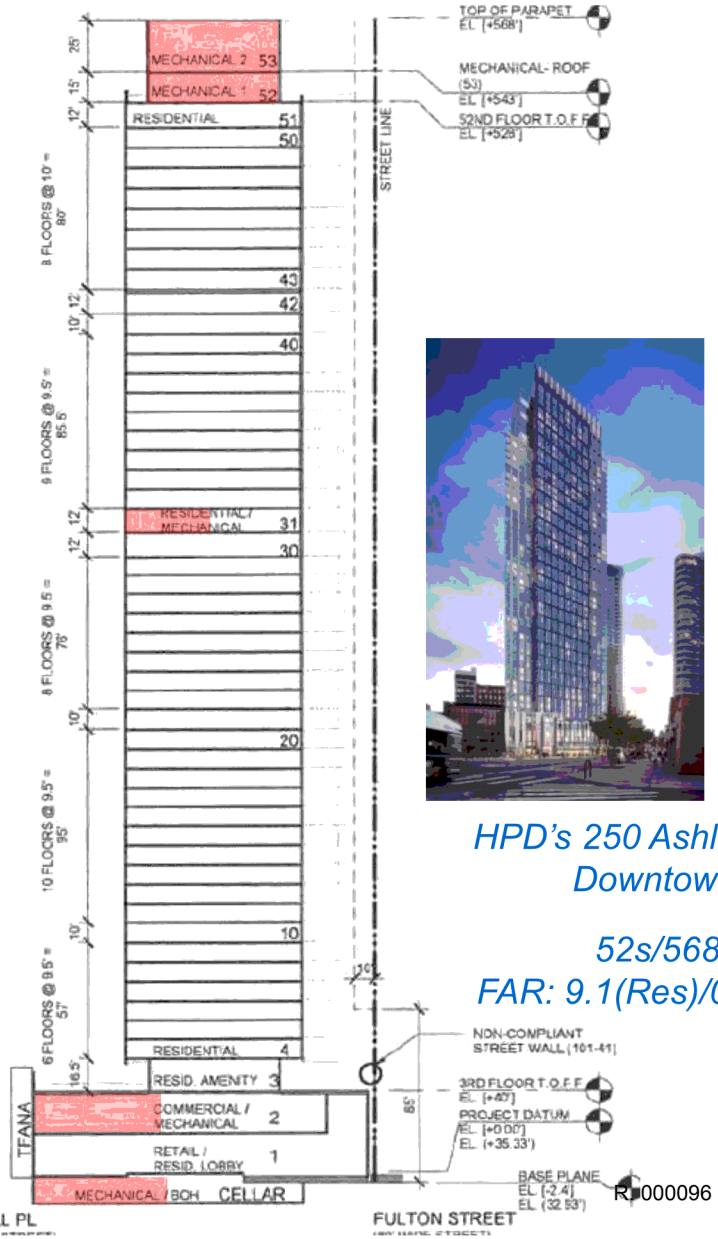
A typical *tower-on-a-base* (TOB) building has:

- Limited commercial mechanical space on a lower floor
- Most, if not all, residential mechanical spaces are located in the cellar and in a mechanical penthouse

Typical Residential Tower

Typical Mechanical Floors

- Only a few TOB buildings had a mechanical floor below the highest residential floor (exclusive of cellars)
- Many non-TOB towers had one or more mechanical floors below the highest residential floor. Their typical height was 12-15 feet, but some exceeded 20 feet.



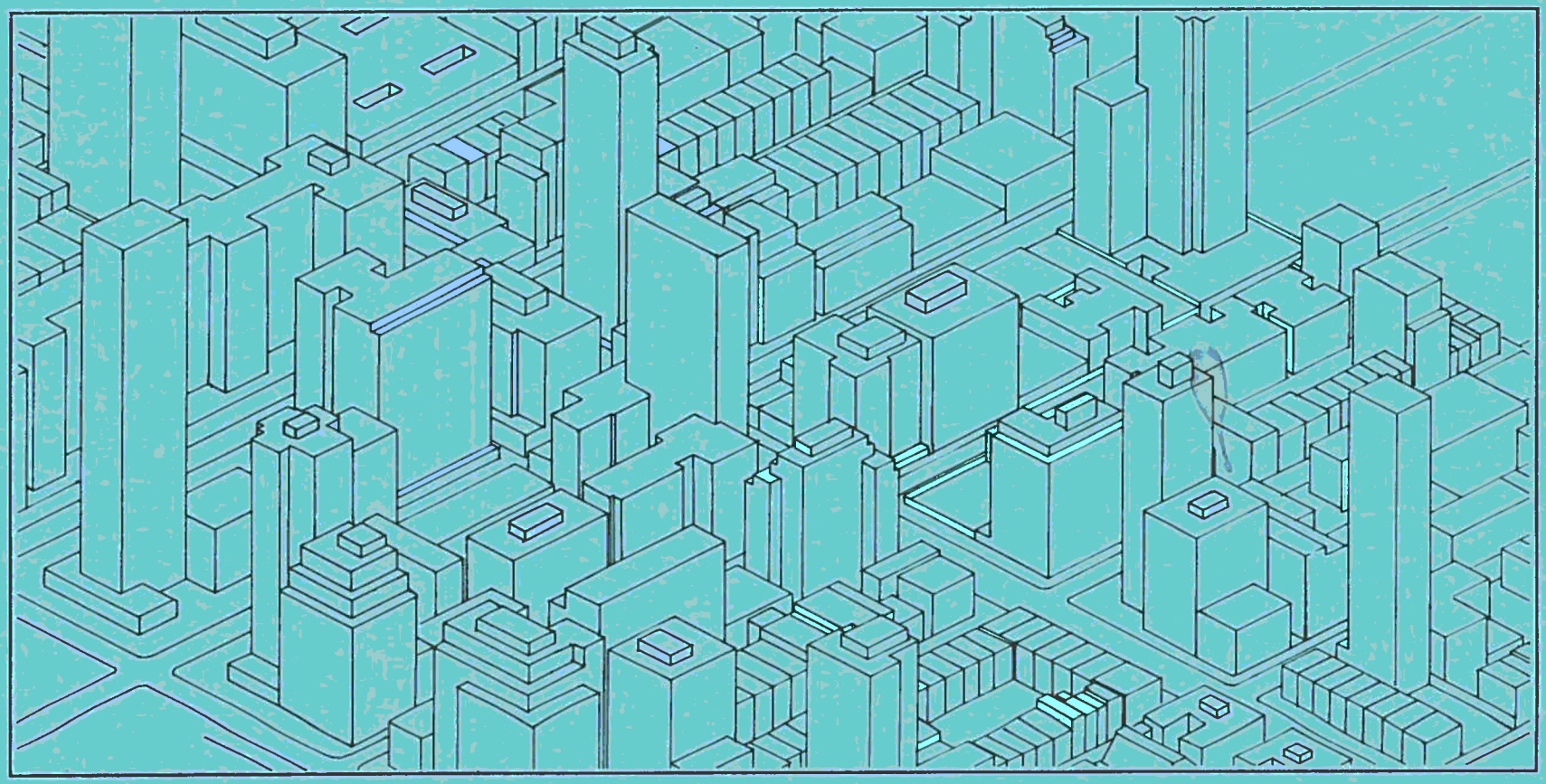
HPD's 250 Ashland Place, Downtown Brooklyn

52s/568', 585 DUs
FAR: 9.1(Res)/0.44(CF/C)

EXHIBIT L

Regulating Residential Towers and Plazas: Issues and Options

A Discussion Document



Department of City Planning/New York City

R. 000098

Regulating Residential Towers and Plazas: Issues and Options

A Discussion Document

Edward I. Koch, Mayor
City of New York

New York Department of City Planning
Sylvia Deutsch, Director
Con Howe, Executive Director

November 1989
NYC DCP #89-46

Introduction

Purpose

This publication presents various options for public discussion and further analysis to address a series of interrelated problems affecting the quality and character of residential development in high density areas, such as the Upper East Side of Manhattan. The issues discussed herein--tower regulations for high density residential districts, zoning lot mergers, and the residential plaza bonus--involve complex policy and technical questions, especially in the areas of urban design and economics. As such, members of the civic, professional and development communities may have different experiences and perspectives involving design and economic aspects of residential development which must be explored and discussed before a specific plan of action is undertaken.

These proposals evolved through several years of planning and urban design study by the Department of City Planning (DCP). The department's aim is to resolve these problems in an integrated manner and to offer a comprehensive planning framework for guiding future development. This document is intended to serve as the basis for public discussion with all interested groups prior to the drafting of specific zoning text amendments for subsequent review.

Current Regulations and Existing Conditions

Tower Regulations

Several regulations exist which guide the design of R10 and R10-equivalent buildings. Tower, height and setback or alternate front setback regulations may be used in these districts; these regulations are summarized in Appendix A. Even though there is a range of permissible building forms, most of the recently constructed buildings follow the tower regulations. However, concern has been raised that the current tower regulations do not ensure that new buildings are as compatible with the established neighborhood character as they could be.

One objection has centered around the erosion of streetwall character caused by buildings which are set back from the streetline as a result of the tower regulations. Additional objections to towers have centered around their height. Many new residential towers on the Upper East Side exceed forty stories; the tallest completed in the last decade is fifty stories, and taller buildings could be constructed (and are currently underway) as-of-right. Buyers and renters pay a premium for space at the upper floors of buildings: condominiums and apartments on the 30th floor typically are priced 30 percent more than identical units on the 10th floor.[1] The trend of constructing large buildings on relatively small "footprints" has also contributed to the construction of taller buildings, as contrasted with residential towers constructed during the 1960's, which tended to be constructed with tower coverage closer to 40 percent.

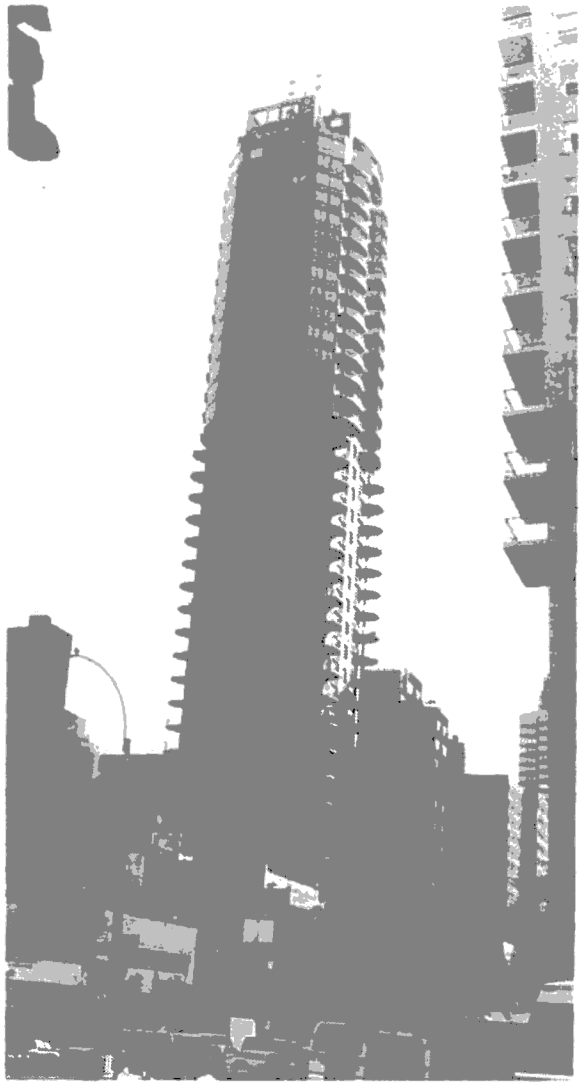


Figure 2 - New tower buildings have altered the traditional streetwall character of certain areas of the east side. The tower in the center is set back from adjacent buildings.

[1] Residential Construction in Manhattan, January 1989.

Proposals for Discussion

The broad range of building forms that exists in the R10 and R10-equivalent zones on the Upper East Side argues for a multi-dimensional approach. At one end of the spectrum are sections of the wide crosstown streets which are characterized by high coverage buildings with a relatively consistent streetwall of 125 to 150 feet. These streets are strong candidates for contextual zoning controls. However, the diversity of building forms along the avenues demands a more flexible approach that can successfully relate the form of new buildings to the varied context.

In considering possible new bulk controls for developments in high density residential zones, the DCP working group was guided by the following criteria:

- Any proposal should be in the form of a new set of envelope controls which would provide architectural flexibility and accommodate economic realities.
- Some minimum streetwall height should be required in order to strengthen the pedestrian-oriented streetscape and to create bases which have a proportional relationship with the towers above.
- A tower should be set back from the streetline in order to reduce the tower's prominence on the street.
- The new building form should relate to the established pattern of bulk placement of the varied building forms along the avenues.

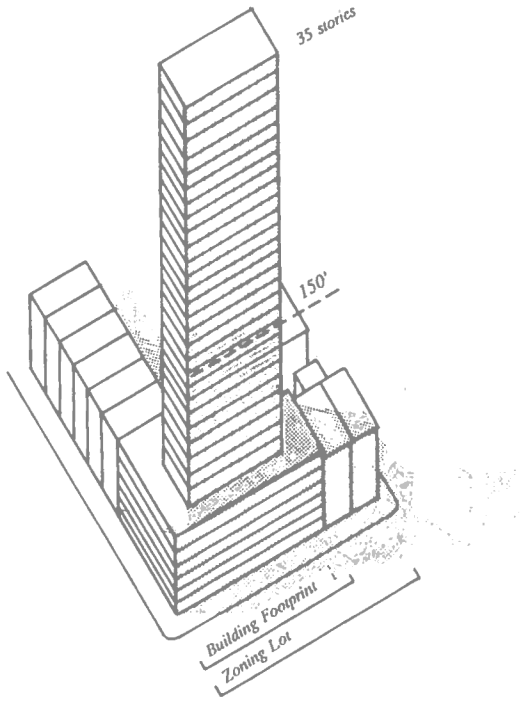


Figure 11 - A possible building configuration illustrating the "Packing-the-Bulk" concept applied to a large corner site.

Many variations of possible envelope controls were tested with drawings, computer simulations and computer analyses. Some results of this work were clear and led to relatively specific recommendations. Other elements of the work established a general direction, with a variety of solutions that might achieve the goal. Further analysis--which would benefit from the experience and perspective of civic, professional, business organizations and the development community--can refine the choices, or perhaps identify other alternatives for consideration.

The proposals developed by the DCP working group envision changes in the regulations that govern tower buildings and those that control residential plazas. The thrust of new regulations would be toward a "tower-on-a-base" form of building with specified controls on the amount of floor area that could be massed in the tower portion. The proposals for amending the residential plaza regulations are directed toward both improving the quality and usefulness of bonused public spaces and establishing parity between the Inclusionary Housing bonus and the residential plaza bonus. A description of these proposals follows.

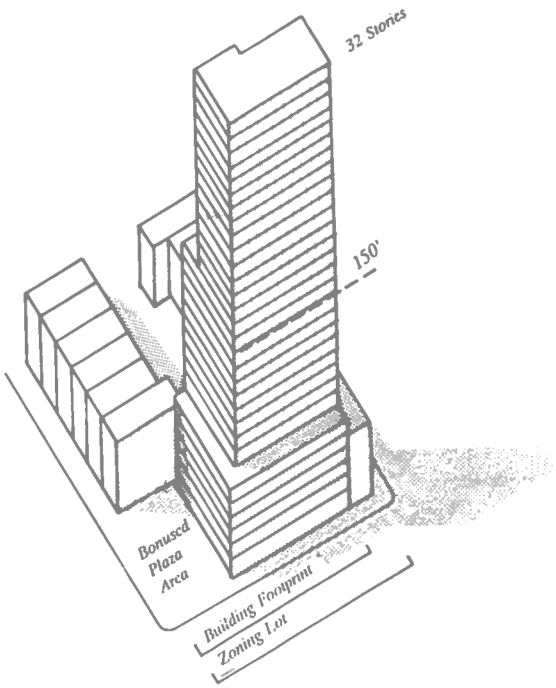


Figure 12 - A possible development using the plaza bonus under the proposed "Packing-the-Bulk" regulations.

Building Form

- Supplemental bulk controls would be established for residential towers in R10, C1-9 and C2-8 districts to require a "tower-on-a-base" form of building. The base of the building would reinforce the traditional streetwall character, and mandatory setbacks would reduce the tower's impact on the streetscape. Given the patterns of development along the avenues on the Upper East Side, the desirable range for the required streetwall is between 60 feet and 85 feet. The streetwall would be required to be located at the streetline, although permitted recesses would

be established; controls on the first 50 feet of the wrap-around from the avenue would also be defined. Above the maximum streetwall height, the building would be governed by the existing setback requirements which are 15 feet from a wide street and 20 feet from a narrow street. The current tower coverage provision would remain in effect above 85 feet.

- Envelope controls would be established that would govern the massing and height of new buildings. A potentially effective approach could be to 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. The DCP working group refers to this concept as "Packing-the-Bulk." In exploring this approach, staff analyzed recent developments and their zoning lot configurations, and concluded that a minimum percentage in the low 60's would result in an appropriate relationship between the base and the tower portions of new buildings. In some instances, an appropriate relationship might be established by coupling other envelope controls, such as a minimum tower coverage, with a lower minimum percentage for the proposed Packing-the-Bulk regulations. Identifying which approach, or mix of approaches, for supplementing existing envelope controls can only be determined after further analysis and discussion with design professionals and others with housing and development expertise.

Residential Plazas

- The bonus rate for residential plazas would be reduced substantially. The DCP working group proposes that the bonus rate for residential plazas

EXHIBIT M

Fried, Frank, Harris, Shriver & Jacobson LLP

FRIED FRANK

One New York Plaza
New York, New York 10004–1980
Tel: +1.212.859.8000
Fax: +1.212.859.4000
www.friedfrank.com

Direct Line: +1.212.859.8927
Email: david.karnovsky@friedfrank.com

January 25, 2019

Via Email

Martin Rebholz, RA
Borough Commissioner
New York City Department of Buildings
280 Broadway, 3rd Floor
New York, NY 10007

Scott Pavan, RA
Borough Commissioner (Development Hub)
New York City Department of Buildings
80 Centre Street, 3rd Floor
New York, NY 10013

Re: Intent to Revoke Approval
36-44 West 66th Street, Manhattan Block 1118, Lots 14, 45, 46, 47, and 48
Job No. 121190200

Dear Commissioners Rebholz and Pavan:

This firm is special land use counsel to West 66th Sponsor LLC (the "Applicant") in connection with proposed development at 36-44 West 66th Street, New York, New York, identified as Block 1118, Tax Lots 14, 45, 46, 47, and 48 on the Tax Map of the Borough of Manhattan (the "Proposed Development"). We write in response to your letter dated January 14, 2019 stating the Department of Buildings' (the "Department") intention to revoke the July 26, 2018 Zoning Diagram ("ZD1") approved in connection with Post Approval Amendments 15 through 18 for the Proposed Development.

The "Notice of Comments" appended to the January 14 letter states that "[t]he proposed mechanical space on the 18th floor does not meet the definition of "accessory use" as per ZR 12-10(b)" on the basis that "mechanical space with a floor-to-floor height of approximately 160 feet is not customarily found in connection with residential uses." This objection has no basis in the text of the Zoning Resolution, and directly contradicts prior determinations of the Department as well as a recent decision by the Board of Standards and Appeals (the "BSA"). In effect, the Department's objection would establish a limitation upon the floor-to-floor height of mechanical

spaces where none exists under the Zoning Resolution. Such action would be ultra vires, and arbitrary, capricious and an abuse of discretion.

The Department has officially determined that the Zoning Resolution does not govern the floor-to-floor heights of floors used for mechanical equipment, and those determinations were confirmed by the BSA last year in its decision in BSA Calendar No. 2016-4327-A (the "BSA Decision").

On July 21, 2016, the Department granted permits for a new building planned at 15 East 30th Street in Manhattan, for which the second, third and fourth stories will be used for mechanical equipment and have a total height of 132 feet. In a ZRD-2 dated June 29, 2016, the Department of Buildings issued a response to a zoning challenge to this determination stating that "[t]here is no prohibition in the Zoning Resolution on the height of building stories regardless of use or occupancy." (ZRD-2, p. 2). In a subsequent determination dated March 1, 2017, the Department stated that the second, third and fourth stories could be excluded from the building's floor area because "those stories contain mechanical equipment throughout each story, which supports the building's mechanical systems" and that "[t]he Zoning Resolution does not regulate the floor-to-ceiling height of a building's mechanical spaces." (BSA Decision, p. 1).

The Department's determinations were appealed to the BSA by the challengers. In a July 11, 2017 submission to the BSA made by the Department's Assistant General Counsel, the Department stated without any qualification that "the Zoning Resolution does not contain any regulations on the floor-to-ceiling height of a building's mechanical spaces." (July 11, 2017 Letter, p. 1).[1] The Department of City Planning submitted a letter dated July 20, 2017 from the Director of the Zoning Division that stated that "there are no regulations in the Zoning Resolution controlling the height of mechanical floors." (July 20, 2017 DCP Letter, p. 1). This position of both the Department of Buildings and the Department of City Planning was affirmed in full by the BSA. Its decision states:

> [B]ased upon its review of the record, the definition of 'floor area' set forth in ZR § 12-10 and the Zoning Resolution as a whole, the Board finds that the Zoning Resolution does not control the floor-to-floor ceiling height of floor space used for mechanical equipment. (BSA Decision, p. 4)

Nothing in the Department's determinations or the BSA Decision supports the notion that there is a distinction between the floor-to-floor heights of the mechanical floors proposed at 15 East 30th Street (totaling 132 feet in height) and the floor-to-floor height of the mechanical space on the 18th floor of the Proposed Development.

The Department's January 14 letter nevertheless asserts that it may restrict the floor-to-floor heights for mechanical space where by claiming that the mechanical space on the 18th floor does not meet the definition of "accessory use" under ZR Section 12-10(b), on the purported

[1] We note that the prior statements of the Department refer to floor-to-ceiling heights and the current objection refers to floor-to-floor heights. For purposes of the issues discussed in this letter, there is no meaningful distinction between the floor-to-floor heights and floor-to-ceiling heights of mechanical spaces. The Zoning Resolution does not regulate either.

basis that its floor-to-floor height of approximately 160 feet is not "customarily found in connection with residential uses."

In the first instance, mechanical space is not a "use" and characterizing it as such is a plain misreading of the Zoning Resolution.

Under ZR Section 12-10, a "use" is defined as:

(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.

Mechanical space is none of these things and is nowhere described or classified under the Zoning Resolution as a "use." Instead, floor space used for mechanical equipment is part of the gross area of a building which is not included in the definition of "floor area" under the Section 12-10 definition of floor area, and forms part of the residential, commercial, or manufacturing use of a building. See ZR Section 12-10(8) definition of Floor Area.

Mechanical space is therefore no more a "use" under the Zoning Resolution than cellar space, elevator or stair bulkheads, attic space, floor space with stairwells, and all other forms of floor space included in a building which are excluded from the calculation of floor area. Stated simply: (i) the use of the Proposed Building is for residential use under Use Group 2 and community facility use under Use Group 3; and (ii) the residential and community facility uses will consist of floor space that either: (a) meets the definition of floor area, or (b) is excluded from the definition of floor area. The mechanical space on the 18th floor falls squarely within the category of floor space excluded from the definition of floor area. The Department's assertion that mechanical space is instead a "use" is wholly unsupported by the Zoning Resolution.

Moreover, mechanical space cannot in any sense be characterized as an "accessory use," a term defined under Section 12-10 of the Zoning Resolution as a use conducted on the same zoning lot as the principal use to which it is related and to which it is subordinate. See ZR Section 12-10 (a)-(c) definition of Accessory Use. The purpose of allowing accessory uses is to permit, subject to certain conditions, a use on a zoning lot which would not ordinarily be permitted in a building under the use regulations of the underlying zoning district on a stand-alone basis (e.g., a restaurant/cafeteria or a gift shop in a hospital located in a residential district which does not permit commercial uses). Unlike a restaurant/cafeteria or a gift shop, which meet the Section 12-10 definition of a "use" and are listed as uses classified under various use groups, including Use Group 6, there is no circumstance under which mechanical space in a residential building operates as a stand-alone use separate and apart from the residential use itself. Rather, mechanical space is an integral part of a building's function as a residential use and quite plainly not an "accessory use."

Even assuming that mechanical floor space within the Proposed Development could somehow be classified as an "accessory use," the BSA has specifically rejected the argument that

the floor-to-floor height dimension of a mechanical floor is susceptible to a determination whether or not it is "customarily found in connection" with such use.

In the proceeding before the BSA in Cal. No. 2016-4327-A, a number of organizations argued that the BSA should address the heights of the mechanical spaces at 12 East 31st Street in order to stem a proliferation of tall mechanical spaces at locations such as 220 Central Park West, 520 Park Avenue, 217 West 57th Street and 432 Park Avenue in Manhattan.

The BSA declined to ground its decision upon a determination that certain heights of mechanical spaces are customary and others are not. Instead it made clear that the request to restrict the heights of mechanical spaces was beyond its Charter authority to review and decide interpretations of the Zoning Resolution, stating that "insofar as Appellant or members of the community take issue with provisions of the Zoning Resolution—or absence thereof—as enacted, that grievance falls outside the scope of the Board's authority to review this appeal." (BSA Decision, p. 5). Quite simply, the Board determined that it was without authority to restrict the floor-to-floor heights of the mechanical spaces at issue in Cal. No. 2016-4327-A, *because this is not a subject matter regulated by the Zoning Resolution.* To do so would have the BSA exercise a power to enact zoning regulations which it does not have. The Department likewise has no power to zone and cannot adopt new zoning regulations.

The authority to adopt zoning regulations rests with the City Planning Commission and the City Council, and it is common knowledge that the Department of City Planning is developing a proposal for new regulations that would for the first time govern the floor-to-floor heights of mechanical spaces. This vividly illustrates that the objection asserted in the Department's January 14 letter is without any basis in law. The Department cannot attempt to achieve indirectly that which can only be achieved by means of a zoning text amendment to the Zoning Resolution duly adopted in accordance with Section 200 of the City Charter, with due process afforded to affected parties through public hearings and opportunity to comment.

For all the reasons set forth above, the Department should not revoke approval of the ZD-1 approved and posted on the Department's website on July 26, 2018. Likewise, the Department should reinstate the ZRD2 issued on November 19, 2018, in response to a public challenge made pursuant to 1 RCNY Sec. 101-15.[2]

Revocation of the ZRD-1 for the reasons stated in the Notice of Comments attached to the Department's January 14 letter would be a violation of law, and arbitrary, capricious, and an abuse of discretion. Such a decision would be tantamount to the adoption of new zoning regulations, a power which the Department does not have. It would also be in direct disregard of the BSA Decision in Cal. No. 2016-4327-A. Finally, a revocation would flatly contradict the

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[2] The public challenge raises questions regarding the mechanical space on the 18th floor, but does not make any zoning argument or cite any provision of the Zoning Resolution to support a claim that the proposed mechanical space does not comply with Zoning Resolution. Moreover, in its ZRD-2 determination the Department rejected the zoning-based arguments made by the challengers that the Proposed Development would violate certain provisions of the Lincoln Square Special District regulations (ZR § 82-30 *et seq.*), and that determination is currently the subject of an appeal filed by the challengers that is pending at the BSA. (Cal. No. 2018-199-A). Accordingly, the Department has no grounds to rescind the ZRD-2. Any rescission of the ZRD-2 is in any event premature at this time.

Department's own determinations that the floor-to-floor height of mechanical spaces are not regulated under the Zoning Resolution.

Respectfully submitted,

David Karnovsky

cc: A. Mannarino
B. Gillen
L. Russo
D. Rothstein

EXHIBIT N

Residential Tower Mechanical Voids

Text Amendment

Revised Environmental Assessment Statement*

CEQR No. 19DCP110Y

ULURP No. N190230 ZRY

* Following certification of the related land use application (ULURP No. N190230 ZRY) on January 28, 2019, the City Planning Commission (CPC) proposed modifications to the proposed zoning text amendment. This Revised EAS supersedes the EAS issued January 25, 2019 and assesses the change to the application, provided in Appendix D. As described herein, the change would not alter the conclusions of the previous environmental review.

Residential Tower Mechanical Voids Text Amendment EAS
Attachment A: Project Description

I. INTRODUCTION

The New York City Department of City Planning (DCP) proposes a zoning text amendment pursuant to Zoning Resolution (ZR) Section 23-16 (Special Floor Area and Lot Coverage Provisions for Certain Areas) and related sections, to modify floor area regulations for residential tower developments located within non-contextual R9 and R10 Residence Districts, their equivalent Commercial Districts, as well as Special Purpose Districts that rely on underlying floor area and height and setback regulations or that are primarily residential in character The proposed zoning text amendment (the "Proposed Action") would count residential mechanical floors in such buildings as zoning floor area when they are taller than 25 feet in height or when they are located within 75 feet in height of each other. Currently, mechanical space is excluded from zoning floor area calculations. The Proposed Action is intended to discourage the use of excessively tall mechanical floors that elevate upper-story residential units above the surrounding context.

II. BACKGROUND

The New York City Zoning Resolution allows floor space containing mechanical equipment to be excluded from zoning floor area calculations. The Resolution does not specifically identify a limit to the height of such spaces. In recent years, some developments have been built or proposed that use tall, inflated mechanical or structural floors to elevate upper-story residential units above the surrounding context and improve their views. These spaces have been commonly described as "mechanical voids".

Renderings of a proposed residential tower on the Upper East Side released in 2018 showed four mechanical floors taking up a total of approximately 150 feet in the middle of the building and raising its overall height to over 500 feet, far above other buildings in the surrounding area built under the same regulations. In response to this building, Mayor De Blasio requested that DCP examine the issue of excessive mechanical voids that are used in ways not anticipated or intended by zoning.

The Department subsequently conducted a citywide analysis of recent construction to better understand the mechanical needs of residential buildings and to assess when excessive mechanical spaces were being used to inflate their overall height. DCP assessed the residential buildings constructed in R6 through R10 districts and their Commercial District equivalents over the past 10 years and generally found excessive mechanical voids to be limited to a narrow set of circumstances in the city.

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

In R9 and R10 non-contextual zoning districts and their equivalent Commercial Districts, residential buildings can penetrate the sky exposure plane through the optional tower regulations, which do not impose a limit on height for portions of buildings that meet certain lot coverage requirements. In these tower districts, generally concentrated in Manhattan, the Department assessed over 80 new residential

buildings and found that most towers exhibit consistent configurations of mechanical floors. This typically included one mechanical floor in the lower section of the building located between the non-residential and residential portions of the building. In addition, taller towers tended to have additional mechanical floors midway through the building, or regularly located every 10 to 20 stories. In both instances, these mechanical floors range in height from 10 to approximately 25 feet. Larger mechanical spaces were generally reserved for the uppermost floors of the building in a mechanical penthouse, or in the cellar below ground.

In contrast to these more typical scenarios, the Department identified seven buildings, either completed or currently undergoing construction, that were characterized by either a single, extremely tall mechanical space, or multiple mechanical floors stacked closely together. The height of these mechanical spaces varied significantly but ranged between approximately 80 feet to 190 feet in the aggregate. In districts where the tower-on-a-base regulations are applicable, like the Upper East Side building described above, these spaces were often located right above the 150-foot mark, which suggests that they are intended to elevate as many units as possible while also complying with the 'bulk packing' rule of these regulations, which require 55 percent of the floor area to be located below 150 feet. In other districts, these spaces were typically located lower in the building to raise more residential units higher in the air, which often also has the detrimental side effect of "deadening" the streetscape with inactive space close to the ground.

III. PROPOSED ACTION

Proposed Text Amendment

The Applicant, the Department of City Planning, is proposing a zoning text amendment to Zoning Resolution Section 23-16 (Special Floor Area and Lot Coverage Provisions for Certain Areas) and related sections, for residential towers in R9 and R10 non-contextual zoning districts, their equivalent Commercial Districts, and certain Special Districts to discourage the use of excessively tall mechanical spaces that disengage substantial amounts of building spaces from their surroundings. The proposed text amendment also seeks to recognize the need for reasonably sized and distributed mechanical spaces in residential towers, as well as the virtue of providing overall flexibility to support design excellence in these areas.

The proposed new text amendment (see Appendix A) would require that, in certain buildings where the text applies, floors occupied predominantly by mechanical space that are taller than 25 feet in height (whether individually or in combination) be counted as floor area. Taller floors, or stacked floors taller than 25 feet, would be counted as floor area based on the new 25-foot height threshold. A contiguous mechanical floor that is 132 feet in height, for example, would now count as five floors of floor area (e.g., 132/25 = 5.28, rounded to the closest whole number equals 5). The 25-foot height is based on mechanical floors found in recently-constructed residential towers and is meant to allow the mechanical needs of residential buildings to continue to be met without increasing the height of residential buildings to a significant degree. The provision would only apply to floors located below residential floor area to not impact mechanical penthouses found at the top of buildings where large amounts of mechanical space is typically located.

Additionally, any floors occupied predominantly by mechanical space located within 75 feet of one another that, in the aggregate, add up to more than 25 feet in height would count as floor area. This change is intended to address situations where non-mechanical floors are interspersed among mechanical

EXHIBIT O

February 06, 2018 11:00 PM

City wants to cut down supertalls

JOE ANUTA

Michael Korfhage

The de Blasio administration is taking aim at developers' practice of stacking luxury condos atop multistory hollow spaces to achieve greater heights and more lucrative sales.

Marisa Lago, chairwoman of the City Planning Commission, said at a town hall meeting last month that her office is working to change how it treats such large voids, which do not count against a building's density limit. Limiting their size could shrink the height of future towers.

"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 zoning code, she said. "We are already working under the mayor's direction with the Department of Buildings to see how we can make sure that the intent of the rules is followed."

Putting a building on stilts is a common gambit used by developers of very tall luxury condo towers to boost a project's height yet comply with existing zoning. It works because floors for mechanical equipment are exempt from the limits. By stretching the ceiling of one or more mechanical floors to dizzying heights, developers can essentially create a pedestal upon which to stack the priciest units.

"We have a building on 62nd Street that we have challenged … that has a 100-foot, floor-to-floor void in the middle," Rachel Levy, executive director of the Friends of the Upper East Side, said at the town hall.

How the city will close the loophole remains unclear. The Buildings Department repeatedly has signed off on the voids, ruling that they do not violate the zoning code. To change things, staff members could alter their interpretation of the code, or the city could simply rewrite the rules.

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RECOMMENDED FOR YOU

STATEMENT OF FACTS AND LAW

NEW YORK CITY BOARD OF STANDARDS AND APPEALS

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THE CITY CLUB OF NEW YORK, JAMES C.P. BERRY, JAN CONSTANTINE, VICTOR A. KOVNER, AGNES C. McKEON, and ARLENE SIMON,

Appellants,

BSA Cal. No. 2019-

Appeal from Building Permit issued April 11, 2019

Concerning Block 1118, Lot 45

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STATEMENT OF FACTS AND LAW

Preliminary Statement

Appellants, a not-for-profit civic organization and individuals who live near the proposed building, challenge the validity of a building permit issued by the Department of Buildings ("DOB") on April 11, 2019, for a 775-foot residential tower at 36 West 66th Street a/k/a 50 West 66th Street. This tower, now being built by Extell Development Company and West 66th Sponsor LLC ("Extell"), would be the tallest building on the Upper West Side, hundreds of feet higher than contemplated by the City Planning Commission when it enacted the tower-on-base regulations in 1993. Those regulations were supposed to limit buildings to "the low 30 stories" in height. This building would be equivalent in height to a traditional 70-plus story building.

The proposed building violates the City's zoning regulations in two ways: (1) it is based on a methodology for calculating allowable floor space that violates the Bulk Packing Rule, ZR § 82-34, and the Split Lot Rules, ZR §§ 33-48 and 77-02; and (2) it claims an exemption from FAR for 196 vertical feet of purported mechanical space in the mid-

section of the building that is neither "used for mechanical equipment" nor customarily accessory to residential uses, and is therefore illegal. ZR §§ 12-10 and 22-12.

FACTS

A. The Special Lincoln Square District, the Proposed Building, and the Site

The proposed building is in the Special Lincoln Square District, established in 1969 "to guide new growth and uses in a way that would complement the newly sited institutions" of Lincoln Center.[1] The great majority of the District is zoned C4-7 (R10 equivalent), a commercial designation which also allows the highest level of residential density in the City. Towers are allowed in this area.[2] Only a very small portion of the Special District – parts of two blocks comprising 5.3 percent of the District's area – is zoned R8, a lower density residential designation where towers are not allowed. The map below shows the Lincoln Square Special District (the grey area between West 60th and West 68th Streets, not including Columbus Circle and surrounds), and Extell's zoning lot within it (cross-hatched).

The current zoning rules for the Special District are the result of the tower-on-a-base amendments enacted in 1993, following a Zoning Review conducted by the Department of City Planning[3] and earlier proposals that had suggested two rules to regulate the height of towers: the Bulk Packing Rule and the Tower Coverage Rule. The Department's proposals

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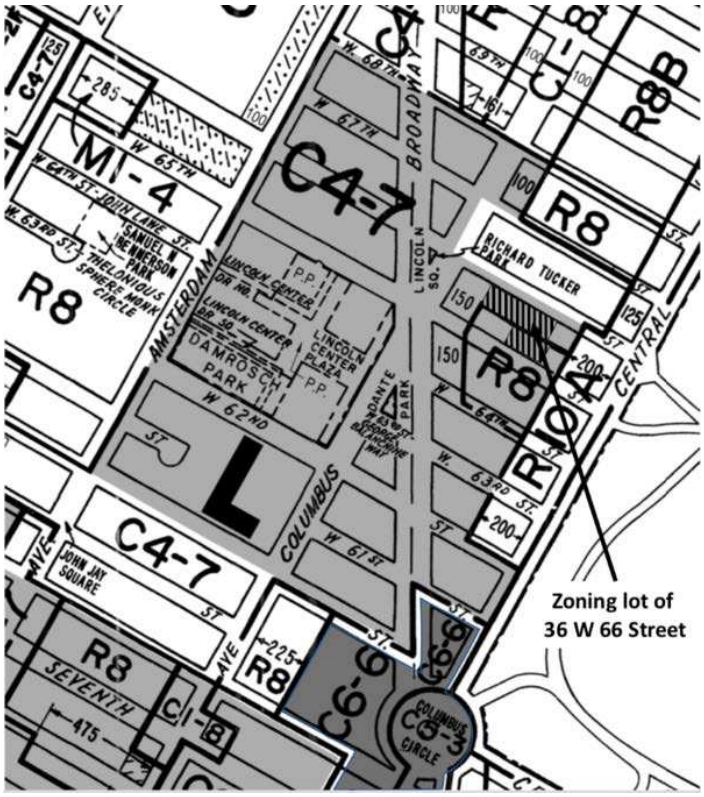
[1] CPC Report N 940127(A) ZRM, at 3 (Dec. 20, 1993) ("1993 CPC Report"), at 3 (https://www1.nyc.gov/assets/planning/download/pdf/about/cpc/940127a.pdf) (Exh. A); *see also* CPC Reports CP-20365A, CP-20388A, and CP-20595 (Mar. 19, 1969) (https://www1.nyc.gov/assets/planning/download/pdf/about/cpc/19690319.pdf).

[2] The Zoning Resolution defines a "tower" as a building that, pursuant to ZR §§ 23-65 or 35-64 ("Tower Regulations"), is permitted to break the "sky exposure plane," an imaginary inclined plane drawn from the street line that otherwise limits building height pursuant to the Zoning Resolution.

[3] Dep't of City Planning, Special Lincoln Square District Zoning Review (May 1993) ("1993 DCP Zoning Review") (Exh. B).

were drafted with a view toward regulating six potential development sites that the Zoning Review had identified within the District. All six potential sites were in the highest residential



density (C4-7/R10) portion of the Special District, where towers are allowed. One of the sites was the "ABC assemblage," comprising three lots with small buildings fronting on 66th Street, which now forms part of Extell's development lot. None of the sites identified for potential development was located in the R8 portion of the Special District, where towers are not allowed.

Extell's zoning lot, Block 1118, Lot 45, runs from West 65th to West 66th Street, approximately 300 feet from Central Park, straddling the C4-7/R10 and R8 districts.

Sixty-four percent of the lot area is in the C4-7/R10 district and 36 percent is in the R8 district.[4] The dividing line between the zoning districts runs east-west right through the middle of Extell's zoning lot, with the northern side zoned C4-7/R10 and the southern side zoned R8. The northern portion contains the landmarked ABC Armory, which remains the property of ABC, and is joined to Extell's lot by a zoning lot merger. The southern portion, prior to its purchase by Extell, had been developed at or close to its total allowable FAR with an 11-story building that housed the headquarters of the Jewish Guild for the Blind, now demolished.

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 Extell 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. These spaces are in addition to two mechanical floors at the top, for a total of 229 vertical feet of supposed mechanical spaces, the equivalent of 23 traditional floors.

[4] *See* Extell's 2019 Zoning Diagram, approved Apr. 4, 2019 ("2019 ZD1), at 1 (http://a810-bisweb.nyc.gov/bisweb/BScanJobDocumentServlet?requestid=3&passjobnumber=121190200&passdocnumber=01&allbin=1028168&scancode=ES636516048) (Exh. C).

B. Procedural History

On November 24, 2015, Extell applied for a permit to build an innocuous 25-story, 292-foot-tall residential building with a community facility on four small tax lots along 66th Street.[5] On June 7, 2017, DOB issued a New Building permit for that building, and Extell began construction pursuant to that permit. In fact, Extell never intended to build this building. It was only a stalking horse. Already in April 2015, seven months before it filed for that permit, it had completed plans for a building more than twice the size – the building at issue here.[6] Under the disingenuous cover of its permit for the smaller building, it has been able to work undisturbed for almost two solid years, advancing preliminary construction, secure in the knowledge that the farther it got, the less likely that it would eventually be ordered to comply with zoning. At a public event last year, another prominent developer, Jon Kalikow, celebrated Extell's stalking-horse trick:[7]

> "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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[5] ZD1 Zoning Diagram, filed Nov. 24, 2015, approved Oct. 24, 2016 ("2016 ZD1") (http://a810-bisweb.nyc.gov/bisweb/BScanJobDocumentServlet?requestid=28&passjobnumber=121190200&passdocnumber=07&allbin=1028168&scancode=ES336402953) (Exh. D).

[6] Extell's Zoning Diagram for the larger building ("2018 ZD1"), approved July 26, 2018, is dated April 15, 2015. *See* http://a810-bisweb.nyc.gov/bisweb/BScanJobDocumentServlet?requestid=4&passjobnumber=121190200&passdocnumber=01&allbin=1028168&scancode=ES555372378 (Exh. D)

[7] 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/) (Exh. E).

Bait and switch indeed.

On December 13, 2017, Extell filed its plans for the 775-foot building.[8] On July 26, 2018, DOB approved Extell's Zoning Diagram for that building. On September 9, 2018, Landmark West! ("LW!") and 10 West 66th Street Corporation, filed a Zoning Challenge with DOB.[9] The challengers raised two issues that remain of concern to Appellants: first, that Extell's building design relied on an illegal methodology for applying the Bulk Packing and Tower Coverage Rules; and second, that the building as then proposed had an enormous 160-foot-high void, an alleged mechanical space that was illegal under the Zoning Resolution.

On November 19, 2018, DOB rejected the challenge on all points.[10] With respect to the 160-foot void, DOB simply stated, "The Zoning Resolution does not prescribe a height limit for building floors."

With respect to the Bulk Packing Rule, DOB's response was more extensive. The challengers had raised the fact that Extell had calculated the bulk below 150 feet based on the entire zoning lot while calculating tower coverage based only on the C4-7/R10 portion of the lot. They argued that the Bulk Packing and Tower Coverage Rules must both apply to the same area. DOB's response followed the reasoning of Extell's counsel David Karnovsky, now in private practice but for many years previous General Counsel at the Department of City

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[8] http://a810-bisweb.nyc.gov/bisweb/JobsQueryByNumberServlet?passdocnumber=16&passjobnumber=121190200&requestid=18#FSup.

[9] BSA Cal. No. 2018-199-A.

[10] The Zoning Challenge and DOB's denial, in document called a "ZRD2," may be found at http://a810-bisweb.nyc.gov/bisweb/BScanJobDocumentServlet?requestid=19&passjobnumber=121190200&passdocnumber=16&allbin=1028168&scancode=SC620325809 (Exh. F).

Planning. Mr. Karnovsky set forth his argument in a December 18, 2017 email addressed to "Council Land Use, Office of Council Member Helen Rosenthal Staff."[11]

Following Mr. Karnovsky, DOB correctly pointed out that under the Zoning Resolution's provisions governing split lots (ZR §§ 33-48 and 77-02), the Tower Coverage Rule can only apply to the C4-7/R10 portion of the zoning lot, where towers are permitted. However, still following Extell's counsel, DOB argued that the split lot provisions 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."[12] Extell's counsel based his assertion on the fact 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," he argued, the Bulk Packing Rule applied to both portions, notwithstanding the split lot rules.[13]

After DOB denied the Zoning Challenge, LW! timely appealed to the BSA.[14] However, before the BSA could address the issue, DOB reversed itself: on January 14, 2019, it issued a Notice of Intent to Revoke Approval of the Zoning Diagram that had been the object of LW!'s Zoning Challenge and subsequent appeal to the BSA.[15] The Notice stated DOB's intent to revoke the approval within 15 calendar days "unless sufficient information is presented to the Department to demonstrate that the approval should not be revoked." DOB

[11] Karnovsky Email (Dec. 18, 2017) (Exh. G).

[12] ZRD2 (Exh. F), at 2.

[13] *Id.*.

[14] *See* Statement of Facts, BSA 2018 199 A (filed Dec. 19, 2018) (Exh. H).

[15] Notice of Intent to Revoke (Jan. 14, 2019) (Exh. I).

now took the position that the void was unlawful. "The proposed mechanical space on the 18th floor of the Proposed Building," it stated, "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."[16] The Notice also announced that DOB was rescinding its denial of LW!'s Zoning Challenge, from which LW! had appealed. As a result, the BSA took the position that the appeal had been rendered moot. The Notice did not, however, reconsider whether Extell'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.

Meanwhile, although DOB had threatened to issue a stop-work order, it had not done so, leaving Extell free to continue construction.

By a letter dated January 25, 2018, Extell 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,[17] and, on April 11, 2019, for the first time, issued a building permit for the 775-foot tower.[18] The permit approved plans that were tweaked, although not in any way that is material here. Apparently in response to objections

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[16] *Id.* at 1.

[17] Exh. C.

[18] *See* http://a810-bisweb.nyc.gov/bisweb/WorkPermitDataServlet?requestid=4&allisn=0003617726&allisn2=0002887139&allbin=1028168&passjobnumber=121190200. (Exh. J).

by the Fire Department, which had raised safety concerns about the proposed 160-foot void, Extell replaced that void 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 mechanical equipment.[19]

On April 24, 2019, Appellants filed a lawsuit against Extell seeking a preliminary and permanent injunction against the ongoing construction of the building at issue.

THE BULK PACKING AND TOWER COVERAGE RULES

In 1993, following various other measures to limit building heights in Manhattan's residential zoning districts, such as the Sliver Law in 1983 and a series of contextual zoning provisions in 1984, the City enacted the Tower-on-a-Base Rules. Already in 1989, the City had begun to consider these rules. In a "Discussion Document" titled "Regulating Residential Towers and Plazas" produced that year, the City Planning Department 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."[20] The Department 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.

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[19] *See* Dep't of City Planning, Residential Mechanical Voids Findings ("Mechanical Voids Findings") (Apr. 2018, updated Feb. 2019) (Exh. K attached).

[20] Dep't of City Planning, Regulating Residential Towers and Plazas: Issues and Options: A Discussion Document (1989) ("Discussion Document"), at 7 (Exh. L).

It introduced "packing-the-bulk" and minimum tower coverage as two complementary tools to regulate height. The Bulk Packing Rule 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.[21]

However, the City did not act on this proposal until 1993. In the Special Lincoln Square District, the tipping point that pushed the City into action was the 545-foot-tall Millennium Tower at 101 West 67th Street, announced in 1992. That tower – 230 feet *shorter* than Extell's planned building – outraged the community and roused the City to action.[22] In its 1993 Zoning Review of the Special District, the City Planning Department restated the problem:

> 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.[23]

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[21] *Id.* at 26-27. The Discussion Document described how too-low lot coverage led to 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.

Id. at 16-17.

[22] 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).

[23] 1993 DCP Zoning Review, at 3 (Exh. A).

The tower-on-a-base amendments were intended to limit building height definitively, not only in the Special Lincoln Square 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 City Planning Commission on December 20th, 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).

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 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.[24]

The two City Planning 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."[25] 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.[26] The Department of City Planning Report for the high-density residential districts elsewhere in Manhattan contained similar language.[27]

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[24] On the other hand, consider the result of using Extell's methodology on a split lot with 10,000 square feet in a C4-7/R10 district and 30,000 square feet in an R8 district. The bulk packing calculation would be based on the entire 40,000 square foot lot but tower coverage calculation would be based only on a smaller, 10,000 square foot portion of the lot. There would be 160,000 square feet available for the tower but the tower floors would only be 3,000 square feet each. This would result in a 53.3 story tower (160,000 divided by 3,000) on top of a 150-foot high base.

[25] 1993 CPC Report, at 3 (Exh. A).

[26] *Id.* at 19.

[27] CPC Report N 940013 ZRM (Dec. 20, 1993), at 2-3, 5, 11-12 (https://www1.nyc.gov/assets/planning/download/pdf/about/cpc/940013.pdf).

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

Extell's interpretation of the Bulk Packing Rule, which has been adopted by DOB, is contrary to the plain language of the Zoning Resolution and nullifies the Bulk Packing Rule.

As Mr. Karnovsky has well-argued, 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, Mr. Karnovsky and DOB 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.

Contrary to their argument, 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 Lincoln Square District from the rest of Manhattan's 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 Extell in fact proposes to put its tower. Extell 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 Extell 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 Extell 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.

Extell'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 Extell's 2019 ZD1.[28] 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 Extell'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 in Timbuktu for all the effect it has on the tower.

[28] 2019 ZD1 (Exh. C).

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.[29] 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.

By Extell'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.[30] With Extell'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 <u>three times</u> the "low 30 stories" in height that the drafters of the Tower-on-a-Base Rules stated would be the maximum!

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[29] 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 Extell, 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 Extell 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, Extell would also have to put the full allowable square footage into its base. For every 6 sf in the base, Extell can place 4 sf in the tower, up to the maximum allowed. However, if Extell 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, Extell cannot build over the Armory.

[30] 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.

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

The Zoning Resolution 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 Extell 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 Extell's Counsel Say It Means

All that DOB and Extell 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.[31]

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.[32] 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 Extell'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.

In further support of his argument, 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 '<u>throughout the district</u> . . ." to govern the

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[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. Extell'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).

massing and height of new buildings.'"[33] This does not bolster his argument; it fatally undermines it. Contrary to Extell'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 Extell's zoning lot.

The paragraph quoted by Extell'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.[34]

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."[35] Yet, as Mr. Karnvosky correctly argues, the

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[33] Karnovsky Email, at 3 (underlining added) (Aff. Exh. G).

[34] 1993 CPC Report, at 7-8 (Exh. A).

[35] 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

Tower Coverage Rule does not apply to the R8 portion of the Special District. If it did, it would drastically reduce the height of Extell'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 Extell'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

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Packing Rule with respect to their applicability to this zoning lot. Neither is applicable or relevant to the R8 portion of this lot.

reached its unexpected height with the help of very high ceiling heights in the movie theaters in its base. This was, the City Planning Department wrote,

> 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.[36]

The building here would be almost half as tall again as the Millennium Tower. And indeed, given a big enough R8 portion, under Extell'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'") (quoting *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").

[36] 1993 DCP Zoning Review at 14 (Exh. D); *see also id.* at 9.

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

Extell'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. Extell'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 (quoting *Town of Harvard v. Maxant,* 275 N.E.2d 347 (Mass. S.J.C. 1971) (emphasis added).

