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

NYC Buildings

ZRD2: Zoning Challenge with response

Must be typewritten.

Scan sticker will be affixed by Department staff

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

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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:

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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: Date: Time:

Issuers: write signature, date, and time on each page of the drawings attached to this form.

Challenge Denied
Date: 11/19/2018

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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:

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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

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:		
Reviewer's Signature:	Date:	Time:	WO#:

Challenge Denied
Date: 11/19/2018

6/09

GEORGE M.
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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

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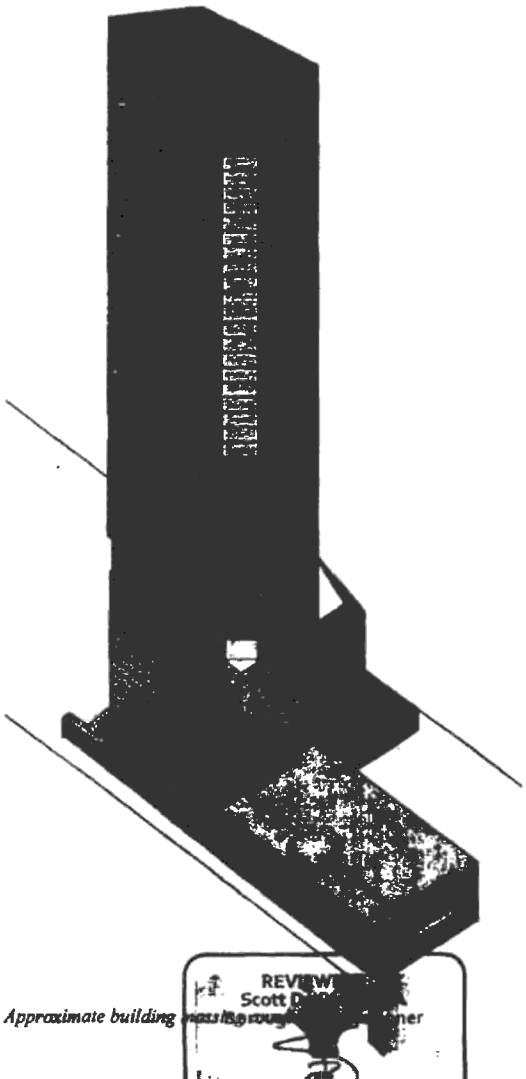
facility in the first floor. The southern portion is developed with an R8 height factor building, also with a community facility in the first floor.

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

GEORGE M. JANES & ASSOCIATES

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 area designated "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.

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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 com[illegible] continues its use.
[3] N 940127 (A) ZRM, December 20[illegible]
[4] The Millennium Tower at 101 West 67th Street.

REVIEWED BY [illegible]
Challenge Denied
Date: 11/19/2018

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.

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Scott D. Pavan, RA
Borough Commissioner

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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 [illegible] 'vacuum-like' readings of statutes in 'isolation with absolute [illegible] is 'contrary to the purpose and intent of the underlying statutory [illegible] and would 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.

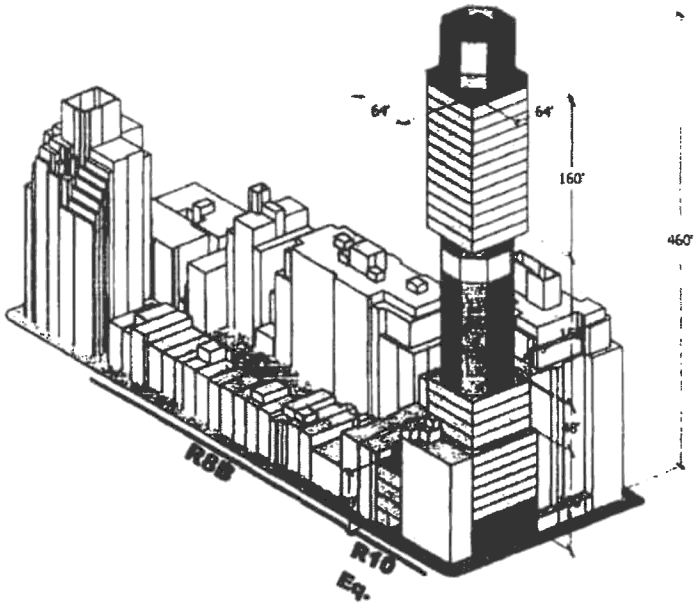
---

[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.

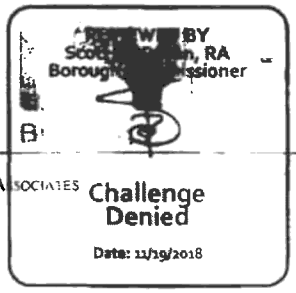
[11] A 45,000 SF increase in area under 150 feet would mean that 40% of that area, or 18,000 SF, could be moved from the base of the proposed building into the tower over 150 feet, effectively allowing the tower to increase another two floors or 32 feet using 16 feet FTF heights. The height of the base can be maintained through 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.

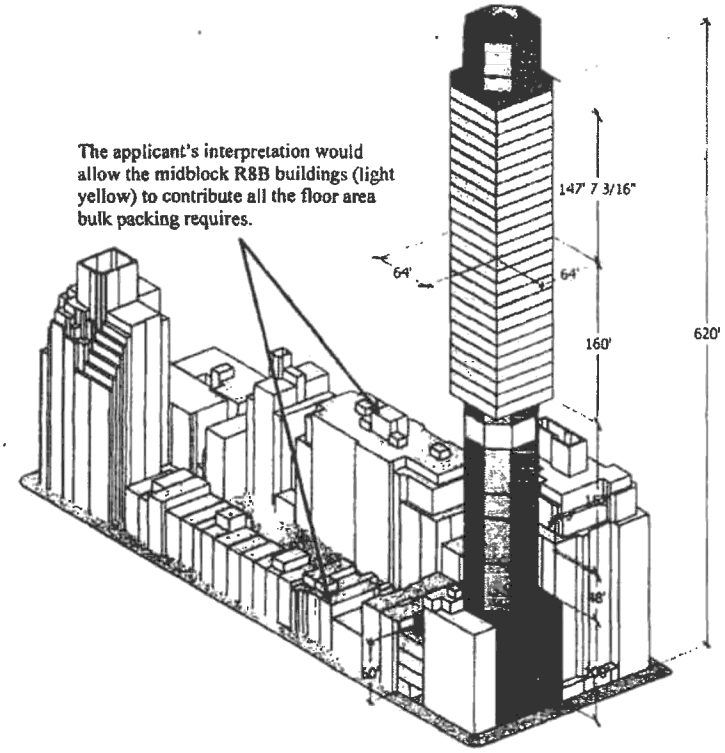
REVIEWED BY
Scott D. Pavan, RA
Borough Commissioner
Challenge Denied
Date: 11/19/2018



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 reasonable planning or design rationale for zoning text to be read as such. The 30% minimum tower coverage standard came out of DCP

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

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 Towers: Challenges and Options, 1989; and Special Lincoln Square District Zoning Revisions, City Planning Commissioner,

[13] The original Notice of Objections was requested under the Freedom of Information Law in October 2017. It has not yet been provided.