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 Extell'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.[37]

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 Extell pretended to be building for two years.

Presumably, however, DOB was responding to Extell'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.[38] 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.

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[37] Notice of Intent to Revoke (Exh. I).

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

Since that decision, the City Planning Department 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...."[39] "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.[40] In any event, Appellants believe that Cal. No. 2016-4327-A was wrongly decided and should be reversed.

In its January 25, 2019 letter, Extell 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. Extell 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, Extell'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

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[39] DCP, Mechanical Voids Findings, at 11 (Exh. K).

[40] DCP, Environmental Assessment Statement, Residential Mechanical Voids Text Amendment (Jan. 25, 2019, revised Apr. 9, 2019) Attachment A, at 2 (Exh. 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.

a Use Group? The statute provides a definition of "use," and despite Extell's efforts to argue otherwise, it strongly supports the argument that mechanical space qualifies under either independent criterion:

> (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 Extell's description or Appellants', the space here plainly qualifies as a use. According to Extell, 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, Extell 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 Extell's public documents supports its claim that this space is necessary to house mechanical equipment. Indeed, there is no mechanical equipment yet imagined by humans that requires a 48- or 64-foot tall clearance for accessory use in a residential building.

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. . . ." *Educational Construction 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.

Extell'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: "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]."[41]

[41] Joe Anuta, "City Wants to Cut Down Supertalls," Crain's New York (Feb. 6, 2018), at 2 (Exh. O).

CONCLUSION

Because the Developer's plans for 36 West 66th Street violate both the letter and the purpose of the Zoning Resolution, Appellants respectfully request that the Board revoke the Developer's permit.

Dated: Brooklyn, New York
May 7, 2019

Respectfully submitted,

/s/
JOHN R. LOW-BEER
415 8th Street
Brooklyn, NY 11215
(718) 499-2590
jlowbeer@yahoo.com

/s/
CHARLES N. WEINSTOCK
8 Old Fulton Street
Brooklyn, NY 11201
(323) 791-1500
cweinstock@mac.com

ZONING RESOLUTION
SECTIONS

36 WEST 66TH STREET - BLOCK 1118, LOT 45
APPLICABLE SECTIONS OF N.Y.C. ZONING RESOLUTION

ZR § 12-10 – Definitions

"Floor area" is the sum of the gross areas of the several floors of a **building** or **buildings**, measured from the exterior faces of exterior walls or from the center lines of walls separating two **buildings** . . . .

However, the **floor area** of a **building** shall not include . . .

(8) floor space used for mechanical equipment, except that such exclusion shall not apply in R2A Districts, and in R1-2A, R2X, R3, R4, or R5 Districts, such exclusion shall be limited to 50 square feet for the first **dwelling unit**, an additional 30 square feet for the second **dwelling unit** and an additional 10 square feet for each additional **dwelling unit**. For the purposes of calculating floor space used for mechanical equipment, **building segments** on a single **zoning lot** may be considered to be separate **buildings** . . . .

ZR § 22-12 - Use Group 2

R3 R4 R5 R6 R7 R8 R9 R10

Use Group 2 consists of all other types of ***residences***.

A. ***Residential uses***

Residences of all kinds, including ***apartment hotels*** and ***affordable independent residences for seniors*** . . . .

B. ***Accessory uses***

ZR § 33-48 – Special Provisions for Zoning Lots Divided by District Boundaries

C1 C2 C3 C4 C5 C6 C7 C8

In all districts, as indicated, whenever a ***zoning lot*** is divided by a boundary between districts, or is subject to other regulations resulting in different height and setback regulations, or whenever a ***zoning lot*** is divided by a boundary between a district to which the provisions of Section 33-45 (Tower Regulations) apply and a

district to which such provisions do not apply, the provisions set forth in Article VII, Chapter 7, shall apply.

ZR § 77-02 – Zoning Lots Not Existing Prior to Effective Date or Amendment of Resolution

Whenever a **zoning lot** is divided by a boundary between two or more districts and such **zoning lot** did not exist on December 15, 1961, or any applicable subsequent amendment thereto, each portion of such **zoning lot** shall be regulated by all the provisions applicable to the district in which such portion of the **zoning lot** is located. However, the provisions of paragraph (a) of Section 77-22 (Floor Area Ratio) and Section 77-40 (SUPPLEMENTAL REGULATIONS) shall apply to **zoning lots** created at any time where different **bulk** regulations apply to different portions of such **zoning lot.**

ZR § 82-00 – General Purposes

The "Special Lincoln Square District" established in this Resolution is designed to promote and protect public health, safety, general welfare and amenity. These general goals include, among others, the following specific purposes:

(a) to preserve, protect and promote the character of the Special Lincoln Square District area as the location of a unique cultural and architectural complex - an attraction which helps the City of New York to achieve preeminent status as a center for the performing arts, and thus conserve its status as an office headquarters center and a cosmopolitan residential community;

(b) to improve circulation patterns in the area in order to avoid congestion arising from the movements of large numbers of people; improvement of subway stations and public access thereto; including convenient transportation to, from and within the district; and provision of arcades, open spaces, and subsurface concourses;

(c) to help attract a useful cluster of shops, restaurants and related amusement activities which will complement and enhance the area as presently existing;

(d) to provide an incentive for possible development of the area in a manner consistent with the aforegoing objectives which are an integral element of the Comprehensive Plan of the City of New York;

(e) to encourage a desirable urban design relationship of each building to its neighbors and to Broadway as the principal street; and

(f) to promote the most desirable use of land in this area and thus to conserve the value of land and buildings, and thereby protect the City's tax revenues.

ZR § 82-02 – General Provisions

In harmony with the general purpose and intent of this Resolution and the general purposes of the **Special Lincoln Square District** and in accordance with the provisions of this Chapter, certain specified regulations of the districts on which the **Special Lincoln Square District** is superimposed are made inapplicable, and special regulations are substituted in this Chapter. Each **development** within the Special District shall conform to and comply with all of the applicable district regulations of this Resolution, except as otherwise specifically provided in this Chapter.

ZR § 82-34 – Bulk Distribution

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**. For the purposes of determining allowable **floor area**, where a **zoning lot** has a mandatory 85 foot high **street wall** requirement along Broadway, the portion of the **zoning lot** located within 50 feet of Broadway shall not be included in **lot area** unless such portion contains or will contain a **building** with a wall at least 85 feet high coincident with the entire **street line** of Broadway.

ZR § 82-35 – Height and Setback Regulations

Within the Special District, all **buildings** shall be subject to the height and setback regulations of the underlying districts, except as set forth in: (a) paragraph (a) of Section 82-37 (Street Walls Along Certain Street Lines) where the **street wall** of a **building** is required to be located at the **street line**; and (b) paragraphs (b), (c) and (d) of Section 82-37 where the **street wall** of a **building** is required to be located at the **street line** and to penetrate the **sky exposure plane** above a height of 85 feet from **curb level**.

ZR § 82-36 – Special Tower Coverage and Setback Regulations

The requirements set forth in Sections 33-45 (Tower Regulations) or 35-64 (Special Tower Regulations for Mixed Buildings) for any **building**, or portion thereof, that qualifies as a **tower** shall be modified as follows:

(a) 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** or, for a **zoning lot** of less than 20,000 square feet, the percent set forth in Section 23-65 (Tower Regulations); and

(2) not less than 30 percent of the **lot area** of a **zoning lot**. However, the highest four **stories** of the tower or 40 feet, whichever is less, may cover less than 30 percent of the **lot area** of a **zoning lot** if the gross area of each **story** does not exceed 80 percent of the gross area of the **story** directly below it.

(b) At all levels at or above a height of 85 feet from **curb level**, the minimum required setback of the **street wall** of a tower shall be at least 15 feet from the **street line** of Broadway or Columbus Avenue, and at least 20 feet on a **narrow street**.

(c) In Subdistrict A, the provisions of paragraph (a) of Section 35-64, as modified by paragraphs (a) and (b) of this Section, shall apply to any **mixed building**. For the purposes of determining the permitted tower coverage in Block 3, as indicated on the District Plan in Appendix A of this Chapter, that portion of a **zoning lot** located within 100 feet of the west **street line** of Central Park West shall be treated as if it were a separate **zoning lot** and the tower regulations shall not apply to such portion.

ZR § 82-37 - Street Walls Along Certain Street Lines

(a) On a ***zoning lot*** with a ***front lot line*** coincident with any of the following ***street lines***, a ***street wall*** shall be located on such ***street line*** for the entire frontage of the ***zoning lot*** on that ***street*** and shall rise without setback to a height of 85 feet above ***curb level***:

(1) the east side of Broadway between West 61st Street and West 65th Street;

(2) the east side of Columbus Avenue between West 65th Street and West 66th Street;

(3) the east side of Broadway between West 67th Street and West 68th Street;

(4) the west side of Broadway between West 66th Street and West 68th Street; and

(5) the west side of Broadway between West 60th Street and West 62nd Street.

Such ***street wall*** shall extend on a ***narrow street*** to a distance of not less than 50 feet from its intersection with the ***street line*** of Broadway or Columbus Avenue and shall include a 20 foot setback at a height of 85 feet above ***curb level*** as required in Section 33-432 (In other Commercial Districts).

(b) On a ***zoning lot*** in Block 1, as indicated on the District Plan in Appendix A of this Chapter, with a ***front lot line*** coincident with any of the following ***street lines***, a ***street wall*** shall be located on such ***street lines*** for the entire frontage of the ***zoning lot*** on that ***street***:

(1) the west side of Broadway between West 62nd Street and West 63rd Street;

(2) the south side of West 63rd Street between Broadway and Columbus Avenue; and

(3) the east side of Columbus Avenue between West 62nd Street and West 63rd Street.

The ***street wall*** located on the south side of West 63rd Street shall rise vertically without setback to the full height of the ***building*** except for the top four floors or 40 feet, whichever is less, and shall extend along Columbus Avenue and/or Broadway for no more than one-half of the length of the total ***block*** front. The ***street wall*** located on the remaining ***block***front on Broadway shall rise to a height of 85 feet above ***curb level*** and then set back 20 feet as required in Section 33-432.

(c) On a ***zoning lot*** in Block 2, as indicated on the District Plan, with a ***front lot line*** coincident with any of the following ***street lines***, a ***street wall*** shall be located on such ***street line*** for the entire frontage of the ***zoning lot*** on that ***street***:

(1) the east side of Broadway between West 67th Street and West 66th Street;

(2) the north side of West 66th Street between Broadway and Columbus Avenue; and

(3) the west side of Columbus Avenue between West 66th Street and West 67th Street.

The ***street wall*** located on the north side of West 66th Street shall rise vertically without setback to the full height of the ***building*** except for the top four floors or 40 feet, whichever is less, and shall extend on Broadway and/or Columbus Avenue for no more than one-half of the length of the total ***block*** front. The ***street wall*** located on the remaining ***block***front on Broadway shall rise to a height of 85 feet above ***curb level*** and then set back 20 feet as required in Section 33-432.

(d) On a ***zoning lot*** in Block 3, as indicated on the District Plan, with a ***front lot line*** coincident with the ***street line*** of Central Park West, the ***street wall*** shall be located on such ***street line*** for the entire frontage of the ***zoning lot*** on that ***street***.

The ***street wall*** fronting on Central Park West shall rise vertically without setback to a height of at least 125 feet but not greater than 150 feet and shall extend along the ***street line*** of West 61st Street and along the ***street line*** of West 62nd Street to a distance of not less than 50 feet but not more than 100 feet from their intersection with the west ***street line*** of Central Park West. Above that height, no ***building or other structure*** shall penetrate a ***sky exposure plane*** that starts at the ***street line*** and rises over the ***zoning lot*** at a ratio of 2.5:1.

ZR § 82-38 - Recesses in Street Wall

Recessed fenestration and special architectural expression lines in the ***street wall*** are required as follows:

(a) Except as set forth in paragraph (b) of this Section, the aggregate width of all recesses in the ***street wall*** fronting upon Broadway shall be between 15 percent and 30 percent of the entire width of such ***street wall*** at any ***story*** between the ground floor and 85 feet above ***curb level***.

(b) In Block 1, as indicated on the District Plan in Appendix A of this Chapter, for any ***street wall*** fronting upon the south side of West 63rd Street and extending along Broadway and/or Columbus Avenue to a distance of not less than 50 percent of the ***block*** front, the aggregate width of all recesses in the ***street walls*** along each such ***street*** shall be between 15 percent and 30 percent of the entire width of each ***street wall*** at any ***story*** between the ground floor and 85 feet above ***curb level*** and shall be between 30 percent and 50 percent of the entire width of each ***street wall*** at any ***story*** above 85 feet above ***curb level***.

(c) In Block 2, as indicated on the District Plan, the requirement of ***street wall*** recesses in paragraph (b) of this Section shall also apply to a ***street wall*** fronting upon the north side of West 66th Street and extending along Broadway and/or Columbus Avenue to a distance of not less than 50 percent of the ***block*** front.

Such recesses shall be a minimum of one foot in depth and shall not exceed a depth of 10 feet. Below a height of 85 feet above ***curb level***, no recesses deeper than one foot shall be permitted in a ***street wall*** within a distance of 10 feet from the intersection of any two ***street lines***.

In addition, along the ***street lines*** of Broadway, West 63rd Street and West 66th Street within Blocks 1 and 2, the ***street wall*** shall provide, at a height of 20 feet above ***curb level***, an architectural expression line consisting of a minimum six inch recess or projection, for a minimum height of one foot and maximum height of two feet.

ZR § 82-39 - Permitted Obstructions Within Required Setback Areas

The ***street wall*** of a ***building*** may be vertically extended above a height of 85 feet above ***curb level*** without setback in accordance with either of the following provisions:

(a) A dormer may be allowed as a permitted obstruction within the required ***initial setback distance*** above a height of 85 feet above ***curb level***. The ***street wall*** of a dormer shall rise vertically as an extension of the ***street wall*** of the ***building***. A dormer may be located anywhere on a ***wide*** or ***narrow street*** frontage.

On any ***street*** frontage the aggregate width of all dormers at the required initial setback level shall not exceed 60 percent of the width of the ***street wall*** of the ***story*** immediately below the initial setback level. For each foot of height above the required initial setback level, the aggregate width of all dormers at that height shall be decreased by one percent of the width of the ***street wall*** of the ***story*** immediately below the initial setback level. Such dormers shall count as ***floor area*** but not as tower ***lot coverage***.

(b) On a ***wide street*** and on a ***narrow street*** within 50 feet of its intersection with a ***wide street***, the ***street wall*** of a ***building*** may be vertically extended without setback within the required ***initial setback distance*** above a height of 85 feet above ***curb level***, up to a maximum height of 125 feet, provided that the aggregate width of such ***street walls*** shall not exceed 50 percent of the width of the ***street wall*** of the ***story*** immediately below the initial setback level and provided the ***street wall*** of the ***building*** contains special architectural expression lines at a height of 85 feet above ***curb level***.

ZR § 82-40 - Special Height Limitation

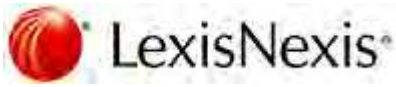
On Block 1 or 2, as indicated on the District Plan in Appendix A of this Chapter, the maximum height of a ***building or other structure*** shall not exceed 275 feet

above ***curb level***, except that a penthouse may be located above such height, provided that such penthouse:

(1) contains not more than four ***stories*** or 40 feet, whichever is less; and

(2) the gross area of each ***story*** does not exceed 80 percent of the gross area of that ***story*** directly below it.

CASE LAW



Abood v. Hospital Ambulance Service, Inc.

Court of Appeals of New York

March 13, 1972, Argued ; May 3, 1972, Decided

No Number in Original

Reporter
30 N.Y.2d 295 *; 283 N.E.2d 754 **; 332 N.Y.S.2d 877 ***; 1972 N.Y. LEXIS 1322 ****

Arthur Abood et al., Plaintiffs, and Motors Insurance Corporation, Plaintiff-Respondent, v. Hospital Ambulance Service, Inc., Appellant, and Beatrice Russo et al., Defendants-Respondents; Angela L. Russo et al., Respondents, v. Hospital Ambulance Service, Inc., Appellant

Prior History: [****1] *Abood v. Hospital Ambulance Serv., 36 A D 2d 583*.

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered January 25, 1971, which unanimously affirmed, insofar as appealed from, (1) an order of the Supreme Court at a Trial Term (Charles J. Beckinella, J.), entered in Kings County, denying a motion by defendant-appellant to set aside a verdict against it and for a new trial as to plaintiff Motors Insurance Corporation and granting the motion as to plaintiff Angela L. Russo unless she stipulated to reduce the verdict to $ 10,000, and (2) the judgment entered upon such order and upon such stipulation.

Disposition: Order affirmed, with costs.

Case Summary

Procedural Posture
By permission, appellant ambulance service sought review of the order of the Appellate Division of the Supreme Court in the Second Judicial Department (New York), which affirmed an order denying a motion by the ambulance service to set aside a verdict against it and for a new trial as to plaintiff insurer and granting the motion as to plaintiff insured, unless she stipulated to reduce the verdict.

Overview

An ambulance owned by the ambulance service, in answering an emergency call, collided with another vehicle at a traffic-controlled intersection. At the time, the red turret light of the ambulance was on, but the driver had not sounded the siren. The court held that the ambulance was not entitled to emergency status because its operator did not, as required by *N.Y. Veh. & Traf. Law § 1104*, give an audible warning as it approached and entered the intersection against a red signal. The court found that the phrase, "as may be reasonably necessary," as found in the statute, meant that the emergency exemption was applicable at other traffic regulation immunities, such as speed limitations, parking restrictions, directional and turning regulations, and not at the immunity from observing red signal lights. The court also looked at legislative history and determined that the ambulance, to be entitled to emergency status, was absolutely required to give an audible warning before the emergency vehicle exemption attached in the circumstances.

Outcome
The court affirmed the denial of the ambulance service's motion to set aside the verdict and for a new trial.

30 N.Y.2d 295, *295; 283 N.E.2d 754, **754; 332 N.Y.S.2d 877, ***877; 1972 N.Y. LEXIS 1322, ****1

Counsel: *James M. Gilleran* and *Edward L. Milde* for appellant. The court was in error in ruling that the ambulance lost its status as an emergency vehicle as matter of law since it did not have a siren in operation. (*Matter of Smith* [*Great Amer. Ins. Co.*], *29 N Y 2d 116*; *Lanvin Parfums v. Le Dans, Ltd., 9 N Y 2d 516*; *Matter of River Brand Rice Mills v. Latrobe Brewing Co., 305 N. Y. 36*; *Matter of Town of Smithtown v. Moore, 11 N Y 2d 238*; *Major v. Waverly & Ogden, 7 N Y 2d 332*; *Matter of Picone v. Commissioner of Licenses, 241 N. Y. 157*.)

Robert G. Martin, Julius Diamond and *Martin H. McGlynn* for defendants-respondents and respondents. I. The court did not err in its [****4] charge dealing with the rights of an ambulance as an emergency vehicle under *sections 1104* and *1144 of the Vehicle and Traffic Law*. II. The question of constitutionality of rules 105 and 106 of the Department of Hospitals which deprived ambulances at the time of this accident of the right to become emergency vehicles should not affect the determination of the rights of the parties to this action.

Judges: Jasen, J. Chief Judge Fuld and Judges Burke, Scileppi, Bergan, Breitel and Gibson concur.

Opinion by: JASEN

Opinion

[*296] [**755] [***878] This appeal requires us to pass upon a question of public importance concerning right-of-way privileges granted by statute to ambulances being driven as emergency vehicles.

An ambulance owned by the defendant, Hospital Ambulance Service, Inc., answering an emergency call, [1] collided with another vehicle at the traffic-controlled intersection of 7th Avenue and 3rd Street in Brooklyn. At the time of the accident, the red turret light of the ambulance was on, but no siren was sounded.

[****5] [***879] The jury was instructed that the defendant's failure to use or equip its ambulance with a siren or other device to give [*297] audible emergency warning deprived the ambulance driver of a preferred right of way at the traffic-controlled intersection at the time of the accident, and required the ambulance driver to observe traffic light commands the same as any other motor vehicle operator. Thus, the issue dispositive of the litigation was the jury's determination as to which of the vehicles entered the intersection against a red traffic signal. The question was resolved by the jury in favor of the plaintiffs and against the ambulance service.

We granted leave to appeal in this case in order to consider the issue whether an ambulance, on an emergency call, is required at a traffic-controlled intersection to sound an audible emergency signal in order to be entitled to the privileges of an emergency vehicle.

Section 1104 of the Vehicle and Traffic Law sets forth the privileges accorded emergency vehicles when responding to an emergency call. [2] [**756] Particularly pertinent is subdivision (c) of the section which provides that the "exemptions herein granted [****6] to an authorized emergency vehicle shall apply only when audible signals are sounded from any said vehicle while in motion by bell, siren, or exhaust whistle *as may be reasonably necessary*, and when the vehicle is equipped with at least one lighted lamp displaying a red light". (Emphasis added.)

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[1] Plaintiff Abood had been struck by a hit-and-run vehicle, and seriously injured. Accompanying him in the ambulance were plaintiffs, Theodore Anderson, Irene Smith and Gerald Pleau.

[2] The privileges are enumerated in *subdivision (b) of section 1104*. Pursuant to this subdivision, the driver may: "1. Stop, stand or park irrespective of the provisions of this title; 2. Proceed past a steady red signal, a flashing red signal or a stop sign, but only after slowing down as may be [reasonably] necessary for safe operation; 3. Exceed the maximum speed limits so long as he does not endanger life or property; 4. Disregard regulations governing directions of movement or turning in specified directions."

30 N.Y.2d 295, *297; 283 N.E.2d 754, **756; 332 N.Y.S.2d 877, ***879; 1972 N.Y. LEXIS 1322, ****6

Construction of the phrase "as may be reasonably necessary" is the pivotal point in controversy. The ambulance service argues that the phrase negatives an absolute requirement that an audible emergency [****7] signal be given, and merely presents a jury question to determine such reasonable necessity. In other words, it contends that "§ 1104 requires the ambulance driver to make a judgment as to whether or not it is 'reasonably necessary' to sound a siren and that a jury will determine whether his judgment was correct, if he does not sound a siren and an accident occurs."

[*298] In construing statutory provisions, the purpose of the statute and the objectives sought to be accomplished by the Legislature must be borne in mind. (Matter of Capone v. Weaver, 6 N Y 2d 307, 309; Matter of New York Post Corp. v. Leibowitz, 2 N Y 2d 677, 685; [***880] People v. Ryan, 274 N. Y. 149, 152; see, also, 2 Sutherland, Statutory Construction [3d ed.], § 4501.) Indeed, the "primary command to the judiciary in the interpretation of statutes is to ascertain and effectuate the purpose of the Legislature." (Rankin v. Shanker, 23 N Y 2d 111, 114.) Whenever such intent is apparent, from the entire statute, its legislative history, or the statutes of which it is made a part, it must be followed in construing the statute. (Matter of United Press Assns. v. Valente [****8] , 308 N. Y. 71, 83-84; Matter of River Brand Rice Mills v. Latrobe Brewing Co., 305 N. Y. 36, 43; McKinney's Cons. Laws of N. Y., Book 1, Statutes, § 111, p. 225.) While it is true that, whenever the language of a statute is clear and unambiguous, we are required under ordinary rules of construction to give effect to its plain meaning (Meltzer v. Koenigsberg, 302 N. Y. 523, 525; Lawrence Constr. Corp. v. State of New York, 293 N. Y. 634, 639), the literal language of the statute, where it does not express the statute's manifest intent and purpose, need not be adhered to. (Matter of Hogan v. Culkin, 18 N Y 2d 330, 335 and cases cited therein.) [3] Rather, "[to] effect the intention of the legislature the words of a single provision may be enlarged or restrained in their meaning and operation, and language general in expression may be subjected to exceptions through implication." (Matter of Meyer, 209 N. Y. 386, 389-390; see Surace v. Danna, 248 N. Y. 18, 21; People v. Santoro, 229 N. Y. 277, 281-282; cf. *Matter of Smith* [*Great Amer. Ins. Co.*], 29 N Y 2d 116, 120.)

[****9] The predecessor statute to section 1104, section 84 of the Vehicle and Traffic Law, [**757] likewise authorized emergency vehicles to pass through red signal-controlled intersections. Such a privilege was granted, however, only when "adequate warning [*299] [was] sounded." (L. 1947, ch. 137, § 2.) Thus, the sounding of an audible emergency warning was made a strict prerequisite. It is highly significant that when the statute was recodified, the joint legislative committee, which proposed section 1104, did not intend any change in this warning requirement. (See N. Y. Legis. Doc., 1954, No. 36, p. 36.) In its report on proposed section 1144 of the Vehicle and Traffic Law, which imposes a duty upon other motorists *to yield the right of way* upon the [***881] approach of an emergency vehicle sounding an audible signal by siren, exhaust whistle, or bell, the committee re-emphasized the mandatory requirement that a siren be sounded in order to invoke the privilege. (N. Y. Legis. Doc., 1954, No. 36, p. 75.)

In light of this legislative history, and considering the contrary indications found in the committee's notes, it is inconceivable, we suggest, that the Legislature [****10] intended to have the jury determine whether there was a need to sound an alarm to take advantage of the privilege of proceeding against a red traffic signal light. (Cf. Williams v. Williams, 23 N Y 2d 592, 598-599.) As the committee's report makes clear, indeed, in view of its recognition of the unreasonable risk imposed on other motorists should an audible warning not be given, the interpolation of the phrase "as may be reasonably necessary", which was not contained in either section 84 or section 11-106 of the Uniform Vehicle Code, [4] was not intended to alter the prior rule that the sounding of an emergency warning is indispensable for the attaching of the privilege to proceed against a red signal light. In other words, when proceeding against a red traffic signal, caution requires and the statute was hardly intended to say

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[3] "There is no more likely way to misapprehend the meaning of language -- be it in a constitution, a statute, a will or a contract --", Judge Learned Hand reminded us, "than to read the words literally, forgetting the object which the document as a whole is meant to secure." (Central Hanover Bank & Trust Co. v. Commissioner of Internal Revenue, 159 F. 2d 167, 169; see, also, Spencer v. Childs, 1 N Y 2d 103, 106-107.)

[4] Section 1104 was derived substantially from this section of the Uniform Vehicle Code. (N. Y. Legis. Doc., 1954, No. 36, p. 36.)

30 N.Y.2d 295, *299; 283 N.E.2d 754, **757; 332 N.Y.S.2d 877, ***881; 1972 N.Y. LEXIS 1322, ****10

otherwise, that audible warnings be sounded -- loud enough to be heard and given soon enough to be acted upon -- so as to avoid a collision.

[****11] It should be readily apparent that motorists facing a green light are invited to proceed through the intersection and, in so doing, may not appreciate or have knowledge of the approaching danger unless they have audible warning. The conclusion, therefore, is clear that the phrase, "as may be reasonably necessary", was primarily directed at other traffic regulation immunities -- such as speed limitations, parking restrictions, [*300] directional and turning regulations -- and not at the immunity from observing red signal lights. This construction is manifestly reasonable since the perceivable risk in the enjoyment of this particular immunity suggests the use of greater caution and standards than are applicable to the other immunities. (Cf. *Buck v. Ice Delivery Co., 146 Ore. 132, 134-135*.)

In so construing *section 1104* (subd. [c]), we also give heed to the principle of statutory construction that a court must take the "entire act into consideration" (*People ex rel. Miller v. Martin, 1 N Y 2d 406, 410)*, and "aim to reconcile apparent contradictions" (*Hoey v. Gilroy, 129 N. Y. 132, 137*; see, also, McKinney's Cons. Laws of N. Y., Book 1, Statutes, §§ [****12] 97, 98). Thus, by imposing an absolute requirement that an audible [***882] warning be given before the emergency vehicle exemption attaches, the apparent inconsistency between *sections 1104* and *1144* is reconciled. (Accord, *Hogle v. City of Minneapolis, 193 Minn. 326*; but see *Reed v. Simpson, 32 Cal. 2d 444*; see, generally, Ann., Ambulance -- Injury -- Liability, *84 ALR 2d 121*, esp. Part III, Accidents at street intersections; Fisher, Vehicle Traffic Law, pp. 147-163, 260-262.)

[**758] In sum, the ambulance was not entitled to emergency status since its operator did not, as required by statute, give an audible warning as it approached and entered the intersection against a red signal.

Accordingly, the order appealed from should be affirmed.

Order affirmed, with costs.

End of Document

NEW YORK CITY BOARD OF STANDARDS AND APPEALS
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THE CITY CLUB OF NEW YORK, JAMES C.P. BERRY, JAN CONSTANTINE, VICTOR A. KOVNER, AGNES C. McKEON, and ARLENE SIMON,

Appellants,

BSA Cal. No. 2019-

Appeal from Building Permit issued April 11, 2019

Concerning Block 1118, Lot 45

----------x

CORRECTED STATEMENT OF FACTS AND LAW

Preliminary Statement

Appellants, a not-for-profit civic organization and individuals who live near the proposed building, challenge the validity of a building permit issued by the Department of Buildings ("DOB") on April 11, 2019, for a 775-foot residential tower at 36 West 66th Street a/k/a 50 West 66th Street. This tower, now being built by Extell Development Company and West 66th Sponsor LLC ("Extell"), would be the tallest building on the Upper West Side, hundreds of feet higher than contemplated by the City Planning Commission when it enacted the tower-on-base regulations in 1993. Those regulations were supposed to limit buildings to "the low 30 stories" in height. This building would be equivalent in height to a traditional 70-plus story building.

The proposed building violates the City's zoning regulations in two ways: (1) it is based on a methodology for calculating allowable floor space that violates the Bulk Packing Rule, ZR § 82-34, and the Split Lot Rules, ZR §§ 33-48 and 77-02; and (2) it claims an exemption from FAR for 196 vertical feet of purported mechanical space in the mid-

section of the building that is neither "used for mechanical equipment" nor customarily accessory to residential uses, and is therefore illegal. ZR §§ 12-10 and 22-12.

FACTS

A. The Special Lincoln Square District, the Proposed Building, and the Site

The proposed building is in the Special Lincoln Square District, established in 1969 "to guide new growth and uses in a way that would complement the newly sited institutions" of Lincoln Center.[1] The great majority of the District is zoned C4-7 (R10 equivalent), a commercial designation which also allows the highest level of residential density in the City. Towers are allowed in this area.[2] Only a very small portion of the Special District – parts of two blocks comprising 5.3 percent of the District's area – is zoned R8, a lower density residential designation where towers are not allowed. The map below shows the Lincoln Square Special District (the grey area between West 60th and West 68th Streets, not including Columbus Circle and surrounds), and Extell's zoning lot within it (cross-hatched).

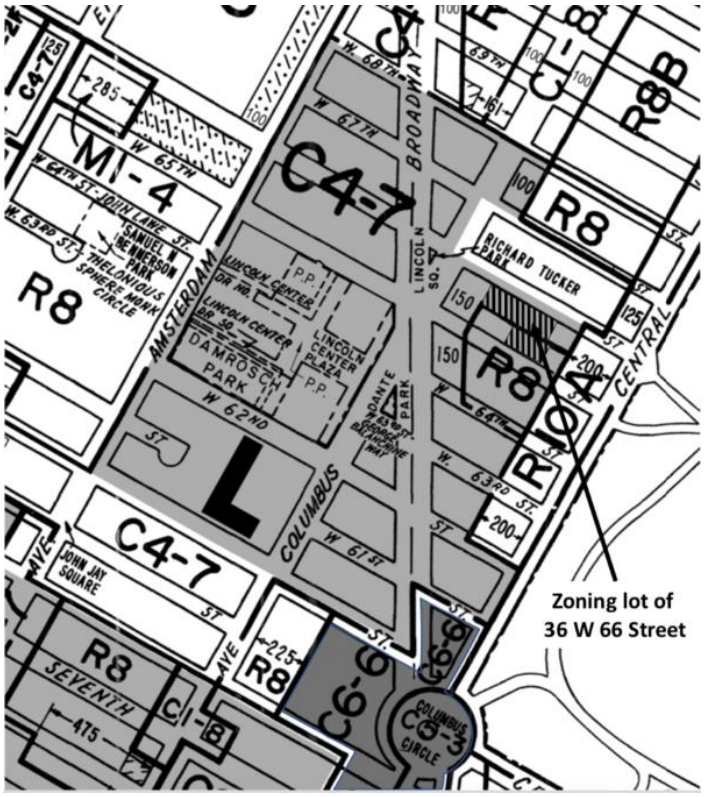
The current zoning rules for the Special District are the result of the tower-on-a-base amendments enacted in 1993, following a Zoning Review conducted by the Department of City Planning[3] and earlier proposals that had suggested two rules to regulate the height of towers: the Bulk Packing Rule and the Tower Coverage Rule. The Department's proposals

[1] CPC Report N 940127(A) ZRM, at 3 (Dec. 20, 1993) ("1993 CPC Report"), at 3 (https://www1.nyc.gov/assets/planning/download/pdf/about/cpc/940127a.pdf) (Exh. A); *see also* CPC Reports CP-20365A, CP-20388A, and CP-20595 (Mar. 19, 1969) (https://www1.nyc.gov/assets/planning/download/pdf/about/cpc/19690319.pdf).

[2] The Zoning Resolution defines a "tower" as a building that, pursuant to ZR §§ 23-65 or 35-64 ("Tower Regulations"), is permitted to break the "sky exposure plane," an imaginary inclined plane drawn from the street line that otherwise limits building height pursuant to the Zoning Resolution.

[3] Dep't of City Planning, Special Lincoln Square District Zoning Review (May 1993) ("1993 DCP Zoning Review") (Exh. B).

were drafted with a view toward regulating six potential development sites that the Zoning Review had identified within the District. All six potential sites were in the highest residential



density (C4-7/R10) portion of the Special District, where towers are allowed. One of the sites was the "ABC assemblage," comprising three lots with small buildings fronting on 66th Street, which now forms part of Extell's development lot. None of the sites identified for potential development was located in the R8 portion of the Special District, where towers are not allowed.

Extell's zoning lot, Block 1118, Lot 45, runs from West 65th to West 66th Street, approximately 300 feet from Central Park, straddling the C4-7/R10 and R8 districts.

Sixty-four percent of the lot area is in the C4-7/R10 district and 36 percent is in the R8 district.[4] The dividing line between the zoning districts runs east-west right through the middle of Extell's zoning lot, with the northern side zoned C4-7/R10 and the southern side zoned R8. The northern portion contains the landmarked ABC Armory, which remains the property of ABC, and is joined to Extell's lot by a zoning lot merger. The southern portion, prior to its purchase by Extell, had been developed at or close to its total allowable FAR with an 11-story building that housed the headquarters of the Jewish Guild for the Blind, now demolished.

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 Extell 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. These spaces are in addition to two mechanical floors at the top, for a total of 229 vertical feet of supposed mechanical spaces, the equivalent of 23 traditional floors.

[4] *See* Extell's 2019 Zoning Diagram, approved Apr. 4, 2019 ("2019 ZD1), at 1 (http://a810-bisweb.nyc.gov/bisweb/BScanJobDocumentServlet?requestid=3&passjobnumber=121190200&passdocnumber=01&allbin=1028168&scancode=ES636516048) (Exh. C).

B. Procedural History

On November 24, 2015, Extell applied for a permit to build an innocuous 25-story, 292-foot-tall residential building with a community facility on four small tax lots along 66th Street.[5] On June 7, 2017, DOB issued a New Building permit for that building, and Extell began construction pursuant to that permit. In fact, Extell never intended to build this building. It was only a stalking horse. Already in April 2015, seven months before it filed for that permit, it had completed plans for a building more than twice the size – the building at issue here.[6] Under the disingenuous cover of its permit for the smaller building, it has been able to work undisturbed for almost two solid years, advancing preliminary construction, secure in the knowledge that the farther it got, the less likely that it would eventually be ordered to comply with zoning. At a public event last year, another prominent developer, Jon Kalikow, celebrated Extell's stalking-horse trick:[7]

> "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.

[5] ZD1 Zoning Diagram, filed Nov. 24, 2015, approved Oct. 24, 2016 ("2016 ZD1") (http://a810-bisweb.nyc.gov/bisweb/BScanJobDocumentServlet?requestid=28&passjobnumber=121190200&passdocnumber=07&allbin=1028168&scancode=ES336402953) (Exh. D).

[6] Extell's Zoning Diagram for the larger building ("2018 ZD1"), approved July 26, 2018, is dated April 15, 2015. *See* http://a810-bisweb.nyc.gov/bisweb/BScanJobDocumentServlet?requestid=4&passjobnumber=121190200&passdocnumber=01&allbin=1028168&scancode=ES555372378 (Exh. D)

[7] 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/) (Exh. E).

Bait and switch indeed.

On December 13, 2017, Extell filed its plans for the 775-foot building.[8] On July 26, 2018, DOB approved Extell's Zoning Diagram for that building. On September 9, 2018, Landmark West! ("LW!") and 10 West 66th Street Corporation, filed a Zoning Challenge with DOB.[9] The challengers raised two issues that remain of concern to Appellants: first, that Extell's building design relied on an illegal methodology for applying the Bulk Packing and Tower Coverage Rules; and second, that the building as then proposed had an enormous 160-foot-high void, an alleged mechanical space that was illegal under the Zoning Resolution.

On November 19, 2018, DOB rejected the challenge on all points.[10] With respect to the 160-foot void, DOB simply stated, "The Zoning Resolution does not prescribe a height limit for building floors."

With respect to the Bulk Packing Rule, DOB's response was more extensive. The challengers had raised the fact that Extell had calculated the bulk below 150 feet based on the entire zoning lot while calculating tower coverage based only on the C4-7/R10 portion of the lot. They argued that the Bulk Packing and Tower Coverage Rules must both apply to the same area. DOB's response followed the reasoning of Extell's counsel David Karnovsky, now in private practice but for many years previous General Counsel at the Department of City

[8] http://a810-bisweb.nyc.gov/bisweb/JobsQueryByNumberServlet?passdocnumber=16&passjobnumber=121190200&requestid=18#FSup.

[9] BSA Cal. No. 2018-199-A.

[10] The Zoning Challenge and DOB's denial, in document called a "ZRD2," may be found at http://a810-bisweb.nyc.gov/bisweb/BScanJobDocumentServlet?requestid=19&passjobnumber=121190200&passdocnumber=16&allbin=1028168&scancode=SC620325809 (Exh. F).

Planning. Mr. Karnovsky set forth his argument in a December 18, 2017 email addressed to "Council Land Use, Office of Council Member Helen Rosenthal Staff."[11]

Following Mr. Karnovsky, DOB correctly pointed out that under the Zoning Resolution's provisions governing split lots (ZR §§ 33-48 and 77-02), the Tower Coverage Rule can only apply to the C4-7/R10 portion of the zoning lot, where towers are permitted. However, still following Extell's counsel, DOB argued that the split lot provisions 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."[12] Extell's counsel based his assertion on the fact 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," he argued, the Bulk Packing Rule applied to both portions, notwithstanding the split lot rules.[13]

After DOB denied the Zoning Challenge, LW! timely appealed to the BSA.[14] However, before the BSA could address the issue, DOB reversed itself: on January 14, 2019, it issued a Notice of Intent to Revoke Approval of the Zoning Diagram that had been the object of LW!'s Zoning Challenge and subsequent appeal to the BSA.[15] The Notice stated DOB's intent to revoke the approval within 15 calendar days "unless sufficient information is presented to the Department to demonstrate that the approval should not be revoked." DOB

[11] Karnovsky Email (Dec. 18, 2017) (Exh. G).

[12] ZRD2 (Exh. F), at 2.

[13] *Id.*.

[14] *See* Statement of Facts, BSA 2018 199 A (filed Dec. 19, 2018) (Exh. H).

[15] Notice of Intent to Revoke (Jan. 14, 2019) (Exh. I).

now took the position that the void was unlawful. "The proposed mechanical space on the 18th floor of the Proposed Building," it stated, "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."[16] The Notice also announced that DOB was rescinding its denial of LW!'s Zoning Challenge, from which LW! had appealed. As a result, the BSA took the position that the appeal had been rendered moot. The Notice did not, however, reconsider whether Extell'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.

Meanwhile, although DOB had threatened to issue a stop-work order, it had not done so, leaving Extell free to continue construction.

By a letter dated January 25, 2018, Extell 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,[17] and, on April 11, 2019, for the first time, issued a building permit for the 775-foot tower.[18] The permit approved plans that were tweaked, although not in any way that is material here. Apparently in response to objections

[16] *Id.* at 1.

[17] Exh. C.

[18] *See* http://a810-bisweb.nyc.gov/bisweb/WorkPermitDataServlet?requestid=4&allisn=0003617726&allisn2=0002887139&allbin=1028168&passjobnumber=121190200. (Exh. J).

by the Fire Department, which had raised safety concerns about the proposed 160-foot void, Extell replaced that void 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 mechanical equipment.[19]

On April 24, 2019, Appellants filed a lawsuit against Extell seeking a preliminary and permanent injunction against the ongoing construction of the building at issue.

THE BULK PACKING AND TOWER COVERAGE RULES

In 1993, following various other measures to limit building heights in Manhattan's residential zoning districts, such as the Sliver Law in 1983 and a series of contextual zoning provisions in 1984, the City enacted the Tower-on-a-Base Rules. Already in 1989, the City had begun to consider these rules. In a "Discussion Document" titled "Regulating Residential Towers and Plazas" produced that year, the City Planning Department 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."[20] The Department 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.

[19] *See* Dep't of City Planning, Residential Mechanical Voids Findings ("Mechanical Voids Findings") (Apr. 2018, updated Feb. 2019) (Exh. K attached).

[20] Dep't of City Planning, Regulating Residential Towers and Plazas: Issues and Options: A Discussion Document (1989) ("Discussion Document"), at 7 (Exh. L).

It introduced "packing-the-bulk" and minimum tower coverage as two complementary tools to regulate height. The Bulk Packing Rule 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.[21]

However, the City did not act on this proposal until 1993. In the Special Lincoln Square District, the tipping point that pushed the City into action was the 545-foot-tall Millennium Tower at 101 West 67th Street, announced in 1992. That tower – 230 feet *shorter* than Extell's planned building – outraged the community and roused the City to action.[22] In its 1993 Zoning Review of the Special District, the City Planning Department restated the problem:

> 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.[23]

[21] *Id.* at 26-27. The Discussion Document described how too-low lot coverage led to 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.

Id. at 16-17.

[22] 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).

[23] 1993 DCP Zoning Review, at 3 (Exh. A).

The tower-on-a-base amendments were intended to limit building height definitively, not only in the Special Lincoln Square 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 City Planning Commission on December 20th, 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).

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 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.[24]

The two City Planning 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."[25] 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.[26] The Department of City

[24] On the other hand, consider the result of using Extell'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.

[25] 1993 CPC Report, at 3 (Exh. A).

[26] *Id.* at 19.

Planning Report for the high-density residential districts elsewhere in Manhattan contained similar language.[27]

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

Extell's interpretation of the Bulk Packing Rule, which has been adopted by DOB, is contrary to the plain language of the Zoning Resolution and nullifies the Bulk Packing Rule.

As Mr. Karnovsky has well-argued, 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, Mr. Karnovsky and DOB 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.

Contrary to their argument, 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 Lincoln Square District from the rest of Manhattan's 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

[27] CPC Report N 940013 ZRM (Dec. 20, 1993), at 2-3, 5, 11-12 (https://www1.nyc.gov/assets/planning/download/pdf/about/cpc/940013.pdf).

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 Extell in fact proposes to put its tower. Extell 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 Extell 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 Extell 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.

Extell'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 Extell's 2019 ZD1.[28] 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 Extell'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

[28] 2019 ZD1 (Exh. C).

the excess base square footage is in a district where towers are not allowed. It might as well be in Timbuktu 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.[29] 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.

By Extell'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.[30] With Extell'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

[29] 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 Extell, 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 Extell 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, Extell would also have to put the full allowable square footage into its base. For every 6 sf in the base, Extell can place 4 sf in the tower, up to the maximum allowed. However, if Extell 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, Extell cannot build over the Armory.

[30] 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.

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

The Zoning Resolution 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 Extell 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 Extell's Counsel Say It Means

All that DOB and Extell 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.[31]

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.[32] 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 Extell'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. Extell'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, 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.'"[33] This does not bolster his argument; it fatally undermines it. Contrary to Extell'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 Extell's zoning lot.

The paragraph quoted by Extell'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.[34]

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."[35] Yet, as Mr. Karnvosky correctly argues, the

[33] Karnovsky Email, at 3 (underlining added) (Aff. Exh. G).

[34] 1993 CPC Report, at 7-8 (Exh. A).

[35] 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

Tower Coverage Rule does not apply to the R8 portion of the Special District. If it did, it would drastically reduce the height of Extell'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").

> <u>development's total floor area to be located below an elevation of 150 feet.</u> 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.

The broader legislative history of the Tower-on-a-Base Rules also makes clear that Extell'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, the City Planning Department wrote,

> 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.[36]

The building here would be almost half as tall again as the Millennium Tower. And indeed, given a big enough R8 portion, under Extell'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'") (quoting *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

[36] 1993 DCP Zoning Review at 14 (Exh. D); *see also id.* at 9.

. . . 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").

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

Extell'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. Extell'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 (quoting *Town of Harvard v. Maxant,* 275 N.E.2d 347 (Mass. S.J.C. 1971) (emphasis added).

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 Extell'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.[37]

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 Extell pretended to be building for two years.

Presumably, however, DOB was responding to Extell'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.[38] 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

[37] Notice of Intent to Revoke (Exh. I).

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

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 City Planning Department 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...."[39] "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.[40] In any event, Appellants believe that Cal. No. 2016-4327-A was wrongly decided and should be reversed.

In its January 25, 2019 letter, Extell 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. Extell 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.

[39] DCP, Mechanical Voids Findings, at 11 (Exh. K).

[40] DCP, Environmental Assessment Statement, Residential Mechanical Voids Text Amendment (Jan. 25, 2019, revised Apr. 9, 2019) Attachment A, at 2 (Exh. 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.

Moreover, Extell'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 Extell's efforts to argue otherwise, it strongly supports the argument that mechanical space qualifies under either independent criterion:

> (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 Extell's description or Appellants', the space here plainly qualifies as a use. According to Extell, 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, Extell 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 Extell's public documents supports its claim that this space is necessary to house mechanical equipment. Indeed, there is no mechanical equipment yet imagined by humans that requires a 48- or 64-foot tall clearance for accessory use in a residential building.

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. . . ." *Educational Construction 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.

Extell'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: "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]."[41]

[41] Joe Anuta, "City Wants to Cut Down Supertalls," Crain's New York (Feb. 6, 2018), at 2 (Exh. O).

CONCLUSION

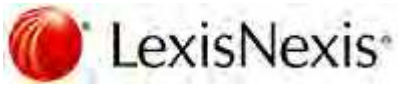
Because the Developer's plans for 36 West 66th Street violate both the letter and the purpose of the Zoning Resolution, Appellants respectfully request that the Board revoke the Developer's permit.

Dated: Brooklyn, New York
May 10, 2019

Respectfully submitted,

_____/s/_____
JOHN R. LOW-BEER
415 8th Street
Brooklyn, NY 11215
(718) 499-2590
jlowbeer@yahoo.com

_____/s/_____
CHARLES N. WEINSTOCK
8 Old Fulton Street
Brooklyn, NY 11201
(323) 791-1500
cweinstock@mac.com



Exxon Corp. v. Board of Standards & Appeals

Supreme Court of New York, Appellate Division, First Department

May 28, 1987

No Number in Original

Reporter
128 A.D.2d 289 *; 515 N.Y.S.2d 768 **; 1987 N.Y. App. Div. LEXIS 43556 ***

In the Matter of Exxon Corporation, Respondent, v. Board of Standards and Appeals of the City of New York et al., Appellants

Prior History: [***1] Appeal from an order of the Supreme Court (Louis J. Grossman, J.), entered July 21, 1986 in New York County, which vacated a resolution of the Board of Standards and Appeals sustaining a Department of Buildings objection to petitioner's application.

Disposition: Order, Supreme Court, New York County, entered on July 21, 1986, unanimously affirmed, without costs and without disbursements.

Case Summary

Procedural Posture
Respondent lessee, which operated a gasoline station, submitted an application to convert it to a combination gasoline station/convenience store. The Supreme Court in New York County (New York) vacated the decision of appellant board of standards and appeals upholding the denial of the application, finding that the board had interpreted the zoning resolution restrictively and arbitrarily. The board challenged the trial court's decision.

Overview
The gas station was in an area zoned for commercial use by service establishments. Writing that zoning ordinances were to be strictly construed, the court noted that the zoning resolution, which defined an automotive service station as a building or tract of land used exclusively for the storage and sale of gasoline or other motor fuels "and for any uses accessory thereto," enumerated certain permitted accessory uses, but did not hold these uses out as exclusive. Moreover, it stated, the zoning resolution defined accessory uses, and mandated that the term be interpreted in accordance with the definition set forth in the resolution. Thus, it held, in determining what uses were accessory to a service station, the board was required to refer to that definition. Noting that the board had granted similar applications, it concluded that while a convenience store was not specifically authorized as an accessory use by the zoning resolution, it was not prohibited, requiring that the board make specific findings of fact as to whether the use qualified as an accessory use under the resolution's definition of the term.

Outcome
The court affirmed the trial court's order, remanding the matter to the board of standards and appeals.

Counsel: *Margaret G. King* of counsel *(June A. Witterschein* with her on the brief; *Peter L. Zimroth*, attorney), for appellants.

George A. Burrell of counsel *(Robert L. Haig* and *Scott I. Batterman* with him on the brief; *Kelley Drye & Warren*, attorneys), for respondent.

128 A.D.2d 289, *289; 515 N.Y.S.2d 768, **768; 1987 N.Y. App. Div. LEXIS 43556, ***1

Judges: Sullivan, J. P. Asch, Milonas, Kassal and Ellerin, JJ., concur.

Opinion by: SULLIVAN

Opinion

[*290] **OPINION OF THE COURT**

[**769] This appeal presents the issue of whether the New York City Zoning Resolution prohibits the operation of a combination convenience store/gasoline station. We are persuaded that it does not, and affirm the remand of the matter to the Board of Standards and Appeals for a consideration of the relevant [***4] factors in determining whether the proposed convenience store satisfies the Zoning Resolution definition of an accessory use.

Exxon is the lessee under a long-term lease of premises located on Bell Boulevard in Queens. The property, a corner lot, is currently utilized, pursuant to a "variation" granted by the Board of Standards and Appeals on April 3, 1956, as a gasoline service station, with a lubritorium, an auto repair facility, as well as facilities for auto washing, an office, and the sale and storage of auto accessories. All four corners of the intersection are zoned C2-2, which allows commercial use by [*291] service establishments. [1] The surrounding area is residentially zoned.

[**770] In 1985, the owner of the property submitted an application to the Department of Buildings to construct a new building [***5] in order to convert the use of the premises to a 24-hour self-service gasoline station, without repair facilities and with a small retail, or convenience store. A retail store falls within a Use Group 6 under the New York City Zoning Resolution and, generally speaking, is permitted as of right, i.e., without need for prior approval, in a C2 area. The Department of Buildings disapproved the application on August 16, 1985, noting, *inter alia*, the following objection: "Proposed retail store on same zoning lot with 'automotive service station' not permitted and contrary to Sec. 12-10 [Zoning Resolution]." [2]

[***6] Section 12-10 of the New York City Zoning Resolution defines "automotive service station" as:

"[A] *building or other structure* or a tract of land used exclusively for the storage and sale of gasoline or other motor fuels and for any *uses accessory* thereto.

"The sale of lubricants, accessories, or supplies, the lubrication of motor vehicles, the minor adjustment or repair of motor vehicles with hand tools only, or the occasional washing of motor vehicles are permitted *accessory uses*.

"A *public parking lot* or *public parking garage* is not a permitted *accessory use*." (Italics as in original.)

Section 12-10 also defines "accessory use":

"An 'accessory use':

---

[1] Since the subject premises is presently in a C2 zoning district, a variance is no longer necessary for the operation of a gasoline station. A special use permit is all that is required.

[2] Only the objection based upon the addition of a convenience store is at issue on this appeal. The Department has also objected to the proposed reconstruction on two other grounds: the need for assurance that fire safety requirements have been considered and the fact that, in completely demolishing the existing gas station, which was constructed prior to the 1961 enactment of the Zoning Resolution, the owner would lose all right to operate such a facility (a nonconforming Group 16 Use) in a C2 area and would have to seek a special use permit or a variance in order to reconstruct any facility selling gasoline at the subject site. The proceeding relating to the appeal from the latter objection was adjourned *sine die* pending final determination of the instant matter. [2]

"(a) Is a *use* conducted on the same *zoning lot* as the principal *use* to which it is related (whether located within the same or an *accessory building or other structure*, or as an [*292] *accessory use* of land), except that, where specifically provided in the applicable district regulations, *accessory* off-street parking or loading need not be located on the same *zoning lot*; and

"(b) Is a *use* which is clearly incidental to, and customarily found in connection with, such [***7] principal *use*; and

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

"When 'accessory' is used in the text, it shall have the same meaning as *accessory use*." (Italics as in original.)

Through their architect, Exxon and the owner appealed to the Board of Standards and Appeals from the Department of Buildings determination, and requested the Board to issue an interpretation of the two subsections of section 12-10 of the Zoning Resolution which define "automotive service station" and "accessory use," respectively, so as to permit the operation of a convenience store at the subject property in conjunction with a self-service gas station. The architect argued that since the Zoning Resolution does not specifically prohibit such combined use, the Board should recognize a retail store as an accessory use to a gas station in a zone where retail stores are permitted. In partial support of his position, the architect relied upon a 1967 Department of Buildings directive stating, in [***8] regard to gas stations, that "additional uses are permitted."

The architect also submitted written materials showing that the operation of a small convenience store in combination with the self-service sale of gasoline had become commonplace throughout the country [**771] over the last few years. At present, for instance, in excess of 70% of all sales of gasoline are conducted from self-service pumps, and some 55,000 gasoline stations, a number of which are located in the City of New York, are being operated in conjunction with a convenience store. The architect placed before the Board examples of some of the many instances in which it had expressly sanctioned such combined use for others, including Exxon's direct competitors.

By unanimous vote and without making any factual findings, the Board upheld the Department of Buildings objection. In so doing, it adopted an interpretation of section 12-10 of the Zoning Resolution which limited permitted "accessory uses" to those contained in that section's definition of "automotive service station." Exxon then commenced this CPLR [*293] article 78 proceeding. The court which heard the petition held, *inter alia*, that the [***9] Board had interpreted the Zoning Resolution too restrictively and arbitrarily, vacated its resolution and remanded the matter to the Board. [3] This appeal followed.

Zoning ordinances, which are in derogation of common law, must be strictly construed against the zoning authority. [***10] *(Thomson Indus. v Incorporated Vil. of Port Wash. N., 27 NY2d 537, 539*; *Matter of 440 E. 102nd St. Corp. v Murdock, 285 NY 298, 304*.) In construing a zoning regulation, "the issue is not whether the use is permissible, but, rather, whether it is prohibited." *(Matter of De Masco Scrap Iron & Metal Corp. v Zirk, 62 AD2d 92, 98*, *affd 46 NY2d 864*.)

In its resolution denying Exxon's appeal, the Board declared that the definition of "automotive service station" contained in section 12-10 "sets forth a clear list" -- in effect, an exclusive list -- "of the uses permitted as

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[3] The Board argues that a remand was unnecessary since, in accordance with the court's decision, a convenience store is an accessory use to a gasoline station as a matter of law and, on remand, it would not have any latitude for the exercise of discretion. We do not read the court's decision so expansively. In our view, it merely held that the Zoning Resolution did not prohibit a convenience store as an accessory use as a matter of law, and remanded the matter for further consideration not inconsistent with that determination. Thus, the order is not a final determination and is not appealable as of right. (*CPLR 5701 [b] [1]*.) Since the issue presented is an important one, leave to appeal is granted, *sua sponte*. (*CPLR 5701 [c]*.)

accessory." [4] But the definition of an automotive service station as a building or tract of land used exclusively for the storage and sale of gasoline or other motor fuels "and for any *uses accessory* thereto" speaks, insofar as the expression "accessory uses" is concerned, not in terms of exclusion or limitation, but, rather, inclusion. The statute expressly permits "any" accessory uses. While section 12-10 enumerates certain permitted accessory uses, it does not, even implicitly, hold the specified uses out as exclusive. Nor does it indicate that these uses are necessarily characteristic of [***11] the only permitted types of use. Significantly, nowhere does it say that "accessory uses", in the context of an automotive service station, must relate directly to the care and maintenance of automobiles. "Had the [city] intended to impose such a condition * * * it could easily have done so." *(Matter of Allen v Adami, 39 NY2d 275, 277.)* Zoning regulations [*294] may not be extended by implication. *(Matter of Monument Garage Corp. v Levy, 266 NY 339.)*

That the Zoning Resolution provides for the inclusion of "any" use accessory to the main use of selling gasoline is made clear in other ways. At the very beginning of section 12-10, the definitional portion of the Zoning Resolution, the following caveat appears: "Words in the text or tables of this resolution which are [***12] *italicized* shall be interpreted in accordance with the provisions set forth in this Section." (Emphasis [**772] in the original.) As is set forth in section 12-01 (c), "[the] word 'shall' is always mandatory and not discretionary." Accordingly, whenever an italicized word appears in any part of the Zoning Resolution, that word must be interpreted in accordance with the definition thereof provided in section 12-10. The Zoning Resolution definition of an "automotive service station", as italicized, provides, in pertinent part: "used exclusively for the storage and sale of gasoline or other motor fuels and for any *uses accessory* thereto." Thus, the Zoning Resolution requires that "uses accessory," as set forth in the definition of an automotive service station, be, without exception, "interpreted in accordance with" the definition of accessory uses set forth in section 12-10.

In determining what are the "uses accessory" to an automotive service station, the Board was therefore required to refer to the definition of an accessory use. It refused to do so, however, insisting that it is "unnecessary to even address the issue of whether a retail store would fit within the [***13] general definition of 'accessory use'", since it considers the list of permissible uses set forth in the definition of automotive service station to be exhaustive. If this were so, however, the words "uses accessory" in that definition would not have been italicized, thereby invoking the Zoning Resolution's definition of "accessory uses". Thus, the Board's interpretation is in direct contradiction to the unambiguous language of the Resolution.

Moreover, the same definition of "automotive service station" includes not only the list of accessory uses which the Board claims is exhaustive and all-inclusive, but also contains two uses -- parking lots and parking garages -- which are prohibited. The Board never suggested that these were the only uses prohibited. Yet, if one list were an all-inclusive enumeration of permitted accessory uses, as the Board contends, there would be no reason at all to have the second list of excluded uses. The existence of such a list, of necessity, militates [*295] against the argument that the first list contains the only permitted uses.

The Zoning Resolution's enumeration of two proscribed uses was apparently intended to prevent undue disturbance [***14] to surrounding areas. For instance, the Resolution permits "the minor adjustment or repair of motor vehicles with hand tools only", and "the occasional washing of motor vehicles", thus interdicting such activities as major overhauls and a commercial car wash. Obviously, the replacement of even these permitted activities with a small retail store would not undermine the intent of the Zoning Resolution.

Thus, the Board's interpretation of section 12-10 effectively struck the words "and for any *uses accessory* thereto" from the last part of the first paragraph. Likewise, it also deleted the last paragraph of the definition with the two prohibited uses, since, according to the Board's reasoning, anything not explicitly mentioned in the second paragraph would be automatically prohibited anyway. In so doing, the Board violated the well-established principle of statutory construction that a statute must be viewed as a whole, and, to that end, all of its parts, should, if possible, be harmonized to achieve the legislative purpose. *(See, Sanders v Winship, 57 NY2d 391, 395-396;*

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[4] The Board also relied, in part, upon its reading of Department of Buildings Directive 7-1967, dated March 23, 1967, as limiting the accessory uses of an automotive service station to "uses [which] are all auto related uses."

People v Mobil Oil Corp., 48 NY2d 192, 199; McKinney's Cons Laws of NY, Book 1, Statutes §§ 97, 98, [***15] 130.) It is also a rule of statutory construction that "effect and meaning must, if possible, be given to the entire statute and every part and word thereof." (McKinney's Cons Laws of NY, *op. cit.*, § 98; *accord,* Pearson v Pearson, 81 AD2d 291, 293; Grich v Wood & Hyde Leather Co., 74 AD2d 183, 184.)

Absent an explanation for the use of the word "any" in the definition, or for the list of prohibitions in the third paragraph, the obvious intent of the Resolution is that any use which would fit the general definition of an accessory use, unless prohibited, is permissible. This would include all uses which are customarily found in connection with the operation of an automotive service station, irrespective of whether they are [**773] specifically mentioned in the second paragraph of the definition, or are expressly "auto related".

Citing, *inter alia,* Matter of Lezette v Board of Educ. (35 NY2d 272, 281), the Board argues that the court is bound to uphold an administrative interpretation, even when doubt or ambiguity exists with respect to the proper construction of a statute. Yet, as already noted, zoning ordinances are in derogation [*296] of common-law rights [***16] and, accordingly, must be strictly construed so as not to place any greater inference upon the free use of land than is absolutely required. *(See, Matter of* 440 E. 102nd St. Corp. v Murdock, supra, 285 NY, at 304.) "Any ambiguity in the language used in such regulations must be resolved in favor of the property owner." *(* Matter of Allen v Adami, supra, 39 NY2d, at 277; *see also,* FGL&L Prop. Corp. v City of Rye, 66 NY2d 111, 115; Town of Huntington v Barracuda Transp. Co., 80 AD2d 555.)

Moreover, the Board's interpretation of what constitutes an accessory use is not entitled to unquestioning judicial deference, since the ultimate responsibility of interpreting the law is with the court. While courts should give due consideration to an agency's practical construction of a statute over a period of time *(see, e.g.,* Town of Amherst v County of Erie, 260 NY 361, 369-370), the Board admits that its determination in the instant matter was not part of any long-standing practical construction of the statute. Indeed, it has characterized the issue as "one of first impression". In fact, however, as Exxon demonstrates, the Board's long-standing practice has been to permit [***17] a retail store to be operated in combination with a gasoline service station. Indeed, the Board recognized as much when its chairperson stated, "The fact that it's become popular and many New York City service stations are equipped with Use Group 6 retail occupancies and that such cases have not had objections issued to them, it seems to the Board, is obvious but not controlling in this case."

While an administrative agency is accorded broad regulatory authority, "[discretionary] power is not absolute; it is subject to the limitation that it cannot be exercised arbitrarily". *(Matter of Freidus v Guggenheimer, 57 AD2d 760, 761.*) Thus, an administrative agency may not rule or act in such a way as to result in inconsistent treatment of similarly situated parties. *(See,* Matter of Society of N. Y. Hosp. v Axelrod, 116 AD2d 426; *Matter of Freidus v Guggenheimer, supra; see also,* R-C Motor Lines v United States, 350 F Supp 1169, 1172, *affd 411 U.S. 941* ["Although the doctrine of *stare decisis* does not apply to decisions of administrative bodies, consistency of administrative rulings is essential, for to adopt different standards for similar situations is to act [***18] arbitrarily."].)

The record indicates that the Board, in a significant number of cases, granted specific permission to others, including Exxon's direct competitors, to operate a gasoline station in combination with a retail store, among other uses. For example, [*297] under Calendar No. 914-83-A, the Board issued a resolution which states that the application sought permission, *inter alia*, "to erect a new * * * brick building to contain the attendant's booth and a retail store (Use Group 6)." In response to that application, the Board specifically amended a prior resolution, and approved the erection of the said "brick building to contain attendant's booth and other conforming uses." As demonstrated by photographs in the record, that "conforming use" is a gasoline station/convenience store combination.

Under Calendar No. 959-83-BZ, the Board again specifically permitted the combination of a gasoline station and a convenience store. The Board suggests, however, that, in that instance, it was only considering whether to allow "larger than permitted business signs," and that it did [**774] not focus on the fact that the site included a convenience store. This claim [***19] is belied by the language of the resolution, which clearly states:

"Whereas, the proposed retail convenience store is a permitted use in the district; and

128 A.D.2d 289, *297; 515 N.Y.S.2d 768, **774; 1987 N.Y. App. Div. LEXIS 43556, ***19

"Whereas, the applicant has declared, in response to the community's request, that no beer or liquor will be sold in the retail convenience store * * *

"Resolved, that the Board of Standards and Appeals does hereby make the required findings and grants a Special Permit * * * to permit * * * the reconstruction of an automotive service station * * * into an automobile gas and oil selling station and the addition of a retail convenience store on condition * * *

"That the store shall not sell beer or liquor * * *

"That there shall be separate employees for the self-service gasoline station and for the retail convenience store at all times."

Similarly, the Board asserts that Calendar No. 654-77-A merely involved an application "to install two new gasoline pump islands and to erect a new steel building." But, as the Resolution clearly states, the petitioner sought permission "to erect a new steel building * * * for use as an attendant's booth and retail store (Use Group 6)." Under Calendar No. 573-55BZ, the Resolution's description [***20] of the "subject" made it clear that the purpose of the application was "to change the use of the accessory building of a gasoline service station (Use Group 16) to a food retail store (Use Group 6)". Photographs of [*298] the site clearly show the operation of a gasoline station and a retail store in the "accessory" building.

Clearly, despite the Board's denial of relevancy, these and other applications have placed the propriety of the operation of a retail store as an accessory use to a gasoline station squarely in issue. Whatever the paramount consideration in each of these applications, if the operation of the combination gas station/retail store were illegal, the Board would not even have had to consider any other issue. The Board has not offered any explanation as to why Exxon's application alone has been denied; nor why it faced a more restrictive definition of what is permissible as an accessory use than any other applicant. Clearly, absent a reasonable explanation, not demonstrated in this record, such discriminatory treatment is arbitrary, and was properly vacated by the motion court.

Although we do not read section 12-10 of the Zoning Resolution as expressly permitting [***21] the construction of a convenience store as an accessory use to an "automotive service station," as Exxon would have us do, there is ample evidence, on the basis of the record before us, that a convenience store may well fall within the Zoning Resolution's general definition of an "accessory use", Exxon's proposal obviously satisfies the first and last parts of the definition, as the facility would be on the same lot and would operate for the benefit and convenience of its customers. Only the requirement that the proposed use be one customarily found in connection with, and incidental to, the sale of gasoline poses a factual issue for Board resolution.

With respect to that issue, as already noted, evidence was offered that in 1985 over 55,000 stations in this country combined the sale of gasoline with a convenience store. The sale of convenience store products could be found in close to one third of all stations selling gasoline, with the trend clearly toward an increase in the number of such combinations. (Daniels, *Big Shift in Gasoline Retailing Is Changing Buying Patterns*, New York Times, May 28, 1985, at A1, col 1.) As the record reflects, these facts are repeated in numerous [***22] other articles highlighting what is, in fact, generally known -- that the sale of some products at gasoline stations, or the sale of gasoline in connection with convenience store operations, is becoming commonplace in this country.

[**775] Nor does there appear to be any immediate danger that the incidental use will dominate the principal use. Consumer [*299] research offered by Exxon reveals that the majority of patrons at Exxon Shops and Exxon's self-service gas stations purchase gasoline alone, while 26% purchase gasoline in combination with the purchase of another product. Only 22% limit their purchase to a convenience product solely. Facilities similar to the one proposed here generate, on average, a sales ratio of approximately 4:1 of motor fuel dollars to convenience item dollars.

In any event, since we find that a convenience store is not prohibited as an accessory use by the Zoning Resolution, although it is not expressly authorized, we remand the matter to the Board for specific findings of fact as to whether Exxon's proposed use qualifies as an accessory use within the section 12-10 general definition of that term.

128 A.D.2d 289, *299; 515 N.Y.S.2d 768, **775; 1987 N.Y. App. Div. LEXIS 43556, ***22

Accordingly, the order of the Supreme Court, [***23] New York County (Louis Grossman, J.), entered July 21, 1986, which, *inter alia*, vacated the resolution of the Board of Standards and Appeals sustaining a Department of Buildings objection to petitioner's building application should be affirmed, without costs or disbursements.

Order, Supreme Court, New York County, entered on July 21, 1986, unanimously affirmed, without costs and without disbursements.

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Gray v. Ward

Supreme Court of New York, Appellate Division, Second Department

March 25, 1974

No Number in Original

Reporter
44 A.D.2d 597 *; 1974 N.Y. App. Div. LEXIS 5385 **; 354 N.Y.S.2d 591

Eric S. Gray et al., Respondents, v. W. Tom Ward, as Mayor of the Incorporated Village of Valley Stream, et al., Respondents, and Nathan Serota et al., Appellants

Prior History: [**1] *74 Misc 2d 50*.

Judges: Latham, Acting P. J., Cohalan, Brennan, Benjamin and Munder, JJ., concur.

Opinion

[*598] Judgment of the Supreme Court, Nassau County, entered June 14, 1973, affirmed, with $ 20 costs and disbursements to petitioners-respondents, on the opinion of the learned Justice at Special Term.

End of Document

Gray v. Ward

Supreme Court of New York, Special Term, Nassau County

May 14, 1973

No Number in Original

Reporter
74 Misc. 2d 50 *; 343 N.Y.S.2d 749 **; 1973 N.Y. Misc. LEXIS 1943 ***

Eric S. Gray et al., Petitioners, v. W. Tom Ward, as Mayor of the Incorporated Village of Valley Stream, et al., Respondents

Disposition: [***1] Accordingly, for all of the reasons set forth hereinabove, the court holds that the building permit granted by the Village Board of Trustee of the Village of Valley Stream on November 17, 1972, to S & E Realty Co. for the construction of a rooftop helipad at Alexander's department store is illegal and must be annulled.

Case Summary

Procedural Posture
Plaintiffs, property owners and parent/teachers associations (residents), brought an art. 78 proceeding seeking a judgment annulling a building permit granted by defendant village board of trustees (board) to the owners of a building leased by a department store for the construction of a rooftop helipad for the takeoff and landing of a helicopter owned by the department store and used solely by their executives.

Overview
The board granted a department store a building permit for a proposed helipad, as an accessory use to the retail store, to replace an existing rooftop pad, which had been in use for four years, to transport its executives. The residents objected to the issuance of the permit and contended that the use of helicopters was dangerous to the residential area. Being a case of first impression, the court evaluated other state decisions. The court held as a matter of law that the permit granted by the board for the proposed pad was illegal because its use was not an accessory use of the store within the purview of the zoning regulations. The court found that although the shuttling of executives did bear some relationship to the business, the use did not meet the test of being commonly and habitually associated with the primary use of the premises as a retail store. Only 66 flights had been made in four years. The court found that the board did not have the authority to grant the permit because it usurped the power of the building official, who denied the permit, by extending the definition of accessory use to the proposed helipad and bypassed the safeguards of review by a board of appeals.

Outcome
The court held that the permit issued by the board for a proposed helipad in a residential area was illegal.

Counsel: *Eric S. Gray*, in person, for petitioners.

Eugene J. Clavin, Village Attorney, for Village of Valley Stream, respondent.

Trubin, Sillcocks, Edelman & Knapp for Nathan Serota and others, respondents.

74 Misc. 2d 50, *50; 343 N.Y.S.2d 749, **749; 1973 N.Y. Misc. LEXIS 1943, ***1

Judges: Joseph A. Suozzi, J.

Opinion by: SUOZZI

Opinion

[*51] [**750] This article 78 proceeding, commenced by a property owner and resident of the Village of Valley Stream and the Valley Stream Council of Parent Teachers Associations, seeks a judgment annulling the building permit granted by the Village Board of Trustees of the Village of Valley Stream on November 17, 1972 to the owners of the building leased by Alexander's [***3] Department Store for the construction of a rooftop helipad for the takeoff and landing of a helicopter owned by Alexander's and used solely by their executives.

The proposed structure is intended to replace an existing rooftop pad which has been in use since December, 1968, following approval of airspace by the Federal Aviation Administration. Although no express authorization for this use was ever given by the Village Board of Trustees, the board has known of the continuous use of this rooftop pad since 1968. This pad has been used to ferry Alexander's executives by helicopter from one store to another throughout the metropolitan area, and the number of flights from this location have not exceeded 66 since December, 1968.

Petitioners contend that, because of the fact that there are numerous houses and other buildings in the immediate vicinity of the subject premises, the landing and taking off of helicopters on and from the subject premises constitute a danger to the numerous persons in the vicinity and the homes in the area, as well as the travelers on Sunrise Highway.

The building permit which the petitioners seek to invalidate was approved by the Board of Trustees on the basis [***4] that the proposed helipad was an accessory use to the retail store. "Accessory use" is defined as follows in the Valley Stream zoning regulations (§ 99-3 -- Use, Accessory):

"A. A use conducted on the same lot as the principal use to which it is related * * * and

"B. A use which is clearly incidental to and is customarily found in connection with such principal use."

[**751] The zoning regulations do not include any reference to helipads in the specified uses permitted in the C-2 District, general commercial, in which Alexander's is located, or in the specified uses permitted anywhere within the village. However, permitted uses in each district are deemed to include "uses and buildings therefor that are customarily accessory to and incidental [*52] to such permitted uses and located on the same lot therewith." (Zoning Regulations, § 99-43A [1]).

The question presented is one of interpretation of the ordinance, i.e., does the principal use of a retail establishment such as Alexander's, in a general commercial district, as a matter of custom carry with it a helipad as an incidental use, so that as a matter of law it can be deemed that the legislative intent was to [***5] include it as a permitted accessory use. In considering this legislative intent, it becomes necessary to determine whether the use was customary as of the time the regulations were adopted, or whether such use has become customary since their enactment. (See *People v. Nicosia, 42 Misc 2d 300*; 1 Rathkopf, Law of Zoning and Planning, p. 23-24.)

The two sections of the Valley Stream regulations dealing with accessory uses are part of the 1952 enactment. At that point in time the utilization of helicopters as a means of transportation had not advanced to such a stage that anyone can now reasonably claim, in retrospect, that the use of helicopters and facilities for their landing and takeoff was "clearly incidental to and customarily found in connection with" even the largest retail or commercial establishment, or the private residences of those who could afford this specialized means of transportation. Clearly, then, it cannot be held that a helipad was encompassed within the definition of an accessory use at the time that the regulations were adopted. The court must therefore consider whether in the intervening years since 1952 the use

has become one which is clearly incidental [***6] to and customarily found in connection with a retail operation such as Alexander's.

A search of the New York authorities fails to disclose any case which had dealt directly with the question of whether a helipad is or is not a permitted accessory use as that phrase is usually defined in zoning ordinances. The only reference to the operation of a helicopter as an accessory use in this jurisdiction is found in Rathkopf (Law of Zoning and Planning, supp. to vol. 1, p. 23-32) where it is suggested that an inference can be drawn from the language of the Court of Appeals in *Thomson Ind. v. Incorporated Vil. of Port Washington North (27 N Y 2d 537, 539)* that the operation of a helicopter is a valid and accessory use to the operation of a manufacturing plant in an industrial district. Inasmuch as that case dealt with a zoning ordinance which prohibited heliports, and the Court of Appeals decided the matter primarily on [**752] the basis of the General Business Law, the inference referred to by Rathkopf, even if it can validly be made, is not controlling here. Therefore, unbridled [*53] by *stare decisis*, this court can approach the determination of the issue presented [***7] herein as one of first impression in this jurisdiction.

The court's attention has been called to a New Jersey case which does deal directly with a landing and takeoff pad as a permitted accessory use. In *Doublis* v. *Garden State Farms* (Super. Ct., Hudson County, Nov. 22, 1972), the court deemed a landing pad a permitted accessory use to a dairy products business on a large tract of land located in an industrial zone. The zoning ordinance involved therein defined an "accessory use" in substantially the same terms as the Valley Stream ordinance. In its decision the court did not discuss the relationship between the principal use and the landing pad which formed the basis for including it as an accessory use, but rather relied entirely on the authority of a New Jersey appellate court decision in *Schantz v. Rachlin (101 N. J. Super. 334)*.

The *Schantz* case involved the maintenance of an unlighted turf airstrip on a farm of about 135 acres, of which 100 acres were cultivated and the remainder used for livestock, a house and outbuildings. The airstrip was intended solely for daytime use and had been licensed for such use by the New Jersey Department of Aeronautics [***8] and stated by that department to be safe. The New Jersey appellate court based its holding on the lower court opinion, and ruled that the airstrip was a valid accessory use to the primary residential and agricultural uses. The lower court asserted as a basis for its conclusion that the installation of a landing strip for an airplane in connection with the defendant's residence is no less accessory to its primary use than the installation of a 60-foot tower support for a radio antenna (citing *Wright v. Vogt, 7 N. J. 1*). This analogy does not persuade this court that a similar conclusion is mandated here. The *Schantz* opinion concluded (p. 342): "but there is sufficient use of such aircraft in our area so that it can be said that the installation of a landing strip for personal use is accessory to the use of property as a residence. It does not change the primary use of the premises from residential."

Apart from the fact that this court is not bound by the holdings of its neighbor State, there is another significant difference between the case at bar and the two New Jersey cases. The New Jersey cases involved large tracts of land in farming and industrial areas. The [***9] helipad here is proposed for a limited roof area, in the midst of a large shopping center which attracts large crowds of shoppers and adjoins a much-traveled highway.

[*54] [**753] In a Massachusetts case, *Town of Harvard v. Maxant (275 N. E. 2d 347)*, the Supreme Judicial Court of Massachusetts held that an airplane strip in an agricultural-residential zone was not customarily incidental to its principal use. In so finding it specifically rejected the holding of *Schantz v. Rachlin (supra)*, and followed instead the Ohio court, which in *Samsa v. Heck (13 Ohio App. 2d 94)* held that a private airport which landowners contemplated constructing on their property zoned for single and two-family dwelling was not permissible as a use "customarily incident" to the expressly permitted use.

After reaching its conclusion in the *Town of Harvard* case, the Massachusetts court stated as follows (p. 352): "Even if we take notice of the increasing use of private aircraft as a means of business travel and transportation and for pleasure purposes, such use has not become so prevalent in Massachusetts that it can now be held that it is one 'customarily incidental' [***10] to the residential use of property. See *Building Inspector of Falmouth v. Gingrass, 338 Mass. 274, 276, 154 N. E. 2d 896*."

It cannot be disputed that the use of helicopters in this area has increased in the past 20 years; that helicopters are being used for the convenient and expeditious movement of corporate executives; that the efficient supervision and management of business establishments with divisions or branches at widely dispersed locations may be enhanced by the swift shuttling between places that is possible with helicopters; and that modern merchandising methods can be assisted and the movement of merchandise can be facilitated by this mode of transportation. However, after taking notice of the increased use of helicopters in this area, this court cannot hold as a matter of law that the use has become so clearly incidental to and customarily found in connection with any principal use as to entitle it to be clothed with the permissive mantle of an accessory use.

In *Town of Harvard* v. *Maxant* (supra, p. 351) the court quotes a discussion which is contained in the case of Lawrence v. Zoning Bd. of Appeals of Town of North Branford (158 Conn. 509, 512-513) [***11] of the meaning of the words "customarily incidental" as they relate to accessory uses. This court deems this discussion pertinent and relevant to the issues presented here, and accordingly likewise sets forth this discussion:

"The word 'incidental' as employed in a definition of 'accessory use' incorporates two concepts. It means that the use must not be the primary use of the property but rather one which is subordinate and minor in significance. * * * But 'incidental,' when used to define an accessory use, must also [*55] incorporate the concept of reasonable relationship with the primary use. It is not enough that [**754] the use be subordinate; it must also be attendant or concomitant. To ignore this latter aspect of 'incidental' would be to permit any use which is not primary, no matter how unrelated it is to the primary use.

"The word 'customarily' is even more difficult to apply. Although it is used in this and many other ordinances as a modifier of 'incidental,' it should be applied as a separate and distinct test. Courts have often held that the use of the word 'customarily' places a duty on the board or court to determine whether it is usual to maintain [***12] the use in question in connection with the primary use of the land. * * * In examining the use in question, it is not enough to determine that it is incidental in the two meanings of that word as discussed above. The use must be further scrutinized to determine whether it has commonly, habitually and by long practice been established as reasonably associated with the primary use. * * *

"In applying the test of custom, we feel that some of the factors which should be taken into consideration are the size of the lot in question, the nature of the primary use, the use made of the adjacent lots by neighbors and the economic structure of the area. As for the actual incidence of similar uses on other properties, geographical differences should be taken into account, and the use should be more than unique or rare, even though it is not necessarily found on a majority of similarly situated properties."

Considering the proposed helipad against this discussion, the shuttling of corporate executives for which it is intended, does bear some relationship to the business of Alexander's in that it would provide a convenient and time-saving method of transportation between the branches of this [***13] chain of stores. However, the proposed use does not meet the test of the word "customarily". Although Alexander's has been utilizing a pad for this purpose since 1968 and a total of 66 flights have been made in this four-year period, averaging less than 17 per year, the court finds that this use hardly measures up to the test of having "commonly, habitually and by long practice been established as reasonably associated with the primary use" of the premises as a retail store. This four-year use must also be evaluated in the light of the fact that it has not been affirmatively authorized by the village officials. Moreover, when considered in the light of the size of the lot in question, the nature of the primary use, the use made of the adjacent lots and the uniqueness of the use in this area, the proposed use does not [*56] meet any of the standards of the test of custom as set forth in the language quoted above.

This court holds as a matter of law that the proposed pad for the occasional flights of Alexander's corporate executives is not an accessory use within the purview of the Valley Stream zoning regulations, [**755] whether that definition is construed as of the [***14] time of the enactment of the regulations or as of the present.

In so holding this court believes it appropriate to raise the question of whether a use such as a helipad should ever be permitted as an accessory use unless such use is specifically included in the zoning regulations.

In considering any part of a zoning ordinance and the legislative intent underlying it, the ordinance must be considered as a whole as well. An examination of the zoning regulations of the Village of Valley Stream reveals that they make specific provision for such commonplace accessory uses as off-street parking spaces in all zoning districts; private garages, swimming pools, tool sheds, fallout shelters and playhouses in residential districts; and have expressly excluded automobile wrecking and junk yards as accessory uses in any district. Many zoning regulations follow this format in substance. This court finds it extremely difficult to logically and reasonably infer that legislators who had given such specific attention to such commonplace accessory uses intended to encompass a helipad within the definition of accessory uses.

This court suggests that the authorization of such uses as helipads under [***15] the guise of their being an accessory use is an unwarranted application of the accessory use device. In Bassett, Zoning (Russell Sage Foundation, 1936, p. 100), the basis for the custom of permitting accessory uses is explained as follows: "During the formative period of comprehensive zoning it became evident that districts could not be confined to principal uses only. It had always been customary for occupants of homes to carry on gainful employment as something accessory and incidental to the residence use * * * The earliest zoning ordinances took communities as they existed and did not try to prevent customary practices that met with no objection from the community."

The extension of the accessory use definition to such uses as helipads does not reflect a sound, realistic or reasonable construction of the legislative intent of those who enacted such regulations. Any land use which involves the operation of aircraft such as a helicopter bears heavily upon a community's health, safety and welfare. The introduction of such a facility into a [*57] community is accompanied with serious implications which mandate more direct regulation and control than the "accessory use" approach [***16] permits. Judicial approval of such an approach is a form of "zoning leniency" which should not be encouraged.

Assuming *arguendo* that the proposed helipad were a permitted accessory use, the permit herein challenged must be invalidated in any event. The Village Board was without authority to grant it or [**756] authorize it as an accessory use or a special permit. An examination of the return filed by the respondent village discloses the following events in connection with this application:

An application for a heliport dated November 17, 1970 was filed with the Village Building Inspector. By a letter dated November 18, 1970, addressed to the applicant, as well as by a memo to the Superintendent of Public Works dated September 7, 1971, the Building Inspector noted that the zoning regulations do not permit such a use, and that the application should be submitted to the Board of Trustees for a special permit.

Subsequently, by resolution dated January 17, 1972, the Village Board denied the application, citing the following objections:

"1. Insufficiency of submitted application.

"2. Hazard to the public (using this area in large numbers).

"3. Already burdened air space [***17] over the Village, especially in foul weather when the glide path for planes landing at J. F. Kennedy International Airport.

"4. Danger of collision with large structure in the area or with other aircraft thus causing peril to dense population of the area.

"5. Discomfort of additional noise for homes located in the immediate vicinity."

The original application was subsequently amended by a letter dated September 7, 1972, from an attorney for Alexander's, to limit it as follows: "The installation of a private executive helipad as an accessory use to its retail store, the use of which shall be limited to accommodate eight (8) Alexander Executives." By resolution dated November 16, 1972, the Village Board authorized the "Superintendent of Public Works to grant the permit, if required, permitting a helipad as an accessory use to Alexander's, Valley Stream."

It is a well-established building and zoning law procedure that upon the refusal of a permit by a building official, the proper procedure is to appeal that decision to the Board of Appeals, whose determination may thereafter be reviewed in an article 78 proceeding. Notwithstanding that the zoning regulations contain no provision [***18] for granting a special permit for a helipad [*58] or heliport by the Village Board, the Building Inspector in denying the permit on the grounds that the regulations did not permit such a use, referred the applicant to the Village Board for a special permit. The Village Board, after having first denied the original application and citing several serious objections, subsequently granted it in its amended form.

Among the powers entrusted to a Village Board is the power to rezone property and to amend the zoning regulations, after appropriate [**757] and mandated public notices and hearings. Property cannot be rezoned or zoning regulations amended without following a prescribed procedure. Most zoning regulations provide, as do Valley Stream's, for the delegation to a building official of the power to grant or deny permits, subject to review by the Board of Appeals after public notices and hearings, and subject to further review by a court by an appropriate procedure. Implicit in this delegation is the power to interpret the ordinance. No power of interpretation is vested in the Village Board. However, a Village Board may request an interpretation from the Board of Appeals. [***19] While a Village Board may express its own legislative intent by the granting or denial of a rezoning, or by amending the zoning regulations, it is not empowered to engage in quasi-judicial interpretation of the intent of other legislators who enacted the regulations as they exist at a particular moment.

By approving the permit, the Village Board has in effect (1) usurped the power of the building official by extending the definition of "accessory use" to the proposed helipad; and (2) bypassed the safeguards of review by a Board of Appeals, thus engaging in "back-door rezoning" without the benefit or safeguard of the required public notice and hearings.

Aside from the lack of any authority to grant the permit, the Village Board has, by devising a special procedure for this application, actually avoided a direct confrontation with the problem of regulating land uses as to such facilities. At the same time the board has, without explanation and without any apparent change of circumstances, completely disregarded the serious and valid objections raised when the application was initially denied. It is the operation of a helicopter that poses the hazard to safety, not the purpose for [***20] which the aircraft is operated. The hazard to safety exists whether the helicopter is taking off and landing from a heliport, as Alexander's originally proposed, or from a helipad for the shuttling of corporate executives.

By their action the Village Board has obviously neglected to consider the consequences and implication of its action if this [*59] permit is validated by this court. If a helipad is to be permitted as an accessory use for Alexander's, what is to prevent the installation of a similar facility, on the basis of such interpretation, at every major department store or any other commercial or industrial establishment, or at every residence whose owner could afford it, for any of the purposes for which this mode of transportation may be utilized? Moreover, by giving judicial sanction to a permit for a helipad as an accessory use, a municipality would in effect be permitted to abdicate its authority with respect to the regulation of these facilities as they relate to the use of land within a community, and by implication a local community's police powers in this regard would be pre-empted. [**758] It is readily apparent that the consequences of utilizing this [***21] approach for the introduction of helipads into a community are far more serious and far-reaching than the use of this approach reflects.

A further question must also be considered: Do the provisions of *article 14 of the General Business Law*, requiring village approval and hearing and determination by the State Commissioner of Transportation, apply to this limited-use helipad? Federal Aviation Administration approval was obtained in 1968. At that time *section 240 of the General Business Law*, a definitional section, provided:

"4. 'Landing area' means any locality either of land or water, including airports and intermediate landing fields, which is used or intended to be used for the landing and take-off of aircraft, whether or not facilities are provided for shelter, servicing or repair of aircraft or for receiving or discharging passengers or cargo.

"5. 'Airport' means any landing area used regularly by aircraft for receiving or discharging passengers or cargo; or for the landing and take-off of aircraft being used for personal or training purposes. * * *

"11. 'Helicopter' means an aircraft, the support of which in the air is normally derived from airfoils mechanically rotated [***22] about an approximately vertical axis."

Section 249 (subd. 1, par. [a]) of the General Business Law, in 1968, forbade the establishment of a privately owned airport except by authorization of the governing body of the village within which such airport was proposed to be established. Airports established prior to April 12, 1947, the effective date of this section, were excepted from this requirement.

In *Thomson Ind. v. Incorporated Vil. of Port Washington North (27 N Y 2d 537, 539* [1970], *supra*), the Court of Appeals [*60] held that a helipad used occasionally for the landing and takeoff of a business-owned helicopter, for purely business-connected use, operating with FAA approval, in effect since 1964, "comes within the definitions contained in *section 240 of the General Business Law* (subd. 4) and the requirements of *section 249* of that statute * * * must be met."

The Village Board of Trustees' authorization required by *section 249* of the statute has not been sought by Alexander's, and therefore never was granted. The inaction of the Village Board cannot be equated with approval, given the strong legislative policy in favor of regulation where public safety [***23] is involved. Illegal from its inception, the helipad can now be established, zoning considerations apart, only in accordance with the requirements of *section 249 of the [**759] General Business Law*, as amended in 1969, which require hearing and determination by the State Commissioner of Transportation prior to obtaining the Village Board of Trustees' authorization. (See *Thomson Ind. v. Incorporated Vil. of Port Washington North, supra.*)

This court does not intend to convey the impression that helipads should be foreclosed for business, industrial or private use in the Village of Valley Stream or elsewhere. Quite the contrary, the court recognizes that there is a demand for facilities for the taking off and landing of helicopters which should be met as expeditiously as possible, by reasonable and appropriate regulations.

The village has had knowledge of the existence of a helipad at Alexander's for some four years, and has had more than ample opportunity within which to deal with this problem in a direct manner by an amendment, after required public hearings, to the zoning regulations. The difficulties presented in the formulation of appropriate regulations neither [***24] warrant nor excuse the utilization of the "accessory use" device to permit the proposed facility. If the Village Board is in favor of a helipad at Alexander's, as it presumably is, they have the legislative power to permit the same by amending the zoning regulations to include a helipad as a special use or an accessory use, or even as a primary use. All that this court suggests is that the village act in accordance with established procedure, and not improvise for a particular use.

Accordingly, for all of the reasons set forth hereinabove, the court holds that the building permit granted by the Village Board of Trustees of the Village of Valley Stream on November 17, 1972, to S & E Realty Co. for the construction of a rooftop helipad at Alexander's department store is illegal and must be annulled.

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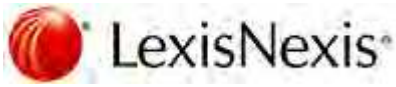

Local Gov't Assistance Corp. v. Sales Tax Asset Receivable Corp.

Court of Appeals of New York

April 28, 2004, Argued ; May 13, 2004, Decided

No. 90

Reporter
2 N.Y.3d 524 *; 813 N.E.2d 587 **; 780 N.Y.S.2d 507 ***; 2004 N.Y. LEXIS 1049 ****

Local Government Assistance Corporation et al., Appellants-Respondents, v. Sales Tax Asset Receivable Corporation et al., Respondents-Appellants.

Prior History: [****1] Cross appeals, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered March 4, 2004. The Appellate Division (1) dismissed the appeal from an order of the Supreme Court, Albany County (Louis C. Benza, J.; op *1 Misc. 3d 272, 764 N.Y.S.2d 577*), entered August 20, 2003, which had denied plaintiffs' motion for a preliminary injunction enjoining defendants from issuing bonds or otherwise implementing the provisions of the Municipal Assistance Corporation Refinancing Act, and (2) modified, on the law, an order of that Supreme Court, entered September 17, 2003, which had denied plaintiffs' cross motion for summary judgment, granted defendants' motion for summary judgment, declared the Municipal Assistance Corporation Refinancing Act, contained in Laws of 2003, chapter 62, part A4, and chapter 63, part V, constitutional under the challenges made therein, and denied all other relief. The modification consisted of (1) reversing so much of the order as had granted defendants' motion for summary judgment declaring constitutional the amendment to *Public Authorities Law § 3240 (5)*, as contained in Laws of 2003, chapter 62, part A4, § 2, and as had denied plaintiffs' cross motion declaring the amendment unconstitutional, (2) granted plaintiffs' cross motion to that extent, (3) declared the amendment unconstitutional, and (4) severed it from the Municipal Assistance Corporation Refinancing Act. The Appellate Division affirmed the order as modified.

Local Gov't Assistance Corp. v. Sales Tax Asset Receivable Corp., 5 A.D.3d 829, 773 N.Y.S.2d 460, 2004 N.Y. App. Div. LEXIS 2234 (N.Y. App. Div. 3d Dep't, 2004), modified.

Disposition: Order of the Appellate Division modified by reinstating the September 17, 2003 order of Supreme Court; as so modified, affirmed.

Case Summary

Procedural Posture

Plaintiff Local Government Assistance Corporation (LGAC) appealed and defendants, a city and a non-profit corporation, cross-appealed a decision of the Appellate Division (New York), which modified a supreme court order granting the LGAC's summary judgment motion, which challenged the constitutionality of *N.Y. Pub. Auth. Law § 3240(5)*, and severed *§ 3240(5)* from the remainder of the Municipal Assistance Corporation Refinancing Act.

Overview

In an effort to provide a funding mechanism to assist the city in satisfying debt, the legislature enacted the Act, 2003 N.Y. Laws ch. 62, pt. A4; 2003 N.Y. Laws ch. 63, pt. V, and charged the LGAC with channeling the payments from a portion of state sales tax revenues. Modifying the order and declaring the Act constitutional, the court held that (1)

the amendment to N.Y. Pub. Auth. Law § 3240(5) did not implicate N.Y. Const. art. VII, § 11 because, inter alia, the Act, as a whole, made clear that the legislature had an incentive, but not an obligation, to appropriate; (2) the city was not required to pledge its faith and credit under N.Y. Const. art. VII, § 2 because the city's assignment of the funds to the nonprofit made clear that the city had no obligation to the nonprofit or its bondholders; and (3) while N.Y. Pub. Auth. Law § 3238-a required the LGAC to make annual payments to the city, it did not modify or repeal the state's pledge to honor the contractual rights and remedies of the LGAC's bondholders pursuant to N.Y. Pub. Auth. Law § 3241(1) and, thus, did not impair the preexisting contractual rights of the LGAC's bondholders under U.S. Const. art. I, § 10.

Outcome
The court modified the appellate division's order by reinstating the order of the supreme court and declared the Act constitutional.

Counsel: *Davis Polk & Wardwell*, New York City (*Guy Miller Struve*, *Russell L. Lippman* and *Douglas K. Yatter* of counsel), *Kornstein Veisz Wexler & Pollard, LLP* (*Alexander H. Shapiro* of counsel), and *Thuillez, Ford, Gold, Johnson & Butler, LLP*, Albany (*Dale M. Thuillez* of counsel), for appellants-respondents. I. The Municipal Assistance Corporation Refinancing Act violates article VII, § 11 of the State Constitution by creating an absolute legal obligation to pay $ 170 million per year which is not subject to legislative appropriations. (Schulz v State of New York, 84 N.Y.2d 231, 639 N.E.2d 1140, 616 N.Y.S.2d 343; Matter of Wood v Irving, 85 N.Y.2d 238, 647 N.E.2d 1332, 623 N.Y.S.2d 824; People ex rel. Alpha Portland Cement Co. v Knapp, 230 N.Y. 48, 129 N.E. 202, *cert denied sub nom. State Tax Commr. of State of N.Y. v People ex rel. Alpha Portland Cement Co., 256 U.S. 702, 41 S. Ct. 624, 65 L. Ed. 1179*; Matter of Westinghouse Elec. Corp. v Tully, 63 N.Y.2d 191, 470 N.E.2d 853, 481 N.Y.S.2d 55; People v Dietze, 75 N.Y.2d 47, 549 N.E.2d 1166, 550 N.Y.S.2d 595; People v Smith, 63 N.Y.2d 41, 479 N.Y.S.2d 706, 468 N.E.2d 879; *469 U.S. 1227, 105 S. Ct. 1226, 84 L. Ed. 2d 364*; Bender v Jamaica Hosp., 40 N.Y.2d 560, 356 N.E.2d 1228, 388 N.Y.S.2d 269; Bright Homes v Wright, 8 N.Y.2d 157, 168 N.E.2d 515, 203 N.Y.S.2d 67; United States v National Treasury Empls. Union, 513 U.S. 454, 115 S. Ct. 1003, 130 L. Ed. 2d 964; National Adv. Co. v Town of Niagara, 942 F.2d 145.) II. The Municipal Assistance Corporation Refinancing Act violates the ban on revenue financing in article VIII, § 2 of the State Constitution by authorizing the City of New York to obtain financing backed only by the assignment of future revenues of the City. (Flushing Natl. Bank v Municipal Assistance Corp. for City of N.Y., 40 N.Y.2d 731, 358 N.E.2d 848, 390 N.Y.S.2d 22; Wein v City of New York, 36 N.Y.2d 610, 331 N.E.2d 514, 370 N.Y.S.2d 550; Schulz v State of New York, 193 A.D.2d 171, 606 N.Y.S.2d 916; 84 N.Y.2d 231, 616 N.Y.S.2d 343, 639 N.E.2d 1140; McCabe v Gross, 274 N.Y. 39, 8 N.E.2d 269; Kelly v Merry, 262 N.Y. 151, 186 N.E. 425; Kronsbein v City of Rochester, 76 A.D. 494, 70 N.Y.S. 813; Matter of Tierney v Cohen, 268 N.Y. 464, 198 N.E. 225; Comereski v City of Elmira, 308 N.Y. 248, 125 N.E.2d 241; Mnich v American Radiator Co., 263 A.D. 573, 34 N.Y.S.2d 16; 289 N.Y. 681, 45 N.E.2d 333; Endico Potatoes, Inc. v CIT Group/Factoring, Inc., 67 F.3d 1063.) III. The Municipal Assistance Corporation Refinancing Act unconstitutionally impairs the rights of Local Government Assistance Corporation's bondholders. (Patterson v Carey, 41 N.Y.2d 714, 363 N.E.2d 1146, 395 N.Y.S.2d 411; Matter of Westinghouse Elec. Corp. v Tully, 63 N.Y.2d 191, 470 N.E.2d 853, 481 N.Y.S.2d 55; United States Trust Co. v New Jersey, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92.)

Michael A. Cardozo, *Corporation Counsel*, New York City (*Leonard Koerner*, *John R. Low-Beer*, *June R. Buch* and *Elizabeth I. Freedman* of counsel), and *Greenberg Traurig*, *LLP*, Albany (*Henry M. Greenberg* of counsel), for respondents-appellants. I. The Municipal Assistance Corporation Refinancing Act requires that the statutory payments be made subject to annual legislative appropriation. (Schulz v State of New York, 84 N.Y.2d 231, 639 N.E.2d 1140, 616 N.Y.S.2d 343; Matter of Consolidated Edison Co. of N.Y. v Department of Envtl. Conservation, 71 N.Y.2d 186, 519 N.E.2d 320, 524 N.Y.S.2d 409; Besser v E.R. Squibb & Sons, 146 A.D.2d 107, 539 N.Y.S.2d 734; 75 N.Y.2d 847, 552 N.Y.S.2d 923, 552 N.E.2d 171; People v Mancuso, 255 N.Y. 463, 175 N.E. 177; New York State Bankers Assn. v Albright, 38 N.Y.2d 430, 381 N.Y.S.2d 17, 343 N.E.2d 735; Matter of Lower Manhattan Loft Tenants v New York City Loft Bd., 66 N.Y.2d 298, 487 N.E.2d 889, 496 N.Y.S.2d 979; Eaton v New York City Conciliation & Appeals Bd., 56 N.Y.2d 340, 437 N.E.2d 1115, 452 N.Y.S.2d 358; Matter of Moran Towing Corp. v Urbach, 99 N.Y.2d 443, 787 N.E.2d 624, 757 N.Y.S.2d 513; TM Park Ave. Assoc. v Pataki, 214 F.3d 344; Waste Recovery Enters. v Town of Unadilla, 294 A.D.2d 766, 742 N.Y.S.2d 715; *100 N.Y.2d 614, 767 N.Y.S.2d 395, 799*

N.E.2d 618; *1 N.Y.3d 507, 776 N.Y.S.2d 223, 808 N.E.2d 359*.) II. The Municipal Assistance Corporation Refinancing Act does not authorize the creation of city debt. (*Schulz v State of New York, 193 A.D.2d 171, 606 N.Y.S.2d 916*; *84 N.Y.2d 231, 616 N.Y.S.2d 343, 639 N.E.2d 1140*; *513 U.S. 1127, 115 S. Ct. 936, 130 L. Ed. 2d 881*; *Endico Potatoes, Inc. v CIT Group/Factoring, Inc., 67 F.3d 1063*; *In re Golden Plan of Cal., Inc., 829 F.2d 705*; *Major's Furniture Mart, Inc. v Credit Corp., Inc., 602 F.2d 538*; *Wein v City of New York, 36 N.Y.2d 610, 331 N.E.2d 514, 370 N.Y.S.2d 550*; *Comereski v City of Elmira, 308 N.Y. 248, 125 N.E.2d 241*; *Schulz v New York State Legislature, 244 A.D.2d 126, 676 N.Y.S.2d 237*; *92 N.Y.2d 818, 684, N.Y.S.2d 489, 707 N.E.2d 444*; *Matter of Schulz v State of New York, 151 Misc. 2d 594, 582 N.Y.S.2d 355*; *185 A.D.2d 596, 586 N.Y.S.2d 428*; *81 N.Y.2d 336, 599 N.Y.S.2d 469, 615 N.E.2d 953*; *Matter of Tierney v Cohen, 268 N.Y. 464, 198 N.E. 225*; *Robertson v Zimmermann, 268 N.Y. 52, 196 N.E. 740*.) III. The Municipal Assistance Corporation Refinancing Act does not unconstitutionally impair the contract rights of Local Government Assistance Corporation bondholders. (*Besser v E.R. Squibb & Sons, 146 A.D.2d 107, 539 N.Y.S.2d 734*; *75 N.Y.2d 847, 552 N.Y.S.2d 923, 552 N.E.2d 171*; *Iazzetti v City of New York, 94 N.Y.2d 183, 723 N.E.2d 81, 701 N.Y.S.2d 332*; *Matter of Jacob, 86 N.Y.2d 651, 636 N.Y.S.2d 716, 660 N.E.2d 397*; *TSC Indus., Inc. v Northway, Inc., 426 U.S. 438, 96 S. Ct. 2126, 48 L. Ed. 2d 757*.)

Carter Ledyard & Milburn LLP, New York City (*Vincent Monte-Sano*, *James Gadsden* and *Susan B. Kalib* of counsel), for Bank of New York as Successor Trustee under the Local Government Assistance Corporation Bond Resolutions, amicus curiae. The trustee requires clarification as to the status of the Local Government Assistance Corporation bondholders. (*Patterson v Carey, 41 N.Y.2d 714, 363 N.E.2d 1146, 395 N.Y.S.2d 411*.)