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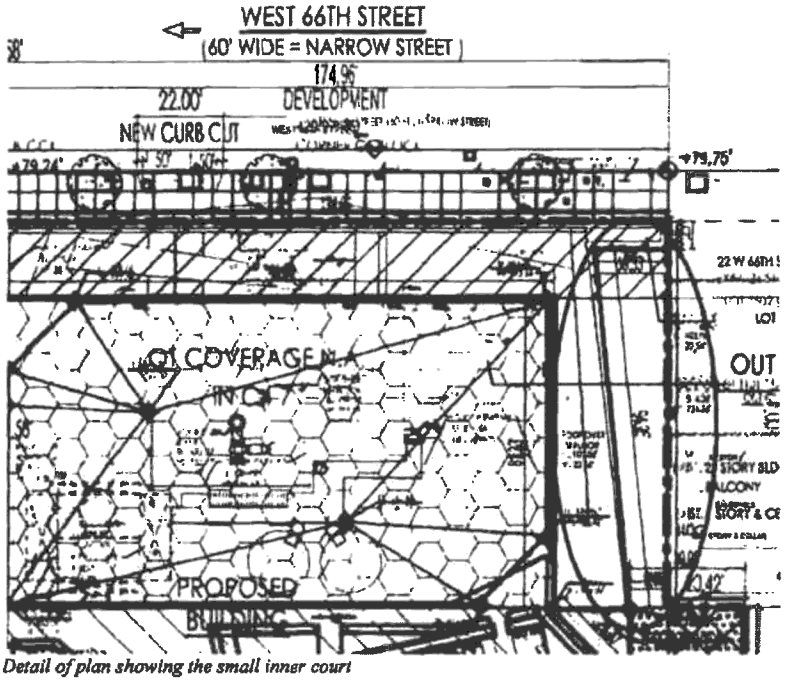
dings
Challenge Denied
Date: 11/19/2018

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.



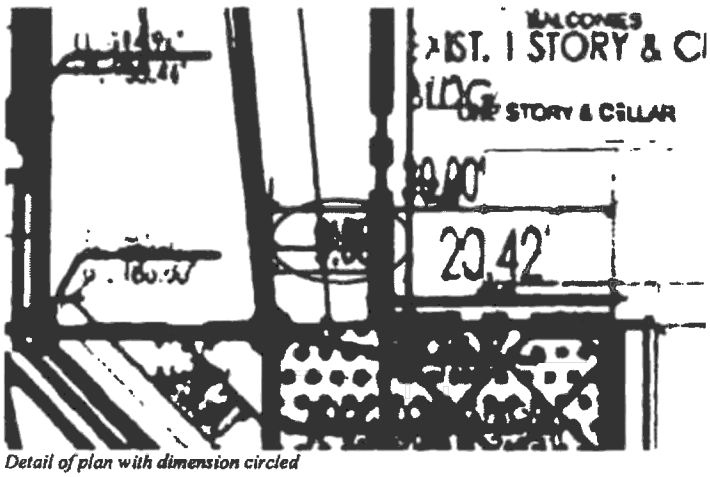
Detail of plan showing the small inner court

REVIEWED BY
Scott D. Pavan, RA
Borough Commissioner

Challenge Denied

Date: 11/19/2018

GEORGE M. JANES & ASSOCIATES



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 [redacted] the substantial progress the applicant made on construction is [redacted] to the 18 months of construction activity between the DOB's initial approval of a building that was never intended to be

Challenge Denied
Date: 11/19/2018

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
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

GEORGE M. JANES & ASSOCIATES

Challenge Denied
Date: 11/19/2018

2019-94-A

05/14/2019

ZONING CALCULATIONS

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
	[illegible] (see below)	12 FAR	421,260.00 SF
	Max. Total		421,260.00 SF

R8 District

23-153	Community Facility	6.5 FAR	127,283.00 SF
24-11	Residential (See HF Calc. Z-015)	5.92 FAR	115,925.44 SF
	Max. Total	6.5 FAR	127,283.00 SF

Total [illegible]

[illegible]	351,050.00 SF
[illegible]	478,333.00 SF
[illegible]	537,185.44 SF
[illegible]	548,543.00 SF

Inclusionary [illegible] in C4-7

23-154	Base	10 FAR	351,050.00 SF
	Max. [illegible]	2 FAR	70,210.00 SF
	Max. [illegible] Inclusionary	12 FAR	421,260.00 SF

Low Income Floor Area Provided: 70,210.00 SF

(See [illegible] 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

C4-7 District (R10 equivalent)

Existing Lot 57

Commercial	43,053.00 SF

(See Alt. 1 #120422729)

Proposed

Community Facility	6,350.00 SF
Residential	371,855.27 SF
Total	378,205.46 SF

C4-7 Total

Commercial	43,053.00 SF
Community Facility	6,350.00 SF
Residential	371,855.27 SF
Total	421,258.14 SF