Donna M.C. Giliberto, Albany, for New York State Conference of Mayors and Municipal Officials, amicus curiae. Public authorities are created in response to state and local concerns coupled with the need to access alternative financing methods not readily available to cities without state legislative action. (*Matter of Plumbing, Heating, Piping & A.C. Contrs. Assn. v New York State Thruway Auth., 5 N.Y.2d 420, 158 N.E.2d 238, 185 N.Y.S.2d 534*; *Matter of Lakeland Water Dist. v Onondaga County Water Auth., 24 N.Y.2d 400, 248 N.E.2d 855, 301 N.Y.S.2d 1*; *Grace & Co. v State Univ. Constr. Fund, 44 N.Y.2d 84, 375 N.E.2d 377, 404 N.Y.S.2d 316*; *Matter of Smith v Levitt, 37 A.D.2d 418, 326 N.Y.S.2d 335*; *30 N.Y.2d 934, 335 N.Y.S.2d 687, 287 N.E.2d 380*; *Wein v City of New York, 36 N.Y.2d 610, 331 N.E.2d 514, 370 N.Y.S.2d 550*; *Matter of Schulz v State of New York, 151 Misc. 2d 594, 582 N.Y.S.2d 355*; *185 A.D.2d 596, 586 N.Y.S.2d 428*; *81 N.Y.2d 336, 599 N.Y.S.2d 469, 615 N.E.2d 953*; *Comereski v City of Elmira, 308 N.Y. 248, 125 N.E.2d 241*; *Union Free School Dist. No. 3 v Town of Rye, 256 A.D. 456, 10 N.Y.S.2d 333*; *280 N.Y. 469, 21 N.E.2d 681*.)

Judges: Opinion by Judge G.B. Smith. Chief Judge Kaye and Judges Ciparick, Rosenblatt, Graffeo and Read concur. Judge R.S. Smith took no part.

Opinion by: G.B. SMITH

Opinion

[*528] [***509] [**589] G.B. Smith, J.

This is a constitutional challenge to the *Municipal Assistance Corporation Refinancing Act*, which was enacted as part of a 2003 budget bill to assist the City of New York in retiring certain long-term debt. The wisdom of this legislation is not a matter for this Court to address (*see Schulz v State of New York, 84 N.Y.2d 231, 237, 639 N.E.2d 1140, 616 N.Y.S.2d 343 [1994]*). As to its legality, we conclude that the Act does not violate the State or Federal Constitutions.

I.

In the 1970s, [****2] defendant City of New York experienced a serious fiscal crisis that brought it to the brink of bankruptcy. In an effort to save the City from default, the State Legislature created the Municipal Assistance Corporation (MAC), which issued long-term bonds and used the proceeds to refinance the City's short-term debt. The bonds were to be financed over the next 30 years by diverting to MAC a [***510] [**590] portion of the state sales tax revenue that would otherwise be available to the City. The last remaining MAC bonds are scheduled to mature in 2008.

In 2003, with $ 2.5 billion left to pay on the MAC debt service (then due at a rate of $ 500 million annually for the remaining [*529] five years), the City faced another fiscal crisis. The Legislature sought to provide a financing mechanism to assist the City in satisfying the remainder of its MAC debt. In May 2003, over the Governor's veto of the entire budget bill, the Legislature enacted the *Municipal Assistance Corporation Refinancing Act* (L 2003, ch 62, part A4; ch 63, part V) to achieve this purpose. The Act amended the Public Authorities Law by adding a new section, *section 3238-a*, and amending existing *section 3240*. In doing so, the Act allowed the [****3] City to receive the sales tax revenue that was being diverted to MAC and thereby retain the remaining $ 2.5 billion that it owed on the debt service, while requiring the State to make 30 annual payments to the City of $ 170 million, or a total of $ 5.1 billion. The City intended to use the annual payments to finance bonds to be issued by a public benefit corporation established for this purpose. The proceeds from the sale of the bonds were to be used to retire the City's MAC debt.

Local Government Assistance Corporation

Plaintiff Local Government Assistance Corporation (LGAC) was charged with channeling the payments from a portion of state sales tax revenues. LGAC was established by chapter 220 of the Laws of 1990 as part of a state fiscal reform program. [1] As a public benefit corporation, it was authorized to issue $ 4.7 billion in bonds to provide funding for public services. LGAC bonds were issued pursuant to general bond resolutions adopted in 1991 and in 2002. The resolutions constitute contracts between LGAC and its bondholders and contain promises that the bondholders would have first priority on the tax dollars available to LGAC for debt service, and included a [****4] pledge that no equal or prior lien on these funds could be created. Additionally, pursuant to *Public Authorities Law § 3241 (1)*, the State has pledged not to limit or alter LGAC's right to fulfill its agreements with its bondholders or to impair the bondholders' rights or remedies.

The debt service on LGAC bonds is payable from revenues derived from state sales and compensating use taxes, one percentage point of which must be deposited in the Local Government [*530] Assistance Tax Fund (Tax Fund). [****5] The Tax Fund is held in the joint custody of the State Comptroller and the Commissioner of Taxation and Finance (*see State Finance Law § 92-r [1]*). Pursuant to *Public Authorities Law § 3240 (1)*, each year the Chairperson of LGAC must certify to the Governor and the Comptroller its debt service requirements and certain other required expenditures for the upcoming fiscal year. Upon annual appropriation by the Legislature, the funds needed are transferred by the Comptroller (*see Public Authorities Law § 3240 [3]*; *State Finance Law § 92-r [5]*). Only after LGAC has received its funds in accordance with its certified request can the remaining revenues in the Tax Fund be distributed to the general fund of the [***511] [**591] State Treasury (*see State Finance Law § 92-r [5]*).

Although the State is not legally obligated to appropriate the funds that LGAC has sought in its certification (*see Public Authorities Law § 3240 [5]*), [2] the State has a powerful incentive to make the requested appropriation

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[1] At the time LGAC was created, the State was encountering fiscal problems from so-called "spring borrowing," which developed because the State's fiscal year ends on March 31, whereas the fiscal year of local governments ends on June 30. Spring borrowing occurred when local governments, in the last quarter of their fiscal year, would borrow money from the State during the first quarter of its fiscal year. LGAC was created to eliminate this practice by providing funding for local government needs.

[2] Prior to the amendment of the provision by the *MAC Refinancing Act*, *Public Authorities Law § 3240 (5)* stated:

"The agreement of the state contained in this section shall be deemed executory only to the extent of appropriations available for payments under this section and no liability on account of any such payment shall be incurred by the state beyond such

because the Comptroller is prohibited [****6] from distributing any money in the Tax Fund to the state general fund unless and until LGAC receives the payments according to its certification (*see* State Finance Law § 92-r [5] [a] [i]). This incentive has been referred to as the statute's "trapping mechanism." Since the inception of LGAC, there has annually been a legislative appropriation and substantial excess funds have been transferred each year from the Tax Fund to the State Treasury.

[****7] The MAC Refinancing Act

The *MAC Refinancing Act* created *Public Authorities Law § 3238-a*, which requires LGAC to make annual payments of $ 170 million to the City during each City fiscal year until 2034. The first paragraph of that provision states:

> "Notwithstanding any inconsistent provision of law, [*531] [LGAC] shall transfer to the city of New York [$ 170 million] from the resources of the corporation pursuant to *section [3239]* of this title. Such payment shall be made during each city fiscal year. Such payments from the corporation shall be made from the fund [i.e., the Tax Fund] established by [*State Finance Law § 92-r*] and in accordance with the provisions thereof" (*Public Authorities Law § 3238-a*).

The Act also amended *Public Authorities Law § 3240 (1)* to require the Chairperson of LGAC to include in its annual certifications to the Governor and Comptroller the $ 170 million payments it is required to make to the City. The Act further amended *Public Authorities Law § 3240 (5)*, which contained the executory clause [****8] and addressed the manner and timing of the State's payments to LGAC, by adding a sentence at the end of the provision which stated, "Provided however, this subdivision shall not apply for payments made pursuant to *section [3238-a]* of this title." [3]

[****9] In addition, the Act permits the City's Mayor to assign the $ 170 million payments to a new not-for-profit local development corporation (*see Public Authorities Law § 3238-a*). [***512] [**592] Once the Mayor gives notice to LGAC and the Comptroller of the assignment, the payments must be made directly to the assignee. The assigned payments then become the property of the assignee for all purposes. In accordance with this statutory scheme, the Mayor of the City of New York irrevocably assigned the City's right to receive the LGAC payments to defendant Sales Tax Asset Receivable Corporation (*C), the not-for-profit development corporation created for this purpose. Under the assignment agreement between the City and *C, *C would issue bonds financed by the LGAC payments. The proceeds from the bonds would be used to retire the City's remaining $ 2.5 billion [*532] MAC debt. Any net proceeds not necessary to retire the remaining MAC debt would be paid to the City.

The Instant Litigation

On August 6, 2003, citing legal and policy concerns regarding LGAC's obligations under the *MAC Refinancing Act*, LGAC's three directors [4] unanimously adopted a resolution (1) [****10] directing LGAC not to participate in the *C

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appropriations. The state, acting through the director of the budget, and the corporation may enter into, amend, modify, or rescind one or more agreements providing for the specific manner, timing, and amount of payments to be made under this section, but only in conformity with this section."

[3] Following the enactment of the *MAC Refinancing Act*, each house of the Legislature passed separate "clean-up" bills to correct drafting errors in the prepared budget bills, although neither clean-up bill was enacted (2003 NY Assembly Bill A 9097 part J; 2003 NY Senate Bill S 5692 part J). These bills were similar in that they both sought to substitute the amended sentence in *Public Authorities Law § 3240 (5)* with language providing that agreements relating to payments made under *section 3238-a* would not be contrary to the intent of that provision. In addition, both bills sought to delete from *section 3238-a* the phrase "Notwithstanding any inconsistent provision of law." The bills also would have delayed the first payment to the City until the fiscal year ending June 30, 2005. Furthermore, both bills sought to add a sentence to *section 3238-a* which would have explicitly subordinated LGAC's payments on behalf of the State to LGAC's payments to its bondholders.

[4] Laws of 1990, chapter 220, sec 1, *§ 3234 (1)* reads as follows:

transaction, (2) authorizing and directing its coexecutive directors to explore the legal issues and to hire litigation counsel and (3) declaring that LGAC had no intention of making the payments to the City on behalf of the State until the legal issues were resolved either by litigation or by legislative action.

As a result of LGAC's resolution, *C restructured its initial bond offering plan by reducing the amount of bonds it intended to offer and resolving to hold the proceeds [****11] from the bonds in escrow, pending resolution of the anticipated litigation, rather than paying the MAC debt. On August 11, 2003, the City issued a preliminary offering circular for $ 532.2 million worth of Series A bonds set to mature in 2029. The offering circular recognized the stance taken by LGAC with regard to its payment obligations and expressed the City's intent to commence litigation to enforce its rights under the Act. The circular further stated that neither the State's payments to LGAC nor LGAC's payments to *C constituted a debt of either the State or the City. The circular also acknowledged that LGAC's obligation to pay *C in accordance with the Act was subordinated to its obligation to pay its bondholders. [5]

[****12] On August 13, 2003, LGAC commenced this declaratory action in Supreme Court, Albany County, seeking judgment declaring the *MAC Refinancing Act* unconstitutional. Specifically, [*533] LGAC alleged that the Act (1) violated *New York State Constitution, article VII, § 11*, by imposing upon the State a multiyear payment obligation without subjecting the payments to either a referendum or a legislative appropriation; (2) violated *New York State Constitution, article VIII, § 2*, because the assignment of the City's payments to [***513] [**593] *C constituted a contracting of debt without a pledge of the City's faith and credit; and (3) violated United States Constitution, article I, § 10, by impairing the contractual rights of LGAC's bondholders.

LGAC also sought a preliminary injunction to prevent *C from issuing its bonds. [6] In a decision dated August 20, 2003, Supreme Court denied LGAC's motion for a preliminary injunction. On August 27, 2003, the Appellate Division issued a preliminary injunction pending the appeal. Both parties have agreed to comply with the injunction pending this Court's decision. Thereafter, *C, along with the City, moved for summary judgment seeking dismissal of [****13] the complaint and a declaration that the Act is valid under the State and Federal Constitutions. LGAC cross-moved for summary judgment seeking a declaration that the Act is unconstitutional.

Supreme Court granted the motion and denied the cross motion, declaring the Act constitutional as challenged. As to the challenge that the Act created a multiyear obligation not subject to legislative appropriation, the court reasoned that *Public Authorities Law § 3238-a* requires that LGAC make its annual $ 170 million payments from funds appropriated by the State pursuant to *State Finance Law § 92-r*. Thus, the court concluded, even if the executory clause of *Public Authorities Law § 3240 (5)* did not apply to LGAC's payments to the City, other provisions of the Public Authorities Law ensured that the annual payments to the City would, [****14] as required, be subject to legislative appropriation.

Relying on this Court's decision in *Wein v City of New York (36 N.Y.2d 610, 331 N.E.2d 514, 370 N.Y.S.2d 550 [1975])*, Supreme Court rejected LGAC's argument that the City was unlawfully contracting a debt obligation without pledging its faith and credit. The court determined that no debt was being incurred by the City since the City was not liable to *C bondholders in the event that LGAC failed to make the annual $ 170 million payments. Finally, the court concluded that LGAC's payments to the City under the Act do [*534] not create obligations that are prior or equal to LGAC's bondholders in that LGAC does not have to pay the City until there has been an appropriation and all of LGAC's debt service obligations have been met.

"The corporation shall be administered by three directors, one of whom shall be the comptroller, one of whom shall be the director of the budget and one of whom shall be appointed by the governor. A director who is not a state official shall serve for a term expiring at the end of the term actually served by the officer making the appointment and may be removed for cause by such officer after hearing on ten days notice."

[5] On August 12, 2003, *C issued a preliminary offering circular for approximately $ 24 million in Series B bonds, the proceeds of which would be used to finance the Series A debt service in the event that the City was unsuccessful in its anticipated litigation. Payment on Series B bonds would otherwise be made in the manner described in the preliminary offering circular for Series A bonds.

[6] On August 13, 2003, Supreme Court issued a temporary restraining order preventing the issuance of *C bonds.

Upon LGAC's appeal, the Appellate Division, with one Justice concurring in part and dissenting in part, modified the order of Supreme Court by (1) reversing that part of the order granting *C's motion for summary judgment declaring constitutional the amendment to *Public Authorities Law § 3240 (5)* and denied LGAC's cross motion as to that amendment; (2) denying *C's motion as to that amendment and granting [****15] LGAC's cross motion as to that amendment; and (3) declaring the amendment unconstitutional and severing it from the remainder of the Act. The Court held that the amendment to *section 3240 (5)* eliminated the necessity of annual legislative appropriations in violation of the State Constitution. The Court determined, however, that the offending provision was severable because to sever would preserve the legislative objective in promulgating the Act, which was to assist the City in retiring its remaining payments due on the MAC indebtedness.

The Court also concluded that the City's assignment of the $ 170 million payments to [***514] [**594] *C did not create a debt for the City. Rather, the Court reasoned, only *C would be liable if LGAC's failure to make its payments to *C resulted in *C's inability to pay its bondholders. Thus, the debt would be incurred by *C, not the City. Moreover, the Court stated that LGAC's obligations of first priority on tax dollars to its bondholders would not be impaired. It concluded that "nothing in the Act explicitly requires that the $ 170 million be paid at the expense of the existing LGAC bondholders. . . . [****16] . [B]ecause we have severed the constitutionally offensive amendment … the $ 170 million payment is subject to annual appropriation. The Act does not require LGAC to make the $ 170 million payment in the event of a shortfall in the appropriation." (*5 A.D.3d 829, 833, 773 N.Y.S.2d 460 [2004]*.)

One Justice concurred in part and dissented in part. While he concurred in the Court's conclusion that the Act, as severed, did not violate either of the state constitutional provisions invoked by plaintiffs, he disagreed with the majority's holding that the Act did not impair the contractual rights of LGAC's existing bondholders. He reasoned that if the Legislature appropriated funds sufficient for either LGAC's debt service or *C payments, but not both, the language of *Public Authorities Law § 3238-a* [*535] would mandate that LGAC pay *C before the LGAC bondholders. Because LGAC's contracts with its bondholders provide that they are to have first priority on money in the Tax Fund, the dissenting Justice concluded that the Act unconstitutionally impairs LGAC's contracts with its bondholders.

Pursuant to *CPLR 5601 (b)*, LGAC appeals and *C and the City cross-appeal to this Court. We now modify the order of the Appellate Division [****17] and reinstate the order of Supreme Court, thus declaring the *MAC Refinancing Act* constitutional.

II.

On this appeal, LGAC argues that the *MAC Refinancing Act* unconstitutionally requires LGAC, acting on behalf of the State, to make multiyear payments which are not subject to legislative appropriations (*see NY Const, art VII, § 11*). LGAC contends that this infirmity is not severable from the remainder of the Act. Additionally, LGAC contends that the Act violates the prohibition against revenue financing by authorizing the City to assign the payments to *C, and thereby to incur debt, without requiring the City to pledge its faith and credit (*see NY Const, art VIII, § 2*). LGAC urges further that the Act unconstitutionally impairs the contracts of LGAC's existing bondholders (*see* US Const, art I, § 10). In their cross appeal, *C and the City argue that the Act's amendment to *Public Authorities Law § 3240 (5)* is constitutional and does not exclude the payments from legislative appropriations.

At the outset, we again note that the wisdom of this refinancing plan is not a matter for this Court to evaluate. Moreover, LGAC bears a heavy burden [****18] to overcome the strong presumption of constitutionality that attaches to every statute (*see Schulz v State of New York, 84 N.Y.2d at 241*; *Hotel Dorset Co. v Trust for Cultural Resources, 46 N.Y.2d 358, 370, 385 N.E.2d 1284, 413 N.Y.S.2d 357 [1978]*). Particularly where the statute concerns public financing programs, courts are required to exercise restraint and give deference to the legislative enactment, unless the program is "patently illegal" (*Hotel Dorset Co., 46 N.Y.2d at 370*, quoting *Comereski v City of Elmira, 308 N.Y. 248, 254, 125 [***515] [**595] N.E.2d 241 [1955]*; *see also Schulz, 84 N.Y.2d at 241*). Thus, in order to prevail, LGAC must prove beyond a reasonable doubt that "in any degree and in every conceivable application the [legislative enactment] suffers wholesale constitutional impairment" (*Matter of Moran Towing Corp. v*

Urbach, 99 N.Y.2d 443, 448, 787 N.E.2d 624, 757 N.Y.S.2d 513 [2003] [citation and internal quotation marks omitted]).

[*536] We conclude that LGAC has not satisfied this substantial burden.

Legislative Appropriations

New York State Constitution, article VII, § 11, provides, in relevant part, "[N]o debt shall be hereafter contracted by or in behalf of [****19] the state, unless such debt shall be authorized by law, for some single work or purpose . . . . No such law shall take effect until it shall, at a general election, have been submitted to the people, and have received a majority of all the votes cast for and against it at such election." As this Court has recognized, a statute providing for multiyear payments pursuant to annual legislative appropriations does not create a debt within the meaning of *article VII, § 11*, and is not subject to the public referendum requirement (*see Schulz, 84 N.Y.2d at 249, 251*). Thus, the 30 annual payments that LGAC is required to make pursuant to the *MAC Refinancing Act*, passed without a public referendum, must be subject to annual legislative appropriations in order to satisfy this provision of the State Constitution.

[1] LGAC contends that the amendment to *Public Authorities Law § 3240 (5)* added a sentence at the end of that subdivision that renders the Act unconstitutional. *Public Authorities Law § 3240 (5)* reads as follows:

> "The agreement of the state contained in this section shall be deemed executory only to the extent of [****20] appropriations available for payments under this section and no liability on account of any such payment shall be incurred by the state beyond such appropriations. The state, acting through the director of the budget, and the corporation may enter into, amend, modify, or rescind one or more agreements providing for the specific manner, timing, and amount of payments to be made under this section, but only in conformity with this section. *Provided however, this subdivision shall not apply for payments made pursuant to section [3238-a] of this title"* (emphasis added).

LGAC argues that the final sentence of the subdivision exempts the payments to the City from the executory clause contained in the first sentence, and therefore obligates the State to provide the funds for LGAC's payments even without an appropriation. We disagree.

Statutes must be construed to effectuate the intent of the Legislature. Reading the Act as a whole, we conclude that the [*537] amended sentence was intended to apply only to the previous sentence, not to the entire subdivision, and the failure to make that intent plain in the statute--the result of legislative haste--cannot serve to void the Act. [****21] The previous sentence permitted LGAC and the State to "amend, modify, or rescind one or more agreements providing for the specific manner, timing, and amount of payments to be made" by LGAC. In enacting the amended sentence, the Legislature sought to prevent the State from changing the specific timing of the payments mandated under the Act. The City's fiscal year begins July 1, whereas the State's fiscal year begins April 1. It was therefore important from a budgeting perspective that the $ 170 million [***516] [**596] be available to the City no later than July 1. Accordingly, the Legislature intended to remove the discretion of the State Budget Director and LGAC with respect to the timing of the annual payments, so as to ensure that LGAC's payment to the City or its assignee would occur during each city fiscal year.

LGAC's contrary contention--that the Legislature's intent in amending *Public Authorities Law § 3240 (5)* was to exempt the payments to the City from the requirement of appropriation--is belied by the reality that the *MAC Refinancing Act* otherwise continues to explicitly require that the payments be subject to annual legislative appropriation.

Public Authorities Law § 3238-a [****22] states, in pertinent part:

> "Notwithstanding any inconsistent provision of law, [LGAC] shall transfer to the city of New York [$ 170 million] from the resources of the corporation pursuant to *section [3239]* of this title. Such payment shall be made during each city fiscal year. Such payments from the corporation shall be made from the fund established by [*State Finance Law § 92-r*] and in accordance with the provisions thereof."

As noted above, the fund established by *State Finance Law § 92-r (1)* is the Tax Fund. LGAC receives its revenue from the Tax Fund only by legislative appropriation. *Section 92-r (5) (a) of the State Finance Law* states that once the Comptroller receives the certification of LGAC's payment requirements, submitted pursuant to *Public Authorities Law § 3240*, the Comptroller must pay the amount certified "pursuant to an appropriation." The Act amended *Public Authorities Law § 3240 (1)* to require LGAC to include in its annual certification the $ 170 million payments it is required to make to the City. Moreover, *section 3240 (3)* [****23] states that the Comptroller must pay the [*538] amount certified by LGAC "provided that any such amounts shall have been first appropriated by the state."

Thus, upon construing *the Act* as a whole and reading its parts together to determine the intent of the Legislature, as we must, we conclude that the intent of the Legislature is clear: to enact a constitutionally sound statute pursuant to which the State would assist the City in meeting its debt obligations to MAC by providing for annual payments to the City through legislative appropriations channeled through LGAC. Moreover, both *C and the City acknowledge that LGAC's annual payments to the City must be appropriated. Of course, if no appropriation is made from the Tax Fund, LGAC cannot access the funds from which it must make its payments to the City, and the City would not receive the payment. Notably, *section 3238-a* requires that LGAC's payments be made from the Tax Fund, and even if revenue were available to LGAC from other sources, it could not be used to make the payments to the City. Thus, the Act ensures that any payments to the City are subject to an annual legislative appropriation notwithstanding the amendment to *Public Authorities Law § 3240 (5)*. [****24] Indeed, the entire purpose of channeling the annual payments through LGAC is to make use of LGAC's trapping mechanism, which gives the Legislature an incentive, but not an obligation, to appropriate; in fact appropriation remains, as it must, ultimately discretionary.

If, as plaintiffs contend, the Legislature had wanted to create an absolute and unconditional requirement of payments to the City, not subject to appropriation, it would simply have provided that in each of the next 30 years the State shall pay $ 170 million annually to the City. If the payments were meant to be mandated without the need for appropriation, there would [***517] [**597] have been no need to channel the payments through LGAC, using the incentive of the trapping mechanism of *State Finance Law § 92-r*. Therefore, we conclude that the *MAC Refinancing Act* does not violate *article VII, section 11, of the New York State Constitution*. [7]

[****25] [*539] Municipal Debt

[2] LGAC further contends that the Act violates *New York State Constitution article VIII, § 2*, because it permits the City to assign to *C its right to receive LGAC's annual payment of $ 170 million. LGAC argues that the City's assignment of this right to *C, in exchange for the proceeds on the bonds that *C would issue, constitutes a debt of the City, on which the City has not pledged its faith and credit. We disagree.

The State Constitution prohibits the City from contracting any indebtedness unless it pledges its "faith and credit" for the payment of the principal and interest on the debt (*NY Const, art VIII, § 2*). The purpose of this provision is obvious--to ensure that the municipalities honor their legal financial obligations to their creditors (*see generally Flushing Natl. Bank v Municipal Assistance Corp., 40 N.Y.2d 731, 358 N.E.2d 848, 390 N.Y.S.2d 22 [1976]*). Debt has a well-settled meaning within the contemplation of the State Constitution. A debt can arise only where the municipality has incurred a legal obligation to fund the public benefit corporation's debt service to its bondholders should the corporation default on its obligation (*see Wein v City of New York, 36 N.Y.2d at 617-618*; [****26] *Schulz v State of New York, 84 N.Y.2d 231, 247-249, 639 N.E.2d 1140, 616 N.Y.S.2d 343 [1994]*). Thus, the City's assignment to *C of payments that the City would otherwise receive from LGAC can be considered a debt of the City only if the City could be held liable to *C or its bondholders in the event that LGAC failed to make the payments to *C.

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[7] We further reject LGAC's contention that--by specifying that $ 170 million be transferred annually to the City by LGAC "[n]otwithstanding any inconsistent provision of law" (*Public Authorities Law § 3238-a*)--the Act creates an "unambiguous" and "absolute" command that the $ 170 million be paid by the State each year, regardless of an appropriation. The challenged provision refers only to LGAC's payments to the City, not to the State's payments to LGAC, which must, of course, be subject to appropriation.

Like Supreme Court and the Appellate Division, we conclude that our decision in *Wein* is dispositive of this issue. In *Wein*, pursuant to the *New York City Stabilization Reserve Corporation Act*, the Mayor of the City of New York was authorized to certify $ 520 million over the course of two succeeding fiscal years to the Stabilization Reserve Corporation (SRC). SRC would then sell $ 520 million of its own bonds and notes, the proceeds of which would be paid into the City's general fund. Under the applicable statute, the bonds and notes were the sole obligations of the SRC, and neither the State nor the City would be liable for payment on the debt service. The bonds were financed out of SRC's capital reserve fund. To assure proper maintenance of the fund, the City was to make a yearly appropriation to the fund. If the City failed to make the [****27] appropriation, [*540] the State Comptroller would pay SRC the amount certified out of revenue that would otherwise have been payable to the City (*see Wein v City of New York, 36 N.Y.2d at 614-615*).

In rejecting plaintiff taxpayer's article *VIII, § 2* challenge to the *New York City Stabilization Reserve Corporation Act*, we noted that the terms of the statute precluded [***518] [**598] the City from becoming indebted to SRC or its bondholders. We held that *article VIII, § 2* did not apply because the City could not be held liable to the bondholders even if the City failed to make the payments, thereby causing SRC to default (*id. at 617-618*).

In this case, as in *Wein*, the City has no legal obligation either to *C or to its bondholders should LGAC fail to make its payments to *C. Although the Act does not specifically state that the City incurs no obligation with respect to *C's bondholders, it does not impose such an obligation. And significantly, the City's avoidance of this debt obligation is abundantly clear in the record. According to *C's certificate of incorporation, "no member of the City Group will guarantee debts of the Corporation." Moreover, the [****28] assignment agreement between the City and *C states:

> "*City Not Liable on Bonds*. It is the intention of the City and [*C], and they do agree, that the Fiscal 2004 Bonds shall not be a debt of the City and the City will not have any obligation or liability thereon."

The preliminary offering circular on *C's Series A bonds states:

> "None of the payments to LGAC, to [*C] by LGAC or to the Bondholders by [*C] constitutes a debt of the State or the City, and neither the faith and credit nor the taxing power of the State or the City is pledged to the payment of amounts to LGAC, to [*C] by LGAC or to the payment of the Series 2004A Bonds."

Finally, the preliminary offering circular on *C's Series B bonds states:

> "Payments to the Series 2004B Bondholders by [*C] do not constitute a debt of the State or the City, and neither the faith and credit nor the taxing power of the State or the City is pledged to the payment of the Series 2004B Bonds."

[*541] The terms of the assignment between the City and *C cannot be clearer on this point--the City has no obligation to *C with regard to LGAC's payments and has no liability [****29] to *C's bondholders in the event that *C defaults. Therefore, the City has not incurred any enforceable debt with respect to the assignment and *article VIII, § 2* of the State Constitution does not apply.

We further reject LGAC's contention that the assignment of the City's right to receive the payments in exchange for bond revenues violates a purported "ban on revenue financing." According to LGAC, "[t]he purposes of the prohibition are to prevent local governments from evading constitutional debt limitations and committing their revenues to long-term obligations that are not conditioned on future local legislative appropriations and that are therefore beyond any local legislative power to alter in response to changed needs and conditions." Although LGAC couches this argument in terms of *article VIII, § 2 of the State Constitution*, this concern about inhibiting future local administrations from determining the use of its revenues has nothing to do with a city's obligation to pledge its faith and credit to its debt obligations. Rather, it appears to be a separate policy consideration altogether.

In any event, here there is no diversion of a preexisting revenue stream that the [****30] City otherwise would have received. Rather, the Legislature created an additional revenue stream of state funds through LGAC which enabled the City to receive revenues that had been diverted for payment of debt service on the MAC bonds. Moreover, the assignment here does not affect the ability of future local [***519] [**599] administrations to determine how the payments from LGAC ought to be expended. Pursuant to *Public Authorities Law § 3238-a*, upon the City's assignment of LGAC's payments to *C, the amount becomes "the property of [*C] for all purposes," and upon the

City's notice to LGAC and to the State Comptroller of the assignment, the payments must be made directly from LGAC to *C. Thus, the assignment constitutes a transfer of the City's entire property interest in the revenue stream. It is not a perpetual spending of the City's revenue on *C, but is rather a one-time assignment of a property right, and once it is made, the City has no interest in any of the LGAC payments. *C thereby has full ownership of the entire revenue stream. Thus, there is no interference in the appropriation power of future local administrations. Simply stated, a city council [****31] cannot appropriate revenue that it does not own.

[*542] Still, even if the City would otherwise have an interest in the LGAC payments, this Court has held that the diversion of municipal funds to a public benefit corporation does not necessarily run afoul of the State Constitution. As earlier noted, we upheld the financing program in the *Wein* case, in which the corporation's capital reserve fund was financed by city appropriation, and failing that appropriation, by the State's diversion of city revenues to the corporation (*see* Wein v City of New York, 36 N.Y.2d at 618). Indeed, we stated, "The fact that the comptroller is permitted, under certain circumstances, to pay a portion thereof directly to a public benefit corporation on behalf of the city, does not create any illegality, and we hold and find that no lien is thereby created on that fund" (*id. at 619*).

Also, in *Comereski v City of Elmira (308 N.Y. 248, 125 N.E.2d 241 [1955])*, we recognized that it was constitutionally permissible for a municipality to provide in a contractual agreement with an authority that, on the one hand, the authority's bonds create no liability for the municipality, and [****32] on the other hand, permit or mandate that the municipality make some kind of direct assistance to the authority (*see id. at 254* ["(A) city's nonliability on an authority's bonds and the same city's right or duty to assist the authority financially are part of the same conventional statutory pattern. We should not strain ourselves to find illegality in such programs"]). As we emphasized in both *Wein* and *Comereski*, if the State were to funnel money to a public benefit corporation that would otherwise be paid to the municipality, the payment would constitute a permissible gift under *article VIII, § 1 of the State Constitution* (*see* Wein v City of New York, 36 N.Y.2d at 618; *Comereski v City of Elmira, 308 N.Y. at 252-253*).

We recognize that there are numerous programs providing for the payment of a public benefit corporation's debt service through the diversion of state aid paid on behalf of a municipality. The most obvious example of such a program, of course, is the diversion of the City's interest in the state sales tax to MAC itself in order to pay the debt at issue in this litigation. Another prominent example is the utilization [****33] of public authorities by several counties of the State, including New York, Westchester, Erie and Nassau, for the issuance of bonds to provide immediate revenue to the respective counties, with the financing of these bonds secured by the proceeds the counties are to receive under the national tobacco settlement (Kasprak, *Securitization of Tobacco Settlement Funds*, Report of Conn Gen Assembly Off [*543] of Legis Research [Sept. 20, 2002] <*http://www.cga.state.ct.us/2002/olrdata/ph/rpt/2002-R-0736.htm*>). [***520] [**600] As we stated in *Wein*,

> "While the constitutional validity of these other enactments is not before us, we must assume that the legal and constitutional basis for the funneling of a municipality's State-aid moneys to these other public benefit corporations by the State Legislature, is founded on the similar right of a municipality to make gifts to a public benefit corporation pursuant to *section 1 of article VIII of the Constitution* and the other cited authorities. Upon a contrary holding it could be argued, successfully or otherwise, that their funding would be illegal." (*Id. at 619*.)

We therefore conclude that the *MAC Refinancing Act* does not violate *New York State Constitution, article VIII, § 2*.

Impairment of Contracts

In its final constitutional challenge, LGAC maintains that [****34] the *MAC Refinancing Act* impairs the preexisting contractual rights of its bondholders (US Const, art 1, § 10). Pursuant to the general bond resolutions adopted in 1991 and 2002, LGAC pledged to its bondholders that they would have first priority on the funds available to LGAC. While LGAC is permitted to issue other debt instruments, any obligations to disburse funds on such instruments must be subordinated to the bondholders' rights and cannot adversely affect LGAC's ability to satisfy its debt on the bonds. Under *Public Authorities Law § 3241 (1)*, the State pledged to LGAC bondholders that it would not limit or alter their rights and remedies to receive the principal and interest due them on the bonds.

[3] LGAC argues that the Act impairs the rights that LGAC bondholders enjoy under the bond resolutions in violation of United States Constitution, article I, § 10 (1), which states, in pertinent part, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." LGAC rests its argument on the first sentence of *Public Authorities Law § 3238-a*: "Notwithstanding any inconsistent provision of law, [LGAC] shall [****35] transfer to the city of New York [$ 170 million] from the resources of [LGAC] pursuant to *section [3239]* of this title." According to LGAC, this provision gives the payments to the City a greater priority than that afforded to the LGAC bondholders, even though LGAC's contracts with its bondholders promised them first priority over any other debtors. LGAC urges that if [*544] there were a shortfall in the funds available for payment to the City and to LGAC's bondholders, the language of *section 3238-a* would require LGAC to disburse payments to the City at the expense of monies due to LGAC bondholders. We reject this contention.

The interpretation that LGAC urges this Court to give to the Act would require us to find that the Legislature modified or repealed *Public Authorities Law § 3241 (1)* by implication. For us to do so would be to ignore the fundamental tenet of statutory construction that implied repeal or modification of a preexisting law is distinctly disfavored (*see Iazzetti v City of New York, 94 N.Y.2d 183, 189, 723 N.E.2d 81, 701 N.Y.S.2d 332 [1999]*; *Matter of Consolidated Edison Co. of N.Y. v Department of Envtl. Conservation, 71 N.Y.2d 186, 195, 519 N.E.2d 320, 524 N.Y.S.2d 409 [1988]*; [****36] *Besser v E.R. Squibb & Sons, 146 A.D.2d 107, 114, 539 N.Y.S.2d 734 [1st Dept 1989]*, *affd 75 N.Y.2d 847, 552 N.E.2d 171, 552 N.Y.S.2d 923 [1990]*). "[T]he judiciary should not lightly infer that the Legislature has repealed one of its own enactments when it has failed to do so expressly; the Legislature is hardly reticent to repeal statutes when it means to do so" (*Alweis v Evans, 69 N.Y.2d 199, 204, 505 N.E.2d 605, 513 N.Y.S.2d 95 [1987]*). [***521] [**601] Generally, a statute impliedly repeals a prior statute "only if the two are in such conflict that it is impossible to give some effect to both" (*id.*). "If by any fair construction, a reasonable field of operation can be found for [both] statutes, that construction should be adopted" (*People v Newman, 32 N.Y.2d 379, 390, 298 N.E.2d 651, 345 N.Y.S.2d 502 [1973]*). Thus, in the absence of some expressed legislative intent to limit or repeal the State's guarantees to LGAC's bondholders under *Public Authorities Law § 3241 (1)*, we will not interpret the Act to have that effect. Rather, harmonizing the provisions of the statute, as we must (*see Alweis v Evans, 69 N.Y.2d at 204*), we conclude that while *§ 3238-a* requires LGAC to make annual payments to the City, it does not modify or repeal the State's pledge to honor [****37] the contractual rights and remedies of LGAC's bondholders pursuant to *section 3241 (1)*.

Public Authorities Law § 3241 (1) was clearly intended to pledge to LGAC and its bondholders that the State would honor the rights and remedies that the bondholders enjoy under their agreement with LGAC. Indeed, the provision permitted the pledge of the State to be incorporated into the agreement of the bondholders, and it subsequently was so incorporated. Pursuant to their contract with LGAC, the bondholders have first priority on appropriated monies in the Tax Fund. Thus, *section 3241 (1)* constituted the State's pledge to honor the bondholders' prior lien on the appropriated funds.

[*545] The Legislature's subsequent enactment of the *MAC Refinancing Act* did not modify or repeal the State's pledge to honor LGAC's contracts with its bondholders. As previously stated, the purpose of the Act was to provide for an annual appropriation of funds to the City in order to assist it in its repayment of the MAC debt. The Legislature sought to channel the payments through LGAC by way of its established certification process. In doing so, the Legislature sought to require LGAC to make the payments [****38] to the City using the same method by which it made payments on its debt service. A plain reading of the phrase "[n]otwithstanding any inconsistent provision of law" in *section 3238-a* reveals an intent on the part of the Legislature to require LGAC to make the annual payments to the City, even if some other provision would prohibit LGAC from making payments of this sort. *Section 3241 (1)* merely confirms the priority of payment set forth in LGAC's contract with its bondholders. It does not prohibit LGAC from making such payments to the City, and so is not inconsistent with the intent of *section 3238-a*. And importantly, nowhere in *section 3238-a* does the Legislature expressly undermine *section 3241 (1)* or otherwise establish a new order of priority on the payments that LGAC must make from its appropriated funds, and we decline to impose such a reading upon the statute.

Indeed, we find no intent on the part of the Legislature to give *C bondholders an equal or greater priority than LGAC bondholders. After all, in the normal course of events, the amount of money in the Tax Fund would be

substantially more than LGAC needs to satisfy its annual expenses, including that required to pay the City. [8] The size [****39] of the Tax Fund even following a disbursement, coupled with the trapping mechanism of *State Finance Law § 92-r (5)*--which would prohibit the Comptroller from making the excess revenue available to the state general fund [***522] [**602] until LGAC receives its requested money--creates a powerful incentive for the Legislature to appropriate the entire amount requested in LGAC's annual certification. Certainly, this was the result intended by the Legislature when it promulgated *State Finance Law § 92-r (5)*. Reading the statute as a whole, it is apparent that the Legislature intended the size of the Tax Fund and the trapping mechanism to assure LGAC's payments to the City, not an alteration to the lien status [*546] of the LGAC bondholders. To be sure, if for whatever reason there were not enough money appropriated to LGAC to meet all of its payment obligations, the LGAC bondholders would have first priority on the appropriated funds and the right of *C to receive payment would be subordinate.

[****40] Indeed, STARC concedes that the rights of LGAC bondholders are superior to its right to receive payments pursuant to *Public Authorities Law § 3238-a*. This concession was expressed three times in STARC's preliminary offering to prospective bondholders. In one of these instances, the offering states, "The payments LGAC is required by the [*MAC Refinancing Act*] to make to [STARC] from the Tax Fund will be subordinate to the payments LGAC is required to make pursuant to its bond resolutions." STARC has also offered to enter into a contract with LGAC confirming that the rights of LGAC bondholders to the money appropriated to LGAC would have priority over the rights of STARC bondholders. While a concession of priority rights in STARC's preliminary offering plan and in an agreement between the parties may not alter the statute, it is significant to note that as a practical matter, LGAC's concerns about the impairment of its bondholders' contracts simply will not come to fruition.

Accordingly, the order of the Appellate Division should be modified, with costs to defendants, by reinstating the September 17, 2003 order of Supreme Court and, as so modified, affirmed.

[****41] Chief Judge Kaye and Judges Ciparick, Rosenblatt, Graffeo and Read concur; Judge R.S. Smith taking no part.

Order modified, etc.

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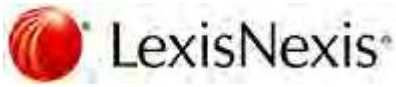
[8] According to STARC, in the state fiscal year ending March 31, 2002, the amount in the Tax Fund was more than three times the amount of LGAC's payment requirements, including a $ 170 million appropriation.



Long v. Adirondack Park Agency

Supreme Court of New York, Appellate Division, Third Department

November 16, 1989

No Number in Original

Reporter
151 A.D.2d 189 *; 547 N.Y.S.2d 921 **; 1989 N.Y. App. Div. LEXIS 14212 ***

In the Matter of George Long et al., Respondents, v. Adirondack Park Agency, Appellant

Prior History: [***1] Appeal from a judgment of the Supreme Court (John G. Dier, J.), entered February 2, 1989 in Warren County in a proceeding pursuant to CPLR article 78, which granted a petition to annul a determination of respondent Adirondack Park Agency reversing area variances granted to petitioners by the Town of Bolton Zoning Board of Appeals.

Disposition: Judgment reversed, on the law, without costs, determination confirmed and petition dismissed.

Case Summary

Procedural Posture
Respondent park agency sought review of the judgment of the Supreme Court in Warren County (New York), which granted the request of petitioners, applicant and zoning board, to annul the park agency's reversals of the zoning board's granting of the applicant's variances.

Overview

The applicant sought to convert his resort into a 32-unit condominium complex. The applicant requested a variance from the zoning board. Pursuant to *N.Y. Exec. Law § 808(3)* and *N.Y. Comp. Codes R. & Regs. tit. 9, § 582.6(b)*, the zoning board notified the park agency of the variance application on May 19, 1988. On June 13, 1988, the zoning board granted the application. On July 19, 1988, the park agency reversed the zoning board's decision. In September, the zoning board reconsidered the application and approved it. Upon the park agency's reversal, the applicant brought suit to set aside the park agency's reversals, alleging that the reversals were untimely under *N.Y. Exec. Law § 808(3)*. The trial court granted the applicant's petition. On appeal, the court reversed the judgment, holding that the park agency issued its reversal on a timely basis. The applicant asserted that under *§ 808(3)* the park agency had 30 days from the granting of the variance to reverse the zoning board's decision. The court disagreed, holding that the 30-day period in *§ 808(3)* did not begin to run until the park agency' received the notice of the grant of the variance and all the necessary documents.

Outcome
The court reversed the trial court's judgment, which granted the applicant's petition to set aside the park agency's reversal of the zoning board's decision to grant the applicant a variance.

Counsel: *Robert Abrams, Attorney-General (Douglas H. Ward, Peter H. Schiff, Val E. Washington* and *Lawrence A. Rappoport* of counsel), for appellant.

Walter O. Rehm, III, for respondents.

151 A.D.2d 189, *189; 547 N.Y.S.2d 921, **921; 1989 N.Y. App. Div. LEXIS 14212, ***1

Bartlett, Pontiff, Stewart, Rhodes & Judge, P. C., for Lake George Association and others, *amici curiae*.

Judges: Levine, J. Mahoney, P. J., Weiss, Mikoll and Yesawich, Jr., JJ., concur.

Opinion by: LEVINE

Opinion

[*190] [**922] **OPINION OF THE COURT**

Petitioners are the owners of Blue Water Manor, a resort comprising approximately seven acres, with frontage on Basin Bay, Lake George, in the Town of Bolton (hereinafter the Town), Warren County. In May 1988 petitioners applied for an area variance to convert Blue Water Manor into a 32-unit [***2] condominium development. After conducting a hearing on the application, the Town Zoning Board of Appeals (hereinafter ZBA) granted the application on June 13, 1988. Pursuant to *Executive Law § 808 (3)* and implementing regulations (*9 NYCRR 582.6 [b]*), the ZBA sent notice of the application to respondent on May 19, 1988. Under *section 808 (3)*, respondent has jurisdiction to review the granting of such a variance and may reverse a local zoning authority's determination if it finds that "such variance involves the provisions of the land use and development plan as approved in the local land use program * * * and was not based upon the appropriate statutory basis of practical difficulties or unnecessary hardships".

Respondent responded by letter dated June 16, 1988 in which it advised that the application fell within the class of cases subject to its statutory power of review and requested a copy of the application materials. On June 21, 1988, respondent received notification that the ZBA had granted petitioners' application on June 13, along with copies of the first page of the application, an undated narrative description of the proposed development, the recommendation of the [***3] Town Planning Board and two letters in opposition. Notification of the grant of the variance was in compliance with the regulations *(see*, *9 NYCRR 582.6 [d]*).

After reviewing the foregoing documents respondent issued a decision dated July 19, 1988, reversing the ZBA essentially on the ground that there had been no finding of practical difficulties to justify the variance requested. Respondent also noted that it had not received a complete record of the evidence before the ZBA, including a copy of the minutes of [*191] the hearing, as it had previously advised was needed in every case subject to its review.

On September 7, 1988, respondent received notice from the ZBA that they would again consider petitioners' request for a variance at its meeting scheduled for September 12. The minutes of the September 12, 1988 meeting indicate that petitioners had reduced the number of condominium units for which the area variance was sought from 32 to 30. On September 26, 1988, respondent received written notice of the ZBA's September 12 approval of the variance, subject to 10 conditions. Shortly thereafter, respondent's staff orally requested from the ZBA additional information, [***4] including a map of the site showing year-round and seasonal units and any financial information pertinent to the financial hardship claimed by petitioners. This request was repeated by letter of October 7, 1988. In response to that request, petitioners' attorney sent to respondent, *inter alia*, two site plans of the proposed conversion, a letter from petitioners' consulting engineer and a copy of their variance application. These documents were received by respondent on October 24, 1988.

By decision dated November 14, 1988, respondent again reversed, citing as reasons the absence of concrete proof by petitioners of significant economic injury if the zoning regulations were strictly applied and that the character of the surrounding area would not be adversely affected by the proposed change. Petitioners then brought this CPLR article 78 proceeding to set aside respondent's reversals of both the [**923] June and September 1988 area variances granted by the ZBA. The sole ground for annulment alleged in the petition was that respondent's reversals were untimely under *Executive Law § 808 (3)*, having been rendered more than 30 days after the ZBA's

determinations granting the [***5] variances. Respondent appeals from the judgment of Supreme Court granting the petition in all respects.

The judgment should be reversed. Executive Law § 808 (3) provides that, upon the application for a variance, the local municipal zoning authority "shall give written notice thereof to [respondent] *together with such pertinent information as [respondent] may deem necessary*" (emphasis supplied). The section further provides that a variance granted by the local zoning body "shall not take effect for thirty days after the granting thereof", and for respondent's authority to review and reverse "within such thirty day period" (Executive Law § 808 [3]). Respondent's regulations require notice by the ZBA [*192] to respondent not only of the filing of an application for a variance but also of the granting thereof (9 NYCRR 582.6 [d]). Respondent has interpreted both the statute and the regulations to the effect that the 30-day period within which it must review and reverse the local municipal zoning authority's approval of a variance does not begin to run until respondent receives both notice of the local body's determination and the relevant documents and data upon [***6] which that determination was based. We uphold that interpretation.

It is true, as petitioners argue, that a literal reading of Executive Law § 808 (3) suggests that, irrespective of when respondent receives notice of a local municipality's decision to grant a variance or the variance record before the local body necessary for respondent to undertake responsible review thereof, respondent's power to reverse is exhausted upon the lapse of 30 days from the actual granting of the variance. Such a construction, however, would conflict with the purposes of the Adirondack Park Agency Act *(see*, Executive Law art 27) (hereinafter the Act), especially the 1973 amendments thereto (L 1973, ch 348). Those amendments reflect the Legislature's purpose of "preserving the priceless Adirondack Park through a comprehensive land use and development plan" *(* Wambat Realty Corp. v State of New York, 41 NY2d 490, 495). The amendments include the adoption of a specific Adirondack Park land use and development plan (Executive Law § 805). The Act, in its statement of purposes (Executive Law § 801), recognized the necessity of State intervention to protect the Adirondack Park from encroachments [***7] sought through local land use regulatory authorities. "Local governments in the Adirondack park find it increasingly difficult to cope with the unrelenting pressures for development being brought to bear on the area, and to exercise their discretionary powers to create an effective land use and development control framework" (Executive Law § 801). Yet the Act, as amended, also provided for local municipality participation in land use planning and regulation within the Adirondack Park. Respondent is empowered to review a municipality's zoning ordinance and other land use legislation to determine whether such codes and ordinances meet, at a minimum, the requirements of the State comprehensive plan (Executive Law § 807). Upon approval by respondent, the local legislative regulatory scheme becomes the municipality's "local land use program" (Executive Law § 802 [32]; § 807 [1]). Thereupon, the municipality initially assumes respondent's authority to pass upon proposals [*193] for a certain class of development projects within the locality's jurisdiction (Executive Law § 808 [2]; § 810 [2]). Nonetheless, supervision over local governmental land use and development [***8] decisions to insure consistency with the State comprehensive plan was reserved to respondent through its review powers under Executive Law § 808, as already outlined.

The Town's land use ordinances were approved by respondent in 1980. In pertinent part, section 9.020 of the Town's Zoning Ordinance provides that preexisting structures associated with, *inter alia*, resort hotels such as Blue Water Manor cannot be converted to condominiums without [**924] site plan review and that any such conversion must conform to the remaining provisions of the Zoning Ordinance. Petitioners have not challenged respondent's conclusion that, because their seven-acre resort lies within an area zoned to permit only one principal building per 1.3 acres, the variance granted by the ZBA here was substantial, i.e., permission to convert to 30 units, which was six times greater than the maximum permitted by the Town Zoning Ordinance.

It seems virtually self-evident that petitioners' literal interpretation of the time limitation for review by respondent and reversal of locally granted variances contained in Executive Law § 808 (3) would substantially jeopardize respondent's exercise of its statutory [***9] responsibility to supervise land use and development regulation by local governments within the Adirondack Park. To illustrate through an extreme hypothetical, a local zoning board could effectively thwart respondent's review, under petitioners' interpretation, by simply failing to give notice of its decision to grant a variance, or by delaying transmittal of the variance record before it until the end of the 30-day period.

Literal application of the time limit from the date of actual local approval of a variance also conflicts with, and renders meaningless, the statutory duty of the local body to send to respondent both notice and "such pertinent information as [respondent] may deem necessary" (*Executive Law § 808 [3]*) for its review.

Petitioners' suggestion, that the danger of respondent being denied meaningful opportunity to review can be alleviated by its enlisting the cooperation of municipalities in prompt transmittal of the materials necessary for review, or by the respondent's exercise of its statutory right to participate in the proceedings on a variance application before the local body *(see*, *Executive Law § 808 [2]*), are unpersuasive. The concept of full [***10] cooperation between respondent and local land use [*194] regulators is inconsistent with the assumption underlying the Act, i.e., that safeguards are necessary to insure that the Adirondack Park does not fall victim to the pressures of local interests applied to local land use regulators. As stated in *Wambat Realty Corp. v State of New York (supra, at 494-495)*, "the * * * Act prevents localities within the Adirondack Park from freely exercising their zoning and planning powers. That indeed is its purpose and effect * * * because the motive is to serve a supervening State concern transcending local interests". The potentially adversarial relationship between respondent and local government regarding review by respondent is recognized under the Act in its provision giving the local zoning body standing to petition Supreme Court under CPLR article 78 for annulment of a reversal by respondent of its grant of a variance (*Executive Law § 808 [3]*). To require respondent to insure timely and thorough review by appearing and participating in every variance proceeding subject to the Act in the approximately 119 local governmental units within the Adirondack Park *(see, Wambat* [***11] *Realty Corp. v State of New York, supra, at 495)* would place a severe and impractical burden on respondent, thereby weakening its ability to perform its proper, supervisory role under the Act.