R8 District

Proposed R8 Total

Community Facility	16,084.00 SF
Residential	111,227.78 SF
Total	127,283.38 SF

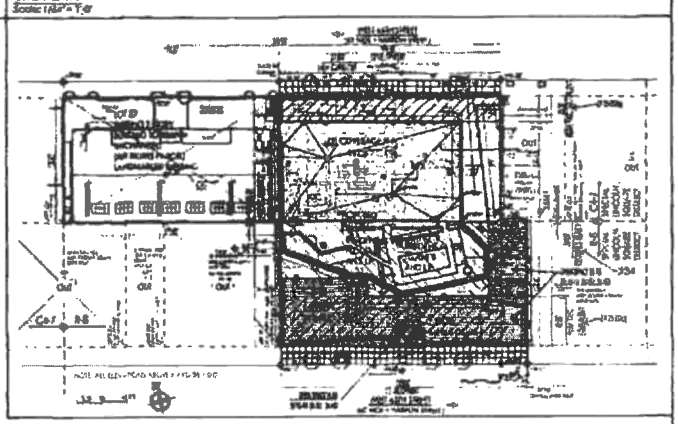
Total both Zones

Commercial	43,053.00 SF
Community Facility	22,409.49 SF
Residential	483,083.05 SF
Total	548,541.94 SF

REVIEWED BY
Scott D. Pavan, RA
Borough Commissioner

Challenge
Denied
Date: 11/29/2018

SITE PLAN



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 / 9,090 SF = 14
FAR @ 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/ Residential Lot Coverage
H.F. for OSR = 111,228 SF / 8,890 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
- TOB 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 1028169

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 STATE OF NEW YORK

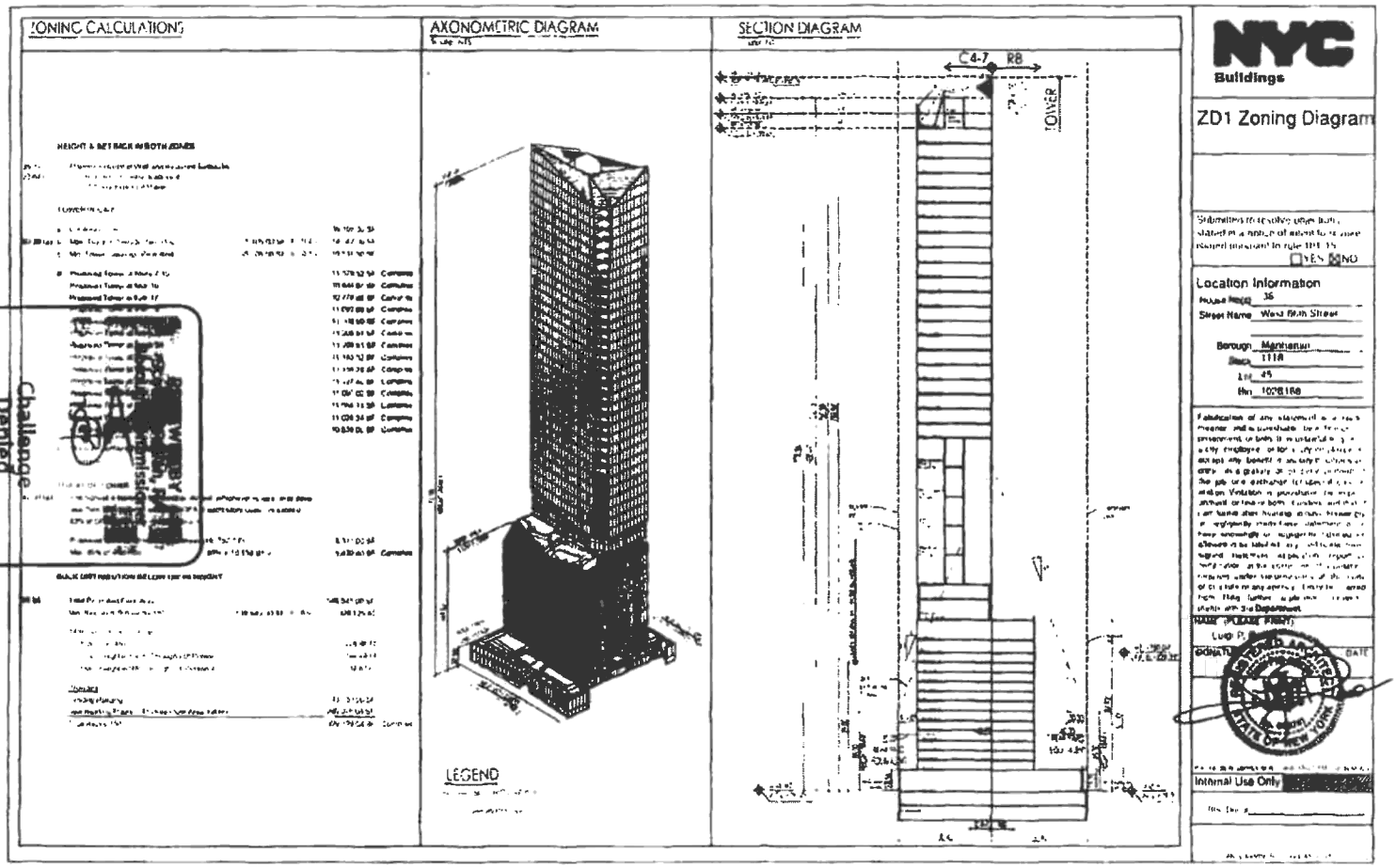
P.E./R.A. SEAL (APPLY SEAL, THEN SIGN OVER SEAL)

Internal Use Only

BIS Doc #

PLAN EXAMINER'S SIGN AND DATE

R. 000517


ZONING CALCULATIONS
AXONOMETRIC DIAGRAM
SECTION DIAGRAM
LEGEND
NYC Buildings
ZD1 Zoning Diagram
Location Information
Challenge Denied
Date: 11/19/2018
Internal Use Only

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 12-21
☐ 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

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

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	9,381.64	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