Thus, there is no realistic way that the literal meaning of the time limitations on review by respondent and reversal of local variances under *Executive Law § 808 (3)* can be applied without impairing respondent's ability to implement the purposes and policies of the Act. Under such circumstances, this court is not powerless to give meaning to statutory language which serves, rather than defeats, the legislative intent. "Adherence to the letter will not be suffered to 'defeat the general purpose and manifest policy intended to be promoted'" *(Surace v Danna, 248 NY 18, 21* [Cardozo, Ch. J], quoting *Spencer v Myers, 150 NY 269, 275*; *see, Matter of Hogan v Culkin, 18 NY2d 330, 335*; *Motor Vehicle Acc. Indem. Corp. v Eisenberg, 18 NY2d 1, 3*; *Matter of Petterson v Daystrom Corp., 17 NY2d 32, 38)*. Therefore, we construe [**925] the time limitation for review by respondent and reversal under *Executive Law § 808 (3)* to commence to run upon respondent's receipt of notice [***12] of the grant of the variance by the local zoning officials and of the variance record and other pertinent materials, requested with reasonable promptness by respondent. Under this interpretation, respondent timely issued reversal of the variances granted by the ZBA.

It should also be noted that Supreme Court's annulment of [*195] respondent's July 19, 1988 reversal of the ZBA cannot stand for an alternative reason, i.e., the failure of petitioners to seek CPLR article 78 review within the applicable period of limitations *(see*, *Executive Law § 818*).

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JOHN R. LOW-BEER
Attorney-at-Law
415 8th Street
Brooklyn, New York 11215

Phone: 718-744-5245 Email: jlowbeer@yahoo.com

May 10, 2019

By Email

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

Re: 36 West 66th Street, Manhattan, BSA Cal. No. 2019-89-A

Dear Honorable Members of the Board:

We represent Appellants in the above matter. We write to request that the Board consider this appeal on an urgent basis so as to ensure a decision in time for it to be effectual in the event that Appellants prevail. Under the Board's normal timeline, a final decision in this matter could take a year or more, as occurred in the recent case of 180 East 88th Street, Cal. No. 2017-290-A, in which I represented the appellants. Expedition is required here because the courts are very reluctant to order the demolition of substantial construction, so Appellants may well be deprived of any effective remedy even if this Board and/or the courts decide that their arguments have merit.

Respondents West 66th Sponsor LLC and Extell Development Corporation ("Extell") have already finished the foundation for the challenged building even though the permit for it was only first issued less than a month ago. They have been able to do this because they have been engaged in construction on the site since approximately June 2017, based on a permit for an innocuous 25-story building they never intended to build. That building was only a stalking horse for the 41-story, 775-foot high building for which they received a permit on April 11th, and which is the subject of this Appeal. This trickery has severely prejudiced opponents of the building. Appellants were further severely prejudiced by the fact that on January 14, 2019, DOB rescinded the ZRD2 from which Landmark West! had appealed to the Board on December 19, 2018, requiring them to bring a new appeal making exactly the same arguments that they made in the December 19th appeal.

Opponents of a project are entitled to rapid action on their objections, not only because they just may be right, but to remove a cloud from the developer's efforts if they are not. Extell's game is a "race to completion." *See Dreikausen v. Zoning Bd. of Appeals*, 98 N.Y.2d 165, 172 (2002) (holding that unless the objecting party seeks a preliminary injunction at

the earliest possible moment, its claims may be held moot if construction continues). Under *Dreikausen*, Appellants must apply for a preliminary injunction lest their claims become moot, and they have done so. Argument on this application is set for May 28, 2019. Nevertheless, an expeditious decision from this Board is the only sure way to a just outcome in this matter. Therefore, Appellants request that the Board consider this appeal on an urgent basis.

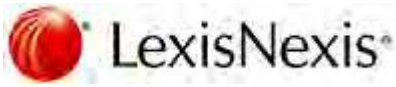
Very truly yours,

John R. Low-Beer

/s/

Charles N. Weinstock
8 Old Fulton Street
Brooklyn, New York 11201

c: Loreal Monroe, David Karnovsky, Paul Selver, Michael Zoltan, Susan Amron, Stuart Klein



Matter of Jamie J. (Michelle E.C.)

Court of Appeals of New York

November 20, 2017, Decided

No. 118

Reporter
30 N.Y.3d 275 *; 89 N.E.3d 468 **; 67 N.Y.S.3d 78 ***; 2017 N.Y. LEXIS 3279 ****; 2017 NY Slip Op 08161; 2017 WL 5557887

[1] In the Matter of Jamie J. Wayne County Department of Social Services, Respondent; Michelle E.C., Appellant.

Prior History: Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered November 10, 2016. The Appellate Division, with two Justices dissenting, affirmed an order of the Family Court of Wayne County (Daniel G. Barrett, J.), which, after a permanency hearing, among other things, continued the placement of the child until the next permanency hearing.

Matter of Jamie J. (Michelle E.C.), 145 AD3d 127, 41 NYS3d 810, 2016 N.Y. App. Div. LEXIS 7303, 2016 NY Slip Op 7424 (Nov. 10, 2016), reversed.

Disposition: Order reversed, without costs, and the January 26, 2016 permanency order vacated.

Case Summary

Overview

HOLDINGS: [1]-When respondent agency's neglect petition was dismissed, the Family Court continued to assert subject matter jurisdiction in a second permanency order, and appellant mother sought review, the matter was not moot when, during the appeal, a third permanency order was issued, a fourth permanency hearing was scheduled, and a proceeding to terminate her parental rights was initiated and stayed, because these did not resolve the parties' conflict, and each permanency hearing was subject to the same jurisdictional objection, which could not be waived and was preserved; [2]-Family Ct Act art. 10-A and *§ 1088* did not let the Court assert jurisdiction because *Family Ct Act § 1088*'s place in the statutory scheme, Family Ct Act art. 10-A's legislative history, and parents' and children's constitutional rights to remain together showed dismissal terminated its jurisdiction.

Outcome
Judgment reversed.

Counsel: [****1] *Legal Assistance of Western New York*, Geneva (*Katharine F. Woods* of counsel), *The Bronx Defenders*, Bronx (*Emma S. Ketteringham* and *Saul Zipkin* of counsel), *Paul, Weiss, Rifkind, Wharton &Garrison LLP*, New York City (*Roberto Finzi, Katriana G. Roh* and *Jennifer S. Garrett* of counsel), and *NYU Family Defense Clinic, Washington Square Legal Services*, New York City (*Martin Guggenheim* and *Christine Gottlieb* of counsel), for appellant. I. The legislature enacted the exclusive framework for the adjudication of abuse or neglect cases in article 10 of the Family Court Act. (*Matter of Albany Law School v New York State Off. of Mental Retardation & Dev. Disabilities, 19 NY3d 106, 968 NE2d 967, 945 NYS2d 613*; *Matter of Wallach v Town of Dryden, 23 NY3d 728, 992 NYS2d 710, 16 NE3d 1188*; *Matter of Sutka v Conners, 73 NY2d 395, 538 NE2d 1012, 541 NYS2d 191*; *Lexecon*

30 N.Y.3d 275, *275; 89 N.E.3d 468, **468; 67 N.Y.S.3d 78, ***78; 2017 N.Y. LEXIS 3279, ****1; 2017 NY Slip Op 08161, *****08161

Inc. v Milberg Weiss Bershad Hynes & Lerach, 523 US 26, 118 S Ct 956, 140 L Ed 2d 62; Matter of Michael B., 80 NY2d 299, 604 NE2d 122, 590 NYS2d 60; Matter of Jacob, 86 NY2d 651, 660 NE2d 397, 636 NYS2d 716; Matter of Tammie Z., 66 NY2d 1, 484 NE2d 1038, 494 NYS2d 686; Santosky v Kramer, 455 US 745, 102 S Ct 1388, 71 L Ed 2d 599; Matter of Sheena B. [Rory F.], 83 AD3d 1056, 922 NYS2d 176; Matter of Brandon C., 237 AD2d 821, 658 NYS2d 461.) II. The Court should construe the Family Court Act to avoid serious constitutional problems. (Matter of Jacob, 86 NY2d 651, 660 NE2d 397, 636 NYS2d 716; Edward J. DeBartolo Corp. v Florida Gulf Coast Building & Constr. Trades Council, 485 US 568, 108 S Ct 1392, 99 L Ed 2d 645; People v Correa, 15 NY3d 213, 933 NE2d 705, 907 NYS2d 106; Troxel v Granville, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49; Santosky v Kramer, 455 US 745, 102 S Ct 1388, 71 L Ed 2d 599; Matter of Marie B., 62 NY2d 352, 465 NE2d 807, 477 NYS2d 87.)

Gary Lee Bennett, Wayne County Department of Social Services, Lyons, for respondent. I. This appeal is now rendered moot due to the third permanency hearing order and should be dismissed. (*Matter of Anthony L. [Lisa P.], 144 AD3d 1690, 41 NYS3d 641*; Matter of Alexander M. [Michael M.], 83 AD3d 1400, 919 NYS2d 450; *Matter of Sysamouth D., 98 AD3d 1314, 951 NYS2d 424*; Matter of Marcus BB. [David BB.], 129 AD3d 1134, 15 NYS3d 477; Matter of Hearst Corp. v Clyne, 50 NY2d 707, 409 NE2d 876, 431 NYS2d 400; *Matter of Gannett Co., Inc. v Doran, 74 AD3d 1788, 903 NYS2d 634.*) II. Due process, other constitutional and Family Court Act article 10-A subject matter jurisdiction claims were not properly raised and preserved at Family Court. (People v Clarke, 81 NY2d 777, 609 NE2d 137, 593 NYS2d 784; *Matter of G. Children, 293 AD2d 470, 739 NYS2d 639*; People v Baumann & Sons Buses, Inc., 6 NY3d 404, 846 NE2d 457, 813 NYS2d 27; Melahn v Hearn, 60 NY2d 944, 459 NE2d 156, 471 NYS2d 47;People v Dozier, 52 NY2d 781, 417 NE2d 1008, 436 NYS2d 620; *Liffiton v Grossman, Levine & Civiletto, 100 AD2d 732, 473 NYS2d 646*; Matter of Mary R.F. [Angela I.], 144 AD3d 1493, 41 NYS3d 341; Merrill v Albany Med. Ctr. Hosp., 71 NY2d 990, 524 NE2d 873, 529 NYS2d 272; Hecker v State of New York, 20 NY3d 1087, 987 NE2d 636, 965 NYS2d 75; Matter of Daniel H., 15 NY3d 883, 938 NE2d 966, 912 NYS2d 533.) III. A finding of neglect is not required to continue the permanency hearing placement of a child previously placed under Family Court Act article 10-A. (Matter of Calm Lake Dev. v Town Bd. of Town of Farmington, 213 AD2d 979, 624 NYS2d 484; Matter of Christopher G. [Priscilla H.], 82 AD3d 1549, 919 NYS2d 244; Matter of Michael B., 80 NY2d 299, 604 NE2d 122, 590 NYS2d 60; Lacks v Lacks, 41 NY2d 71, 359 NE2d 384, 390 NYS2d 875; Matter of Sheena B. [Rory F.], 83 AD3d 1056, 922 NYS2d 176; Matter of Dashaun G. [Diana B.], 117 AD3d 1526, 985 NYS2d 802; Matter of Sullivan County Dept. of Social Servs. v Richard C., 260 AD2d 680, 687 NYS2d 470; Matter of Tatiana R., 17 Misc 3d 443, 841 NYS2d 834; Matter of Shinice H., 194 AD2d 444, 599 NYS2d 37; Matter of Jose R., 83 NY2d 388, 632 NE2d 1260, 610 NYS2d 937.) IV. Due process was provided by the Family Court Act article 10-A process below. (Eaton v New York City Conciliation & Appeals Bd., 56 NY2d 340, 437 NE2d 1115, 452 NYS2d 358; Matter of Marie B., 62 NY2d 352, 465 NE2d 807, 477 NYS2d 87; Matter of Anthony QQ., 48 AD3d 1014, 852 NYS2d 459; *Matter of Adney v Morton, 68 AD3d 1742, 890 NYS2d 864*; *Matter of Jerri D. v Jarrett H., 299 AD2d 863, 750 NYS2d 394*; Matter of Commissioner of Social Servs. v Philip De G., 59 NY2d 137, 450 NE2d 681, 463 NYS2d 761.)

James S. Hinman, P.C., Rochester (*James S. Hinman* of counsel), for James R. and another, interested parties. I. The Family Court had jurisdiction, and an obligation, to continue Jamie J. in foster care despite dismissal of the neglect petition against appellant. (Matter of Tammie Z., 66 NY2d 1, 484 NE2d 1038, 494 NYS2d 686; Matter of Brandon C., 237 AD2d 821, 658 NYS2d 461; Matter of Maria L., 152 AD2d 466, 543 NYS2d 674; Matter of Rasha B., 139 AD2d 962, 527 NYS2d 933; Matter of Sheena B. [Rory F.], 83 AD3d 1056, 922 NYS2d 176.) II. The only issue preserved for review was that of subject matter jurisdiction. III. Appellant was accorded due process.

Devalk, Power, Lair & Warner, P.C., Sodus (*Sean D. Lair* of counsel), Attorney for the Child. I. An adjudication of abuse or neglect is not required for the court's jurisdiction to continue pursuant to Family Court Act article 10-A. (Matter of Dashaun G. [Diana B.], 117 AD3d 1526, 985 NYS2d 802; Bender v Jamaica Hosp., 40 NY2d 560, 356 NE2d 1228, 388 NYS2d 269; People ex rel. New York Cent. & Hudson Riv. R.R. Co. v Woodbury, 208 NY 421, 102 N.E. 565; People v Golo, 26 NY3d 358, 23 NYS3d 110, 44 NE3d 185; Patrolmen's Benevolent Assn. of City of N.Y. v City of New York, 41 NY2d 205, 359 NE2d 1338, 391 NYS2d 544.) II. It is not a violation of the appellant's

30 N.Y.3d 275, *275; 89 N.E.3d 468, **468; 67 N.Y.S.3d 78, ***78; 2017 N.Y. LEXIS 3279, ****1; 2017 NY Slip Op 08161, *****08161

constitutionally protected rights to due process to hold her child in foster care absent a finding of neglect. (*Matter of Adney v Morton, 68 AD3d 1742, 890 NYS2d 864*.)

Mayer Brown LLP, New York City (*Scott A. Chesin* and *Allison Levine Stillman* of counsel), for Lawyers for Children, Inc. and another, amici curiae. I. Family Court Act article 10-A permanency hearings do not afford the necessary procedural safeguards to avoid unconstitutional and inappropriate placement in care. (*Duchesne v Sugarman, 566 F2d 817*; *Troxel v Granville, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49*; *Santosky v Kramer, 455 US 745, 102 S Ct 1388, 71 L Ed 2d 599*; *Matter of Michael B., 80 NY2d 299, 604 NE2d 122, 590 NYS2d 60*; *Nicholson v Scoppetta, 3 NY3d 357, 820 NE2d 840, 787 NYS2d 196*.) II. Existing procedural mechanisms under Family Court Act article 10 effectively protect children. III. Time spent in foster care has proven, deleterious effects on children. (*Matter of Michael B., 80 NY2d 299, 604 NE2d 122, 590 NYS2d 60*; *Matter of Dale P., 84 NY2d 72, 638 NE2d 506, 614 NYS2d 967*.)

Judges: WILSON, J. Opinion by Judge Wilson. Chief Judge DiFiore and Judges Rivera, Stein, Fahey, Garcia and Feinman concur.

Opinion by: WILSON

Opinion

[**469] [***79] [*279] Wilson, J.

This case presents the novel question of whether Family Court retains subject matter jurisdiction to conduct a permanency hearing pursuant to Family Court Act article 10-A once the underlying neglect petition brought under article 10 of that statute has been dismissed for failure to prove neglect. We hold that it does not. Instead, the dismissal of a [2] neglect petition terminates Family Court's jurisdiction.

As then-Judge Kaye explained,

> "New York's foster care scheme is built around several fundamental social policy choices that have been explicitly declared by the Legislature and are binding on this Court . . .
>
> "A biological parent has a right to the care and custody of a child, superior to that of others, unless the parent has abandoned that right or is proven unfit to assume the duties and privileges of parenthood, even though the State perhaps could [****2] find 'better' parents. A child is not the parent's property, but neither is a child the property of the State. [***80] [**470] Looking to the child's rights as well as the parents' rights to bring up their own children, the Legislature has found and declared that a child's need to grow up with a normal family life in a permanent home is ordinarily best met in the child's natural home" (*Matter of Michael B., 80 NY2d 299, 308-309, 604 NE2d 122, 590 NYS2d 60 [*280] [1992]* [internal quotation marks, citations and emphasis omitted]).[1]

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[1] According to amici, those legislative findings are further substantiated by amici's experience and by recent works of social science (*see e.g.* Kristin Turney & Christopher Wildeman, *Mental and Physical Health of Children in Foster Care*, 138 [No. 5] Pediatrics at 1, 3 [2016] [documenting "vast" differences between the physical and mental health of those children placed in foster care and those in general population, many of which persist even after adjusting for child and household characteristics]; Diane Mastin, Sania Metzger & Jane Golden, *Foster Care and Disconnected Youth: A Way Forward for New York* [Apr. 2013], available at http://www.fysany.org/sites/default/files/document/report_final_April_2_0.pdf [accessed Oct. 25, 2017] [finding young adults who age out of foster care face particularly poor chances of achieving educational objectives, gaining employment, or developing strong family relations and stable housing arrangements]; Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 [No. 5] Am Econ Rev 1583 [2007] [suggesting that children on the margin of placement tend to have better outcomes when they remain at home]).

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Those rights are among our oldest and most fundamental and are not only provided by statute, but also guaranteed to parents and children by our State and Federal Constitutions (*Matter of Brooke S.B. v Elizabeth A.C.C., 28 NY3d 1, 26, 39 NYS3d 89, 61 NE3d 488 [2016]*; *Matter of Marie B., 62 NY2d 352, 358-359, 465, 465 NE2d 807, 477 NYS2d 87 [1984]*; *Santosky v Kramer, 455 US 745, 760, 102 S Ct 1388, 71 L Ed 2d 599 [1982]*; *Matter of Bennett v Jeffreys, 40 NY2d 543, 546, 356 NE2d 277, 387 NYS2d 821 [1976]*; *Stanley v Illinois, 405 US 645, 651, 92 S Ct 1208, 31 L Ed 2d 551 [1972]* [collecting cases]).

Here, the rights at issue are those of the subject child, Jamie J., and her mother, Michelle E.C. Jamie J. was born in November 2014. A week later, at the request of the Wayne County Department of Social Services (the Department), Family Court directed her temporary removal from Michelle E.C.'s custody pursuant to an ex parte pre-petition order under Family Court Act § 1022.[2] Four days after that, [****3] the Department filed its Family Court Act article 10 neglect petition. More than a year later, on the eve of the fact-finding hearing held to determine whether it could carry its burden to prove neglect, the Department moved to amend its petition to conform the pleadings with the proof. Family Court denied that eleventh-hour motion as unfairly prejudicial to Michelle E.C. and to the attorney for Jamie J. After hearing evidence, Family Court found that the Department failed to prove neglect, and therefore dismissed the petition. The Department did not appeal that decision.

[*281] Family Court, however, did not release Jamie J. into her mother's custody when it dismissed the article 10 neglect petition. Instead, at the Department's insistence and over Michelle E.C.'s objection, it held a second permanency hearing, which had been scheduled as a matter of course during the statutorily required first permanency hearing in the summer of 2015. Family Court and the Department contended that, even though the Department had failed to prove any legal basis to remove Jamie J. from her mother, article 10-A of the Family Court Act gave Family [***81] [**471] Court continuing jurisdiction over Jamie J. and entitled it to continue her placement in foster care.

Family Court held the second [****4] permanency hearing on January 19, 2016. There, Michelle E.C. argued, as she does here, that the dismissal of the neglect proceeding ended Family Court's subject matter jurisdiction and should have required her daughter's immediate return. Solely to expedite her appeal of that issue, Michelle E.C. consented to a second permanency hearing order denying her motion to dismiss the proceeding and continuing Jamie J.'s placement in foster care. The Appellate Division, with two Justices dissenting, affirmed the second permanency hearing order *(145 AD3d 127, 41 NYS3d 810 [4th Dept 2016])* and Michelle E.C. appealed that decision as of right under *CPLR 5601 (a)*. Her appeal presents a straightforward question of statutory interpretation: does Family Court Act article 10-A provide an independent grant of continuing jurisdiction that survives the dismissal of the underlying article 10 neglect petition?

[1, 2] Before turning to that question, we first consider whether mootness and preservation issues prevent us from reaching it. During the pendency of this appeal, the second permanency hearing order was superseded by a third, a fourth permanency hearing was scheduled, a proceeding to terminate Michelle E.C.'s parental rights was commenced and stayed [3] pending the result of this appeal, and [****5] a second neglect petition was filed. The Department argues this appeal has been rendered moot by those occurrences. However, none of them resolved the conflict between the parties, and each permanency hearing—docketed under the first neglect petition—remains subject to the same jurisdictional objection as its predecessor (*see Matter of State of New York v Michael M., 24 NY3d 649, 657, 2 NYS3d 830, 26 NE3d 769 [2014]*). Moreover, even if the appeal were moot, the exception to that doctrine would plainly apply (*see generally Matter of Hearst Corp. v Clyne, 50 NY2d 707, 714-715, 409 NE2d 876, 431 NYS2d 400 [1980]*). As to [*282] preservation, the jurisdictional objection, which may be raised at any time and may not be waived (*Lacks v Lacks, 41 NY2d 71, 75, 359 NE2d 384, 390 NYS2d 875 [1976]*), was preserved in Michelle E.C.'s letter to Family Court, through her proposed order to show cause, and at the second permanency hearing. Her eventual consent to the second permanency order was expressly understood by all parties and by the court as a means of expediting appellate review, not a waiver of the alleged defect. Finally, her due process argument is properly apprehended not as a stand-alone challenge requiring notice to the Attorney General, but as an invocation, in service of her jurisdictional challenge, of the canon of constitutional avoidance: that is, we should

[2] Jamie J.'s father's parental rights have subsequently been terminated upon consent.

construe the statute, if possible, to avoid the due process infirmity [****6] to which she points (*see* Matter of Jacob, 86 NY2d 651, 668 n 5, 660 NE2d 397, 636 NYS2d 716 [1995]). On that basis, we proceed to the heart of the parties' disagreement: the interplay between Family Court Act articles 10 (§§ 1011-1085) and 10-A (§§ 1086-1090-a).

Article 10, titled "Child Protective Proceedings," is designed to "establish procedures to help protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional well-being" and "to provide a due process of law for determining when the state, through its family court, may intervene against the wishes of a parent on behalf of a child so that his [or her] needs are properly met" (Family Ct Act § 1011). A child is "neglected" if that child's "physical, [***82] [**472] mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of [a] parent or other person legally responsible for his [or her] care to exercise a minimum degree of care" (*id.* § 1012 [f] [i]).

An article 10 proceeding is commenced by the filing of a neglect and/or abuse petition by the relevant child protective agency or another person (*id.* §§ 1031 [a]; 1032). However, even before a petition is filed, Family Court may temporarily remove a child who, inter alia, "appears so to suffer from the abuse or neglect of his or her parent or other person legally responsible [****7] for his or her care that his or her immediate removal is necessary to avoid imminent danger to the child's life or health" and if there is not enough time to hold a preliminary post-petition hearing (*id.* § 1022 [a] [i]). In making this determination, Family Court "shall consider and determine in its order whether continuation in the child's home would be contrary to the best interests of the child" (*id.* § 1022 [a] [iii]). It must also determine that "reasonable efforts were made prior to the date [*283] of application for the order directing such temporary removal to prevent or eliminate the need for removal" or that "the lack of such efforts was appropriate [4] under the circumstances" (*id.*). If a child is removed under this section, a neglect petition must be filed within three court days, except for good cause shown, and a permanency hearing scheduled (*id.* §§ 1022 [b]; 1027 [h]).

For that neglect petition to be sustained, the child protective agency must prove neglect by a preponderance of the competent, material, and relevant evidence (*id.* §§ 1046 [b]; 1051 [a]). If the petition contains allegations that do not conform to the proof of neglect, Family Court may amend the petition provided the parent retains reasonable time to prepare an answer to [****8] the amended allegations (*id.* § 1051 [b]). If the agency carries its burden, Family Court must sustain the petition and hold a dispositional hearing, at the conclusion of which it may, inter alia, suspend judgment, release the child to parental custody under an order of supervision, enter an order of protection, or place the neglected child in foster care (*id.* §§ 1052-1057). If the agency fails to carry its burden, Family Court must dismiss the petition (*id.* § 1051 [c]).

Article 10-A, "Permanency Hearings for Children Placed Out of Their Homes," exists "to provide children placed out of their homes timely and effective judicial review that promotes permanency, safety and well-being in their lives" (*id.* § 1086). Enacted in 2005, it establishes a system of "permanency hearings" for children who have been removed from parental custody. Prior to each hearing, scheduled at six-month intervals beginning at the expiration of an initial eight-month window (*id.* § 1089 [a] [2]), the child protective agency proffers a sworn report that recommends a "permanency goal" for the child, which may be reunification with the parent, adoption, or another goal (*id.* §§ 1087 [e]; 1089 [c]). At the conclusion of each hearing, Family Court enters an order of disposition, [****9] schedules a subsequent hearing, and may also consider whether the permanency goal should be approved or modified (*id.* § 1089 [d]). Those determinations must be made "in accordance with the best interests and safety of the child, including whether the child would be at risk of abuse or neglect if returned to the parent" (*id.*). Regardless of the determination, once a child has been placed in foster care pursuant to certain sections of the Social Services Law or of Family Court Act articles 10 and 10-C ("Destitute Children"), "the case shall remain on the [*284] court's calendar and the court shall maintain jurisdiction over the case until the child is discharged [***83] [**473] from placement and all orders regarding supervision, protection or services have expired" (*id.* § 1088).

Here, the Department seizes on a hyperliteral reading of section 1088, divorced from all context, to argue that Family Court's pre-petition placement of Jamie J. under section 1022 triggered a continuing grant of jurisdiction that survives the eventual dismissal of the neglect petition. In other words, even if the Family Court removes a child who

has not been neglected or abused, it has jurisdiction to continue that child's placement in foster care until and unless it decides otherwise. Section 1088's place in the overall [****10] statutory scheme, the legislative history of article 10-A, and the dictates of parents' and children's constitutional rights to remain together compel the opposite conclusion: Family Court's jurisdiction terminates upon dismissal [5] of the original neglect or abuse petition.

Section 1088 and article 10-A must be construed not in isolation, but (as the "-A" implies) together with the other provisions of the Family Court Act on which their triggering facially depends (*see id.*; *Matter of Long v Adirondack Park Agency, 76 NY2d 416, 420, 559 NE2d 635, 559 NYS2d 941 [1990]* [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 and would conflict with other operative features of the statute's core overview procedures"]). Article 10 erects a careful bulwark against "unwarranted state intervention into private family life," for which its drafters had a deep concern (*Nicholson v Scoppetta, 3 NY3d 357, 368, 820 NE2d 840, 787 NYS2d 196 [2004]*; *see* Family Ct Act § 1011), and is particularly adamant that reasonable efforts be made to prevent the need for the removal of a child (*id.* § 1052 [b] [i] [A]). Neglect findings cannot be casually issued, but require proof of actual or imminent harm to the child as a result of a parent's failure to exercise a minimum degree of care (*id.* § 1012 [f]). "This [****11] prerequisite . . . ensures that the Family Court, in deciding whether to authorize state intervention, will focus on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior. 'Imminent danger' . . . must be near or impending, not merely possible" (*Nicholson, 3 NY3d at 369*).

As the dissenting Appellate Division Justices correctly noted, adopting the Department's interpretation of section 1088 would permit a temporary order issued in an ex parte proceeding to [*285] provide an end-run around the protections of article 10. Permanency hearing determinations are based not on the elevated "imminent harm" standard of article 10, but "in accordance with the best interests and safety of the child" under article 10-A (Family Ct Act § 1089 [d]). Allowing a separate jurisdictional expressway for the placement of a child to substitute for the manner in which article 10 expects that threshold determination to be reached would subvert the statutory scheme.[3]

[**474] [***84] As we held in *Matter of Tammie Z.*, "[i]f abuse or neglect is not proved, the court must dismiss the petition . . . at which time the child is returned to the parents" *(66 NY2d 1, 4-5, 484 NE2d 1038, 494 NYS2d 686 [1985])*. Nothing in the legislative history of article 10-A suggests that its drafters intended to overturn [****12] the long-established rule, promulgated by pre-2005 decisions of this Court and of the Appellate Division, that the dismissal of a neglect petition divests Family Court of jurisdiction to issue further orders or impose additional conditions on a child's release (*see id.*; *Matter of Edwin SS., 302 AD2d 754, 754 NYS2d 912 [3d Dept 2003]*; *Matter of Amanda SS., 284 AD2d 588, 725 NYS2d 747 [3d Dept 2001]*; *Matter of Brandon C., 237 AD2d 821, 658 NYS2d 461 [3d Dept 1997]*; *Matter of Melissa B., 225 AD2d 452, 639 NYS2d 348 [1st Dept 1996]*; *Matter of Anthony YY., 202 AD2d 740, 608 NYS2d 580 [3d Dept 1994]*; *Matter of Maria L., 152 AD2d 466, 543 NYS2d 674 [1st Dept 1989]*; *Matter of Rasha B., 139 AD2d 962, 527 NYS2d 933 [4th Dept 1988]*; *Matter of Dina V., 86 AD2d 875, 447 NYS2d 296 [2d Dept 1982]*; *see also Matter of Male Infant L., 61 NY2d 420, 427, 462 NE2d 1165, 474 NYS2d 447 [1984]* ["For once it is found that the parent is fit . . . the inquiry ends and the natural parent may not be deprived the custody of his or her child"]).

Instead, that history demonstrates that the drafters intended only to correct a technical issue that plagued article 10 and [*286] threatened the State's continued access to federal funding under *title IV of the Social Security Act*:

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[3] The Department's interpretation would create a further anomaly: according to the Department, Family Court's continuing jurisdiction under article 10-A turns on the fortuity of whether the neglect petition is adjudicated before or after the statutorily required first permanency hearing. Under that interpretation, Family Court has continuing jurisdiction here only because it failed to hold the fact-finding hearing for more than a year after removal; had it held that hearing during the first seven months following Jamie J.'s removal, the Department concedes no continuing jurisdiction would exist under its interpretation of section 1088. Having the court's jurisdiction and a family's welfare turn on the vagaries of a court's congested calendar would be not only arbitrary and unlikely to comport with legislative intent, but also out of step with our precedents (*see Matter of Sanjivini K., 47 NY2d 374, 381, 391 NE2d 1316, 418 NYS2d 339 [1979]* [holding a neglect finding could not be based on a prolonged separation when that separation was due to the slow pace of litigation commenced by the child protective agency]).

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Family Court's need to constantly reassert jurisdiction *after* a child had been determined to be the victim of neglect or abuse. As the Sponsor's Memorandum noted, under then-current law,

> "After the initial finding of abuse or neglect, even where the child is placed in foster care and orders are issued regarding the respondent parents, the Court's jurisdiction over the parties ends with the order of disposition. Any other action necessary to pursue return of the child home, including holding permanency hearings for court review [****13] of the permanency plan for the child, requires the filing of a new petition and delay occasioned by the calendaring of that petition . . . [S]ervice upon the respondents must be effected for each new petition before the Court may address the gravamen of the petition, although the Court previously established jurisdiction over those parties at the initiation of the original proceeding" (Senate Introducer's Mem in Support, Bill Jacket, L 2005, ch 3 at 12, 2005 NY Legis Ann at 4).

That technical fix served a practical goal: to "reduce by months the time a child spends in foster care" (*id.*). Far from accomplishing this goal, the Department's interpretation of section 1088 would instead indefinitely prolong a child's placement outside the home.

Finally, the state intrusion into family matters licensed by the Department's interpretation of section 1088 would infringe the constitutional rights of both parents and children. As Justice Marshall explained, [***85]

> [**475] "[w]e have little doubt that the *Due Process Clause* would be offended if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best [****14] interest" (*Quilloin v Walcott, 434 US 246, 255, 98 S Ct 549, 54 L Ed 2d 511 [1978]* [citations, internal quotation marks and brackets omitted]).

Sensitive to that concern, this Court has provided a list of the constitutionally permissible showings of "overriding necessity" [*287] that would justify the removal of a child from a parent or parents (*Matter of Marie B., 62 NY2d at 358*). That list includes "abandonment, surrender, persisting neglect, unfitness or other like behavior evincing utter indifference and irresponsibility to the child's well-being"—and excludes the child's best interests (*id.*). Here, application of the canon of constitutional avoidance leads us to reject the Department's interpretation of section 1088 as providing Family Court jurisdiction when the Department has failed to prove neglect or abuse.

Taken together, those arguments from the statutory scheme, legislative history, and canon of constitutional avoidance demonstrate that Family Court cannot continue with an article 10-A permanency hearing once it has dismissed the underlying article 10 neglect petition. Accordingly, we hold that the dismissal of a neglect petition operates to discharge a child from placement, terminate all orders regarding supervision, protection or services docketed thereunder, and extinguish the court's jurisdiction over the matter.

That result [****15] harms neither Jamie J. nor future children in equally tragic circumstances. As to Jamie J., the Department remains free to take steps to place her in foster care, if warranted, including pursuing a section 1027 order under the second neglect petition. As to future children, the Department and those children's attorneys remain free to take all the steps the petitioners abjured or belatedly pursued here, including moving more quickly to conform the pleadings to the proof, appealing the petition's dismissal, or filing an additional petition.

Accordingly, the Appellate Division order should be reversed, without costs, and the January 26, 2016 permanency order vacated.

Chief Judge DiFiore and Judges Rivera, Stein, Fahey, Garcia and Feinman concur.

Order reversed, without costs, and the January 26, 2016 permanency order vacated.

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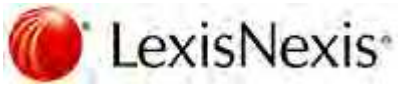

New York Botanical Garden v. Board of Stds. & Appeals

Court of Appeals of New York

February 18, 1998, Argued ; April 2, 1998, Decided

No. 29

Reporter
91 N.Y.2d 413 *; 694 N.E.2d 424 **; 671 N.Y.S.2d 423 ***; 1998 N.Y. LEXIS 605 ****

In the Matter of New York Botanical Garden, Appellant, v. Board of Standards and Appeals of the City of New York, Respondent, and Fordham University, Intervenor-Respondent.

Prior History: [****1] Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered April 15, 1997, which affirmed an order and judgment (one paper) of the Supreme Court (Sheila Abdus-Salaam, J.), entered in New York County in a proceeding pursuant to CPLR article 78, denying an application by petitioner to annul a determination of respondent Board of Standards and Appeals of the City of New York that a radio tower being built on the campus of intervenor-respondent Fordham University is an accessory use, and dismissing the petition.

Matter of New York Botanical Garden v Board of Stds. & Appeals, 238 AD2d 200, affirmed.

Disposition: Order affirmed, with costs.

Case Summary

Procedural Posture
Appellant botanical garden sought review of an order of the Appellate Division of the Supreme Court (New York), which affirmed the trial court's order and judgment that denied and dismissed the botanical garden's application to annul a determination of respondent Board of Standards and Appeals (board) that a radio tower built by intervenor-respondent university was an accessory use.

Overview
The Department of Buildings issued a permit to the university to build a radio station and tower as an accessory use on its campus. After construction began, the botanical garden, which was adjacent to the campus, objected to the issuance of the permit and appealed to the board. The board determined that the radio station and tower constituted an accessory use of the university's property. The botanical garden then commenced a proceeding under N.Y. C.P.L.R. 78 to annul the board's determination. On appeal, the botanical garden asserted that the tower was not clearly incidental to, and customarily found in connection with, the principal use of the university's land and, therefore, the tower was not an accessory use under N.Y. Zoning Res. 12-10. The court disagreed and held that the board's finding was not arbitrary or capricious or unsupported by substantial evidence. The board was comprised of land use planning experts, and their determination was entitled to deference. Furthermore, there was sufficient evidence to conclude that the university's radio operations were of a type and character customarily found on college campuses.

Outcome
The court affirmed the order of the lower appellate court.

91 N.Y.2d 413, *413; 694 N.E.2d 424, **424; 671 N.Y.S.2d 423, ***423; 1998 N.Y. LEXIS 605, ****1

Counsel: *Rosenman & Colin, L. L. P.,* New York City *(Jeffrey L. Braun, Kenneth Lowenstein* and *Rosemary Halligan* of counsel), for appellant. The Board of Standards and Appeals' determination that Fordham's radio tower is an "accessory" use is irrational and erroneous. *(300 Gramatan Ave. Assocs. v State Div. of Human Rights, 45 NY2d 176*; *Matter of Pell v Board of Educ., 34 NY2d 222*; *Matter of Moran Towing & Transp. Co. v New York State Tax Commn., [****2] 72 NY2d 166*; *Chinese Staff & Workers Assn. v City of New York, 68 NY2d 359*; *Matter of Trump-Equitable Fifth Ave. Co. v Gliedman, 62 NY2d 539*; *Matter of Toys "R" Us v Silva, 89 NY2d 411*; *Matter of Raritan Dev. Corp. v Silva, 91 NY2d 98*; *Kurcsics v Merchants Mut. Ins. Co., 49 NY2d 451*; *Matter of Teachers Ins. & Annuity Assn. v City of New York, 82 NY2d 35*; *Matter of 7-11 Tours v Board of Zoning Appeals, 90 NY2d 486*.)

Jeffrey D. Friedlander, Acting Corporation Counsel of New York City *(Deborah R. Douglas* and *Kristin M. Helmers* of counsel), for respondent. The determination by the Board of Standards and Appeals that Fordham University's proposed radio tower qualifies as an "accessory use" under the Zoning Resolution, thereby permitting construction of the tower as of right, has a rational basis and is supported by substantial evidence. *(Matter of Toys "R" Us v Silva, 89 NY2d 411*; *Appelbaum v Deutsch, 66 NY2d 975*; *Matter of Cowan v Kern, 41 NY2d 591*; *Matter of Teachers Ins. & Annuity Assn. v City of New York, 82 NY2d 35*; *Irwin v Kayser, 112 AD2d 192*; *Matter of Khan v Zoning Bd. of Appeals, 87 NY2d 344*; *Matter of Fuhst [****3] v Foley, 45 NY2d 441*; *Matter of Collins v Lonergan, 198 AD2d 349*; *Conley v Town of Brookhaven Zoning Bd. of Appeals, 40 NY2d 309*; *Matter of Raritan Dev. Corp. v Silva, 91 NY2d 98*.)

Kurzman Karelsen & Frank, L. L. P., New York City *(Deirdre A. Carson* and *Joanne Seminara Lehu* of counsel), for intervenor-respondent. I. The New York Botanical Garden failed to articulate to the Board of Standards and Appeals, or present evidence on, its theory that the tower alone is the accessory use; because the new theory was not preserved, the appeal must be dismissed. *(Cooper v City of New York, 81 NY2d 584*; *Merrill v Albany Med. Ctr. Hosp., 71 NY2d 990*; *Matter of Levine v New York State Liq. Auth., 23 NY2d 863*; *Matter of Fanelli v New York City Conciliation & Appeals Bd., 90 AD2d 756, 58 NY2d 952*; *Matter of Mengoni v Division of Hous. & Community Renewal, 186 AD2d 385*; *Matter of Schodack Concerned Citizens v Town Bd., 148 AD2d 130*; *Matter of Celestial Food Corp. v New York State Liq. Auth., 99 AD2d 25*.) II. The Board of Standards and Appeals' determination that, whether viewed as a use by itself, or together with WFUV's studio as an element [****4] of a single use, the WFUV tower is accessory to Fordham University, is rational, text-based and supported by substantial evidence. *(Matter of Exxon Corp. v Board of Stds. & Appeals, 128 AD2d 289, 70 NY2d 614*; *Aim Rent A Car v Zoning Bd. of Appeals, 156 AD2d 323*; *Matter of Porianda v Amelkin, 115 AD2d 650*; *Matter of Presnell v Leslie, 3 NY2d 384*; *Matter of Toys "R" Us v Silva, 89 NY2d 411*; *Matter of Fuhst v Foley, 45 NY2d 441*; *Matter of Collins v Lonergan, 198 AD2d 349*; *Matter of Raritan Dev. Corp. v Silva, 91 NY2d 98*.)

Edward N. Costikyan, New York City, for Municipal Art Society of New York, Inc., *amicus curiae.* The decision of the Board of Standards and Appeals finding that a 480-foot radio tower qualifies as an accessory use is arbitrary and capricious because there is no evidence in the record that a tower of such size is "customarily found in connection with" a university campus in a residential district. *(Matter of Teachers Ins. & Annuity Assn. v City of New York, 82 NY2d 35*; *Matter of Presnell v Leslie, 3 NY2d 384*; *Gray v Ward, 74 Misc 2d 50, 44 AD2d 597*; *Aim Rent A Car v Zoning Bd. of Appeals, 156 AD2d 323*; [****5] *Matter of 7-11 Tours v Board of Zoning Appeals, 90 AD2d 486*; *Matter of Porianda v Amelkin, 115 AD2d 650*; *Matter of Baker v Polsinelli, 177 AD2d 844, 80 NY2d 752*; *Matter of Exxon Corp. v Board of Stds. & Appeals, 151 AD2d 438, 75 NY2d 703*.)

Judges: Chief Judge Kaye and Judges Titone, Bellacosa and Ciparick concur; Judges Smith and Levine taking no part.

Opinion by: WESLEY

Opinion

91 N.Y.2d 413, *413; 694 N.E.2d 424, **424; 671 N.Y.S.2d 423, ***423; 1998 N.Y. LEXIS 605, ****5

[*416] [**425] [***424] Wesley, J.

In 1993, Fordham University applied to the New York City Department of Buildings (DOB) for a permit to build a new broadcasting facility and attendant tower as an accessory use on its Rose Hill campus. The DOB issued Fordham a building permit. After construction began, the New York Botanical Garden objected to the issuance of the permit. The DOB Commissioner determined that the radio station and accompanying tower together were an accessory use within the meaning of section 12-10 of the New York City Zoning Resolution. The Botanical Garden appealed to the Board of Standards and Appeals (BSA) which, after reviewing numerous submissions from both parties and holding two public hearings, unanimously confirmed the Commissioner's determination. The issue before this [****6] Court is whether that determination was arbitrary or capricious; we agree with both lower courts that it was not.

Fordham University was founded in 1841, at the site of the current main campus, as St. John's College. Shortly thereafter, the Jesuits assumed administration of the institution; it took its current name in 1907. The main campus is situated on approximately 80 acres in the Rose Hill section of the North Bronx, directly adjacent along its eastern border to the Botanical Garden. The campus falls within an R6 zoning district (medium density residential). The University offers a wide variety [*417] of graduate and undergraduate studies, including degree programs in communications and media studies. As part of these programs, the University offers courses such as "Introduction to Radio," "Radio News Techniques," "Broadcast News Operations" and an internship at the University's radio station, WFUV.

Fordham has operated WFUV as an on-campus, noncommercial, educational radio station since 1947. WFUV is affiliated with National Public Radio and has operated at its current signal strength of 50,000 watts since 1969. The station's current antenna extends 190 feet above [****7] ground level and is situated atop the University's Keating Hall, which also houses WFUV's broadcast studio. In 1983, Fordham explored new sites for the antenna. On February 17, 1993, it filed an application with the DOB to construct a new one-story radio transmitting building and an accessory 480-foot (approximately 45-story) radio tower midway along the eastern border of the campus. The application correctly identified the University as a Use Group 3 facility, a permitted use within R6 zoning districts (*see,* NY City Zoning Resolution § 22-13), and described the tower and radio station as an accessory use to the principal use of the property as an educational institution. DOB approved the project and issued a building permit on March 1, 1994; construction began shortly after the permit was renewed on May 13, 1994.

By letter to the DOB Commissioner dated June 30, 1994, the Botanical Garden, which is located across a four-lane thoroughfare from the tower site, objected to the construction and its classification as an "accessory use" under the Zoning Resolution. By that time, construction of the tower was partially complete, at a cost to Fordham of $ 800,000. On July 1, [****8] 1994, the DOB Commissioner issued a stop work order pending resolution of the objection.

By letter of September 12, 1994, the Commissioner informed Fordham that the DOB had determined that the tower did in fact constitute an accessory use within the meaning of Zoning Resolution § 12-10. In response [**426] [***425] to the Botanical Garden's request, the Commissioner issued a final determination confirming the decision on November 7, 1994. The Botanical Garden filed an administrative appeal with the BSA on December 6, 1994. After reviewing substantial submissions, and holding two public hearings, the BSA affirmed the Commissioner's determination. The BSA found that Fordham's operation of a radio station of this size and power was "clearly [*418] incidental to the educational mission of the University," and that it was "commonplace" for universities to operate stations "at or near the same power level." The BSA expressly ruled that "the sole issue … is whether the proposed tower is 'incidental to' and 'customarily found' in connection with the University and not whether the tower could be smaller or relocated to another site."

The Botanical Garden then commenced this [****9] CPLR article 78 proceeding to annul the BSA's determination that the radio station and tower constituted an accessory use of Fordham's property. The trial court dismissed the petition, holding that the BSA's determination was rational and supported by substantial evidence. The court noted

that aesthetics appeared to be at the heart of petitioner's concerns, and implicitly rejected this as a valid basis for labeling the BSA's determination arbitrary and capricious. The court further noted that the record was devoid of any proof that the Botanical Garden would suffer any economic harm, that the tower presented any sort of danger or that the tower would prompt an undesirable change in the character of the neighborhood. The court found it significant that Federal policy and Federal Communications Commission (FCC) regulations encourage local authorities to accommodate radio communications, and that FCC guidelines on radiation exposure levels made a new tower a practical necessity. The court noted that it would be "an arrogant abuse of judicial power" to annul the BSA's determination after its expert members had considered all the relevant factors and decided that the tower was a proper [****10] accessory use. Finally, the court noted that petitioner's application suffered from "a taint of laches," in that it had waited until the tower was half complete before taking action. The Botanical Garden appealed.

The Appellate Division unanimously affirmed. The Court held that:

"Respondent's determination is supported by substantial evidence that it is commonplace for universities to own and operate radio stations many of which operate at or near the same power level of the proposed radio station, and is rationally based on a statute that specifically lists radio towers as an accessory use." (*238 AD2d 200*.)

We granted petitioner leave to appeal, and now affirm.

This Court has frequently recognized that the BSA is comprised of experts in land use and planning, and that its interpretation [*419] of the Zoning Resolution is entitled to deference. So long as its interpretation is neither "irrational, unreasonable nor inconsistent with the governing statute," it will be upheld (*Matter of Trump-Equitable Fifth Ave. Co. v Gliedman, 62 NY2d 539, 545)*. Of course, this principle does not apply to purely legal determinations; where "the question is one of pure legal interpretation [****11] of statutory terms, deference to the BSA is not required" (*Matter of Toys "R" Us v Silva, 89 NY2d 411, 419)*. However, "when applying its special expertise in a particular field to interpret statutory language, an agency's rational construction is entitled to deference" (*Matter of Raritan Dev. Corp. v Silva, 91 NY2d 98, 102)*.

Here, the BSA determined that Fordham's radio station and tower constituted an "accessory use" within the meaning of Zoning Resolution § 12-10. That section provides that an accessory use:

"(a) Is a *use* conducted on the same *zoning lot* as the principal *use* to which it is related (whether located within the same or an *accessory building or other structure,* or as an *accessory use* of land) … and

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

[**427] [***426] "(c) Is either in the same ownership as such principal *use,* or is operated and maintained on the same *zoning lot* substantially for the benefit or convenience of the owners, occupants, employees, customers, or visitors of the principal *use.*"

Thus, Zoning Resolution § 12-10 sets forth a [****12] three-prong test for determining whether a use qualifies as an accessory one: first, it must be conducted on the same zoning lot as the principal use; second, it must be "clearly incidental to, and customarily found in connection with" the principal use; and third, there must be unity of ownership, either legal or beneficial, between the principal and accessory uses. Petitioner acknowledges that the first and third prongs are satisfied here. It takes issue, however, with the BSA's determination that a tower of this size is clearly incidental to, and customarily found in connection with, the principal use of this land as a university campus. Petitioner also maintains that this question, particularly the "customarily found" inquiry, presents an issue of pure [*420] statutory construction and therefore this Court should not give any deference to the BSA determination. We disagree.

Whether a proposed accessory use is clearly incidental to and customarily found in connection with the principal use depends on an analysis of the nature and character of the principal use of the land in question in relation to the accessory use, taking into consideration the over-all character [****13] of the particular area in question (*see, Matter of Hassett v Horn, 23 NY2d 745*, *revg 29 AD2d 945 on the dissent below*). This analysis is, to a great

extent, fact-based (*Matter of Exxon Corp. v Board of Stds. & Appeals, 128 AD2d 289, 298* ["the requirement that the proposed use be one customarily found in connection with, and incidental to, (the principal use) poses a factual issue for Board resolution"]). Moreover, such an analysis is one that will clearly benefit from the expertise of specialists in land use planning. Pursuant to *section 659 (b) of the New York City Charter*, the BSA includes a city planner, an engineer and an architect. These professionals unanimously determined that the radio station and the proposed tower are incidental to, and customarily found in connection with, an educational institution. This Court may not lightly disregard that determination.

The Botanical Garden nonetheless argues that the "customarily found" element of the definition of accessory use itself poses a purely legal question, relying on *Matter of Teachers Ins. & Annuity Assn. v City of New York (82 NY2d 35)*. We did hold in *Teachers* that, in an appropriate case, [****14] this Court will parse various sections of a statute or regulation, and identify certain sections as requiring deference to agency experts, while other sections present questions of pure legal interpretation. In *Teachers* we noted that whether a restaurant was of "special historical or aesthetic interest" (*Administrative Code of City of NY § 25-301 [b]*) to justify its designation as a landmark was an interpretation and application of the Landmarks Law better left to the expertise of the Landmarks Preservation Commission. However, the "jurisdictional predicate" that the restaurant would only be given landmark status if it was " 'customarily open or accessible to the public' " was a matter of pure legal interpretation (*id., at 41-42*). The Court in *Teachers* was not called upon to examine whether there was record support for deciding the "jurisdictional predicate." The issue was a straightforward legal one: does a restaurant fall within the coverage of the statute--i.e., areas that are customarily open or accessible to the public.

[*421] In this case, there is no dispute that radio stations and their attendant towers are clearly incidental to and customarily found [****15] on college campuses in New York and all over the United States. The issue before the BSA was: is a station of this particular size and power, with a 480-foot tower, customarily found on a college campus or is there something inherently different in this radio station and tower that would justify treating it differently. This is clearly a fact-based determination substantially different from the law issue presented in *Teachers (supra).*

[**428] [***427] Granting the BSA's determination its appropriate weight, we cannot say that its classification of the tower as an accessory use is arbitrary or capricious, or not supported by substantial evidence. It must be noted that the Botanical Garden's initial objection was to the over-all size of Fordham's radio operations. Petitioner argued before the DOB Commissioner and the BSA that it was not customary, but rather highly unusual, for a university to operate a station which is affiliated with National Public Radio and which broadcasts at a signal strength of 50,000 watts. It argued that the "sheer extent of the operations," which reached "far beyond the immediate college community" showed that the station was not being operated as an [****16] adjunct to University programs, but that it was essentially a commercial enterprise.

In response, Fordham established that it is commonplace for stations affiliated with educational institutions to operate on the scale of WFUV. The University submitted evidence showing that 180 college or university radio stations are affiliated with National Public Radio. (This represents 58% of all NPR affiliates.) Of these, slightly more than half operate at a signal strength of 50,000 watts. Fordham also presented proof that the station was an integral part of the University's communications curriculum. Finally, Fordham introduced evidence that building this tower was a practical necessity, in order for the station to comply with FCC regulations. This evidence provides a substantial basis for the BSA's determination that Fordham's radio operations are of a type and character customarily found in connection with an educational institution.