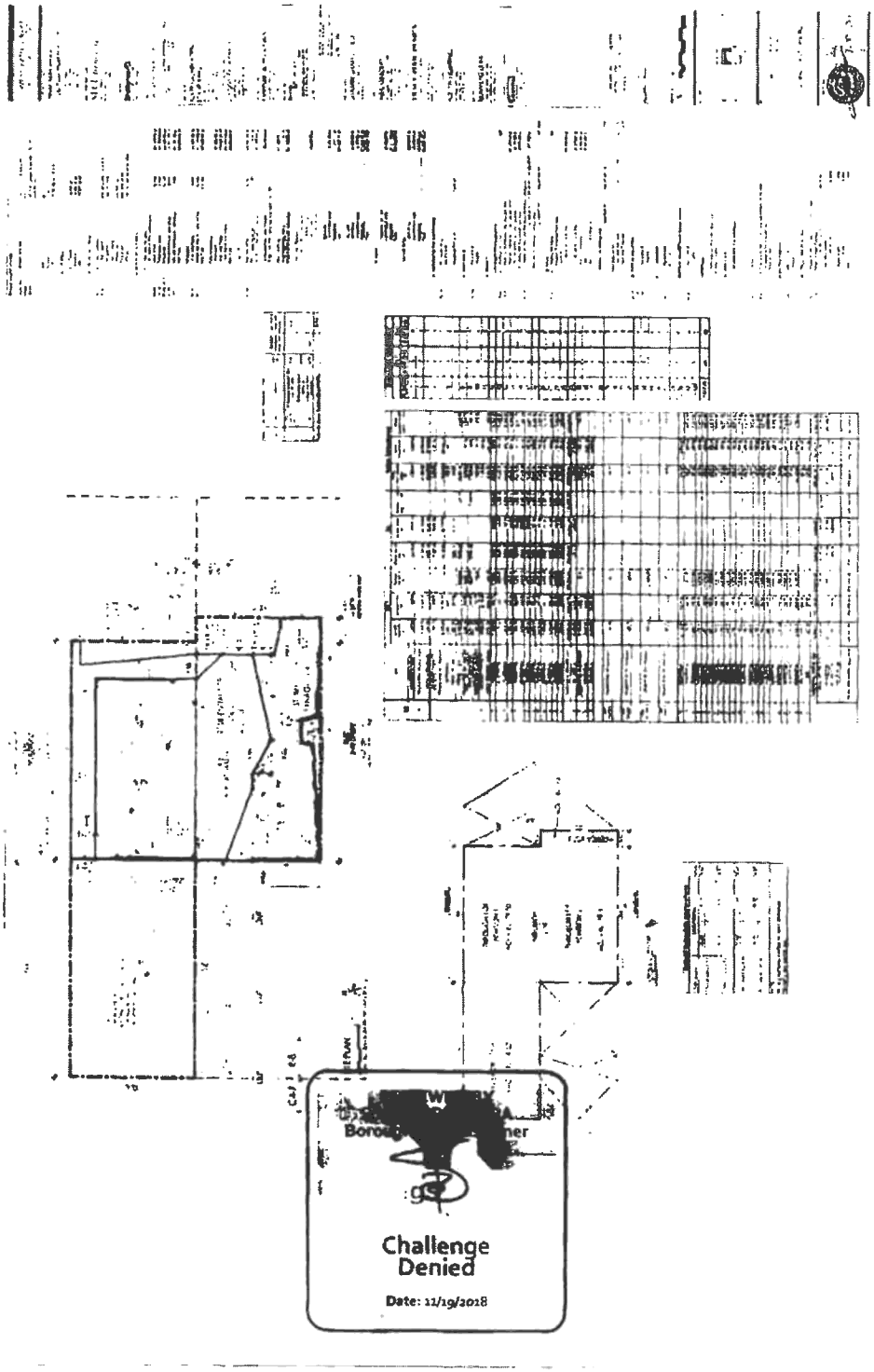
4 Proposed Floor Area *Required for all applications. One Use Group per line*

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	7,748.54				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	21,631.78				0.40
034	11,208.58	2	10,883.73				0.20
035	11,183.38	2	10,858.64				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		83,083.05	22,405.49			,24

Total Zoning Floor Area	505,488.54

07/08

R. 000519


Challenge
Denied
Date: 11/19/2018

DEPT OF BLDGS 121190200 Job Number ES673992433 Scan Code

NYC Buildings

25291A

PW1A: Schedule A - Occupancy / Use

Must be typewritten.

Sheet 1 of 13

121190200

Floor	Existing Legal Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations?	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)	Proposed Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations only*	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)
SUB-SUB			☐Yes ☐N				7	OG	☒Yes	S-1, F-2, S-2		2B
Description							SEWER EJECTOR, OIL TANK/FUEL OIL, POOL EQUIPMENT, BOWLING EQUIPMENT ROOM					
SUB-SUB			☐Yes ☐N				68	OG	☒Yes	R-2		2B
Description							ACCESSORY AMENITY SPACE FOR RESIDENTIAL TENANTS (POOL & DECK, SPA)					
SUB-SUB			☐Yes ☐N				118	OG	☒Yes	R-2		2B
Description							ACCESSORY AMENITY SPACE FOR RESIDENTIAL TENANTS (GAMING LOUNGE, BOWLING ALLEY, CHILDREN'S PLAYROOM, SCREENING ROOM & GOLF SIMULATOR)					
SUB-SUB			☐Yes ☐N				69	OG	☒Yes	R-2		2B
Description							ACCESSORY AMENITY SPACE FOR RESIDENTIAL TENANTS (HEALTH CLUB, STUDIO, PILATES STUDIO)					
SUB-SUB			☐Yes ☐N				63	OG	☒Yes	R-2		2B
Description							BASKETBALL COURT, SQUASH COURT(ACCESSORY TO RESIDENTIAL)					

*Use 2008 Code equivalents only even for older Codes.

Challenge Denied
Date: 11/9/2018

REVIEWED BY
Scott D. Pavan, RA
Borough Commissioner

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 hereby state all the above information is complete and correct to the best of my knowledge.

Applicant's Name (please print) Luigi Fosso

8/28/18

12/14

2019-94-A
05/14/2019

NYC Buildings

25291A

PW1A: Schedule A - Occupancy / Use

Must be typewritten.

Sheet 2 of 13

Orient and affix BIS job number label here
121190200

*Use 2008 Code equivalents only even for older Codes.

Floor	Existing Legal Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations?	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)	Proposed Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations only*	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)
SUB-SUB			☐ Yes ☐ No				469	OG	☒ Yes	A-3		4
Description							SYNAGOGUE (VACANT SPACE AT SUBCELLAR FLOOR SHALL NOT BE OCCUPIED UNLESS AN AMENDED CO IS OBTAINED)					
SUB-SUB			☐ Yes ☐ No				1	OG	☒ Yes	R-2		2B
Description							RECEPTION AREA & LOUNGE (ACCESSORY TO RESIDENTIAL)					
SUB-SUB			☐ Yes ☐ No				47	OG	☒ Yes	R-2		2B
Description							ACCESSORY AMENITY SPACE FOR RESIDENTIAL TENANTS (LOCKER ROOM, STEAM ROOMS, SAUNAS)					
			☐ Yes ☐ No						☒ Yes			
Description												
CEL-CEL			☐ Yes ☐ No				51	OG	☒ Yes	R-2		2B
Description							ACCESSORY TO RESIDENTIAL (BUILDING SUPER SHOP, RES MANAGER'S OFFICE, STAFF LOUNGE, WOMEN'S LOCKER, MEN'S LOCKER, COMPACTOR, TENANT STORAGE, LAUNDRY, STORAGE ROOM, REFUSE ROOM & WINE CELLAR)					

REVIEWED BY
Scott M. Pavan, RA
Borough Commissioner
Challenge Denied
Date: 12/19/2018

REGISTERED ARCHITECT
NEW

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 hereby state all the above information is complete and correct to the best of my knowledge.

Applicant's Name: Luigi Russo
Signature: [signature]
Date: 8/20/18

12/14

R. 000522

NYC Buildings

PW1A: Schedule A - Occupancy / Use

Must be typewritten

25291A

Sheet 3 of 15

Orient and affix BIS job number label here

121190200

Floor	Existing Legal Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations?	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)	Proposed Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations only*	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)
CEL			☐Yes ☐N				3	OG	☒Yes	R-2		2B
CEL	Description						Description: BIKE STORAGE ROOM (467 SF, 66 BIKES PROVIDED)					
CEL			☐Yes ☐No				31	OG	☒Yes	S-1		2B
-CE L	Description						Description: STORM WATER TANK, FIRE PUMP & WATER METER ROOM, GAS METER ROOM, ELECTRICAL SWITCHGEAR ROOM, TELEPHONE & IT SERVER, DOMESTIC HOT WATER ROOM, SATELITE TERMINAL, FIRE PUMP, ATS ROOM, DAS ROOM, MEP ROOM.					
CEL -CE			☐Yes ☐No				6	OG	☒Yes	A-3		4
	Description						Description: SYNAGOGUE MECHANICAL CELLAR (VACANT SPACE AT CELLAR FLOOR SHALL NOT BE OCCUPIED UNLESS AN AMEDED CO IS OBTAINED)					
CEL -CE			☐Yes ☐N				6		☒Yes	A-3		4
	Description						Description: HABONIM (MEP ROOM)					
001-001			☐Yes ☐N				706	100	☒Yes	A-3		
	Description						Description: SYNAGOGUE (VACANT SPACE AT FIRST FLOOR SHALL NOT BE OCCUPIED UNLESS AN AMENDED CO IS OBTAINED)					

Re-work entire line →

REVIEWED BY
Scott D. Pavan, RA
Borough Commissioner

Denied
Date: 12/9/2016

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 hereby state all the above information is complete and correct to the best of my knowledge.

Applicant's Name (print): Luis Russo

6/28/18

12/14

2019-94-A 05/14/2019

NYC Buildings

25291A

PW1A: Schedule A - Occupancy / Use

Must be typewritten.

Sheet 4 of 13

Drawn and write BIS job number label here

121190200

Floor	Existing Legal Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations?	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)	Proposed Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations only*	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)
001-001			☐Yes ☐No				16	100	☒Yes	R-2		2
Description							RES LOBBY, MAIL ROOM, PACKAGE ROOM, MECHANICAL ROOM, CART ROOM & DOG SPA (ACCESSORY TO RESIDENTIAL)					
			☐Yes ☐No						☒Yes			
Description							Delete Existing MZ1 line and Add next two lines MZ-1					
MZ1-MZ			☐Yes ☐No				3	40	☒Yes	A-3		4
Description							MEP ROOM (ACCESSORY TO RESIDENTIAL) (BETWEEN 1ST AND 2ND FLOOR)					
MZ1-MZ			☐Yes ☐No					40	☒Yes	R-2	6	2
Description							SYNAGOGUE MEZZANINE(VACANT SPACE AT MZ1 FLOOR SHALL NOT BE OCCUPIED UNLESS AN AMENDED CO IS OBTAINED) BETWEEN 1ST AND 2ND FLOOR)					
002-005			☐Yes ☐No					40	☒Yes	R-2	6	2
Description							SIX (6) CLASS A DWELLING UNITS PER FLOOR					

*Use 2008 Code equivalents only even for older Codes.

REVIEWED BY D. Pav... Commis...
Challenge Denied
Date: 12/19/2018

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Applicant's Name: Luigi Russo

Signature: [signature] Date: 8/28/18

REGISTERED ARCHITECT STATE OF NEW YORK

12/14

R. 000524

NYC Buildings

PW1A: Schedule A - Occupancy / Use

Must be typewritten.

25291A

Sheet 5 of 13

121190200

Floor	Existing Legal Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designa-tions?	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)	Proposed Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designa-tions only*	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)	Description
002-002			☐Yes ☐No					40	☒Yes	R-2		2	PRIVATE DWELLING UNIT TERRACES (NORTH)
002-005			☐Yes ☐No				6	40	☒Yes	R-2		2	TENANT STORAGE ROOM ACCESSORY TO RESIDENTIAL PER FLOOR
002-002			☐Yes ☐N	Add new line				40	☒Yes	R-2		2	PRIVATE DWELLING UNIT TERRACES (SOUTH)
			☐Yes ☐N						☒Yes	Delete M22			
			☐Yes ☐N						☒Yes	Delete M22			

Challenge Denied
Date: 11/9/2018

REVIEWED BY
Scott D. Pavan, RA
Borough Commissioner

*Use 2008 Code equivalents only even for older Codes.

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Applicant's Name (please print): Luigi Russo

Signature

Date: 8/28/18

REGISTERED ARCHITECT STATE OF NEW YORK

12/14

NYC Buildings

PW1A: Schedule A - Occupancy / Use

Must be typewritten.

25291A

Sheet 6 of 13

121190200

Floor	Existing Legal Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations?	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)	Proposed Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations only*	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)
			☐Yes ☐N						☒Yes			
Description	Delete line 003-003											
			☐Yes ☐N						☒Yes			
Description	Delete line 003-024											
			☐Yes ☐N						☒Yes			
Description	Delete line 004-004											
			☐Yes ☐N						☒Yes			
Description	Delete line 005-005 Delete line 006-006 (duplicate)											
006-008			☐Yes ☐N				40		☒Yes	R-2	7	2
Description							SEVEN (7)CLASS A DWELLING UNITS PER FLOOR					

Challenge Denied
Date: 11/19/2018

REGISTERED ARCHITECT
STATE OF NEW YORK

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 hereby state all the above information is complete and correct to the best of my knowledge.