The Botanical Garden nonetheless maintains that it is not customary for universities to build radio towers of this height in connection with their radio operations. This argument ignores the fact that the Zoning Resolution classification of accessory [****17] uses is based upon functional rather than structural specifics. The use found to be accessory here is the operation of [*422] a 50,000-watt university radio station. As set forth above, there was more than adequate evidence to support the conclusion that such a use is customarily found in connection with a college or university. In order to operate such a station, it is necessary to maintain an antenna at a sufficient height to properly radiate that signal. The FCC has determined that broadcasting WFUV's signal from its current antenna atop Keating Hall has resulted in ground radiation levels which "substantially exceed[] the Commission's Radio

91 N.Y.2d 413, *422; 694 N.E.2d 424, **428; 671 N.Y.S.2d 423, ***427; 1998 N.Y. LEXIS 605, ****17

Frequency Protection Guidelines" (*In re: WFUV [FM], 12 FCCR 6774, 6777*; *see, 47 CFR 1.1307 [b]*; 1.1310). WFUV therefore cannot receive a license renewal unless and until it moves its antenna to a new location (*id*). *

[****18] The specifics of the proper placement of the station's antenna, particularly the height at which it must be placed, are dependent on site-specific factors such as the surrounding geography, building density and signal strength. This necessarily means that the placement of antennas will vary widely from one radio station to another. Thus, the fact that this specific tower may be somewhat different does not render the Board's determination unsupported as a matter of law, since the use itself (i.e., radio operations of this particular size and scope) is one customarily found in connection with an educational institution. Moreover, Fordham did introduce evidence that a significant number of other radio stations affiliated with educational institutions in this country utilize broadcast towers similar in size to the one it proposes.

Separation of powers concerns also support the decision we reach today. Accepting the Botanical Garden's argument would result in the judicial enactment of a new restriction on accessory uses not found in the Zoning Resolution. Zoning Resolution § 12-10 (accessory use) (q) specifically lists "*[a]ccessory* radio or television towers" as examples [****19] of permissible accessory uses (provided, of course, that they comply with the requirements of Zoning Resolution § 12-10 [accessory use] [a], [b] and [c]). Notably, no [**429] [***428] height restriction is included in this example of a permissible accessory use. By contrast, other examples of accessory uses contain specific size restrictions. For instance, Zoning Resolution § 12-10 defines a "home occupation" as an accessory use which "[o]ccupies not more than [*423] 25 percent of the total *floor area* … and in no event more than 500 square feet of *floor area*" (§ 12-10 [home occupation] [c]) and the accessory use of "[l]iving or sleeping accommodations for caretakers" is limited to "1200 square feet of *floor area*" (§ 12-10 [accessory use] [b] [2]). 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. The BSA is the body designated to make this determination, and courts may intervene only if its determination is arbitrary or capricious.

The Botanical Garden continues to press [****20] the argument that the BSA abrogated its obligation to consider the environmental impact of the tower on an adjoining property by designating the tower an accessory use. The statute has no reference to environmental considerations in defining an accessory use, although it does list radio antennas as one type of an accessory use. The Botanical Garden's real complaint is the impact of the tower on the unique nature of its buildings and grounds. The Botanical Garden has raised these same concerns with the FCC in the context of the National Historic Preservation Act (*16 USC § 470 et seq.*) and that matter is still pending (*see, In re: WFUV [FM], 12 FCCR 6774*, *supra*). While we are not unmindful of those concerns, they are simply not part of the legal equation before us.

Matter of Presnell v Leslie (3 NY2d 384), relied upon heavily by petitioner, does not dictate a contrary result. The petitioner in *Presnell,* an amateur radio operator, applied for a building permit to construct a 44-foot radio tower. He claimed that he was entitled to a permit as of right, because the tower was an accessory use to the principal use of the lot as his residence. The Village Board [****21] of Trustees denied the application, finding that the tower was neither an accessory building nor use customary to a residential dwelling. Presnell challenged this determination. The trial court dismissed the petition and the Appellate Division affirmed. This Court affirmed, holding that "it cannot be said as a matter of law that the erection of a 44-foot steel tower in a compact residential area of a suburban community, where dwellings are restricted in height to 35 feet … is a customarily incidental use of residential property, or one which might commonly be expected by neighboring property owners" (*id., at 388*).

Presnell (supra) is both factually and legally distinguishable from the case at bar. The homeowner in *Presnell* claimed the [*424] right to build his radio tower in the pursuit of a hobby. This Court ruled that the municipality could legitimately conclude that the scope of the proposed operation took it outside the realm of a simple pastime. As we stated in *Presnell,* "[i]t is clear that, in the conduct of a hobby, the scale of its operation may well carry it

* FCC compliance concerns, as well as concerns with respect to the structural integrity of the current Keating Hall site, were apparently the primary impetus for Fordham's decision to build a new tower.

beyond what is customary or permissible" (*3 NY2d, at 387-388*). Here, we are concerned [****22] not with a personal hobby carried on as an incident to a residential premises, but with a legally recognized institutional use that is integral to the educational mission of this University. As noted at the outset, Fordham offers both bachelor's and master's degrees in communications and media studies, and WFUV is a key part of that curriculum. Fordham submitted ample evidence showing that the scope of its radio operations is not outside the norm for an educational institution and that the station has operated at its current power levels for almost 30 years.

In addition, *Presnell (supra)* is distinguishable because there, the municipality had denied the permit. Thus, we specifically limited our scope of review to whether that determination was unsupported "as a matter of law" (*3 NY2d, at 388*). We did not hold that the municipality could not have determined that the tower was a permissible accessory use. We afforded its determination the proper [**430] [***429] level of respect, reviewable only for clear legal error. While we did not articulate this as an arbitrary and capricious or substantial evidence question, this was the standard effectively employed. Here, the BSA determined [****23] that the station and tower did constitute an accessory use. Thus, rather than mandating reversal, *Presnell* actually lends support to Fordham's position that the BSA's determination should be upheld as an appropriate and well-supported exercise of its power to decide what does or does not constitute an accessory use under the pertinent zoning ordinance.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge Kaye and Judges Titone, Bellacosa and Ciparick concur; Judges Smith and Levine taking no part.

Order affirmed, with costs.

End of Document

New York City Educ. Constr. Fund v Verizon NY Inc.

Supreme Court of New York, New York County

June 11, 2012, Decided

650193/09

Reporter
36 Misc. 3d 1201(A) *; 957 N.Y.S.2d 265 **; 2012 N.Y. Misc. LEXIS 2949 ***; 2012 NY Slip Op 51142(U) ****; 2012 WL 2368984

[****1] New York City Educational Construction Fund, Plaintiff, against Verizon New York Inc. f/k/a NEW YORK TELEPHONE CO., TACONIC INVESTMENT PARTNERS LCC, TIP ACQUISITIONS LLP, SQUARE MILE CAPITAL, 375 PEARL ASSOCIATES LLC, MANUFACTURERS AND TRADERS TRUST COMPANY, AREFIN US INVESTMENT LENDERS 1 LLC, PAUL PARISER, as Manager of BOARD OF MANAGERS OF 375 PEARL STREET CONDOMINIUM, and DOES 1-100, Defendants.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NEW YORK SUPPLEMENT.

Subsequent History: Affirmed by, Appeal dismissed by, in part *New York City Educ. Constr. Fund v. Verizon N.Y. Inc., 114 A.D.3d 529, 981 N.Y.S.2d 11, 2014 N.Y. App. Div. LEXIS 1104 (N.Y. App. Div. 1st Dep't, Feb. 18, 2014)*

Counsel: [***1] For Plaintiff: Jeffrey E. Glen, Dennis J. Nolan and Lawrence J. Bartelemucci, Esqs., ANDERSON KILL & OLICK, P.C., New York, New York.

For Defendant: Randy M. Mastro, Jennifer H. Rearden and Gabriel Hermann, Esqs., GIBSON, DUNN & CRUTCHER LLP, New York, New York.

Judges: BARBARA R. KAPNICK, J.S.C.

Opinion by: BARBARA R. KAPNICK

Opinion

Barbara R. Kapnick, J.

This action arises out of plaintiff's sale, almost 40 years ago, to New York Telephone Company ("Telco"), the predecessor of defendant Verizon New York Inc. f/k/a New York Telephone Co. ("Verizon"), of a plot of land designated as Block 113, Lot 150 on the Tax Map of New York County, together with certain specified development rights. Plaintiff ("ECF" or the "Fund") is a New York public benefit corporation that was created in 1966 "to facilitate the timely construction of [elementary and secondary] school buildings in combination with other compatible and lawful uses ... of available land." *Education Law 451*. The Fund develops combined-occupancy structures on land that is conveyed to it by the City of New York (the "City") (*see Education Law 452*), and finances the construction of schools with the revenue of bonds that, in turn, are financed by its sale of land [***2] and development rights to commercial entities.

Directly adjacent to Lot 150 is Lot 100 which ECF owns; this is the site of the Murry Bergtraum High School for Business Careers (the "School Building"). Together, the lots comprise a single zoning lot (the "Combined Zoning Lot"). Under New York City zoning laws, the Combined Zoning Lot is considered a single zoning lot "for zoning calculation and limits", such as the amount of zoning floor area available for development in a particular lot.

*[****2] Background*

By Agreement made as of July 22, 1971 (the "City-Fund Agreement"), the City agreed to transfer to the Fund the Combined Zoning Lot consisting of real property located at 375 Pearl Street and 411 Pearl Street, for the purpose of building the School Building, and a Telco "multistory office building and wire equipment center." Prior to this transfer, the City Planning Commission ("CPC") had approved certain zoning variances needed because the proposed Telco building would exceed height and setback limitations set forth in the New York City Zoning Resolution ("Zoning Resolution"), and had issued a Special Permit providing that the building was to be "a million square foot telephone equipment and [***3] office building." CPC Approval, at 2863. The Board of Estimate had approved the transfer of this City-owned property, on condition that the Telco building not exceed a height of 544 feet above grade.

By contract of sale dated July 13, 1972 (the "1972 Contract") the Fund agreed to convey to Telco real property located at 375 Pearl Street, certain development rights above that land, and certain development rights above the School Building that would be built at 411 Pearl Street. AC, ¶ 28. In return, Telco was required to pay the Fund $4,278,000 plus 8.25% interest per year on the unpaid balance, payable in quarterly installments over 35 years, to build the telephone building as described in the 1972 Contract and to build the school. AC, ¶ 35. The Contract also provided that after 35 years, the Fund would transfer to Telco title to the land and the appurtenant rights for which Telco had paid (the "Closing").

By Development Agreement, also made as of July 13, 1972, the Fund, Telco, the Chancellor of the City School District, and Pearl Street Development Corporation agreed that the latter would oversee the construction of both the Telco building and the School Building. That agreement provided, [***4] among other things, that all parties would have the right to enter upon the construction site at any time to "examine the same for the purpose of inspection to determine whether or not Developer [was] complying with the terms and conditions of this Agreement." Development Agreement, Sec 215.

Construction of the Telco building was completed in 1976. On September 14, 1976, December 7, 1976, and March 8, 1977, the New York City Department of Buildings (the "DOB") issued temporary certificates of occupancy for the building. DOB issued a final Certificate of Occupancy on May 12, 1977, certifying that the building "conforms substantially to the approved plans and specifications and to the requirements of all applicable laws, rules and regulations for the uses and occupancies specified herein." The Certificate of Occupancy specifically notes that at least eight floors of the building were to be used for "Mechanical equipment", "Telephone equipment", or "Office telephone equipment".

In 2007, shortly before the contemplated Closing, Verizon notified the Fund that an architect's survey, which Verizon had commissioned, showed that the building actually occupied 759,200 square feet of Floor Area, [***5] rather than the 744,000 square feet which the Contract set as the limit on the Telco building. At that time, Verizon provided the Fund with, at least, the title sheet of a document entitled "Floor Area at Verizon 375 Pearl St. New York, NY," prepared by William Collins, AIA Architects, LLP, and dated November 2005.[1] AC, ¶ 68. The title sheet states that the Verizon building occupies a total of 759,200 square feet of Floor Area, "BASED ON NEW YORK ZONING RESOLUTION ARTICLE 1, CHAPTER 2, SECTION 12-10," and that "TELEPHONE EQUIPMENT AREAS HAVE BEEN ASSUMED AS ALLOWABLE EXCLUSIONS TO FLOOR AREA.'". The title sheet also noted that the "FLOOR PLANS SHOULD NOT BE RELIED UPON AS ACCURATE OR REFLECTING CURRENT [****3] CONDITIONS."

[1] Verizon contends that it provided the Fund with the entire survey.

36 Misc. 3d 1201(A), *1201(A); 957 N.Y.S.2d 265, **265; 2012 N.Y. Misc. LEXIS 2949, ***5; 2012 NY Slip Op 51142(U), ****3

On or about July 31, 2007, the Fund and Verizon entered into a third amendment to the 1972 Contract (the "Third Amendment"), which described the real property sold as "including 771,003 square feet of Floor Area, as defined in the Zoning Resolution." Third Amendment, Recital B.2. (which replaced Sec. 101 of the 1972 Contract).[2] At the same time, the parties also entered into a Zoning Lot and Easement Agreement [***6] (the "ZLDA") and a Bargain and Sale Deed, which transferred to Verizon title to the real property described in the 1972 Contract, as modified by the Third Amendment, and which provided for reciprocal easements. The ZLDA recites that the Verizon building and the school contain, respectively, 759,200 and 219,403 square feet of Floor Area and that there remain 38,807 square feet of unused Floor Area. The ZLDA further recites that the Parties desire to allocate the Excess Development Rights as follows: 27,004 square feet to the Fund Premises and 11,803 square feet to the [Verizon] Building Premises, so that the Fund Premises shall have a total of 246,407 square feet Floor Area (the "*Fund Development Rights*"), and the [Verizon] Building Premises shall have a total of 771,003 square feet of Floor Area (the "*Office Building Development Rights*"), for use and enjoyment by the Fund and the [Verizon] Building Owner, respectively.

In November 2007, Verizon converted its property to condominium ownership, and then sold a condominium unit comprising most of the building to defendant TIP Acquisitions LLP, one of [***7] the "Taconic" defendants.[3]

After apparently examining "more closely" the floor-area calculations for the building as set forth in the Collins Drawings, ECF "inquired of the Department of Buildings as to whether telephone switching equipment was properly deductible" from the calculation of zoning floor area. It submitted a letter to DOB on March 10, 2008, more than six months after closing and delivering the Deed to Verizon.

A responsive letter dated March 27, 2008 was sent to the Executive Director of ECF from Manher Shah, P.E., Executive Engineer at DOB, which provided in relevant part as follows:

Please be advised that floor space occupied by equipment which supports the building's mechanical system is considered a mechanical space and can be excluded from zoning floor area. As you mentioned in your letter that the referenced telephone building is occupying floor space for housing telephone switching equipment for business operation and not for the building's mechanical system, such space will not qualify for mechanical space and therefore should not be exempt from zoning floor [***8] area.

ECF then initiated this action by Summons and Complaint filed on April 9, 2009, and filed its First Amended Complaint ("Amended Complaint" or "AC") on July 1, 2009.

The Amended Complaint alleges the following causes of action against Verizon: (1) fraud [****4] in relation to the 1972 Contract; (2) fraud in relation to the Third Amendment; (3) fraud in relation to the ZLDA; (4) negligent misrepresentation; (5) unjust enrichment for use of the overbuilt space; (6) unjust enrichment for the compensation that it received for the overbuilt space; (8) breach of the 1972 Contract; (9) breach of the ZLDA; (11) a request for a declaratory judgment; (12) a request for injunctive relief; (13) determination of interests under RPAPL Article 15 and (14) fraudulent concealment.[4]

Verizon now moves to dismiss the Amended Complaint, pursuant to CPLR 203 (g), 213 (1), (2), and (8), 214 (4), 3016 (b), and 3211 (a) (1) (5), and (7).

Discussion

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[2] The first two amendments to the Contract have no bearing on the claims in this action.

[3] By Stipulation dated April 25, 2011, plaintiff discontinued this action as to the non-Verizon defendants.

[4] The causes of action which related solely to the non-Verizon defendants who settled are not included in this list.

36 Misc. 3d 1201(A), *1201(A); 957 N.Y.S.2d 265, **265; 2012 N.Y. Misc. LEXIS 2949, ***8; 2012 NY Slip Op 51142(U), ****4

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction . . . We accept the facts as alleged in the complaint [***9] as true, accord plaintiffs the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.

Leon v Martinez, 84 NY2d 83, 87-88, 638 N.E.2d 511, 614 N.Y.S.2d 972 (1994) (internal citations omitted). Allegations consisting of bare legal conclusions, with no factual specificity, however, "are insufficient to survive a motion to dismiss." Godfrey v Spano, 13 NY3d 358, 373, 920 N.E.2d 328, 892 N.Y.S.2d 272 (2009); *see also Caniglia v Chicago Tribune-N.Y. News Syndicate, 204 AD2d 233, 233-34, 612 N.Y.S.2d 146 (1st Dep't 1994).*

Verizon argues that the central premise of this case is that Verizon misrepresented the total amount of "zoning floor area" utilized in the Verizon Building by misstating the amount of "gross floor area" it deducted, pursuant to a "mechanical space" exemption, from the calculation of "zoning floor area". Specifically, ECF alleges that Telco obtained a reduced price by offering to reduce the size of the building that it would construct, but that instead of doing so, it simply "misclassif[ied] certain space . . . as mechanical space' under the Zoning Resolution in order to exclude such space from the calculation of Floor Area utilized by the Verizon Building." AC, ¶ 52.

According to Verizon, [***10] the Zoning Resolution controls and limits the amount of "zoning floor area" that may be developed on any given zoning lot. Section 12-10 of the Resolution defines "floor area" to include "the sum of the gross areas of the several floors of a building or buildings," but it also excludes several categories of floor space from the scope of floor area; of significance here, section 12-10 states that "the floor area of a building shall not include . . . floor space used for mechanical equipment." This "mechanical equipment" exemption has been part of the Zoning Resolution at all times relevant to this action.

ECF's claim that Verizon improperly excluded its telephone switching equipment under the "mechanical equipment" exemption relies on the informal opinion letter ECF obtained from Mr. Shah in March 2008.

Verizon argues that the opinion in the DOB letter runs afoul of squarely applicable precedent, which precludes DOB or ECF from imposing such non-textual, purpose-based limitations on the Zoning Resolutions's floor-area provisions, and that the Court of Appeals decision in Matter of Raritan Dev. Corp v Silva, 91 N.Y.2d 98, 102-103, 689 N.E.2d 1373, 667 N.Y.S.2d 327 (1997), requires that the entire Complaint be dismissed. [****5]

In [***11] *Matter of Raritan*, the issue was whether cellar space in a building, that was used as dwelling space, should be included in the floor space used to calculate the Floor Area Ratio ("FAR") for zoning purposes. The Zoning Resolution provides that floor area includes the total amount of "floor space used for dwelling purposes, no matter where located within a building, when not specifically excluded; ... However, the floor area of a building shall not include ... cellar space." Id. at 100, quoting Zoning Resolution 12-10. "Cellar space" is defined in terms of its physical location in a building ("a space wholly or partly below the base plane with more than one-half of its height ... below the base plane"). Zoning Resolution 12-10. The Court of Appeals held that because the Zoning Resolution defines cellar space, "FAR calculations should not include cellars regardless of the intended use of the space." 91 NY2d at 103.

Verizon argues that the Court of Appeals' reasoning in *Matter of Raritan* compels the same conclusion here, because Section 12-10's "mechanical equipment" exemption unequivocally provides that zoning floor area "shall not include . . . floor space used for mechanical equipment."

However, [***12] ECF claims that there is a distinction here because unlike the phrase "cellar space", which is unambiguously defined in the Zoning Resolution, the phrase "mechanical equipment" is not defined therein.

Relying on the DOB opinion letter, ECF argues that the only "mechanical equipment" that is exempt from the zoning floor area is the equipment which services the building itself, not the telephone switching equipment that routes communications throughout lower Manhattan. Otherwise, plaintiff argues, a building housing only such equipment would occupy no zoning floor area at all, and could be built to an infinite size. Therefore, according to ECF, the only reasonable definition of "mechanical equipment" as used in the Zoning Resolution is the interpretation offered by Mr. Shah, on behalf of the DOB, i.e., equipment which supports the building's mechanical system. As the Court held

in *Matter of Raritan*, "when applying its special expertise in a particular field rational construction is entitled to deference." *91 NY2d at 102*.

Defendant, however, argues that no deference is owed to mere informal opinions expressed by agency personnel, as opposed to a definitive final agency determination. *See [***13] State Farm Mut. Auto. Ins. Co. v Mallela, 372 F3d 500, 506 (2d Cir 2004)*; *Marigliano v New York Cent. Mut. Fire Ins. Co., 15 Misc 3d 766, 774, 831 N.Y.S.2d 697 (Civ Ct, NY Co 2007)* aff'd *22 Misc. 3d 131A, 880 N.Y.S.2d 225 [A], 2009 NY Slip Op 50137 [U] (App. Term, 1st Dep't 2009)*; *Matter of Park Radiology v Allstate Ins. Co., 2 Misc 3d 621, 625 n.2 (Civ. Ct., 769 N.Y.S.2d 870, Richmond Co., 2003)*.

Where the question is one of "pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency" (*Kurcsics v Merchants Mut. Ins. Co., 49 NY2d 451, 459, 403 N.E.2d 159, 426 N.Y.S.2d 454 [1980]*), and no deference is required. However where the statutory language suffers from some "fundamental ambiguity" (*Matter of Golf v New York State Dep't. of Social Servs., 91 NY2d 656, 667, 697 N.E.2d 555, 674 N.Y.S.2d 600 [1998]*; *Matter of Beekman Hill Assn. v Chin, 274 A.D.2d 161, 167, 712 N.Y.S.2d 471 [2000]*; *lv denied 95 N.Y.2d 767, 742 N.E.2d 123, 719 N.Y.S.2d 647 [2000]*), or "the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices" (*Kurcsics v Merchants Mut. Ins. Co., 49 NY2d 451, 459, 403 N.E.2d 159, 426 N.Y.S.2d 454 [1980]*, courts routinely defer to the agency's construction of a statute it administers.

New York City Council v City of New York, 4 AD3d 85, 97, 770 N.Y.S.2d 346 (1st Dep't 2004), [***14] lv den *4 N.Y.3d 701, 824 N.E.2d 48, 790 N.Y.S.2d 647 (2004)*.

It that case, which was an Article 78 proceeding, referred to by both counsel during oral [****6] argument as the *Highline* case, the petitioner City Council sought to compel the respondent City to submit a pending agreement to demolish the Highline on Manhattan's West Side to the Uniform Land Use Review Procedure ("ULURP") set forth in the New York City Charter, because it was part of the "City Map". The City and the adjoining landowners contended that despite the appearance of the Highline on various engineering maps maintained by the City over the years, the Highline was privately owned, and the private easements which were to be abandoned to the adjacent landowners were not part of the "City Map".

The respondents relied heavily on the affidavit of their expert, Robert Gochfeld, a supervisor in the Technical Review Division of the New York City Department of City Planning, whose responsibilities for 15 years had included "supervising the review and processing of applications for modifications of the City Map" submitted to the City Planning Department. *Highline, 4 AD3d at 95*. The Court found that Mr. Gochfeld's experiences, "his intimate knowledge of the operational [***15] practices of that Department and the nature of his duties" made him "uniquely qualified to render an opinion on the proper subjects of the City Map" (*id. at 96*), and found that his opinion was deserving of some degree of judicial deference because the language of the mapping provision was fundamentally ambiguous and susceptible to conflicting interpretations. *Id. at 97*.

ECF argues that since, as in the *Highline* case, there has been no formal adjudication by the relevant agency (i.e., DOB) of the issue before the Court - namely, what constitutes "floor area used for mechanical equipment" - the agency's view is binding, unless it is inherently arbitrary and capricious.

In reply, Verizon asserts that there is no valid basis for disregarding the plain language of the Zoning Resolution. Verizon argues that the arbitrary distinction between supposedly qualifying and non-qualifying "floor space used for mechanical equipment" which ECF urges the Court to adopt, is not supported in the statutory text, nor does it serve to address any legitimate textual ambiguity.

Since there is no specific definition of "mechanical equipment" in the Zoning Resolution or any definitive finding by DOB on this issue, [***16] it demands administrative determination in the first instance, and this Court declines to dismiss the action on this preliminary basis.

36 Misc. 3d 1201(A), *1201(A); 957 N.Y.S.2d 265, **265; 2012 N.Y. Misc. LEXIS 2949, ***16; 2012 NY Slip Op 51142(U), ****6

Fraud and Negligent Misrepresentation Claims

The Court turns now to the specific causes of action alleged in the Complaint. The first to fourth, and the fourteenth causes of action alleging fraud, negligent misrepresentation, and fraudulent concealment, respectively, are all predicated on the large discrepancy between Telco's, and later Verizon's, representations of the amount of floor space that the telephone building would contain, and the actual amount of floor space that the building ultimately did contain.

Verizon argues that even if there were any legal basis for ECF's claim that Verizon improperly excluded its telephone switching space from the calculation of floor area used in the Verizon Building, all of ECF's fraud and misrepresentation claims would, nonetheless, fail as a matter of law, for lack of justifiable reliance, as well as being time-barred to the extent that fraud is claimed in connection with the original 1972 Contract. For inherent in the principle of justifiable reliance, Verizon contends, is the requirement that a party to a commercial [***17] contract must conduct reasonable, independent due diligence before purporting to rely on the representations of its counterparty. *See* *UST Private Equity Invs Fund v Salomon Smith Barney, 288 AD2d 87, 88, 733 N.Y.S.2d 385 (1st Dep't 2001)* ("a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff [****7] failed to make use of the means of verification that were available to it"). Further, where the circumstances call into question the reliability of the representations at issue, or direct the plaintiff's attention to the source of information that would reveal the truth, the plaintiff bears a heightened burden of investigation. *Global Minerals & Metals Corp. v Holme, 35 AD3d 93, 100, 824 N.Y.S.2d 210 (1st Dep't 2006) lv den 8 N.Y.3d 804, 863 N.E.2d 111, 831 N.Y.S.2d 106 (2007)*; *UST Private Equity Invs Fund, supra.*

Verizon argues that ECF cannot possibly meet its burden of establishing justifiable reliance on any alleged misrepresentation here, because its own pleading, as well as the governing transactional documents and relevant public records, demonstrate that ECF failed to make any independent efforts to investigate the relevant facts and discover the alleged [***18] fraud.

Moreover, Verizon asserts that ECF is a sophisticated party, well-versed in matters of real estate development, was represented by counsel and was certainly capable of conducting its own diligence. Thus, according to Verizon, ECF bore a heightened duty to exercise reasonable diligence, which it failed to uphold.

It is Verizon's position that ECF knew all along that Verizon planned to construct a "telephone equipment and office building" which was to be built "in size and arrangement as proposed and as indicated on the plans" filed publicly with the CPC and Board of Estimate in connection with their review of the proposed project. *Journal of Proceedings of the Board of Estimate of the City of New York*, from May 28, 1971 to July 28, 1971, at 2755, 2757 and 2930-3.

In fact, ECF's own agreement with the City acknowledged that the proposed Verizon Building would contain a "wire equipment center," and required that the building be constructed "in accordance with plans and specifications" that had been prepared by Verizon's architects and "approved" by ECF. City Fund Agreement, Sec. 201. The Development Agreement also provided that the building would be "constructed in accordance with" [***19] plans made available to ECF, and it afforded ECF an express right to inspect the building at any time during construction, "day or night." Development Agreement, Sections 215, 301.2. Likewise, the 1972 Contract acknowledged that Verizon was purchasing the property for the purpose of constructing an "office/telephone facilities building" that was to contain a "telephone plant and equipment." Sections 201.2, 202.2. Despite all of these provisions, ECF does not allege that it took any steps to confirm Verizon's zoning floor-area analysis - including its calculation of "mechanical equipment" exemptions - at any time before or during the construction of the building.

Even after the building was completed, Verizon submits that ECF failed to take any steps to confirm whether Verizon correctly assessed the amount of the floor-are exemptions it claimed for "mechanical equipment" in the building. ECF failed to do so even though public documents, including the Certificate of Occupancy, clearly revealed that Verizon had characterized substantial portions of the building as dedicated to mechanical equipment.

36 Misc. 3d 1201(A), *1201(A); 957 N.Y.S.2d 265, **265; 2012 N.Y. Misc. LEXIS 2949, ***19; 2012 NY Slip Op 51142(U), ****7

Verizon further contends that ECF failed to conduct any independent diligence to confirm [***20] the amount of zoning floor area contained in the Verizon Building prior to the 2007 transactions culminating in the transfer of title to Verizon under the 1972 Contract. ECF's duty to close under the 1972 Contract was expressly conditioned on Verizon having "substantially performed" all of its obligations under the 1972 Contract. *See*, Sec. 1002. Yet, according to Verizon, ECF failed to perform any diligence even after Verizon put it on notice that its initial floor-area calculations might not have been accurate. How, Verizon asks, with all this, could a sophisticated party justifiably rely on its counterparty's representation, without conducting any independent analysis? Yet, ECF proceeded to negotiate the Third Amendment to address the discrepancy identified by Verizon, and then proceeded to close the deal. [****8]

ECF admits it undertook no independent analysis here, but nonetheless claims it was wronged because it relied on the floor-area calculations contained in the Collins Title Sheet which Verizon provided prior to the Closing, notwithstanding the express disclaimers contained therein, as discussed, supra.

Verizon argues that ECF cannot now be heard to claim that it *justifiably* relied [***21] on a document that expressly disclaims reliance, and that expressly put ECF on notice that it should seek DOB's input to "provide interpretation" regarding Verizon's claimed floor-area exclusion.

Moreover, ECF's allegations demonstrate not only that it "failed to make use of the means of verification that were available to it," *UST Private Equity Invs. Fund, 288 AD2d at 88*, but also that ECF clearly *could have* discovered the alleged fraud had it undertaken any such efforts at the time the alleged misrepresentations were made. When it finally took the time to examine the facts "more closely," ECF apparently discovered that Verizon had claimed a higher-than-average amount of "mechanical deductions" in calculating the zoning floor area contained in the building. Specifically, ECF's counsel complained in a letter dated April 23, 2008, that Verizon had deducted about 30% of the gross floor area in the building, even though, according to ECF, "mechanical deductions for this type of building are typically under five percent." That "discovery" by ECF ultimately led to the commencement of this action. But ECF certainly knew, or should have known from the outset, that the gross floor space in [***22] the building would be approximately one million square feet. The Development Agreement, Sec. 30.12 makes reference to the plans and specifications and indicates that Telco agreed to provide the plaintiff with a conformed copy of them. The Fund also knew from the 1972 Contract that the building was supposed to contain only 744,000 square feet of zoning floor area. *See*, Sec. 201.2. The difference between those two figures alone should have alerted ECF to the possibility that "the amount of zoning floor area which Verizon[] . . . contracted to purchase" differed from "what was actually built in the Building." *See*, April 17, 2008 letter from plaintiff's counsel to Verizon in connection with the Closing.

Thus, Verizon argues that ECF's failures are fatal to its fraud and misrepresentation claims and that they must be dismissed. *See, e.g. Permasteelisa, S.p.A. v Lincolnshire Mgt., Inc., 16 AD3d 352, 793 N.Y.S.2d 16 (1st Dep't 2005)*; *UST Private Equity Invs. Fund, supra.*

ECF attempts to distinguish the holding in *UST*, arguing that it is not applicable to the facts here. Moreover, ECF argues that the facts misrepresented here - namely, the size of the actual building space in the Verizon Building - were previously [***23] within Verizon's own knowledge. ECF asserts that Verizon was obligated to build to specific specifications and thus asks "[w]hy on earth would ECF even think it needed [to] check" or to "independently measure each of the internal spaces Verizon built to be sure that Verizon was not committing fraud" since "[t]here was simply no reason for ECF to think that fraud was afoot."

ECF also refers to the 2010 Court of Appeals decision in *DDJ Mgt., LLC v Rhone Group L.L.C., 15 NY3d 147, 155, 931 N.E.2d 87, 905 N.Y.S.2d 118* where the Court of Appeals declined to dismiss a fraud claim on a *CPLR 3211* motion, based on justifiable reliance, recognizing that "[t]he question of what constitutes reasonable reliance is always nettlesome because it is so fact-intensive" (quoting *Schlaifer Nance & Co. v Estate of Warhol, 119 F3d 91, 98 [2d Cir 1997]*).

The *DDJ* Court further stated that where

> a plaintiff has taken reasonable steps to protect itself against deception, it should not be denied recovery merely because hindsight suggests that it might have been possible to detect the fraud when it occurred. In particular, where a plaintiff has [****9] gone to the trouble to insist on a written representation that certain facts are true, it will often [***24] be justified in accepting that representation rather than making its own inquiry.

15 NY3d at 154.

ECF asserts that as in *DDJ*, it sought and received from Verizon representations about the building's space dimensions that were offered as truthful, namely the Collins Architectural Drawings, and thus the Court should deny defendant's motion to dismiss the fraud claims based on plaintiff's failure to demonstrate reasonable or justifiable reliance on any alleged misrepresentation by Verizon as to the zoning floor area of the Verizon Building.

Of course, on March 27, 2012, after this motion was briefed and argued, the Appellate Division, First Department issued its decision in *HSH Nordbank AG v UBS AG, 95 AD3d 185, 941 NYS2d 59*, in which it dismissed plaintiff's fraud claim as legally insufficient pursuant to *CPLR 3211(a)(1)* and *(7)*, finding that plaintiff, - "a sophisticated commercial entity" (i.e., a German commercial bank)-could not satisfy the element of justifiable reliance. While the facts in that case were based on a complex financial transaction between the parties, and not a real estate transaction, the Appellate Division made clear that despite the Court of Appeals holding in *DDJ*, [***25] which it distinguished, the Appellate Division continues to adhere to its previous holdings that

> " [a]s a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it'"
>
> (*Ventur Group, LLC v Finnerty, 68 AD3d 638, 639, 892 N.Y.S.2d 69 [2009]*, quoting *UST Private Equity Invs. Fund v Salomon Smith Barney. 288 AD2d 87,88, 733 N.Y.S.2d 385 [2001]*; *see also Global Mins & Metals Corp. v Holme, 35 AD3d 93, 100, 824 N.Y.S.2d 210 [2006]*, *lv denied 8 N.Y.3d 804, 863 N.E.2d 111, 831 N.Y.S.2d 106 [2007]* ["New York law imposes an affirmative duty on sophisticated investors to protect themselves from misrepresentations . . . by investigating the details of the transactions"]; *Stuart Silver Assoc. v Baco Dev. Corp., 245 AD2d 96, 98-99, 665 N.Y.S.2d 415 [1997]* [justifiable reliance cannot be shown "(w)here a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means"]; *Lampert v Mahoney, Cohen & Co., 218 AD2d 580, 582-583, 630 N.Y.S.2d 733 [1995]* [dismissing fraud claim where "plaintiff failed to undertake an independent appraisal of the risk he was [***26] assuming," and thereby "assumed the risk of loss that a proper investigation would have been likely to disclose"]).
>
> The principle that sophisticated parties have "a duty to exercise ordinary diligence and conduct an independent appraisal of the risk they [are] assuming" (*Abrahami v UPC Constr. Co., 224 AD2d 231, 234, 638 N.Y.S.2d 11 [1996]*; *see also Granite Partners, L.P. v Bear, Stearns & Co., 58 F. Supp. 2d 228, 259 [SDNY 1999]*) has particular application where, as here, the true nature of the risk being assumed could have been ascertained from reviewing market data or other publicly available information (*see Havell Capital Enhanced Mun. Income Fund, L.P. v Citibank, N.A., 84 AD3d 588, 589, 923 N.Y.S.2d 479 [2011]*.

HSH Nordbank AG v UBS AG, 941 NYS2d at 66.

Verizon has made reference to the contracts between the parties, the Certificate of Occupancy and the Collins Architectural Drawings which all should have put a sophisticated [****10] commercial entity such as ECF on notice of the discrepancy with the zoning floor area in the building. The applicable rule, as stated by the Court of Appeals and referenced by the Appellate Division in HSH, is as follows:

> "If the facts represented are not matters peculiarly within the party's knowledge, [***27] and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentation" (*Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V., 17 N.Y.3d 269, 278-279, 952 N.E.2d 995, 929 N.Y.S.2d 3, [2011]* [internal

quotations marks and brackets omitted]; *see also* Danann Realty Corp. v. Harris, 5 N.Y.2d 317, 322, 157 N.E.2d 597, 184 N.Y.S.2d 599 [1959] [same]; Schumaker v Mather, 133 NY 590, 596, 30 N.E. 755, 4 Silv. A. 224 [1892] [same].

HSH, 941 NYS2d at 65-66.

The Appellate Division distinguished its holding from the DDJ case, at least in part "on the ground that the matters misrepresented therein . . . were matters of existing fact peculiarly within the knowledge of the defendants,"[5] and also because the plaintiffs there made a significant effort to protect themselves against the possibility of false statements by obtaining written representations and warranties to the effect that nothing in the statements was materially misleading. HSH, 941 NYS2d at 68, FN 9 (citing DDJ, supra).

Based on the transactional documents and the relevant public records, and the fact that ECF failed to make any independent efforts to investigate the relevant facts and discover the alleged fraud, or at least the discrepancy in the zoning floor-area analysis, this Court finds that as a matter of law, plaintiff cannot establish the element of justifiable reliance necessary to sustain its causes of action based on fraud, and thus the first, second, third, fourth and fourteenth causes of action are dismissed.

Contract Claims

The eighth and ninth causes of action, alleging breach of the 1972 Contract and the ZLDA, respectively, must also be dismissed because the provisions of those contracts were merged into the deed upon closing of title. *See* Stollsteimer v Kohler, 77 AD3d 1259, 910 N.Y.S.2d 581 (3d Dep't 2010); Marcantonio v Picozzi, 70 AD3d 655, 893 N.Y.S.2d 623 (2d Dep't 2010). Plaintiff argues, however, that this rule does not apply "where there is a clear intent evidenced [***29] by the parties that a particular provision will survive delivery of the deed or where there is a collateral undertaking." Goldsmith v Knapp, 223 AD2d 671, 673, 637 N.Y.S.2d 434 (2d Dep't 1996). Still, ECF has failed to identify any contract provision or other "surrounding circumstances" which reflect any intent on the part of the parties to have the relevant contract provision survive the issuance of the deed.

Further, while ECF argues that the 1972 Contract required construction of the telephone building, and that such a "collateral undertaking" may show an intent that it not be merged in the deed, collateral matters are those that "cannot be performed until after conveyance." *See* White v [****11] Long, 204 AD2d 892, 612 N.Y.S.2d 482 (3d Dep't 1994), *mod on other grnds* 85 NY2d 564, 650 N.E.2d 836, 626 N.Y.S.2d 989 (1995). The Verizon Building herein was completed decades before the Fund conveyed title to Verizon.

Unjust Enrichment Claims

The Court will also dismiss the fifth and sixth causes of action alleging unjust enrichment, because quasi contract claims generally do not lie where, as here, there is a valid and enforceable written contract which covers the scope of the dispute between the parties. IDT Corp. v Morgan Stanley Dean Witter & Co., 12 NY3d 132, 142, 907 N.E.2d 268, 879 N.Y.S.2d 355 (2009); [***30] Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 388-389, 516 N.E.2d 190, 521 N.Y.S.2d 653 (1987).

Claims for Declaratory and Injunctive Relief

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[5] This is also the reason, in part, that this Court recently denied [***28] a motion to dismiss a fraud claim for failing to satisfy the element of justifiable reliance, notwithstanding that the plaintiff was a sophisticated entity. See ***ACA Fin. Guar. Corp. v Goldman, Sachs & Co., 35 Misc. 3d 1217 [A], 951 N.Y.S.2d 84, 2012 NY Slip Op 50723 [U] (Sup Ct, NY Co April 23, 2012)***.

36 Misc. 3d 1201(A), *1201(A); 957 N.Y.S.2d 265, **265; 2012 N.Y. Misc. LEXIS 2949, ***28; 2012 NY Slip Op 51142(U), ****11

The eleventh and twelfth causes of action allege that Verizon (and Taconic) are planning certain unspecified alterations to the Verizon Building that would violate both the ZLDA and unspecified provisions of the Zoning Resolution. Similarly, the thirteenth cause of action seeks a determination of interests pursuant to Article 15 of the Real Property Actions and Proceedings Law, and alleges that Verizon claims "or might claim" (AC, ¶ 257) an ownership interest adverse to that of the Fund. The Court questions plaintiff's standing to bring these claims since it no longer owns the Building, nor does Verizon or Taconic for that matter. In any event, counsel for ECF stated on the record during oral argument on June 2, 2011 that they "have withdrawn that aspect of the case. We are no longer claiming that what's inside [the Verizon Building] didn't belong to Verizon and doesn't now belong to whoever bought it from Taconic." Tr. June 2, 2011, 28:19-22.

Thus, the eleventh to thirteenth causes of action are dismissed.

Accordingly, Verizon's motion is granted in its entirety and the [***31] action is dismissed with prejudice and without costs or disbursements.

The Clerk shall enter judgment accordingly.

This constitutes the decision and order of this Court.

Dated: June 11, 2012

BARBARA R. KAPNICK

J.S.C.

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2016-4327-A

APPLICANT – Sky House Condominium, owner.

SUBJECT – Application November 10, 2016 – Appeal challenging NYC Department of Building's determination that the Tower complies with the New York City Zoning Resolution and the New York City Housing Maintenance Code. C5-2 zoning district.

PREMISES AFFECTED – 15 East 30th Street, Block 860, Lot (s) 12, 69, 63, Borough of Manhattan.

COMMUNITY BOARD #5M

ACTION OF THE BOARD – Appeal denied.

THE VOTE TO GRANT –

Affirmative: ……0

Negative: Chair Perlmutter, Vice-Chair Chanda and Commissioner Ottley-Brown ……3

THE RESOLUTION –

WHEREAS, the determination of the Department of Buildings ("DOB"), dated March 1, 2017, acting on a public challenge to New Building Application No. 122128679, reads in pertinent part:

> The challenger's second zoning challenge pertains to the classification of the Chandler Hotel's existing use as a residential use and not a commercial use (Point II). The Chandler Hotel at 12 East 31st Street is on tax lot No. 74, which is one of six adjoining tax lots, including the subject building's tax lot No. 12, which have been merged into a single zoning lot. Per the latest Certificate of Occupancy (CO) (No. 38263) in the Department's BIS website, dated March 8, 1951, the Chandler Hotel's lawful use is a "hotel." In addition, the CO states that "[t]his building complies with Section 67 of the Multiple Dwelling Law."
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> [. . .]
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> As per the Chandler Hotel's inspection I-cards, circa 1938, from the Housing Preservation and Development's (HPD) website . . . , the Chandler Hotel is classified as a "Heretofore Erected Existing Class B" (HEXB) multiple dwelling "originally erected as [an] apartment [and] transient hotel." Per the NYS Multiple Dwelling Law's (MDL) definition in MDL § 4(9), "[a] 'class B' multiple dwelling is a multiple dwelling which is occupied, as a rule transiently, as the more or less temporary abode of individuals or families who are lodged with or without meals. This class shall include hotels . . . ." MDL § 4(12) defines hotel as "an inn having thirty or more sleeping rooms." According to the I-card issued contemporaneously with the 1951 CO, none of the units in the Chandler Hotel were identified as residential apartments. Therefore, based on the above DOB and HPD records, this public challenge is hereby denied.
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> [. . .]
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> The challenger's third zoning challenge pertains to the subject building's mechanical floor spaces' use and "unnecessary height" (Point III). The challenger does not specify which of the subject building's mechanical floor spaces will be constructed with "unnecessary height."
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> Per the Zoning Resolution's definition for "floor area" in Section ZR 12-10, "the floor area of a building shall not include . . . (8) floor space used for mechanical equipment . . . ." Per the mechanical plans approved by the Department for the building's second, third, fourth, fiftieth and fifty-first stories, those stories contain mechanical equipment throughout each story, which supports the building's mechanical systems. As such, these stories may be excluded from the building's floor area, as demonstrated on the approved zoning analysis . . . .
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> In addition, the Zoning Resolution does not regulate the floor-to-ceiling height of a building's mechanical spaces. The building's bulk, including the building's height, is limited by the applicable height and setback regulations, including the tower regulations, in the Zoning Resolution. The approved zoning analysis . . . demonstrates that the subject building's bulk complies with the tower regulations in ZR 23-65 (Tower Regulations), including ZR 23-652 (Standard Tower). Therefore, this public challenge is hereby denied.
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> [. . .]
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> The [fifth] zoning challenge pertains to the minimum required distance between the subject building and the Chandler Hotel.
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> In response, the challenger states that "I agree that the building space requirements of 23-71 are not applicable 'because the existing and proposed building are abutting on the same zoning lot and therefore considered to be one building.'"
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> In addition, the challenger cites to subdivision 2 in MDL § 28 (Two or more buildings on same lot) in the NYS Multiple Dwelling Law . . . . Because the Chandler Hotel on tax lot No. 74 and the subject building on tax lot No. 12 are located on two separate tax lots, MDL 28(2) is not applicable. Therefore, this public challenge is hereby denied; and

WHEREAS, this is an appeal for interpretation under ZR § 72-11 and Charter § 666(6)(a), brought on behalf of Sky House Condominium ("Appellant"), owner in fee of land located in Manhattan known and designated as Block 859, Lot 7501 (11 East 29th Street), alleging errors of law pertaining to floor space

used for mechanical equipment within a building proposed at 15 East 30th Street (the "Proposed Building") and to the use classification of Hotel Chandler, an existing building located at 12 East 31st Street (the "Hotel"); and

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

WHEREAS, a public hearing was held on this appeal on July 25, 2017, after due notice by publication in *The City Record*, with a continued hearing on September 20, 2017, and then to decision on the same date; and

WHEREAS, Vice-Chair Chanda performed an inspection of the site and surrounding neighborhood; and

WHEREAS, the New York City Department of City Planning ("DCP") submitted testimony stating that there are no regulations in the Zoning Resolution controlling the height of stories with floor space used for mechanical equipment, that no inner court regulations apply to commercial hotel uses and that there are no provisions of the Zoning Resolution that would preclude the merger of two or more zoning lots in the event that such a merger would create any non-compliance with the bulk regulations of the Zoning Resolution; and

WHEREAS, New York City Councilmember Daniel R. Garodnick submitted testimony expressing concern that the idea of a "structural void," a shorthand term referring to the second, third and fourth stories of the Proposed Building and identified as mechanical floors, does not exist in the Zoning Resolution, that the DOB determination at issue in this appeal may set precedent for other developments in the City and that the proposed building may adversely affect legally mandated light and air available to Hotel Chandler; and

WHEREAS, Friends of the Upper East Side Historic Districts, The Municipal Art Society of New York and the Greenwich Village Society for Historic Preservation presented written and oral testimony in opposition to the proposed building and in support of this appeal; and

WHEREAS, DOB, Appellant, the owner of the Proposed Building (the "Owner") and the Hotel have been represented by counsel throughout this appeal; and

BACKGROUND

WHEREAS, the subject zoning lot is bounded by East 31st Street to the north, Madison Avenue to the east and East 30th Street to the south, in a C5-2 zoning district, in Manhattan; and

WHEREAS, the zoning lot has approximately 220 feet of frontage along East 31st Street, 143 total feet of non-continuous frontage along Madison Avenue, 118 square feet of frontage along East 30th Street and consists of Tax Lots 10, 12, 16, 63, 64, 67, 69, 71, 74, 1101–1107 and 90671; and

WHEREAS, the Proposed Building is under construction at 15 East 30th Street (Tax Lot 12); and

WHEREAS, 12 East 31st Street (Tax Lot 74) is occupied by the Hotel, a 13-story with cellar and sub-cellar building; and

PROCEDURAL HISTORY

WHEREAS, this appeal concerns the development of the Proposed Building, a 56-story, with cellar, mixed-use residential and commercial building; and

WHEREAS, a construction application for the Proposed Building was filed with DOB on September 11, 2014, and permits were issued in conjunction with New Building Application No. 122128679 (the "NB Application") on July 21, 2016, and subsequently renewed; and

WHEREAS, beginning February 11, 2015, numerous determinations regarding application of the Zoning Resolution to the Proposed Building were posted publicly on DOB's website in accordance with DOB's public-challenge rule, 1 RCNY § 101-15, which affords members of the public an opportunity to learn about proposed buildings early in the construction process; and

WHEREAS, by letter dated April 25, 2016, Appellant submitted a challenge to the Proposed Building, which DOB accepted in part and denied in part on June 29, 2016; and

WHEREAS, by letter dated July 14, 2016, Appellant internally appealed DOB's challenge denial to DOB's Technical Affairs Unit; and

WHEREAS, on June 29, 2016, and July 13, 2016, DOB audited the NB Application, finding open issues, which were resolved by August 4, 2016, when the NB Application passed its third audit; and

WHEREAS, post approval amendments to the NB Application were submitted and subsequently approved by DOB on August 11, 2016, and October 17, 2017; and

WHEREAS, on November 10, 2016, Appellant filed this appeal, contesting DOB's reissuance of Permit No. 122128679-01-NB for the Proposed Building on October 11, 2016; and

WHEREAS, on March 1, 2017, DOB issued the determination cited above (the "Final Determination") and Appellant filed an amendment to this appeal on March 31, 2017; and

WHEREAS, on May 5, 2017, the Board's staff instructed Appellant to notify the Hotel of this appeal because of Appellant's apparent challenge to the Hotel's CO; and

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1 ZR § 12-10 states that a "zoning lot" "may or may not coincide with a lot as shown on the official tax map of the City of New York." Here, pursuant to subdivision (d) of the "zoning lot" definition, multiple tax lots have been merged into one zoning lot pursuant to a restrictive declaration executed by each party in interest and recorded in the Conveyances Section of the New York City Department of Finance Office of the City Register (Document ID No. 2017041300245001), and the Board credits DOB's testimony that these tax lots constitute one merged zoning lot.

ISSUES PRESENTED

WHEREAS, the two issues in this appeal are whether (1) DOB appropriately determined that floor space used for mechanical equipment within the Proposed Building could be deducted from floor area under ZR § 12-10 without limitation as to height and (2) DOB properly considered a certificate of occupancy for the Hotel in determining its legal use and occupancy and in applying bulk regulations to the Proposed Building2; and

DISCUSSION

(1) MECHANICAL SPACE

WHEREAS, Appellant, DOB and the Owner dispute whether floor space on the second, third and fourth stories of the Proposed Building may properly be deducted from floor area; and

WHEREAS, ZR § 12-10 reads in pertinent part that "the *floor area* of a *building* shall not include: . . . floor space used for mechanical equipment" and that an "*accessory use* . . . is a *use* which is clearly incidental to, and customarily found in connection with, such principal *use*"; and

WHEREAS, Appellant contends that the spaces on the second, third and fourth stories3 of the Proposed Building used for mechanical equipment are too tall to permit their exemption from floor area and that the height of those floors are too excessive and unrelated to the housing of mechanical equipment that they must be classified as their own use (a "Structural Void" 4) with the primary purpose of increasing the height of the building, which is not a permitted use in the Zoning Resolution; and

WHEREAS, the Board considers Appellant's contentions in turn but ultimately finds them unconvincing; and

(A) Height

WHEREAS, Appellant argues that the Proposed Building will contain Structural Voids rather than bona fide mechanical floor space used for mechanical equipment and that a Structural Void is not a listed—and thereby permitted—floor area deduction under the Zoning Resolution; and

WHEREAS, Appellant states that Structural Voids, masquerading as accessory building mechanicals, are designed to boost building heights, views and sales prices; and

WHEREAS, Appellant states, in a submission dated March 31, 2017, that approximately 172 feet of height, or 24 percent of the Proposed Building's volume, is devoted to accessory building mechanicals, but Appellant also states that the Structural Void proposed is 132 feet in height5; and

WHEREAS, the Owner replies that mechanical deductions constitute approximately five percent of the Proposed Building's above-grade square footage and that Appellant's figures are unsupported by calculations; and

WHEREAS, Appellant cites no provision in the Zoning Resolution restricting the height of floor space used for mechanical equipment as is at issue here,6 and Appellant states that it has found no case law or legal guidance on the topic but contends that, under *New York Botanical Garden v. Bd. of Standards & Appeals of City of New York*, 91 N.Y.2d 413, 423 (1998), the Zoning Resolution's silence as to the height permitted for accessory uses is not determinative; and

WHEREAS, Appellant also cites to *47 East 3rd Street*, BSA Cal. No. 128-14-A (May 12, 2015), where the Board stated that "DOB may take into consideration, with respect to a purported accessory use, the relative size of the purported accessory use where the size of the purported accessory use is indicative of its status as subordinate and minor in significance to said principal use"; and

WHEREAS, DOB replies that the Zoning Resolution does not contain any regulations pertaining to the floor-to-ceiling height of a building's mechanical spaces and, by letter dated July 20, 2017, DCP corroborates that there are no regulations in the Zoning Resolution controlling the height of stories with floor space used for mechanical equipment; and

WHEREAS, the Owner replies that, where the Zoning Resolution restricts floor-to-ceiling heights or overall building heights, it does so explicitly, though no such provision restricts the height of the Proposed Building under ZR § 23-65; and

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2 Appellant's revised statement of facts, dated March 31, 2017, indicates that these are the two issues on appeal. Subsequent submissions by Appellant attempt to muddy the issues by including, for instance, discussion of provisions of the Housing Maintenance Code without providing a final agency determination from DOB interpreting said provisions. Consistent with the Board's Rules of Practice and Procedure §§ 1-06.1(a) and 1-06.3(a), the Board declines to consider new arguments not presented to—and decided by—DOB in the first instance.