Applicant's Name (print): Livio Russo

Signature: 6/28/18

12/14

NYC Buildings

PW1A: Schedule A - Occupancy / Use

Must be typewritten.

25291A

Sheet 7 of 13

121190200

Floor	Existing Legal Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations?	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)	Proposed Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations only*	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)
007-008			☐Yes ☐No					40	☒Yes	R-2	7	2
Description							SEVEN (7) CLASS A DWELLING UNITS PER FLOOR					
009-014			☐Yes ☐No					40	☒Yes	R-2	7	2
Description							SEVEN (7)CLASS A DWELLING UNITS PER FLOOR					
015-015			☐Yes ☐No				28	100	☒Yes	S-2, F-2, S-1		2B
Description							STORM WATER DENTENTION TANK, POOL EQUIPMENT ROOM,MECHANICAL 1 & 2, GENERATOR ROOM, TELEPHONE ROOM, ATS ROOM, ELECTRICAL ROOM					
Description			☐Yes ☐No						☒Yes			
016-018			☐Yes ☐No				60	40	☒Yes	R-2		2
Description							ACCESSORY AMENITY SPACE FOR RES. TENANTS (LOUNGE ROOM, CONFERENCE ROOM, SERVING PANTRY)					

Re-write description →

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

Delete M1-5

STERED ARCHI
10
STAT
ORK

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 hereby state all the above information is complete and correct to the best of my knowledge.

Applicant's Name (please print): Luigi Russo

Date: 6/28/18

12/14

2019-94-A
05/14/2019

NYC Buildings

25291A

PW1A: Schedule A - Occupancy / Use

Must be typewritten.

Sheet 8 of 13

Orient and affix BIS job number label here

121190200

*Use 2008 Code equivalents only even for older Codes.

Floor	Existing Legal Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations?	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)	Proposed Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations only*	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)
016-016			☐Yes ☐No				66	40	☒Yes	R-2		2
Description							Description: LOBBY/VESTIBULES_1 & 2 (ACCESSORY TO RESIDENTIAL)					
016-016			☐Yes ☐No				9		Yes			2
Description	*Add new line*						Description: MECHANICAL ROOM					
016-016			☐Yes ☐No				160	40	☒Yes	A-3		2
Description							Description: GREAT ROOM (ACCESSORY TO RESIDENTIAL)					
016-016			☐Yes ☐No				66	40	☒Yes	R-2		2
Description							Description: POOL, POOL TERRACE & SPA, WALKWAY, EXTERIOR TERRACE(ACCESSORY TO RESIDENTIAL)					
017-017			☐Yes ☐No				19	40	☒Yes	S-1		2
Description	*Re-write description →*						Description: ELECTRICAL ROOM, MECHANICAL ROOM, BOILER ROOM, ... RISE, E.M.R., AV ROOM					

Challenge Denied
Date: 11/29/2018

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Applicant's Name: Luigi Russo

Signature: [signature]

Date: 6/28/18

REGISTERED ARC... STATE ... 020741

12/14

NYC Buildings

25291A

PW1A: Schedule A - Occupancy / Use

Must be typewritten.

Sheet 9 of 13

Orient and affix BIS job number label here

121190200

Floor	Existing Legal Use: Description	Maximum Number of Persons	Live Load (psf)	2014 Code Designations?	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)	Proposed Use: Description	Maximum Number of Persons	Live Load (psf)	2014 Code Designations only*	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)
018-018				☐Yes ☐No				MECHANICAL ROOMS & ELECTRICAL ROOM (2)	30	100	☒Yes	R-2		2
019-019				☐Yes ☐No				MECHANICAL ROOMS (4), ELECTRICAL ROOM, FIRE PUMP ROOM, FIRE RESERVE STORAGETANK	34	100	☒Yes	S-1		2
020-026				☐Yes ☐No				PRIVATE DWELLING UNIT LOGGIA'S (3 PER FLOOR)	0	40	☒Yes	R-2	3	2
020-026				☐Yes ☐No				THREE (3) CLASS A DWELLINGS PER FLOOR		40	☒Yes	R-2	3	2
027-033				☐Yes ☐No				TWO (2) CLASS A DWELLINGS PER FLOOR		40	☒Yes	R-2	2	2

Change Denied
Date: 11/19/2018

REVIEWED BY
Scott D. Pavan, RA
Borough Commissioner

Add new line

STERED ARC
STAT 1 RK

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Applicant's Name: Luigi Russo

Signature: [signature]

Date: 8/28/18

12/14

2013 94 A 05/14/2019

NYC Buildings

PW1A: Schedule A - Occupancy / Use

25291A

Must be typewritten.

Sheet 10 of 13

121190200

Floor	Existing Legal Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations?	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (DC)	Zoning Use Group(s)	Proposed Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations only*	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (DC)	Zoning Use Group(s)
027-033			☐Yes ☐No				40		☒Yes	R-2		2
Description							PRIVATE DWELLING UNIT LOGGIA'S (3)					
034-037			☐Yes ☐No				40		☒Yes	R-2	1	2
Description							ONE (1) CLASS A DWELLING UNIT PER FLOOR					
034-037			☐Yes ☐No				40		☒Yes	R-2	0	2
Description							PRIVATE DWELLING UNIT LOGGIA'S (2)					
038-038			☐Yes ☐No				40		☒Yes	R-2	0.5	2
Description							ONE-HALF (1/2) CLASS A DUPLEX DWELLING UNIT					
039-039			☐Yes ☐No				40		☒Yes	R-2	0.5	2
Description							ONE-HALF CLASS A DWELLINGS PER FLOOR					

Challenge Denied

Date: 11/09/2018

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Applicant's Name (please print): Luigi Russo

Signature

Date: 6/29/18

12/14

NYC Buildings

PW1A: Schedule A - Occupancy / Use

Must be typewritten.