3 Appellant states in a letter dated August 8, 2017, that it does not address whether the fiftieth and fifty-first stories of the Proposed Building are primarily used for accessory building mechanicals in this appeal, but Appellant does not state what differentiates those stories from the second, third and fourth stories contested here.

4 The Board notes that "structural void" is a shorthand term, not one found or defined in the Zoning Resolution.

5 Presumably this discrepancy results from Appellant's inclusion or exclusion of the fiftieth and fifty-first stories from its calculations.

6 The Owner submits that the Zoning Resolution does regulate the height of mechanical equipment in the limited context of height restrictions for permitted obstructions under ZR §§ 23-62(g), 33-42(f) and 43-42(e), but those sections are inapplicable in this appeal.

WHEREAS, based upon its review of the record, the definition of "floor area" set forth in ZR § 12-10 and the Zoning Resolution as a whole, the Board finds that the Zoning Resolution does not control the floor-to-ceiling height of floor space used for mechanical equipment; and

(B) Accessory Use

WHEREAS, Appellant additionally argues that a Structural Void does not constitute a lawful accessory use and, thus, the excessive heights of the second, third and fourth floors are not permitted by the Zoning Resolution; and

WHEREAS, pursuant to ZR § 12-10, an "accessory use":

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

WHEREAS, Appellant posits that the Structural Void proposed on the second, third and fourth stories of the Proposed Building will hold only limited amounts of mechanical equipment that are not proportional to the size of the space or consistent with current standards for apartment buildings; and

WHEREAS, DOB and the Owner reply that the space at issue will be used for mechanical equipment, which is a lawful accessory use because the mechanical equipment proposed is "clearly incidental to" and "customarily found in connection with" the principal use of the Proposed Building under ZR § 12-10; and

WHEREAS, DCP states that, regardless of floor-to-ceiling height, any space devoted to accessory mechanical equipment is considered a lawful accessory use; and

WHEREAS, the Board notes that, under *New York Botanical Garden*, 91 N.Y.2d 413, 420 (1998):

> Whether a proposed accessory use is clearly incidental to and customarily found in connection with the principal use depends on an analysis of the nature and character of the principal use of the land in question in relation to the accessory use, taking into consideration the over-all character of the particular area in question . . . . This analysis is, to a great extent, fact-based . . . [and] one that will clearly benefit from the expertise of specialists in land use planning; and

WHEREAS, accordingly, the Board considers whether the proposed mechanical equipment is "clearly incidental to" and "customarily found in connection with" the principal use of the Proposed Building under ZR § 12-10; and

(i) Clearly Incidental

WHEREAS, despite the Board's request to do so, Appellant provided no testimony from a mechanical engineer evaluating whether the amount of floor space used for mechanical equipment in the Proposed Building is excessive or irregular, and, in its submission dated August 8, 2017, Appellant states that it "does not intend to hire an engineer or enter into a technical argument about what really constitutes mechanical space"; and

WHEREAS, at hearing, Appellant stated that, after searching, Appellant was unable to find someone willing and qualified to testify on the record evaluating the amount of floor space used for mechanical equipment in the Proposed Building; and

WHEREAS, instead, Appellant urges DOB to employ its discretion, as upheld in *9th & 10th St. L.L.C. v. Bd. of Standards & Appeals of City of New York*, 10 N.Y.3d 264 (2008), to require specific proof that floor space denoted on the approved plans as being used for mechanical equipment could be put to that use; and

WHEREAS, DOB states that, based upon its review, the architectural and mechanical plans for the Proposed Building show mechanical space sufficient to justify its exemption from floor are as follows: the second floor contains an emergency generator and switchboard, cooling towers, primary cold-water pumps, secondary condenser water-loop pumps, an expansion tank, heat exchangers and an air separator; the third floor has a cogeneration power plan, a precipitator, boilers, hot-water pumps, an air separator, an expansion tank, heat exchangers, part of the indoor-cooling towers from the second floor and other equipment; and the fourth floor includes domestic hot-water pumps, domestic-water heat-exchanger units, air-handler units, fan units and other equipment; and

WHEREAS, DOB and the Owner represent that, here, DOB has no reason to doubt that the mechanical space can be used as proposed, especially in light of composite mechanical plans for the Proposed Building illustrating the mechanical equipment proposed for the second, third and fourth stories; and

WHEREAS, the Board credits DOB's review of the proposed plans and finds that, unlike *9th & 10th St. L.L.C.*, there is no reason to suspect that floor spaces designated as being used for mechanical equipment on the approved plans will not be put to such use; and

WHEREAS, the Owner submits sworn affidavits from Fatma M. Amer, former First Deputy Commissioner for DOB with more than 25 years of experience in technical positions, stating that composite mechanical plans for the Proposed Building

demonstrate that the second, third and fourth stories will be used solely for mechanical equipment with no other uses; and

WHEREAS, the Owner additionally cites *246 Spring Street*, BSA Cal. No. 315-08-A (Oct. 5, 2010), where the Board upheld DOB's determination that the specific floor-area deductions taken for swimming pool service process equipment spaces and electric meter rooms were proper; and

WHEREAS, the Board credits DOB's review of the specific mechanical equipment proposed and, in the absence of contradicting testimony or evidence from a licensed and appropriately experienced engineer, the Board has no basis upon which to question the evidence in the record suggesting that the floor space on the second, third and fourth stories of the Proposed Building is "clearly incidental" to the principal use of the Proposed Building, in satisfaction of subdivision (b) of the "accessory use" definition in ZR § 12-10; and

(ii) Customary Connection

WHEREAS, at hearing, Appellant stated that large spaces used for mechanical equipment are not unique to this building and can be found in dozens of buildings currently planned, under construction and recently built in the City; and

WHEREAS, Appellant further stated that, on 57th Street in Manhattan, there is another building under construction with multiple stories devoted to mechanical equipment, totaling approximately 390 feet or 27 percent of that building's height, though Appellant did not specify how much floor space was used for such mechanical equipment; and

WHEREAS, the Owner states that other buildings within the City have been constructed using similar floor-area deductions for mechanical space, including 220 Central Park South, 520 Park Avenue, 111 West 57th Street, 217 West 57th Street and 432 Park Avenue in Manhattan; and

WHEREAS, at hearing, the Board noted that, on the same street as the Proposed Building, a similar building was completed within the past year that featured four interstitial mechanical floors and also discussed the similarity of the building located at 432 Park Avenue, Manhattan, to the Proposed Building; and

WHEREAS, Friends of the Upper East Side Historic Districts states that a building under construction at 180 East 88th Street, Manhattan, contains a three-story space used for mechanical equipment that is exempt from floor area, though no mention is made of the specific amount of floor space deducted; and

WHEREAS, The Municipal Art Society of New York states that several developments—including 217 West 57th Street, Manhattan, with 350 feet of its height devoted to mechanical space and an unspecified amount of floor space thereby exempted—contain tall mechanical spaces that extend heights, improve views and increase prices; and

WHEREAS, in response to concerns from Appellant and the community regarding the applicability of this appeal to other development within the City, the Board notes that, while it has the power, among other things, "to hear and decide appeals from and to review interpretations of this Resolution" under ZR § 72-01(a), the Board does not have the power to zone, *see* Charter § 666; and

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

WHEREAS, the Board notes that whether the amount of mechanical equipment proposed for the Proposed Building is customarily found in connection with mixed-use buildings similar to the Proposed Building is "a fact-based determination," *New York Botanical Garden v. Bd. of Standards & Appeals of City of New York*, 91 N.Y.2d 413, 421 (1998); and

WHEREAS, in response to an inquiry from the Board regarding whether a standard percentage of floor space dedicated to mechanical equipment has been interpreted as reasonable for similar developments and, thus, properly exempt from floor-area calculations, DOB states that mechanical floor space deductions are evaluated on a case-by-case basis and that the deduction of floor space on the second, third and fourth stories of the Proposed Building is consistent with its evaluation of mechanical floor space in comparable mixed-use developments in the City; and

WHEREAS, based upon the foregoing, the Board finds that, in accordance with the "floor area" and "accessory use" definitions of ZR § 12-10, DOB properly classified the floor space identified for the placement of mechanical equipment in the Proposed Building as a permissible accessory use and properly deducted that floor space from the calculation of floor area; and

(2) OCCUPANCY OF THE HOTEL

WHEREAS, Appellant, DOB and the Owner dispute the Hotel's legal occupancy under the Multiple Dwelling Law as of 1951 and today, the Hotel's legal use under the Zoning Resolution and the affect that the Hotel's legal occupancy and use have on the applicability of certain bulk regulations to construction of the Proposed Building, specifically with regards to distance between buildings; and

WHEREAS, the Board considers each contention in turn, but ultimately finds none of Appellant's arguments persuasive; and

(A) Legal Occupancy in 1951

WHEREAS, Appellant states that, according to the CO, the Hotel "is used for hotel rooms"7; and

7 Appellant also argues that the CO is "largely illegible and unconvincing of the [Hotel's] status in 1951." The Board does not find the CO illegible, especially in light of the fact that Appellant, DOB and the Owner have all concluded that the CO permits occupancy for a class B hotel.

WHEREAS, DOB and the Owner represent that the permissible occupancy of the Hotel is technically as a class B hotel,8 as defined in the Multiple Dwelling Law ("MDL"), and further emphasize that the definition of "class B" multiple dwelling in MDL § 4(9) indicates that such dwelling is occupied "as a rule transiently"; and

WHEREAS, the Board finds that, as authorized under the CO in 1951, the legal occupancy of the Hotel was as a class B hotel—a multiple dwelling designed to be occupied, as a rule transiently, as an inn having more than thirty sleeping rooms; and

(B) Current Legal Occupancy and Use

(i) Legal Occupancy under the Multiple Dwelling Law

WHEREAS, Appellant argues that the legal use of the Hotel in 1951 is irrelevant to this appeal, and that it is its current use, allegedly contrary to the CO, that dictates the applicability of certain bulk regulations to the Proposed Building; and

WHEREAS, in response, DOB directs the Board's attention to Charter § 645(e), which reads in relevant part:

> [E]very certificate of occupancy shall, unless and until set aside, vacated or modified by the board of standards and appeals or a court of competent jurisdiction, be and remain binding and conclusive upon all agencies and officers of the city . . . as to all matters therein set forth, and no order, direction or requirement affecting or at variance with any matter set forth in any certificate of occupancy shall be made or issued by any agency or officer of the city . . . unless and until the certificate is set aside, vacated or modified . . . upon the application of the agency, department, commission, officer or member thereof seeking to make or issue such order, direction or requirement; and

WHEREAS, accordingly, DOB argues that because the CO is binding as to matters set forth therein, it would be improper for DOB to look beyond the CO to determine the Hotel's legal occupancy; and

WHEREAS, the Board notes that DOB has not filed an appeal with the Board to set aside, vacate or modify the CO and that nothing in the record indicates that the CO was temporary, has otherwise expired as a matter of law or been superseded; and

WHEREAS, accordingly, the Board finds that the CO is currently in effect and that the Hotel's current legal occupancy remains class B hotel, as defined in the Multiple Dwelling Law and stated therein; and

(ii) Legal Use under the Zoning Resolution

(a) Apartment Hotel

WHEREAS, Appellant alleges that currently, the legal primary use of the Hotel is residential because the Hotel meets the definition of "apartment hotel" under ZR § 12-109; and

WHEREAS, ZR § 12-10 defines a "residence," in pertinent part, as "one or more *dwelling units* or *rooming units* . . . . A *residence* may, for example, consist of . . . multiple dwellings . . . or *apartment hotels*. However, *residences* do not include: (a) such transient accommodations as *transient hotels*"; and

WHEREAS, ZR § 12-10 defines an "apartment hotel," in pertinent part, as:

> [A] *building* or part of a *building* that is a Class A multiple dwelling as defined in the Multiple Dwelling Law, which:
> (a) has three or more *dwelling units* or *rooming units*;
> (b) has one or more common entrances serving all such units; and
> (c) provides one or more of the following services: housekeeping, telephone, desk, or bellhop service, or the furnishing or laundering of linens; and

WHEREAS, Appellant does not apply the Multiple Dwelling Law's definition of "Class A multiple dwelling"10 and instead presents records from the New York City Department of Finance ("DOF"), argues that they indicate that the Hotel contains rent-regulated residential units11 and cites *Nutter v. W&J Hotel Company*, 171 Misc. 2d 302 (N.Y.C. Civil Ct. 1997) for the proposition that rent-stabilized units in hotels are treated as permanent residences under the New York Rent Stabilization Law ("RSL"); and

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8 MDL § 4 states in relevant part: "9. A 'class B' multiple dwelling is a multiple dwelling which is occupied, as a rule transiently, as the more or less temporary abode of individuals or families who are lodged with or without meals. This class shall include hotels, lodging houses, rooming houses, boarding houses, boarding schools, furnished room houses, lodgings, club houses, college and school dormitories and dwellings designed as private dwellings but occupied by one or two families with five or more transient boarders, roomers or lodgers in one household. . . . 12. A 'hotel' is an inn having thirty or more sleeping rooms."

9 Contradictorily, Appellant states in its submission dated August 8, 2017, "The Hotel is a transient hotel and a multiple dwelling." The Board notes that apartment hotels and transient hotels are mutually exclusive primary uses but considers Appellant's argument to be that the Hotel is primarily used as an apartment hotel.

10 Nor does Appellant apply the Zoning Resolution's definitions of "dwelling unit" or "rooming unit" under subdivision (a) of the "apartment hotel" definition set forth in ZR § 12-10. However, Appellant does state that the Hotel has a common entrance on 30th Street in response to subdivision (b) of the definition of "apartment hotel" and submitted a printout from the Hotel's website and states that the Hotel provides services listed under subdivision (c).

11 However, under the heading "Annual Property Tax Detail," the DOF property tax statement indicates that the Hotel is "Tax class 4 – Commercial Property."

WHEREAS, in response, DOB points out that hotels subject to rent regulation include "[a]ny Class A or Class B multiple dwelling" under 9 NYCRR § 2520.6; thus, Appellant's reference to the RSL proves unpersuasive as determinative of the Hotel's proper use classification; and

WHEREAS, both DOB and the Owner submit that the presence of an incidental number of rent-regulated units within the Hotel would not convert the Hotel into a class A multiple dwelling and, thus, residential; and

WHEREAS, the Board notes that, in administering and enforcing the Zoning Resolution, neither DOB nor the Board is "required to blindly import a definition" from other statutes with varying purposes, *see Appelbaum v. Deutsch*, 66 N.Y.2d 975, 977 (1985); and

WHEREAS, the Board does not credit Appellant's suggestion that the Hotel's tax classification or the treatment of rent-stabilized units under the RSL as determinative of the Hotel's legal primary use; and

WHEREAS, rather, the Board looks to the definitions section of the Multiple Dwelling Law, which is directly referenced in the relevant text of the Zoning Resolution, and notes that MDL § 4(8)(a) states in pertinent part:

> A "class A" multiple dwelling is a multiple dwelling that is occupied for permanent residence purposes. This class shall include . . . all other multiple dwellings except class B multiple dwellings. A class A multiple dwelling shall only be used for permanent residence purposes. For the purposes of this definition, "permanent residence purposes" shall consist of occupancy of a dwelling unit by the same natural person or family for thirty consecutive days or more . . . ; and

WHEREAS, the Owner emphasizes that, under MDL § 4(8)(a), a class A multiple dwelling "shall only" be used for permanent residence purposes; and

WHEREAS, the Board notes that, because the Hotel's current legal occupancy is class B multiple dwelling while class A multiple dwellings include "all other multiple dwellings except class B multiple dwellings" under MDL § 4(8)(a), the Hotel cannot be a "Class A multiple dwelling as defined in the Multiple Dwelling Law" in accordance with the "apartment hotel" definition of ZR § 12-10; and

WHEREAS, accordingly, the Board finds that the Hotel is not an apartment hotel under ZR § 12-10; and

(b) Transient Hotel

WHEREAS, DOB and the Owner contend that the Hotel is instead a commercial12 building and classified as a transient hotel under ZR § 12-10; and

WHEREAS, ZR § 12-10 states in relevant part, "A 'transient hotel' is a *building* or part of a *building* in which: (a) living or sleeping accommodations are used primarily for transient occupancy, and may be rented on a daily basis"13; and

WHEREAS, Appellant states in its submission dated July 21, 2017, that the Hotel is primarily used "as a transient Class B multiple dwelling"14; and

WHEREAS, the Board notes that ZR § 12-01(f) states, "The phrase 'used for' includes 'arranged for', 'designed for', 'intended for', 'maintained for', 'or occupied for'"; and

WHEREAS, as stated above, the Board finds that the Hotel's current certificate of occupancy indicates that the Hotel is designed and arranged for occupancy, as a rule transiently, as an inn having more than thirty sleeping rooms; and

WHEREAS, the Board notes that nothing in the record indicates that the Hotel has been unlawfully altered from its legal occupancy as a class B hotel; and

WHEREAS, to the contrary, the Board notes that the Hotel's website indicates that the Hotel is actively being operated and advertising rooms for short-term, transient occupancy; and

WHEREAS, accordingly, the Board finds that the primary use of the Hotel is consistent with the "transient hotel" definition in ZR § 12-10 and that the Hotel is, therefore, a commercial building; and

(C) Applicability of Bulk Regulations

WHEREAS, Appellant argues that certain bulk regulations15 applicable to residential buildings apply to the Hotel and were not properly considered in DOB's evaluation of the NB Application and, thus, the Final Determination was in error; and

WHEREAS, in particular, Appellant argues that MDL § 28 precludes construction of the Proposed Building, and MDL § 28(2) reads in relevant part:

> Except as otherwise provided . . . for dwellings erected, enlarged, converted or altered pursuant to plans filed prior to December fifteenth, nineteen hundred sixty-one in accordance with the provisions of

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12 ZR § 12-10 states, "A 'commercial' *use* is any *use* listed in Use Group[] 5." Transient hotels and accessory uses are listed in Use Group 5 under ZR § 32-14 and are, therefore, commercial uses.

13 None of the other elements of the "transient hotel" definition of ZR § 12-10 as they apply to the Hotel are disputed in this appeal.

14 The Board again notes that this statement contradicts Appellant's argument that the Hotel is an apartment hotel.

15 By letter from Appellant to DOB dated July 14, 2016, as referenced in the Final Determination, Appellant states, "I agree that the building space requirements of 23-71 are not applicable 'because the existing and proposed buildings are abutting on the same zoning lot and therefore considered to be one building.'" Accordingly, the Board declines to consider the applicability of ZR § 23-71 in this appeal since Appellant apparently conceded this point before DOB. Appellant has also not challenged any bulk regulations of the Zoning Resolution applied by DOB in the Final Determination, including ZR §§ 23-532 and 23-65.

subdivision one of section twenty-six, if any building or dwelling is placed on the rear of the same lot with a multiple dwelling or a multiple dwelling is placed anywhere on the same lot with another building, there shall be left between the two buildings an open space unoccupied from the ground up and at least forty feet in depth, measured in the direction from one building to the other for the first one hundred twenty-five feet above the curb level, and eighty feet above that point; and

WHEREAS, both DOB and the Owner state that MDL § 28(2) does not apply because said provision relates to multiple buildings on a single tax lot, not zoning lot, and the Proposed Building and the Hotel are located on two separate tax lots; and

WHEREAS, additionally, the Owner notes that MDL § 4(31) states, "A 'lot' is a parcel or plot of ground which is or may be occupied wholly or in part by a dwelling, including the spaces occupied by accessory or other structures and any open or unoccupied spaces thereon, but not including any part of an abutting public street or thoroughfare"; and

WHEREAS, comparing the "lot" definition in MDL § 4(31) with the "zoning lot" definition in ZR § 12-10, the Board notes that the definitions differ in scope and purposes16; and

WHEREAS, the Board finds Appellant's conclusory conflation of the "lot" definition in MDL § 4(31) with the "zoning lot" definition in ZR § 12-10 unpersuasive; and

WHEREAS, the Board credits DOB's interpretations, especially in light of DOB's extensive experience administering complex zoning lot mergers; and

WHEREAS, based on the above, the Board finds MDL § 28(2) is inapplicable to the Proposed Building; and

CONCLUSION

WHEREAS, the Board has considered all of Appellant's arguments on appeal and finds them to be without merit; and

WHEREAS, for the foregoing reasons, the Board finds that DOB appropriately permitted floor space used for mechanical equipment within the Proposed Building to be deducted from floor area under ZR § 12-10 without limitation as to height and that DOB properly determined that the Hotel constitutes a commercial building occupied as a class B hotel, as defined in MDL § 4, and used as a transient hotel under ZR § 12-10 in applying bulk regulations to the Proposed Building.

Therefore it is Resolved, that the determination of the Department of Buildings, dated March 1, 2017, acting on a public challenge to New Building Application No. 122128679, shall be and hereby is *upheld* and that this appeal shall be and hereby is *denied*.

Adopted by the Board of Standards and Appeals, September 20, 2017.

16 For instance, MDL § 4(31) states that a lot "may be occupied wholly or in part by a dwelling," but ZR § 12-10 contains no reference to residences in the "zoning lot" definition. Likewise, ZR § 12-10 states that a "zoning lot" "may or may not coincide with a lot as shown on the official tax map of the City of New York," but MDL § 4(31) contains no such disclaimer.

A true copy of resolution adopted by the Board of Standards and Appeals, September 20, 2017.
Printed in Bulletin No. 39, Vol. 102.
Copies Sent
To Applicant
Fire Com'r.
Borough Com'r.

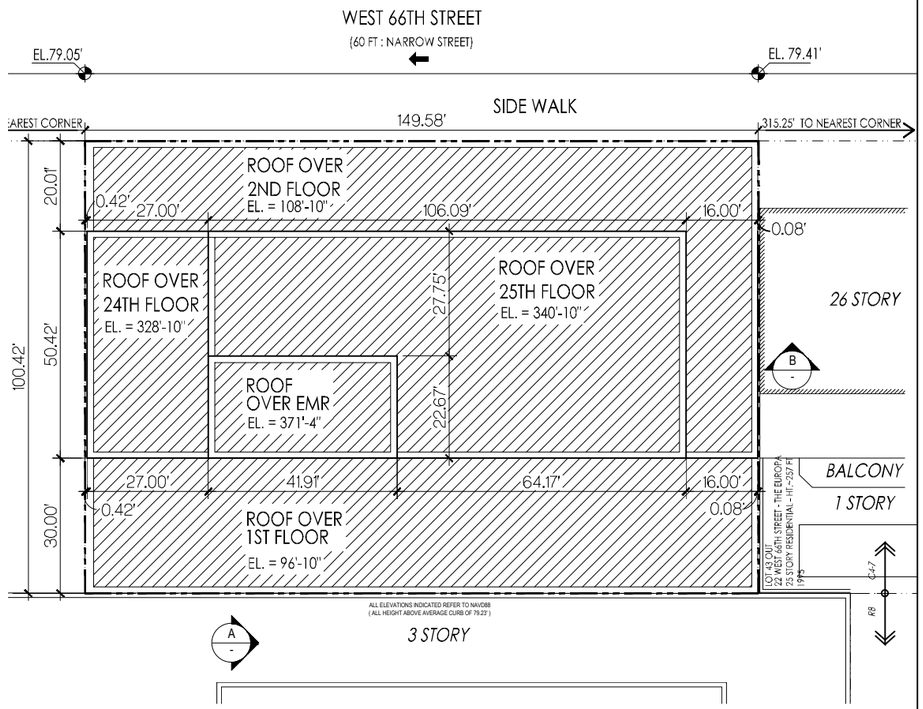
CERTIFIED RESOLUTION

Margery Perlmutter, R.A., Esq.
Chair/Commissioner of the Board

R. 000254

PLANS

SITE PLAN
Scale: 1/32" = 1'-0"



ZONING CONSIDERATION

ZONE	C4-7 / R10 Eq.	Map 8D, Special Lincoln Square District Subdistrict A
SITE AREA	15,021 SF	Block: 1118, Lot: 45, 46, 47, 48
MAX. BASE FAR	10	
MAX. BASE ZONING FLOOR AREA	150,210 SF	
INCLUSIONARY HOUSING INCREASE	20% 30,042 SF	ZR 82-32 (a)
TOTAL ALLOW. ZONING FLOOR AREA	180,252 SF	
PERMITTED COMMERCIAL FLOOR AREA	100,000 SF	ZR 82-31
MAXIMUM TOWER COVERAGE	45% 6,759 SF	ZR 23-65
MINIMUM TOWER COVERAGE	30% 4,506 SF	ZR 82-36 (a) (2)
MAXIMUM STREET WALL	85 FT	
MINIMUM SETBACK ABOVE STREETWALL	20 FT	NARROW STREET. ZR 82-36 (b)
MINIMUM BULK DISTRIBUTION MINIMUM FLOOR AREA BELOW 150 FT.	60% 108,151 SF	BELOW 150 FT. ZR 82-34

LEGEND

C4-7/ R-10 EQUIVALENT -
(SPECIAL LINCOLN SQUARE
DISTRCT - SUB DISTRICT A)

PROPOSED BUILDING

ZONING LOT

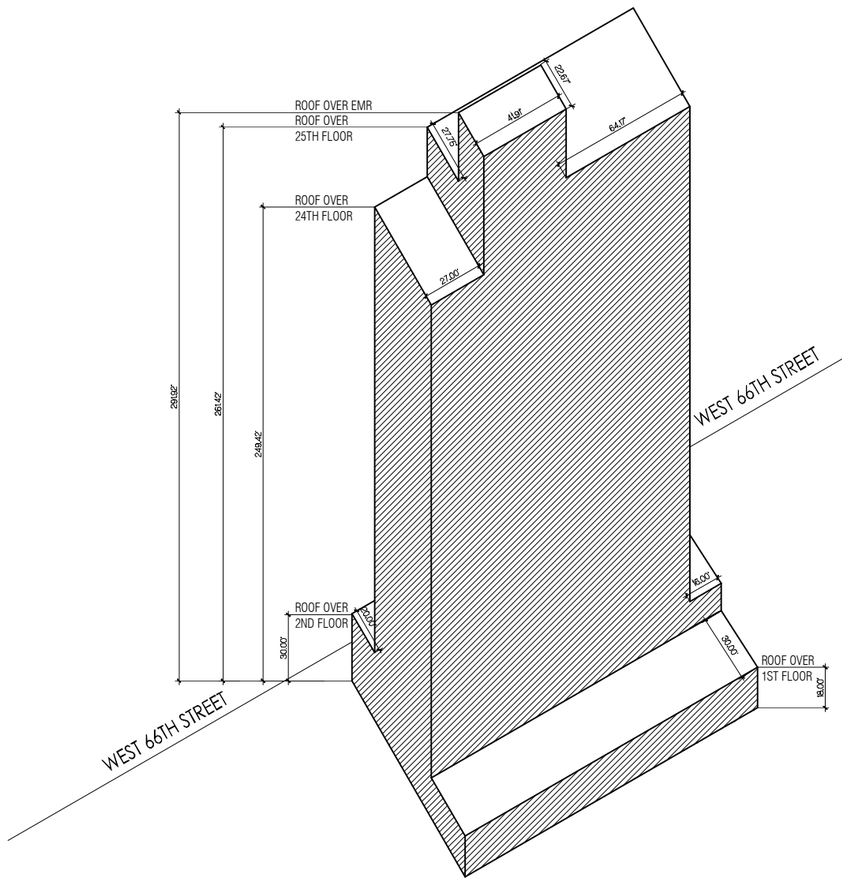
AXONOMETRIC DIAGRAM
SCALE: 1/64" = 1'-0"

STANDARD SETBACK REQUIREMENT AS PER ZR 82-36 (b):

20' MINIMUM SETBACK ABOVE STREETWALL

REQUIREMENT SETBACK:

FRONT: 20'-0"
REAR: 30'-0"
SIDE: NOT REQUIRED



NYC Buildings

ZD1 Zoning Diagram

Location Information

House No(s) 36
Street Name West 66th Street

Borough Manhattan
Block 1118
Lot 45
Bin 108168

For additional zoning characteristics, see Section 12 of the PW1.

Falsification of any statement is a misdemeanor and is punishable by a fine or imprisonment, or both. It is unlawful to give to a city employee, or for a city employee to accept, any benefit, monetary or otherwise, either as a gratuity for properly performing the job or in exchange for special consideration. Violation is punishable by imprisonment or fine or both. I understand that if I am found after hearing to have knowingly or negligently made false statement or to have knowingly or negligently falsified or allowed to be falsified any certificate, form, signed statement, application, report or certification of the correction of a violation required under the provisions of this code or of a rule of any agency, I may be barred from filing further applications or documents with the Department.

NAME (PLESE PRINT)
Luigi P. Russo

SIGNATURE DATE

REGISTERED ARCHITECT LUIGI P. RUSSO No. 020741 STATE OF NEW YORK

P.E/R.A. SEAL (APPLY SEAL; SIGN AND DATE OVER SEAL)

Internal Use Only

BIS Doc # _____

PLAN EXAMINERS SIGN AND DATE

R. 000256

Buildings

ZD1 Zoning Diagram

Must be typewritten.
Sheet 1 of 2

1 Applicant Information *Required for all applications.*

Last Name Russo | First Name Luigi | Middle Initial

Business Name SLCE Architects, LLP | Business Telephone (212) 979-8400

Business Address 1359 Broadway, 14th Floor | Business Fax (212) 979-8387

City New York | State NY | Zip 10018 | Mobile Telephone

E-Mail lrusso@slcearch.com | License Number 020741

2 Additional Zoning Characteristics *Required as applicable.*

Dwelling Units | Parking area | sq. ft. | Parking Spaces: Total | Enclosed

3 BSA and/or CPC Approval for Subject Application *Required as applicable.*

Board of Standards & Appeals (BSA)

- ☐ Variance — Cal. No. _____ — Authorizing Zoning Section 72-21
- ☐ Special Permit — Cal. No. _____ — Authorizing Zoning Section _____
- ☐ General City Law Waiver — Cal. No. _____ — General City Law Section _____
- ☐ Other — Cal. No. _____

City Planning Commission (CPC)

- ☐ Special Permit — ULURP No. _____ — Authorizing Zoning Section _____
- ☐ Authorization — App. No. _____ — Authorizing Zoning Section _____
- ☐ Certification — App. No. _____ — Authorizing Zoning Section _____
- ☐ Other — App. No. _____

4 Proposed Floor Area *Required for all applications. One Use Group per line.*

Floor Number	Building Code Gross Floor Area (sq. ft.)	Use Group	Zoning Floor Area (sq. ft.) Residential	Community Facility	Commercial	Manufacturing	FAR
SC1	15,021		-				
CEL	15,021		-	-			
001	14,962		6,161	3,299	5,442		0.99
002	10,492			10,492			0.70
003	6,684		6,429				0.43
004	6,684		6,429				0.43
005	6,684		6,429				0.43
006	6,684		6,429				0.43
007	6,684		6,429				0.43
008	6,684		6,429				0.43
009	6,684		6,429				0.43
010	6,684		6,429				0.43
011	6,684		6,429				0.43

ZD1 Sheet 2 of 2

4 Proposed Floor Area *Required for all applications. One Use Group per line.*

Floor Number	Building Code Gross Floor Area (sq. ft.)	Use Group	Zoning Floor Area (sq. ft.) Residential	Community Facility	Commercial	Manufacturing	FAR
012	6,684		6,429				0.43
013	6,684		6,429				0.43
014	6,684		6,429				0.43
015	6,684		6,429				0.43
016	6,684		6,429				0.43
017	6,684		6,429				0.43
018	6,684		6,429				0.43
019	6,684		6,429				0.43
020	6,684		6,429				0.43
021	6,684		6,429				0.43
022	6,684		6,429				0.43
023	6,684		6,429				0.43
024	6,684		6,429				0.43
025	5,633		5,424				0.36
ROF	956		-				
BULKHEAD	956		-				
Totals	210,089		153,023	13,791	5,442		11.47

Total Zoning Floor Area 172,256

07/09

R. 000257

2019-89-A 05/08/2019

DEPT OF BLDGS 121190200 Job Number ES555372378 Scan Code

ZONING CALCULATIONS

ZONING DISTRICT : C4-7 (R-10 EQUIVALENT)
R8
SPECIAL LINCOLN SQUARE DISTRICT
SUBDISTRICT A
MAP: 8C
BLOCK: 1118
LOT: 14, 45, 46, 47, 48 & 52

LOT AREA: C4-7 DISTRICT = 35,105 SF
R8 DISTRICT = 19,582 SF
TOTAL LOT AREA = 54,687 SF

NO PARKING REQUIRED WITHIN MANHATTAN CORE AS PER ZR 13-10, NONE PROVIDED

STREET TREE PLANTING AS PER ZR 26-41 & 33-03

4) ZONING FLOOR AREA

a. Floor Area Permitted

C4-7 District (R10 equivalent)

33-122	Commercial	10 FAR	351,050.00 SF
33-123	Community Facility	10 FAR	351,050.00 SF
23-152, 23-16	Residential	10 FAR	351,050.00 SF
23-154	Inclusionary Bonus (see below)	2 FAR	70,210.00 SF
35-31	Res. with Inclusionary (see below)	12 FAR	421,260.00 SF
	Max. Total		**421,260.00 SF**

R8 District

23-151	Community Facility	6.5 FAR	127,283.00 SF
24-11	Residential (See HF Calcs. Z-013)	5.92 FAR	115,925.44 SF
	Max. Total	6.5 FAR	**127,283.00 SF**

Total All Districts

Commercial	351,050.00 SF
Community Facility	478,333.00 SF
Residential w/ Inclusionary	537,185.44 SF
Max. Total	**548,543.00 SF**

b. Inclusionary Housing Bonus in C4-7

23-154	Base Residential	10 FAR	351,050.00 SF
	Max. Inclusionary Bonus	2 FAR	70,210.00 SF
	Max. Residential with Inclusionary	12 FAR	421,260.00 SF
	Low Income Floor Area Provided		70,210.00 SF
	Off-site, see HPD Certificates and Table 1 on Z-001		
	Base Residential		351,050.00 SF
	Actual Inclusionary Bonus		70,210.00 SF
	Actual Residential with Inclusionary		421,260.00 SF

c. Floor Area Proposed

C4-7 District (R10 equivalent)

Existing Lot 52

Commercial	43,053.00 SF
(See Alt. 1 #120422729)	

Proposed

Community Facility	6,350.89 SF
Residential	371,855.27 SF
Total	378,206.16 SF

C4-7 Total

Commercial	43,053.00 SF
Community Facility	6,350.89 SF
Residential	371,855.27 SF
Total	**421,259.16 SF**

R8 District

Proposed / R8 Total

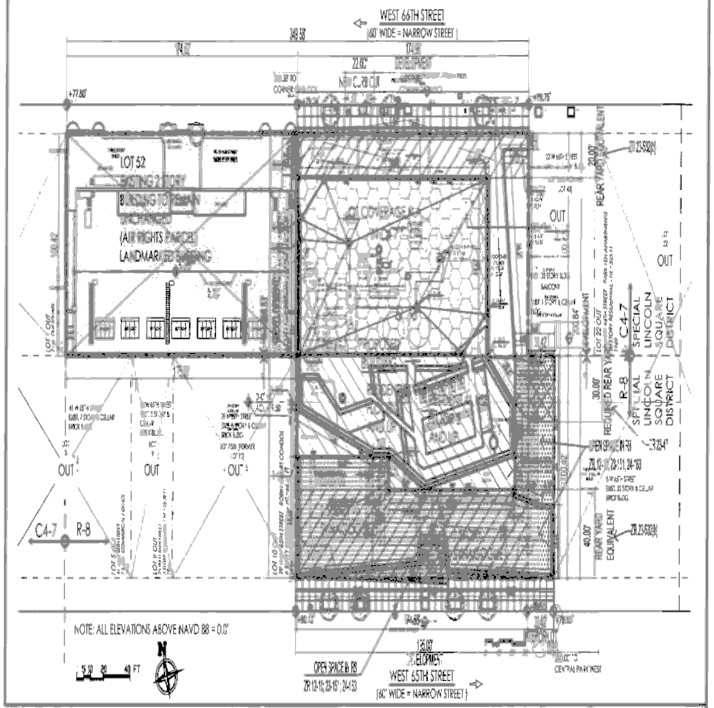
Community Facility	16,054.60 SF
Residential	111,227.78 SF
Total	**127,282.38 SF**

Total both Zones

Commercial	43,053.00 SF
Community Facility	22,405.49 SF
Residential	483,083.05 SF
Total	**548,541.54 SF**

SITE PLAN

Scale: 1/64" = 1'-0"



RESIDENTIAL FAR CALCULATIONS IN R8

12-10 Open Space shall not be included in Lot Coverage

23-151 Residential

Height Factor for Residential FAR

a. H.F. for FAR = Total Floor Area / Total Lot Coverage

H.F. for FAR = 127,282 SF / 8,899 SF = 14

F.A.R. @ H.F. 14 = 5.92

OPEN SPACE CALCULATIONS IN R8

23-151 a. Height Factor for OSR

24-163 H.F. for OSR = Residential FAR Residential Lot Coverage

H.F. for OSR = 111,228 SF / 8,899 SF = 12

b. Required Open Space

Open Space Ratio @ H.F. 12 = 9.2 %

Min. Open Space = 111,228 X 0.092 = 10,233 SF

c. Open Space Provided = 10,635 SF Complies

d. Open Space at Grade

12-10 Open space at grade shall be accessible and usable by all residential occupants.

e. Open Space on Roof

12-10 - Open Space on roof in R8 need not be accessible

12-10 - No dimension less than 25' except that area adjoining street line or rear yard min. depth 9' and max. length min. 2 times depth (or full width of zoning lot or 50', whichever is less).

24-16 Open Space permitted on roof of community facility

COMMUNITY FACILITY COVERAGE IN R8

24-11 Max. 65% Community Facility Coverage in R8 Zone

19,582 SF X 65 % = 12,728 SF

Provided 0 SF Complies

24-12 Community Facility use below 23' may be excluded from Lot Coverage

LEGEND

- EXISTING BUILDING
- PROPOSED BUILDING
- REAR YARD EQUIVALENT
- REQUIRED REAR YARD
- OPEN SPACE AT ROOF IN R8
- OPEN SPACE AT GRADE IN R8
- RESIDENTIAL COVERAGE IN R8
- TOWER COVERAGE IN C4-7
- ZONING LOT LINE
- STREET TREE
- SKY EXPOSURE PLANE
- PROPERTY LINE
- TCB TOP OF BEAM WITHIN NON-OCCUPIABLE SPACE

NYC Buildings

ZD1 Zoning Diagram

Submitted to resolve objections stated in a notice of intent to revoke issued pursuant to rule 101-15.
☐ YES ☒ NO

Location Information

House No(s) 36
Street Name West 66th Street
Borough Manhattan
Block 1118
Lot 45
Bin 1028168

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NAME (PRINT) Luigi P. R...

SIGNATURE DATE

REGISTERED ARCHITECT ... STATE OF NEW YORK

P.E./R.A. SEAL (APPLY SEAL; SIGN AND DATE OVER SEAL)

Internal Use Only

BIS Doc # _____

PLAN EXAMINERS SIGN AND DATE

R. 000258

2019-89-A 05/08/2019

ZONING CALCULATIONS

HEIGHT & SETBACK IN BOTH ZONES

35-21 / 23-641 Maximum Height of Wall and Required Setbacks
20' minimum setback above 85'
2.7:1 Sky Exposure Plane

TOWER IN C4-7

a.	Lot Area in C4-7		35,105.00 SF
82-36 (a) b.	Max. Tower Coverage Permitted	35,105.00 SF X 0.4 =	14,042.00 SF
c.	Min. Tower Coverage Permitted	35,105.00 SF X 0.3 =	10,531.50 SF
d.	Proposed Tower at floors 7-15		11,579.52 SF Complies
	Proposed Tower at floor 16		10,644.64 SF Complies
	Proposed Tower at floor 17		10,770.66 SF Complies
	Proposed Tower at floor 18		11,092.68 SF Complies
	Proposed Tower at floor 19		11,206.89 SF Complies
	Proposed Tower at floors 20-33		11,206.57 SF Complies
	Proposed Tower at floors 34		11,206.51 SF Complies
	Proposed Tower at floors 35		11,183.32 SF Complies
	Proposed Tower at floors 36		11,156.28 SF Complies
	Proposed Tower at floors 37		11,127.40 SF Complies
	Proposed Tower at floor 38		11,097.02 SF Complies
	Proposed Tower at floor 39		11,064.13 SF Complies
	Proposed Tower at floor 40		11,028.24 SF Complies
	Proposed Tower at floor 41		10,538.00 SF Complies
e.	Minimum Setback 20' above 85'		
	Complies		

TOP 40' OF TOWER

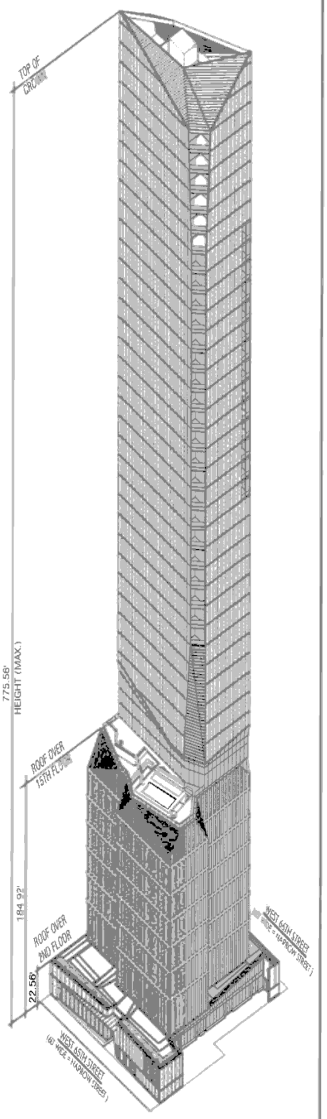
82-36 (a) The highest 4 stories of the tower or 40 feet, whichever is less, may cover less than 30% of the lot area if the GFA of each story does not exceed 80% of GFA of the story directly below it.

Proposed tower at 42nd Floor, Bulkhead (Ht. 752.73')		8,311.00 SF
Max. 80% of 41st Floor	80% x 10,538 SF =	8,430.40 SF Complies

BULK DISTRIBUTION BELOW 150' IN HEIGHT

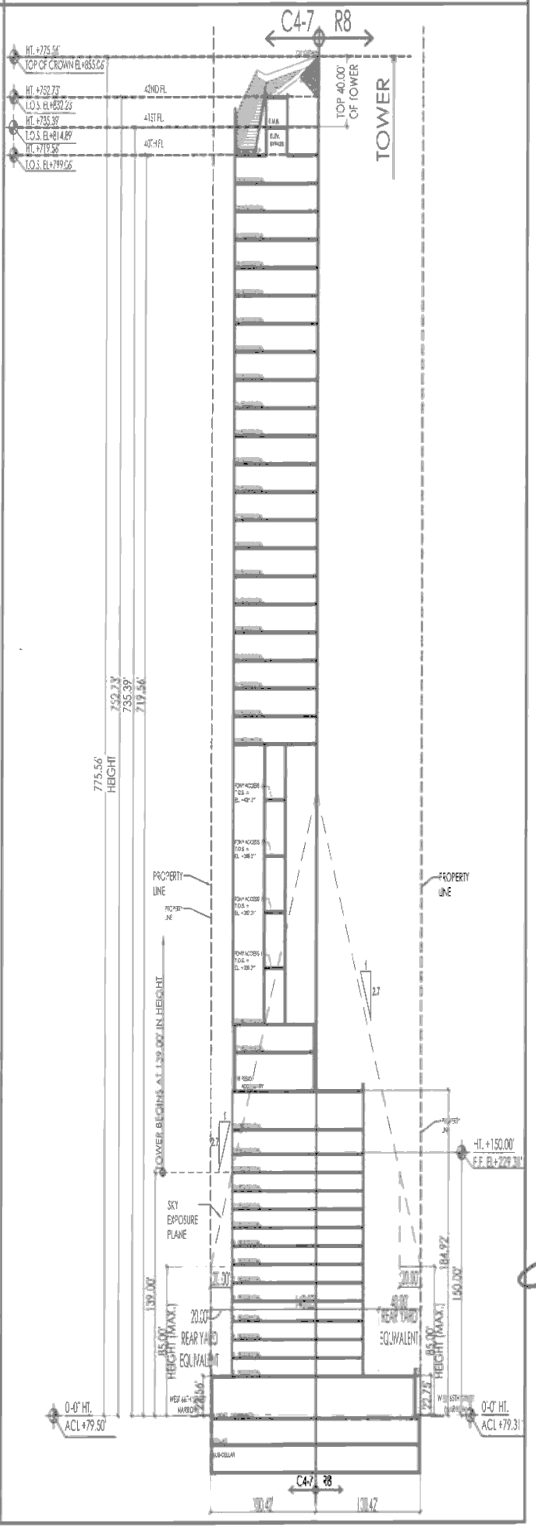
82-34	Total Permitted Floor Area		548,543.00 SF
	Min. Required ZFA Below 150'	548,543.00 SF X 0.6 =	329,125.80
	14th Floor - Finished Floor		
	Floor Elevation		228.98 Ft
	Floor Height in C4-7/ Through Lot Portion 1		149.48 Ft
	Floor Height in R8/ Through Lot Portion 2		149.67 Ft
	Provided:		
	Existing Building		43,053.00 SF
	New Building Floors 1-14 (See Floor Area Table)		286,076.04 SF
	Total Below 150'		329,129.04 SF Complies

AXONOMETRIC DIAGRAM
Scale: NTS



LEGEND
— — SKY EXPOSURE PLANE
PROPERTY LINE

SECTION DIAGRAM
Scale: NTS



NYC Buildings

ZD1 Zoning Diagram

Submitted to resolve objections stated in a notice of intent to revoke issued pursuant to rule 101-15.
☐ YES ☒ NO

Location Information

House No(s) 36
Street Name West 66th Street
Borough Manhattan
Block 1118
Lot 45
Bin 1028168

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NAME (PLEASE PRINT) Luigi P. [illegible]
SIGNATURE DATE

REGISTERED ARCHITECT LUIGI P. [illegible] No. 035741 STATE OF NEW YORK

P.E./R.A. SEAL (APPLY SEAL; SIGN AND DATE OVER SEAL)

Internal Use Only

BIS Doc # _____

PLAN EXAMINERS SIGN AND DATE

R. 000259

NYC Buildings

ZD1 Zoning Diagram

Must be typewritten.
Sheet 2 of 2

ZD1 Sheet 2 of 2

1 Applicant Information *Required for all applications.*

Last Name Russo | First Name Luigi | Middle Initial
Business Name SLCE Architects, LLP | Business Telephone (212) 979-8400
Business Address 1359 Broadway, 14th Floor | Business Fax (212) 979-8387
City New York | State NY | Zip 10018 | Mobile Telephone
E-Mail lrusso@slcearch.com | License Number 020741

2 Additional Zoning Characteristics *Required as applicable.*

Dwelling Units 127 | Parking area sq. ft. | Parking Spaces: Total | Enclosed

3 BSA and/or CPC Approval for Subject Application *Required as applicable.*

Board of Standards & Appeals (BSA)

- ☐ Variance — Cal. No. _____ — Authorizing Zoning Section 72-21
- ☐ Special Permit — Cal. No. _____ — Authorizing Zoning Section _____
- ☐ General City Law Waiver — Cal. No. _____ — General City Law Section _____
- ☐ Other — Cal. No. _____

City Planning Commission (CPC)

- ☐ Special Permit — ULURP No. _____ — Authorizing Zoning Section _____
- ☐ Authorization — App. No. _____ — Authorizing Zoning Section _____
- ☐ Certification — App. No. _____ — Authorizing Zoning Section _____
- ☐ Other — App. No. _____

4 Proposed Floor Area *Required for all applications. One Use Group per line.*

Floor Number	Building Code Gross Floor Area (sq. ft.)	Use Group	Zoning Floor Area (sq. ft.) Residential	Community Facility	Commercial	Manufacturing	FAR
SUB	27,751.62	2B	0				0
SUB	9,362.04	4A		0			0
CEL	27,721.93	2B	0				0
CEL	9,391.64	4A		0			0
001	9,370.60	2	8,923.74				0.16
001	22,405.49	4A		22,405.49			0.41
MEZ1	1,691.49	2	910.32				0.02
MEZ1	2,020.23	4A		0			0
002	20,478.30	2	19,507.39				0.36
003	20,478.30	2	19,509.56				0.36
004	20,478.30	2	19,509.56				0.36
005	20,478.30	2	19,509.56				0.36
006	20,478.30	2	19,531.26				0.36

4 Proposed Floor Area *Required for all applications. One Use Group per line.*

Floor Number	Building Code Gross Floor Area (sq. ft.)	Use Group	Zoning Floor Area (sq. ft.) Residential	Community Facility	Commercial	Manufacturing	FAR
007-008	40,956.60	2	39,062.52				0.71
009-014	122,869.80	2	117,206.64				2.14
015	17,402.80	2	0				0
016	10,644.64	2B	7,746.54				0.14
017	6,637.02	2	0				0
018	10,240.55	2	0				0
FDNY AC 1	334.25	2	334.25				0.01
FDNY AC 2	334.25	2	334.25				0.01
FDNY AC 3	334.25	2	334.25				0.01
FDNY AC 4	334.25	2	334.25				0.01
019	10,916.98	2	0				0
020-026	78,459.99	2	75,739.86				1.38
027-031	56,042.85	2	54,076.90				0.99
032-033	22,417.14	2	21,631.76				0.40
034	11,208.58	2	10,883.73				0.20
035	11,183.38	2	10,858.54				0.20
036	11,156.28	2	10,831.50				0.20
037	11,127.40	2	10,802.62				0.20
038	11,097.02	2	10,747.10				0.20
039	10,626.00	2	4,756.95				0.09
040	928.55	2	0				0
041	927.82	2	0				0
Totals	658,286.81		483,083.05	22,405.49			9.24

Total Zoning Floor Area 505,488.54

07/09

R. 000260

DEPT OF BLDGS 121190200 Job Number

ES636516048 Scan Code

ZONING CALCULATIONS

ZONING DISTRICT : C4-7 (R-10 EQUIVALENT)
R8
SPECIAL LINCOLN SQUARE DISTRICT
SUBDISTRICT A
MAP: 8C
BLOCK: 1118
LOT: 14, 45, 46, 47, 48 & 52

LOT AREA: C4-7 DISTRICT = 35,105 SF
R8 DISTRICT= 19,582 SF
TOTAL LOT AREA = 54,687 SF

NO PARKING REQUIRED WITHIN MANHATTAN CORE AS PER ZR 13-10, NONE PROVIDED

STREET TREE PLANTING AS PER ZR 26-41 & 33-03

4) ZONING FLOOR AREA

a Floor Area Permitted

C4-7 District (R10 equivalent)

33-122	Commercial	10 FAR	351,050.00 SF
33-123	Community Facility	10 FAR	351,050.00 SF
23-152, 23-16	Residential	10 FAR	351,050.00 SF
23-154	Inclusionary Bonus (see below)	2 FAR	70,210.00 SF
35-31	Res. with Inclusionary (see below)	12 FAR	421,260.00 SF
	Max. Total		**421,260.00 SF**

R8 District

23-151	Community Facility	6.5 FAR	127,283.00 SF
24-11	Residential (See I.H. Calcs. Z 012)	5.92 FAR	115,925.44 SF
	Max. Total	6.5 FAR	**127,283.00 SF**

Total All Districts

Commercial	351,050.00 SF
Community Facility	478,333.00 SF
Residential w/ Inclusionary	537,185.44 SF
Max. Total	**548,543.00 SF**

b Inclusionary Housing Bonus in C4-7

23-154	Base Residential	10 FAR	351,050.00 SF
	Max. Inclusionary Bonus	2 FAR	70,210.00 SF
	Max. Residential with Inclusionary	12 FAR	421,260.00 SF
	Low Income Floor Area Provided		70,210.00 SF
	Off site, see HPD Certificates and Table 1 on Z 001		
	Base Residential		351,050.00 SF
	Actual Inclusionary Bonus		70,210.00 SF
	Actual Residential with Inclusionary		421,260.00 SF

c Floor Area Proposed

C4-7 District (R10 equivalent)

Existing Lot 52	
Commercial	43,053.00 SF
(See Alt. 1 #120427279)	
Proposed	
Community Facility	6,285.22 SF
Residential	371,920.68 SF
Total	378,205.90 SF
C4-7 Total	
Commercial	43,053.00 SF
Community Facility	6,285.22 SF
Residential	371,920.68 SF
Total	**421,258.90 SF**

R8 District

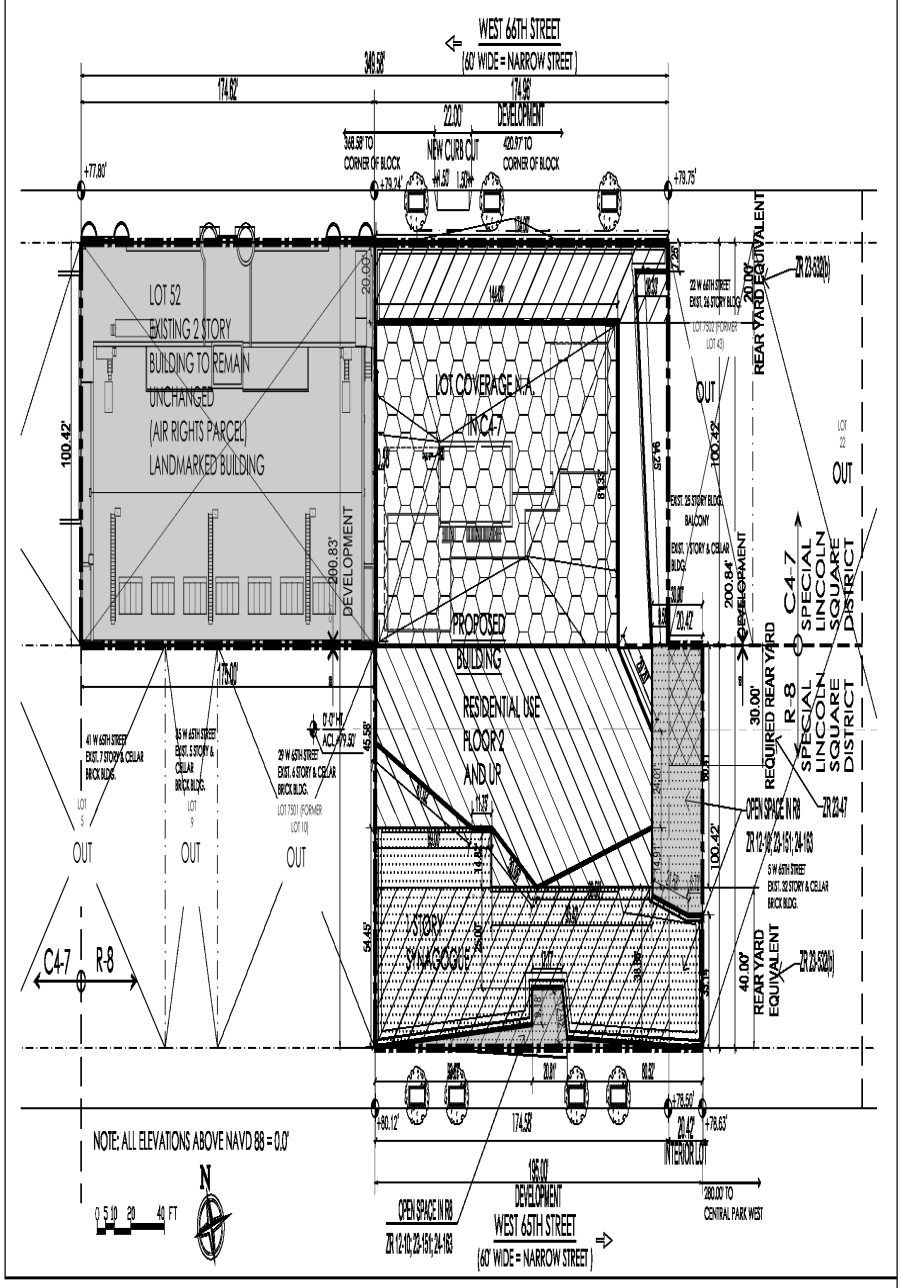
Proposed / R8 Total	
Community Facility	16,048.87 SF
Residential	111,717.62 SF
Total	**127,276.49 SF**

Total both Zones

Proposed Both Zones Total	
Community Facility	22,344.09 SF
Residential	483,138.30 SF
Total	**505,482.39 SF**
Commercial	43,053.00 SF
Proposed Both Zones Total	505,482.39 SF
Total	**548,535.39 SF**

SITE PLAN

Scale: 1/64" = 1'-0"



RESIDENTIAL FAR CALCULATIONS IN R8

12-10 Open Space shall not be included in Lot Coverage

23-151 Residential

Height Factor for Residential FAR

a. H.F. for FAR = Total Floor Area / Total Lot Coverage

H.F. for FAR = 127,276 SF / 8,899 SF = 14

F.A.R. @ H.F. 14 = 5.92

OPEN SPACE CALCULATIONS IN R8

23-151 a. Height Factor for OSR

24-153 H.F for OSR = Residential FA/ Resicental Lot Coverage

H.F for OSR = 111,218 SF / 8,899 SF = 12

a. Required Oper Space

Open Space Ratio @ H.F. 12 = 9.2 %

Min. Open Space = 111,218 X 0.092 = 10,232 SF

c. Open Space Provided = 10,635 SF Complies

d. Open Space at Grade

12-10 Open space at grade shall be accessible and usable by all residential occupants.

e. Open Space on Roof

12-10 - Open Space on roof in R8 need not be accessible

12-10 - No dimension less than 25' except that area adjoining street line or rear yard min. depth 9' and max. height min. 2 times depth (or full width of zoning lot or 50', whichever is less).