25291A

Sheet 11 of 13

121190200

Floor	Existing Legal Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations?	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)	Proposed Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations only*	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)
039-039			☐Yes ☐N				12	40	☒Yes	S-1		2
Description							PLUMBING, TELEPHONE, ELECTRICAL ROOM #1, ELECTRICAL ROOM #2, FIRE PUMP ROOM, MECHANICAL					
038-038			☐Yes ☐N					40	☒Yes	R-2		2
Description							PRIVATE DWELLING UNIT LOGGIA'S (2)					
039-039			☐Yes ☐N					40	☒Yes	R-2		2
Description							PRIVATE DWELLING UNIT LOGGIA'S (1)					
Description			☐Yes ☐N						☒Yes			
	Delete 040-040											
Description			☐Yes ☐N						☒Yes			
	Delete 041-041											

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

REGISTERED ARCHITECT
STATE OF NEW YORK

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Applicant's Name (please print): Luigi Russo

Signature

Date: 8/28/18

12/14

2019-94-A 05/14/2019

NYC Buildings

25291A

PW1A: Schedule A - Occupancy / Use

Must be typewritten.

Sheet 12 of 13

121190200

REVIEWED BY Scott Pavan, RA Borough Commissioner
Challenge Denied
Date: 12/19/2018

Floor	Existing Legal Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations?	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)	Proposed Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations only*	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)
ROOF-ROOF			☐Yes ☐No				3	40	☒Yes	S-1		2
Description							ELECTRICAL ROOM & STORAGE ROOMS					
ROOF-ROOF			☐Yes ☐No						☒Yes	S-1		2
Description							MECHANICAL UNITS					
ROOF-ROOF			☐Yes ☐No				5		☒Yes	S-1		2
Description							EMR & SATELLITE TERMINAL ROOM					
			☐Yes ☐No						☒Yes			
Description												
			☐Yes ☐No						☒Yes			
Description												

*Use 2008 Code equivalents only even for older Codes.

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Applicant's Name (please print): Luigi Russo
Signature: [signature]
Date: 6/29/18

12/14

R. 000532

PW1A Sheet 13 of 13

2 Building Notes to appear on the Certificate of Occupancy

EXHIBIT 2: 2017000441503
EXHIBIT 4: 2017000441504
EXHIBIT 5: 2017000441505
ZLDA: 2017000441506

ACCESSORY USES RESTRICTED TO RESIDENTIAL OCCUPANTS OF THE BUILDING AND THEIR GUESTS FOR WHOM NO ADMISSION OR MEMEBERSHIP FEES MAY BE CHARGED (SUBCELLAR & 16TH FLOOR).

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

3 Applicant's Statements and Signatures *Required for all applications.*

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Name (please print) Luigi Russo

Signature

Date 8/20/18

Internal Use Only

P.E. / R.A. Seal *(apply seal, then sign and date over seal)*

12/14

R. 000533

DEPT.BLDGS 110483418 Job Number

SC130530497 Scan Code

ZRD1/CCD1 Response Form

Location information (To be completed by a Buildings Department official if applicable)

House No. [redacted] Street Name [redacted]

Borough Manhattan Block 1010 Lot 7503 BIN 1023723 Job No. 120011192

DETERMINATION (To be completed by a Buildings Department official)

Request has been: ☒ Approved ☐ Denied ☐ Approved with conditions

Follow-up appointment required? ☐ Yes ☒ No

Primary Zoning Resolution or Code Section(s): ZR 12-10

Other secondary Zoning Resolution or Code Section(s): ZR 34-42 & ZR 34-422

Comments:

This CCD1 Response Form hereby supersedes the CCD1 previously issued on March 12, 2010.

Request for a determination to include the horizontal branches of the plumbing lines and their respective chases in calculating zoning mechanical deductions, under ZR 12-10, is hereby approved based on drawings submitted nos. Z-1, Z-10, Z-11 and Z-12, dated February 16, 2010.

CONTROL NO. 963

Name of Authorized Reviewer (please print): Raymond Plumey, FAIA

Title (please print): Deputy Borough Commissioner

Authorized Signature: [signature] Date: 04-02-10 Time: 4:30 PM

Issuers: write signature, date, and time on each page of the hardcopy format and attach this form.

Note: Determination will expire if construction equipment approval is not obtained within 12 months of issuance.

PG. 1 OF 4

6/09

[redacted] Borough Commissioner

Challenge Denied

Date: 11/19/2018

2019-94-A 05/14/2019

NYC Buildings

ZRD1: Zoning Resolution Determination Form
Must be typewritten.

110463418

9631

Orient and affix BIS job number label here

1 Location Information *Required for all requests on filed applications.* 05137 - obj -01,07

House No(s) 143 Street Name WEST 57TH STREET
Borough MANHATTAN Block 1010 Lot 7503 BIN 1023723 CB No. 105

2 Applicant Information *Required for all requests on filed applications.*

Last Name Davidson First Name James Middle Initial
Business Name SLCE Architects Business Telephone 212-979-8400
Business Address 841 Broadway, 7th Floor Business Fax
City New York State NY Zip 10003 Mobile Telephone
E-Mail License Number 014019
License Type ☐ P.E. ☒ R.A. DOB PENS ID # (if available)

3 Attendee Information *Required if different from Applicant in section 2 or no Applicant.*

Relationship to the property: ☒ Filing Representative ☐ Attorney ☐ Other:
Last Name Silberman First Name Nathan Middle Initial B.
Business Name Construction Consulting Associates, Inc. Business Telephone 212-385-1816
Business Address 100 CHURCH STREET, SUITE #1625 Business Fax 212-385-1911
City New York State NY Zip 10007 Mobile Telephone
E-Mail License/Registration # (if P.E./R.A./Attorney)
DOB PENS ID # (if available)

4 Nature of Request *Required for all requests. Only one request may be submitted per form.*

Note: Use this form only to request Zoning Resolution determination (for all other requests, use CCD1 form)

Determination request issued to: ☒ Borough Commissioner's Office ☐ Technical Affairs
Job associated with this request? ☒ Yes (provide job#/doc#/examiner name below) ☐ No
Job Number: 120011182 Document Number: 4 Examiner: K. Flayden
Has this request been previously denied? ☐ Yes *(attach all denied request form(s) and attachment(s))* ☒ No
Indicate total number of pages submitted with this request, including attachments: *(attachment may not be larger than 11" x 17")*
Indicate relevant Zoning Resolution section(s): 12-10 Z.R., 34-42 Z.R., 34-422 Z.R.