24-15 Open Space permitted on roof of community facility

COMMUNITY FACILITY COVERAGE IN R8

24-11 Max. 65% Community Facility Coverage in R8 Zone

19,582 SF X 65 % = 12,728 SF

Provided 0 SF Complies

24-12 Community Facility use below 23' may be excluded from Lot Coverage

LEGEND

- EXISTING BUILDING
- PROPOSED BUILDING
- REAR YARD EQUIVALENT
- REQUIRED REAR YARD
- OPEN SPACE AT ROOF IN R8
- OPEN SPACE AT GRADE IN R8
- RESIDENTIAL COVERAGE IN R8
- TOWER COVERAGE IN C4-7
- ZONING LOT LINE
- STREET TREE
- SKY EXPOSURE PLANE
- PROPERTY LINE

Buildings

ZD1 Zoning Diagram

Submitted to resolve objections stated in a notice of intent to revoke issued pursuant to rule 101-15.
☐ YES ☒ NO

Location Information

House No(s) 36
Street Name West 66th Street
Borough Manhattan
Block 1118
Lot 45
Bin 1028168

Falsification of any statement is a misdemeanor and is punishable by a fine or imprisonment, or both. It is unlawful to give to a city employee, or for a city employee to accept, any benefit, monetary or otherwise, either as a gratuity for properly performing the job or in exchange for special consideration. Violation is punishable by imprisonment or fine or both. I understand that if I am found after hearing to have knowingly or negligently made false statement or to have knowingly or negligently falsified or allowed to be falsified any certificate, form, signed statement, application, report or certification of the correction of a violation required under the provisions of this code or of a rule of any agency, I may be barred from filing further applications or documents with the Department.

NAME (PLEASE PRINT) Luigi P. Russo
SIGNATURE DATE

REGISTERED ARCHITECT LUIGI P. RUSSO No. 028731 STATE OF NEW YORK

P.E/R.A. SEAL (APPLY SEAL, SIGN AND DATE OVER SEAL)

Internal Use Only

BIS Doc #

PLAN EXAMINERS SIGN AND DATE

R. 000261

ZONING CALCULATIONS

HEIGHT & SETBACK IN BOTH ZONES

Maximum Height of Wall and Required Setbacks
20' minimum setback above 85'
2.7 Sky Exposure Plane

TOWER IN C4-7

a	Lot Area in C4-7		35,106.00 SF
b	Max Tower Coverage Permitted	35,106.00 SF X 0.4	14,042.00 SF
c	Min Tower Coverage Permitted	35,106.00 SF X 0.3	10,531.80 SF
d	Proposed Tower at floors 7-15		11,579.52 SF Complies
	Proposed Tower at floor 16		10,644.64 SF Complies
	Proposed Tower at floor 16 MR		10,760.53 SF Complies
	Proposed Tower at floor 17		11,002.72 SF Complies
	Proposed Tower at floor 18 DNY ACCESS level 1		11,270.18 SF Complies
	Proposed Tower at floor 18 DNY ACCESS level 2		11,270.18 SF Complies
	Proposed Tower at floor 18 DNY ACCESS level 3		11,270.18 SF Complies
	Proposed Tower at floor 18		11,248.18 SF Complies
	Proposed Tower at floor 19 DNY ACCESS level 4		11,211.48 SF Complies
	Proposed Tower at floor 19 DNY ACCESS level 5		11,208.86 SF Complies
	Proposed Tower at floor 19 DNY ACCESS level 6		11,208.86 SF Complies
	Proposed Tower at floor 19		11,208.86 SF Complies
	Proposed Tower at floor 19 DNY ACCESS level 7		11,208.86 SF Complies
	Proposed Tower at floor 19 DNY ACCESS level 8		11,208.86 SF Complies
	Proposed Tower at floors 20-33		11,208.58 SF Complies
	Proposed Tower at floors 34		11,208.86 SF Complies
	Proposed Tower at floors 35		11,183.56 SF Complies
	Proposed Tower at floors 36		11,156.42 SF Complies
	Proposed Tower at floors 37		11,127.46 SF Complies
	Proposed Tower at floor 38		11,096.64 SF Complies
	Proposed Tower at floor 39		11,063.92 SF Complies
	Proposed Tower at Roof (402nd FL)		11,028.28 SF Complies
	Proposed Tower at Bulkhead Roof (41st FL)		10,537.68 SF Complies
e	Maximum Setback 20' above 85'		
	Complies		

TOP 40' OF TOWER

(ZR 35-63 (a)) The highest 4 stories of the tower or 40 feet, whichever is less, may cover less than 30% of the lot area if the CF/A of such story does not exceed 80% of CF/A of the story directly below it

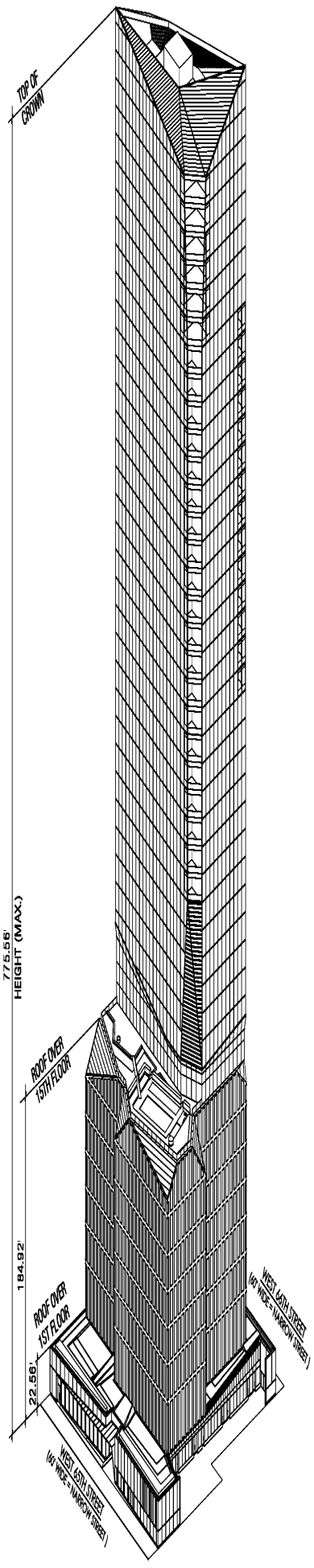
Proposed tower at 2nd Bulkhead Roof (42nd FL) (FL 752.73')		8,311.46 SF
Max 80% of Bulkhead Roof (41st FL)	80% x 10,538 SF	8,430.14 SF Complies

BULK DISTRIBUTION ABOVE 150' IN HEIGHT

(ZR 35-64)	Total Permitted Floor Area		349,343.00 SF
	Min. Required FAR below 150'	349,343.00 SF X 0.6	329,125.80
	14th Floor - Finished Floor		
	Floor Elevation		229.19 FT
	Floor Height in C4-7 Through Lot Portion 1		149.48 FT
	Floor Height in R8B Through Lot Portion 2		149.67 FT
	Provided		
	Existing Building		43,063.00 SF
	New Building Floors 1-14 (See Floor Area Table)		286,078.92 SF
	Total Below 150'		329,141.92 SF Complies

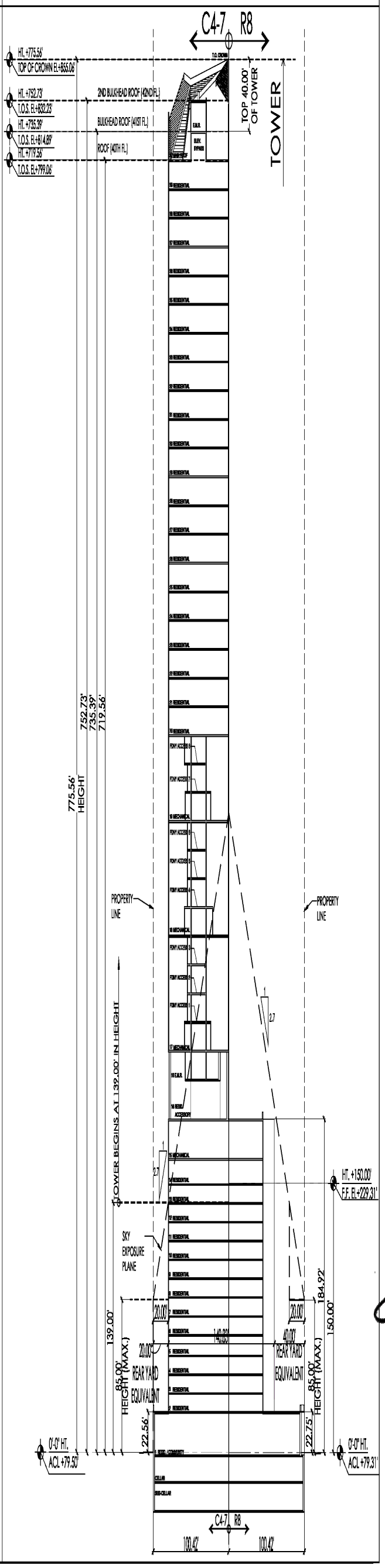
AXONOMETRIC DIAGRAM

Scale: NTS



SECTION DIAGRAM

Scale: NTS



LEGEND

- SKY EXPOSURE PLANE
- PROPERTY LINE

Buildings

ZD1 Zoning Diagram

Submitted to resolve objections stated in a notice of intent to revoke issued pursuant to rule 101-15.
☐YES ☒NO

Location Information

House No(s) 36
Street Name West 66th Street
Borough Manhattan
Block 1118
Lot 45
Bin 1028168

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NAME (PLEASE PRINT) Luigi P. Russo
SIGNATURE DATE

REGISTERED ARCHITECT LUIGI P. RUSSO No. 028751 STATE OF NEW YORK

P.E./R.A. SEAL (APPLY SEAL; SIGN AND DATE OVER SEAL)

Internal Use Only

BIS Doc #

PLAN EXAMINERS SIGN AND DATE

R. 000262

NYC Buildings

ZD1 Zoning Diagram

Must be typewritten.
Sheet 3 of 3

1 Applicant Information *Required for all applications.*

Last Name Russo | First Name Luigi | Middle Initial

Business Name SLCE Architects, LLP | Business Telephone (212) 979-8400

Business Address 1359 Broadway, 14th Floor | Business Fax (212) 979-8387

City New York | State NY | Zip 10018 | Mobile Telephone

E-Mail lrusso@slcearch.com | License Number 020741

2 Additional Zoning Characteristics *Required as applicable.*

Dwelling Units 127 | Parking area sq. ft. | Parking Spaces: Total | Enclosed

3 BSA and/or CPC Approval for Subject Application *Required as applicable.*

Board of Standards & Appeals (BSA)

☐ Variance Cal. No. _____ Authorizing Zoning Section 72-21

☐ Special Permit Cal. No. _____ Authorizing Zoning Section _____

☐ General City Law Waiver Cal. No. _____ General City Law Section _____

☐ Other Cal. No. _____

City Planning Commission (CPC)

☐ Special Permit ULURP No. _____ Authorizing Zoning Section _____

☐ Authorization App. No. _____ Authorizing Zoning Section _____

☐ Certification App. No. _____ Authorizing Zoning Section _____

☐ Other App. No. _____

4 Proposed Floor Area *Required for all applications. One Use Group per line.*

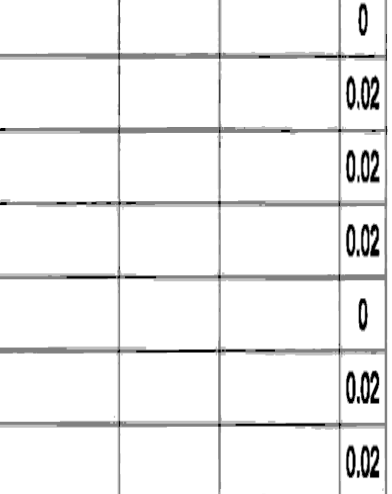
Floor Number	Building Code Gross Floor Area (sq. ft.)	Use Group	Zoning Floor Area (sq. ft.) Residential	Community Facility	Commercial	Manufacturing	FAR
SUB	27,754.56	2	0				0
SUB	9,359.07	4		0			0
CEL	28,108.47	2	0				0
CEL	9,004.88	4		0			0
001	9,384.46	2	8,989.42				0.16
001	22,344.09	4		22,344.09			0.41
MEZ1	1,604.41	2	969.95				0.02
MEZ1	2,002.10	4		0			0
002	20,478.30	2	19,510.36				0.36
003	20,478.30	2	19,515.75				0.36
004	20,478.30	2	19,516.25				0.36
005	20,478.30	2	19,513.47				0.36
006	20,478.30	2	19,526.06				0.36

ZD1 Sheet 3 of 3

4 Proposed Floor Area *Required for all applications. One Use Group per line.*

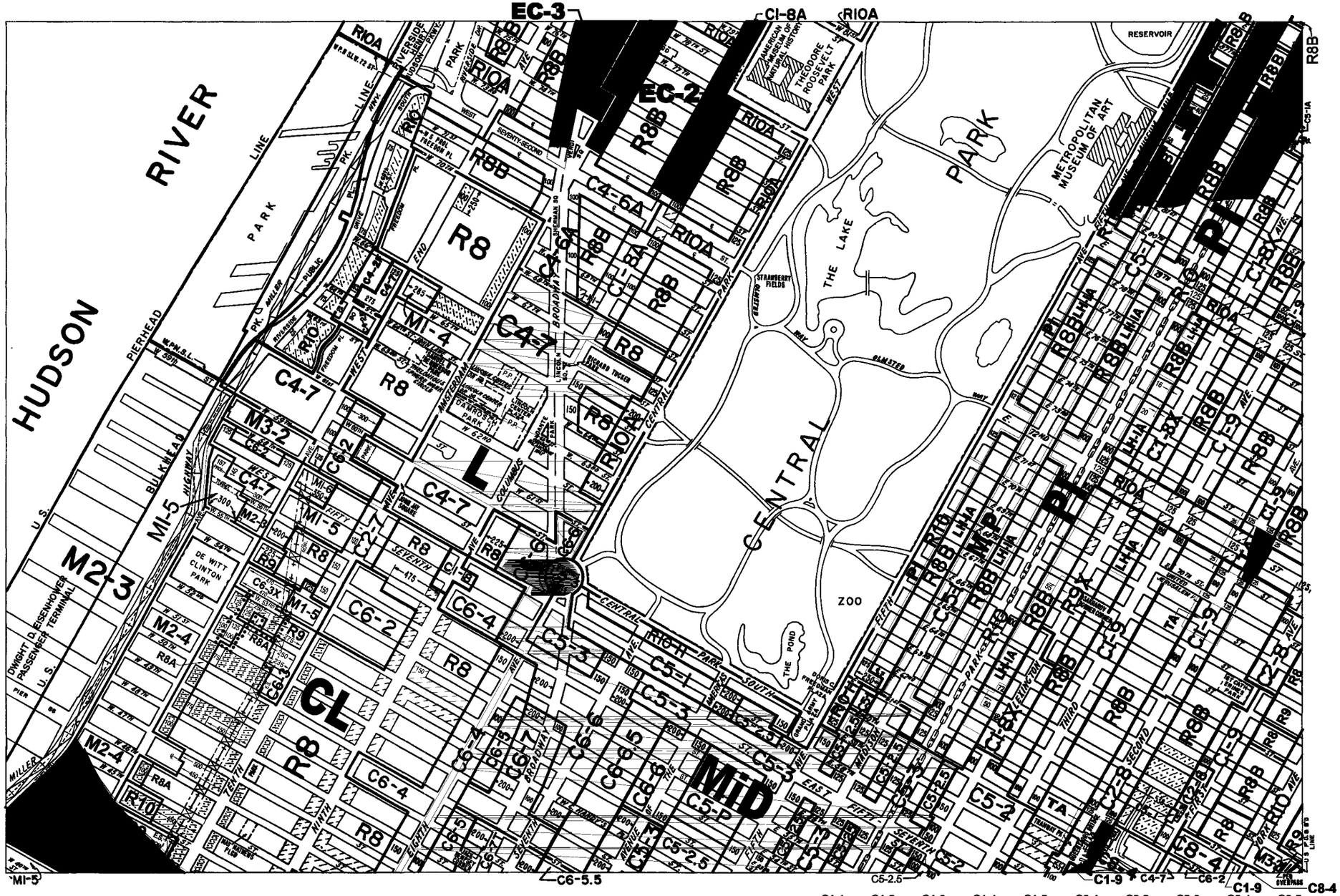
Floor Number	Building Code Gross Floor Area (sq. ft.)	Use Group	Zoning Floor Area (sq. ft.) Residential	Community Facility	Commercial	Manufacturing	FAR
007-008	40,956.60	2	39,052.12				0.71
009-011	61,434.90	2	58,570.35				1.07
012-014	61,434.90	2	58,571.10				1.07
015	20,478.25	2	0				0
016	10,644.64	2	7,899.31				0.14
016 E.M.R.	1,967.77	2	1,279.99				0.02
017	10,216.56	2	0				0
FDNY AC 1	993.13	2	896.07				0.02
FDNY AC 2	993.13	2	892.47				0.02
FDNY AC 3	993.13	2	896.07				0.02
018	10,240.54	2	0				0
FDNY AC 4	993.13	2	892.47				0.02
FDNY AC 5	993.13	2	892.47				0.02
FDNY AC 6	993.13	2	892.47				0.02
019	10,917.09	2	0				0
FDNY AC 7	993.13	2	892.47				0.02
FDNY AC 8	1,317.36	2	1,216.71				0.02
020-026	75,402.50	2	72,769.87				1.33
027-030	43,087.15	2	41,495.43				0.76
031	10,771.79	2	10,372.49				0.19
032-033	21,543.58	2	20,747.98				0.38
034	10,173.91	2	9,849.63				0.18
035	10,667.73	2	10,353.45				0.19
036	11,156.42	2	10,832.14				0.20
037	11,127.45	2	10,803.17				0.20
038	11,098.54	2	10,747.41				0.20
039	10,625.28	2	4,781.38				0.09
ROOF (40)	3,914.45	2	0				0
BH RF (41)	920.79	2	0				0
Totals	669,011.64		483,138.3	22,344.09			9.24

Total Zoning Floor Area	505,482.39



R. 000263 07/09

ZONING MAP



C1-1 C1-2 C1-3 C1-4 C1-5 C2-1 C2-2 C2-3 C2-4 C2-5

NOTE: Where no dimensions for zoning district boundaries appear on the zoning maps, such dimensions are determined in Article VII, Chapter 6 (Location of District Boundaries) of the Zoning Resolution.

ZONING MAP

THE NEW YORK CITY PLANNING COMMISSION

Major Zoning Classifications:

The number(s) and/or letter(s) that follows an **R, C** or **M** District designation indicates use, bulk and other controls as described in the text of the Zoning Resolution.

R – RESIDENTIAL DISTRICT

C – COMMERCIAL DISTRICT

M – MANUFACTURING DISTRICT

SPECIAL PURPOSE DISTRICT
The letter(s) within the shaded area designates the special purpose district as described in the text of the Zoning Resolution.

AREA(S) REZONED

Effective Date(s) of Rezoning:

06–26–2014 C 140181 ZMM

Special Requirements:

For a list of lots subject to CEQR environmental requirements, see APPENDIX C.

For a list of lots subject to "D" restrictive declarations, see APPENDIX D.

For Inclusionary Housing designated areas on this map, see APPENDIX F.

N

MAP KEY

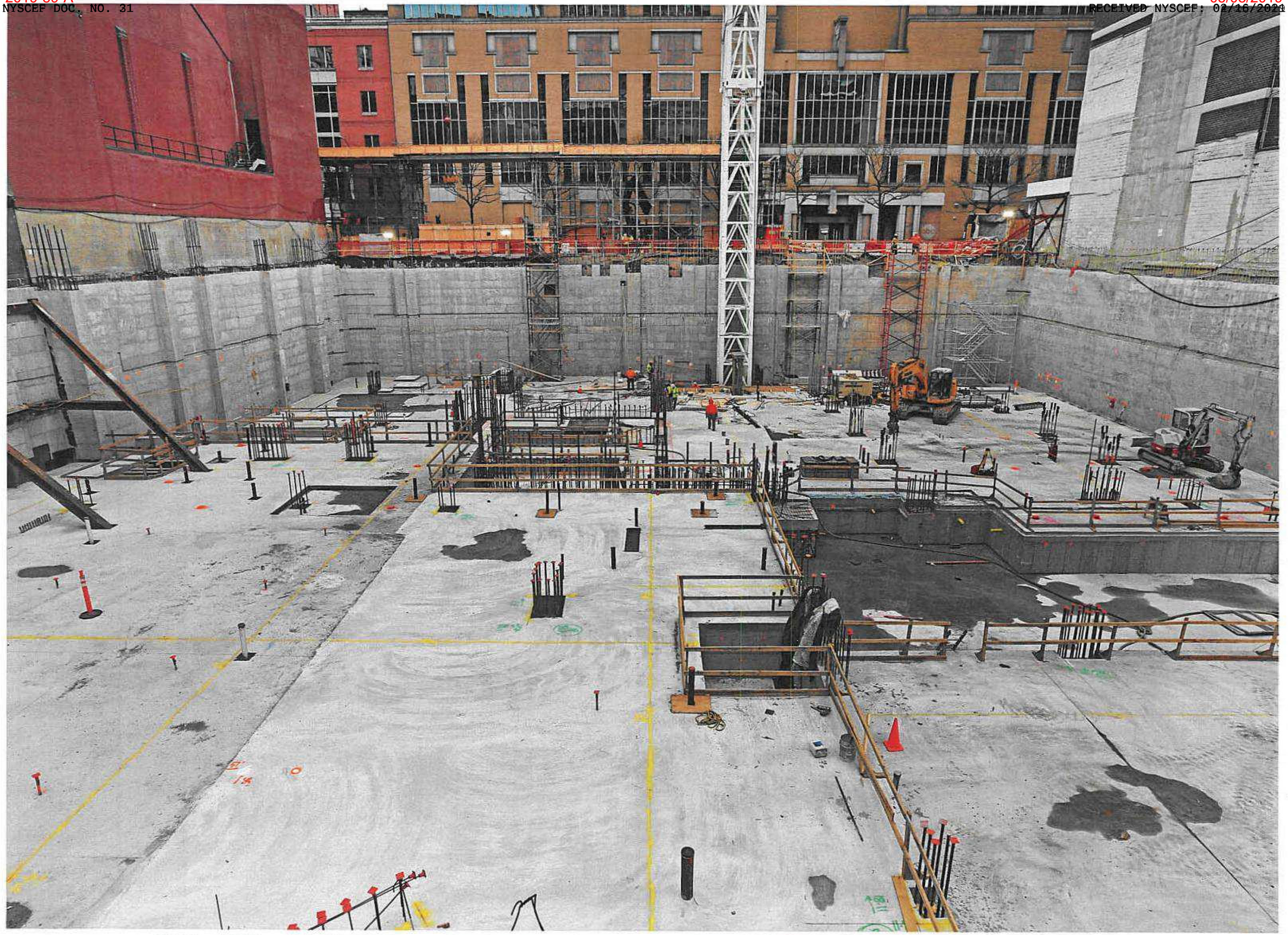
	5d	6b
8a	**8c**	9a
8b	8d	9b

ZONING MAP **8C**

NOTE: Zoning information as shown on this map is subject to change. For the most up-to-date zoning information for this map, visit the Zoning section of the Department of City Planning website: **www.nyc.gov/planning** or contact the Zoning Information Desk at (212) 720-3291.

R. 000265

PHOTOGRAPH



36 West 66th , NY, NY 10023 Date Taken: 4/11/2019 Time: 1:32 PM Image # 2 View Looking: North
Location: South Side of Site Description: Site Overview Photographer: G. Brennan , 100 S. Moger Ave, Mt Kisco, NY

NEW YORK CITY BOARD OF STANDARDS AND APPEALS
----------x

THE CITY CLUB OF NEW YORK, JAMES C.P. BERRY, JAN CONSTANTINE, VICTOR A. KOVNER, AGNES C. McKEON, and ARLENE SIMON,

Appellants,

BSA Cal. No. 2019-

Appeal from Building Permit issued April 11, 2019

Concerning Block 1118, Lot 45

----------x

CORRECTED STATEMENT OF FACTS AND LAW

Preliminary Statement

Appellants, a not-for-profit civic organization and individuals who live near the proposed building, challenge the validity of a building permit issued by the Department of Buildings ("DOB") on April 11, 2019, for a 775-foot residential tower at 36 West 66th Street a/k/a 50 West 66th Street. This tower, now being built by Extell Development Company and West 66th Sponsor LLC ("Extell"), would be the tallest building on the Upper West Side, hundreds of feet higher than contemplated by the City Planning Commission when it enacted the tower-on-base regulations in 1993. Those regulations were supposed to limit buildings to "the low 30 stories" in height. This building would be equivalent in height to a traditional 70-plus story building.

The proposed building violates the City's zoning regulations in two ways: (1) it is based on a methodology for calculating allowable floor space that violates the Bulk Packing Rule, ZR § 82-34, and the Split Lot Rules, ZR §§ 33-48 and 77-02; and (2) it claims an exemption from FAR for 196 vertical feet of purported mechanical space in the mid-

section of the building that is neither "used for mechanical equipment" nor customarily accessory to residential uses, and is therefore illegal. ZR §§ 12-10 and 22-12.

FACTS

A. The Special Lincoln Square District, the Proposed Building, and the Site

The proposed building is in the Special Lincoln Square District, established in 1969 "to guide new growth and uses in a way that would complement the newly sited institutions" of Lincoln Center.[1] The great majority of the District is zoned C4-7 (R10 equivalent), a commercial designation which also allows the highest level of residential density in the City. Towers are allowed in this area.[2] Only a very small portion of the Special District – parts of two blocks comprising 5.3 percent of the District's area – is zoned R8, a lower density residential designation where towers are not allowed. The map below shows the Lincoln Square Special District (the grey area between West 60th and West 68th Streets, not including Columbus Circle and surrounds), and Extell's zoning lot within it (cross-hatched).

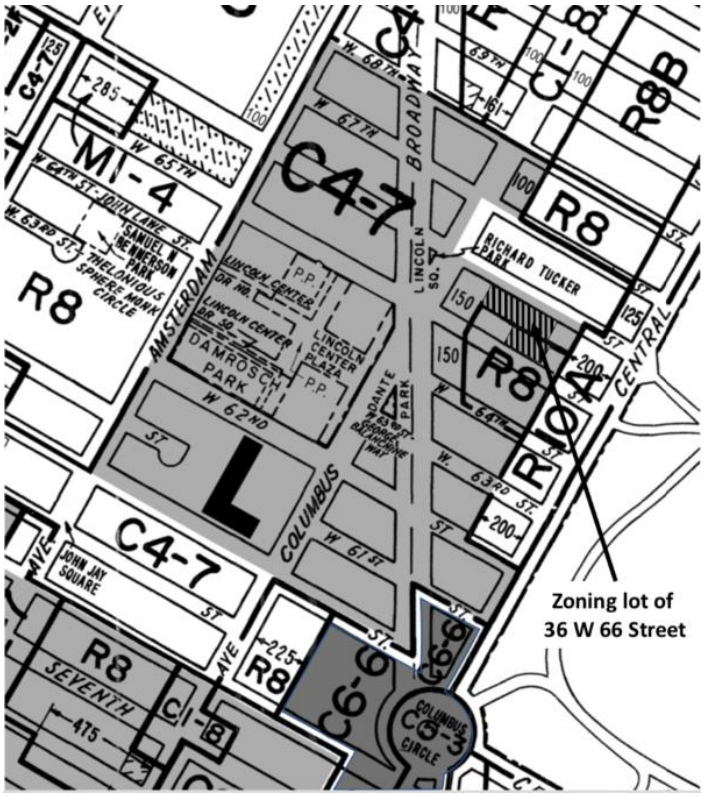
The current zoning rules for the Special District are the result of the tower-on-a-base amendments enacted in 1993, following a Zoning Review conducted by the Department of City Planning[3] and earlier proposals that had suggested two rules to regulate the height of towers: the Bulk Packing Rule and the Tower Coverage Rule. The Department's proposals

[1] CPC Report N 940127(A) ZRM, at 3 (Dec. 20, 1993) ("1993 CPC Report"), at 3 (https://www1.nyc.gov/assets/planning/download/pdf/about/cpc/940127a.pdf) (Exh. A); *see also* CPC Reports CP-20365A, CP-20388A, and CP-20595 (Mar. 19, 1969) (https://www1.nyc.gov/assets/planning/download/pdf/about/cpc/19690319.pdf).

[2] The Zoning Resolution defines a "tower" as a building that, pursuant to ZR §§ 23-65 or 35-64 ("Tower Regulations"), is permitted to break the "sky exposure plane," an imaginary inclined plane drawn from the street line that otherwise limits building height pursuant to the Zoning Resolution.

[3] Dep't of City Planning, Special Lincoln Square District Zoning Review (May 1993) ("1993 DCP Zoning Review") (Exh. B).

were drafted with a view toward regulating six potential development sites that the Zoning Review had identified within the District. All six potential sites were in the highest residential



density (C4-7/R10) portion of the Special District, where towers are allowed. One of the sites was the "ABC assemblage," comprising three lots with small buildings fronting on 66th Street, which now forms part of Extell's development lot. None of the sites identified for potential development was located in the R8 portion of the Special District, where towers are not allowed.

Extell's zoning lot, Block 1118, Lot 45, runs from West 65th to West 66th Street, approximately 300 feet from Central Park, straddling the C4-7/R10 and R8 districts.

Sixty-four percent of the lot area is in the C4-7/R10 district and 36 percent is in the R8 district.[4] The dividing line between the zoning districts runs east-west right through the middle of Extell's zoning lot, with the northern side zoned C4-7/R10 and the southern side zoned R8. The northern portion contains the landmarked ABC Armory, which remains the property of ABC, and is joined to Extell's lot by a zoning lot merger. The southern portion, prior to its purchase by Extell, had been developed at or close to its total allowable FAR with an 11-story building that housed the headquarters of the Jewish Guild for the Blind, now demolished.

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 Extell 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. These spaces are in addition to two mechanical floors at the top, for a total of 229 vertical feet of supposed mechanical spaces, the equivalent of 23 traditional floors.

[4] *See* Extell's 2019 Zoning Diagram, approved Apr. 4, 2019 ("2019 ZD1), at 1 (http://a810-bisweb.nyc.gov/bisweb/BScanJobDocumentServlet?requestid=3&passjobnumber=121190200&passdocnumber=01&allbin=1028168&scancode=ES636516048) (Exh. C).

B. Procedural History

On November 24, 2015, Extell applied for a permit to build an innocuous 25-story, 292-foot-tall residential building with a community facility on four small tax lots along 66th Street.[5] On June 7, 2017, DOB issued a New Building permit for that building, and Extell began construction pursuant to that permit. In fact, Extell never intended to build this building. It was only a stalking horse. Already in April 2015, seven months before it filed for that permit, it had completed plans for a building more than twice the size – the building at issue here.[6] Under the disingenuous cover of its permit for the smaller building, it has been able to work undisturbed for almost two solid years, advancing preliminary construction, secure in the knowledge that the farther it got, the less likely that it would eventually be ordered to comply with zoning. At a public event last year, another prominent developer, Jon Kalikow, celebrated Extell's stalking-horse trick:[7]

> "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.

[5] ZD1 Zoning Diagram, filed Nov. 24, 2015, approved Oct. 24, 2016 ("2016 ZD1") (http://a810-bisweb.nyc.gov/bisweb/BScanJobDocumentServlet?requestid=28&passjobnumber=121190200&passdocnumber=07&allbin=1028168&scancode=ES336402953) (Exh. D).

[6] Extell's Zoning Diagram for the larger building ("2018 ZD1"), approved July 26, 2018, is dated April 15, 2015. *See* http://a810-bisweb.nyc.gov/bisweb/BScanJobDocumentServlet?requestid=4&passjobnumber=121190200&passdocnumber=01&allbin=1028168&scancode=ES555372378 (Exh. D)

[7] 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/) (Exh. E).

Bait and switch indeed.

On December 13, 2017, Extell filed its plans for the 775-foot building.[8] On July 26, 2018, DOB approved Extell's Zoning Diagram for that building. On September 9, 2018, Landmark West! ("LW!") and 10 West 66th Street Corporation, filed a Zoning Challenge with DOB.[9] The challengers raised two issues that remain of concern to Appellants: first, that Extell's building design relied on an illegal methodology for applying the Bulk Packing and Tower Coverage Rules; and second, that the building as then proposed had an enormous 160-foot-high void, an alleged mechanical space that was illegal under the Zoning Resolution.

On November 19, 2018, DOB rejected the challenge on all points.[10] With respect to the 160-foot void, DOB simply stated, "The Zoning Resolution does not prescribe a height limit for building floors."

With respect to the Bulk Packing Rule, DOB's response was more extensive. The challengers had raised the fact that Extell had calculated the bulk below 150 feet based on the entire zoning lot while calculating tower coverage based only on the C4-7/R10 portion of the lot. They argued that the Bulk Packing and Tower Coverage Rules must both apply to the same area. DOB's response followed the reasoning of Extell's counsel David Karnovsky, now in private practice but for many years previous General Counsel at the Department of City

[8] http://a810-bisweb.nyc.gov/bisweb/JobsQueryByNumberServlet?passdocnumber=16&passjobnumber=121190200&requestid=18#FSup.

[9] BSA Cal. No. 2018-199-A.

[10] The Zoning Challenge and DOB's denial, in document called a "ZRD2," may be found at http://a810-bisweb.nyc.gov/bisweb/BScanJobDocumentServlet?requestid=19&passjobnumber=121190200&passdocnumber=16&allbin=1028168&scancode=SC620325809 (Exh. F).

Planning. Mr. Karnovsky set forth his argument in a December 18, 2017 email addressed to "Council Land Use, Office of Council Member Helen Rosenthal Staff."[11]

Following Mr. Karnovsky, DOB correctly pointed out that under the Zoning Resolution's provisions governing split lots (ZR §§ 33-48 and 77-02), the Tower Coverage Rule can only apply to the C4-7/R10 portion of the zoning lot, where towers are permitted. However, still following Extell's counsel, DOB argued that the split lot provisions 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."[12] Extell's counsel based his assertion on the fact 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," he argued, the Bulk Packing Rule applied to both portions, notwithstanding the split lot rules.[13]

After DOB denied the Zoning Challenge, LW! timely appealed to the BSA.[14] However, before the BSA could address the issue, DOB reversed itself: on January 14, 2019, it issued a Notice of Intent to Revoke Approval of the Zoning Diagram that had been the object of LW!'s Zoning Challenge and subsequent appeal to the BSA.[15] The Notice stated DOB's intent to revoke the approval within 15 calendar days "unless sufficient information is presented to the Department to demonstrate that the approval should not be revoked." DOB

[11] Karnovsky Email (Dec. 18, 2017) (Exh. G).

[12] ZRD2 (Exh. F), at 2.

[13] *Id.*.

[14] *See* Statement of Facts, BSA 2018 199 A (filed Dec. 19, 2018) (Exh. H).

[15] Notice of Intent to Revoke (Jan. 14, 2019) (Exh. I).

now took the position that the void was unlawful. "The proposed mechanical space on the 18th floor of the Proposed Building," it stated, "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."[16] The Notice also announced that DOB was rescinding its denial of LW!'s Zoning Challenge, from which LW! had appealed. As a result, the BSA took the position that the appeal had been rendered moot. The Notice did not, however, reconsider whether Extell'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.

Meanwhile, although DOB had threatened to issue a stop-work order, it had not done so, leaving Extell free to continue construction.

By a letter dated January 25, 2018, Extell 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,[17] and, on April 11, 2019, for the first time, issued a building permit for the 775-foot tower.[18] The permit approved plans that were tweaked, although not in any way that is material here. Apparently in response to objections

[16] *Id.* at 1.

[17] Exh. C.

[18] *See* http://a810-bisweb.nyc.gov/bisweb/WorkPermitDataServlet?requestid=4&allisn=0003617726&allisn2=0002887139&allbin=1028168&passjobnumber=121190200. (Exh. J).

by the Fire Department, which had raised safety concerns about the proposed 160-foot void, Extell replaced that void 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 mechanical equipment.[19]

On April 24, 2019, Appellants filed a lawsuit against Extell seeking a preliminary and permanent injunction against the ongoing construction of the building at issue.

THE BULK PACKING AND TOWER COVERAGE RULES

In 1993, following various other measures to limit building heights in Manhattan's residential zoning districts, such as the Sliver Law in 1983 and a series of contextual zoning provisions in 1984, the City enacted the Tower-on-a-Base Rules. Already in 1989, the City had begun to consider these rules. In a "Discussion Document" titled "Regulating Residential Towers and Plazas" produced that year, the City Planning Department 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."[20] The Department 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.

[19] *See* Dep't of City Planning, Residential Mechanical Voids Findings ("Mechanical Voids Findings") (Apr. 2018, updated Feb. 2019) (Exh. K attached).

[20] Dep't of City Planning, Regulating Residential Towers and Plazas: Issues and Options: A Discussion Document (1989) ("Discussion Document"), at 7 (Exh. L).

It introduced "packing-the-bulk" and minimum tower coverage as two complementary tools to regulate height. The Bulk Packing Rule 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.[21]

However, the City did not act on this proposal until 1993. In the Special Lincoln Square District, the tipping point that pushed the City into action was the 545-foot-tall Millennium Tower at 101 West 67th Street, announced in 1992. That tower – 230 feet *shorter* than Extell's planned building – outraged the community and roused the City to action.[22] In its 1993 Zoning Review of the Special District, the City Planning Department restated the problem:

> 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.[23]

[21] *Id.* at 26-27. The Discussion Document described how too-low lot coverage led to 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.

Id. at 16-17.

[22] 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).

[23] 1993 DCP Zoning Review, at 3 (Exh. A).

The tower-on-a-base amendments were intended to limit building height definitively, not only in the Special Lincoln Square 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 City Planning Commission on December 20th, 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).

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 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.[24]

The two City Planning 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."[25] 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.[26] The Department of City

[24] On the other hand, consider the result of using Extell'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.

[25] 1993 CPC Report, at 3 (Exh. A).

[26] *Id.* at 19.

Planning Report for the high-density residential districts elsewhere in Manhattan contained similar language.[27]

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

Extell's interpretation of the Bulk Packing Rule, which has been adopted by DOB, is contrary to the plain language of the Zoning Resolution and nullifies the Bulk Packing Rule.

As Mr. Karnovsky has well-argued, 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, Mr. Karnovsky and DOB 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.

Contrary to their argument, 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 Lincoln Square District from the rest of Manhattan's 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

[27] CPC Report N 940013 ZRM (Dec. 20, 1993), at 2-3, 5, 11-12 (https://www1.nyc.gov/assets/planning/download/pdf/about/cpc/940013.pdf).

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 Extell in fact proposes to put its tower. Extell 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 Extell 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 Extell 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.

Extell'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 Extell's 2019 ZD1.[28] 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 Extell'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

[28] 2019 ZD1 (Exh. C).

the excess base square footage is in a district where towers are not allowed. It might as well be in Timbuktu 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.[29] 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.

By Extell'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.[30] With Extell'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

[29] 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 Extell, 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 Extell 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, Extell would also have to put the full allowable square footage into its base. For every 6 sf in the base, Extell can place 4 sf in the tower, up to the maximum allowed. However, if Extell 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, Extell cannot build over the Armory.

[30] 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.

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

The Zoning Resolution 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 Extell 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 Extell's Counsel Say It Means

All that DOB and Extell 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.[31]

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.[32] 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 Extell'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. Extell'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, 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.'"[33] This does not bolster his argument; it fatally undermines it. Contrary to Extell'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 Extell's zoning lot.

The paragraph quoted by Extell'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.[34]

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."[35] Yet, as Mr. Karnvosky correctly argues, the

[33] Karnovsky Email, at 3 (underlining added) (Aff. Exh. G).

[34] 1993 CPC Report, at 7-8 (Exh. A).

[35] 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

Tower Coverage Rule does not apply to the R8 portion of the Special District. If it did, it would drastically reduce the height of Extell'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").

> <u>development's total floor area to be located below an elevation of 150 feet.</u> 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.

The broader legislative history of the Tower-on-a-Base Rules also makes clear that Extell'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, the City Planning Department wrote,

> 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.[36]

The building here would be almost half as tall again as the Millennium Tower. And indeed, given a big enough R8 portion, under Extell'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'") (quoting *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

[36] 1993 DCP Zoning Review at 14 (Exh. D); *see also id.* at 9.

. . . 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").

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

Extell'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. Extell'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 (quoting *Town of Harvard v. Maxant,* 275 N.E.2d 347 (Mass. S.J.C. 1971) (emphasis added).

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 Extell'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.[37]

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 Extell pretended to be building for two years.

Presumably, however, DOB was responding to Extell'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.[38] 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

[37] Notice of Intent to Revoke (Exh. I).

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

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 City Planning Department 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...."[39] "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.[40] In any event, Appellants believe that Cal. No. 2016-4327-A was wrongly decided and should be reversed.

In its January 25, 2019 letter, Extell 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. Extell 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.

[39] DCP, Mechanical Voids Findings, at 11 (Exh. K).

[40] DCP, Environmental Assessment Statement, Residential Mechanical Voids Text Amendment (Jan. 25, 2019, revised Apr. 9, 2019) Attachment A, at 2 (Exh. 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.

Moreover, Extell'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 Extell's efforts to argue otherwise, it strongly supports the argument that mechanical space qualifies under either independent criterion:

> (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 Extell's description or Appellants', the space here plainly qualifies as a use. According to Extell, 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, Extell 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 Extell's public documents supports its claim that this space is necessary to house mechanical equipment. Indeed, there is no mechanical equipment yet imagined by humans that requires a 48- or 64-foot tall clearance for accessory use in a residential building.

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. . . ." *Educational Construction 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.

Extell'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: "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]."[41]

[41] Joe Anuta, "City Wants to Cut Down Supertalls," Crain's New York (Feb. 6, 2018), at 2 (Exh. O).

CONCLUSION

Because the Developer's plans for 36 West 66th Street violate both the letter and the purpose of the Zoning Resolution, Appellants respectfully request that the Board revoke the Developer's permit.

Dated: Brooklyn, New York
May 10, 2019

Respectfully submitted,

_____/s/_____
JOHN R. LOW-BEER
415 8th Street
Brooklyn, NY 11215
(718) 499-2590
jlowbeer@yahoo.com

_____/s/_____
CHARLES N. WEINSTOCK
8 Old Fulton Street
Brooklyn, NY 11201
(323) 791-1500
cweinstock@mac.com

JOHN R. LOW-BEER
Attorney-at-Law
415 8th Street
Brooklyn, New York 11215

Phone: 718-744-5245 Email: jlowbeer@yahoo.com

May 10, 2019

By Email

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

Re: 36 West 66th Street, Manhattan, BSA Cal. No. 2019-89-A

Dear Honorable Members of the Board:

We represent Appellants in the above matter. We write to request that the Board consider this appeal on an urgent basis so as to ensure a decision in time for it to be effectual in the event that Appellants prevail. Under the Board's normal timeline, a final decision in this matter could take a year or more, as occurred in the recent case of 180 East 88th Street, Cal. No. 2017-290-A, in which I represented the appellants. Expedition is required here because the courts are very reluctant to order the demolition of substantial construction, so Appellants may well be deprived of any effective remedy even if this Board and/or the courts decide that their arguments have merit.

Respondents West 66th Sponsor LLC and Extell Development Corporation ("Extell") have already finished the foundation for the challenged building even though the permit for it was only first issued less than a month ago. They have been able to do this because they have been engaged in construction on the site since approximately June 2017, based on a permit for an innocuous 25-story building they never intended to build. That building was only a stalking horse for the 41-story, 775-foot high building for which they received a permit on April 11th, and which is the subject of this Appeal. This trickery has severely prejudiced opponents of the building. Appellants were further severely prejudiced by the fact that on January 14, 2019, DOB rescinded the ZRD2 from which Landmark West! had appealed to the Board on December 19, 2018, requiring them to bring a new appeal making exactly the same arguments that they made in the December 19th appeal.

Opponents of a project are entitled to rapid action on their objections, not only because they just may be right, but to remove a cloud from the developer's efforts if they are not. Extell's game is a "race to completion." *See Dreikausen v. Zoning Bd. of Appeals*, 98 N.Y.2d 165, 172 (2002) (holding that unless the objecting party seeks a preliminary injunction at

the earliest possible moment, its claims may be held moot if construction continues). Under *Dreikausen*, Appellants must apply for a preliminary injunction lest their claims become moot, and they have done so. Argument on this application is set for May 28, 2019. Nevertheless, an expeditious decision from this Board is the only sure way to a just outcome in this matter. Therefore, Appellants request that the Board consider this appeal on an urgent basis.

Very truly yours,

John R. Low-Beer

/s/

Charles N. Weinstock
8 Old Fulton Street
Brooklyn, New York 11201

c: Loreal Monroe, David Karnovsky, Paul Selver, Michael Zoltan, Susan Amron, Stuart Klein