Indicate all Buildings Department officials that you have previously reviewed this issue with (if any):

☐ Borough Commissioner ☐ Code & Zoning Specialist ☐ General Counsel's Office
☐ Deputy Borough Commissioner ☐ Chief Plan Examiner ☒ Other: High Rise Exam

2010 FEB 18 AM 10:05 HORO...

ADMINISTRATIVE USE ONLY

Reference #: 9631 Appointment date: Appointment time:
Appointment Scheduled With:
Comments:
Reviewed By: [signature] RA Date 03/12/10 Time: 3:30PM

PG. 2 OF 4

8/09

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

R. 000535

ZRD1 PAGE 2

5 **Description of Request** (additional space is available on page 3)

Note: Buildings Department officials will only interpret or clarify the Zoning Resolution. Any request for variations of the Zoning Resolution must be filed with the Board of Standards and Appeals (BSA) or the Department of City Planning (DCP).

Please itemize all attachments, including plans/sketches, submitted with this form. If request is based on a plan examiner objection, type in the applicable objection text exactly as it appears on the objection sheet.

Respectfully request determination that objection #1 and #7 to PAA dated 1/12/10 which states:

[1] SF Deductions – typical floors. The square footage taken for plumbing chases is excessive. Deductions have been taken where there appears to be no plumbing or ductwork. Correct zoning calculations.

[7] The mechanical deductions submitted on 2/5/10 are still excessive. There are deductions taken in areas where there does not appear to be mechanical equipment/plumbing to support the deductions. Revise the mechanical deductions. Deductions can only be taken where there is slab penetration. There are NO deductions for areas where plumbing/mechanical ductwork is running horizontally!

The mechanical deductions taken for plumbing vertical & horizontal chase are in compliance with the definition and intent of exclusion from floor area as per Sec. 12-10 ZR. for the following reasons:

1. Subject application is for the construction of a High Rise Luxury Transient Hotel and Residential Condominium above, requiring larger diameter piping to properly keep the water and waste demands requiring thicker pipe shafts.

2. The hotel room arrangements require multiple pipe shafts because each unit has a full bath and in some units multiple bathrooms, thus increasing the typical percent of shaft deductions. Additionally the non typical luxurious hotel bathrooms often will have a shower in addition to a bathtub thus requiring additional horizontal and vertical pipe shafts. In many cases the showers are outfitted with shower heads in more than one wall of the shower requiring even more horizontal and vertical pipe runs/shafts.

3. The design of the residential condominium include many very large units with multiple bedrooms, many having their own bathroom, thus increasing the number of shafts and the percentage of plumbing and mechanical shaft deductions.

4. Many of the residential master bathrooms will have a shower in addition to the bathtub; these showers will have shower heads in more than one of the shower enclosure walls requiring additional horizontal and vertical shafts.

5. The residential kitchen designs call for fixtures on more than one or two walls to accommodate luxurious amenities i.e. more than one dishwasher, ice machine, separate cook tops and ovens, multiple sinks, etc. Thus the need for more than the typical number of wet horizontal or vertical shafts.

6. It is proposed to use vertical heat pumps to heat and cool the residential units and that fresh air is supplied to both the hotel and residential units, further increasing the percentage of mechanical (shaft) deductions.

7. It is important to note that spacial and construction cost economy has been sacrificed i.e. few back to back bathrooms or kitchens, to create luxurious layouts, all resulting in mechanical deductions at a higher range.

GENERAL NO. 963

Note: Buildings Department Determination will be issued on the ZRD1 Response Form

ADMINISTRATIVE USE ONLY

Reviewed By: [illegible] **Date:** 03/12/10 **Time:** 3:30PM

PG. 3 OF 4

6/09

Challenge Denied

Date: 11/19/2018

ZRD1 PAGE 3

6 Description of Request (use this section if additional space is required for description)

Note: Buildings Department Determination will be issued on the ZRD1 Response Form

7 Statements and Signature *Required for all requests*

I hereby state that all of the above information is correct and complete to the best of my knowledge. 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.

Name (please print) JAMES DAVIDSON

Signature Date FEB. 17 2020

REGISTERED ARCHITECT JAMES S. DAVIDSON NO. 014019 STATE OF NEW YORK

P.E. / R.A. Seal *(apply seal, then sign and date over seal – not required for Attorneys on unfiled applications)*

CONTROL NO. 0631

ADMINISTRATIVE USE ONLY

Reviewed By: [illegible] RA Date 02/21/20 Time: 3:30 PM

PG. 4 OF 4

6/09

REVIEWED BY
Scott D. Pavan, RA
Borough Commissioner

Challenge Denied

Date: 11/19/2018

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

Appeals Application

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

APPEALS (A) CALENDAR
Application Form

RECEIVED 2018 199 A
BSA APPLICATION NO.
BD. STANDARDS AND APPEALS
2018 DEC 19 P 2:09

Section A — *Applicant/ Owner*

Landmark West!	West 66th Sponsor LLC c/o Paul Hastings LLP
NAME OF APPLICANT	OWNER OF RECORD
45 West 67th Street	200 Park Avenue
ADDRESS	ADDRESS
New York / NY / 10023	New York / NY / 10166
CITY / STATE / ZIP	CITY / STATE / ZIP
(212) / 496-8110	
AREA CODE / TELEPHONE	LESSEE / CONTRACT VENDEE
(212) / 875-0209	
AREA CODE / FAX	ADDRESS
landmarkwest@landmarkwest.org	
EMAIL	CITY / STATE / ZIP

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 62 - 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 11/19/18 Acting on Application No. 121190200

Section D — *Description*

Legalization ☐ Yes ☐ No ☐ In part
Appeal from decision of DOB Manhattan Borough Commissioner denying Zoning Challenge to posted ZD1 Zoning Diagram

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		
2. Are there any applications concerning the premises pending before any other government agency?.....	☐	☑
3. Is the property the subject of any court action?.....	☐	☑

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 19th DAY OF Dec 2018

Charles Weinstock — Attorney
Print Name — Title

NOTARY PUBLIC

LISA SUCHIT
Notary Public, State of New York
NO. 01SU6360628
Qualified in Queens County
My Commission Expires Jan 26, 2021

R. 000542

1 - Page Cowley Affidavit

2019-94 A 05/14/2019

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

Page Cowley, being duly sworn, deposes and says that she is the Chair of the Board of Landmark West!, with offices at 45 West 67th Street, New York, NY 10023; 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 Landmark West!

Signature Page Cowley

Print Name: Page Cowley

Title: Chair, Landmark West!

Sworn to before me this 18th day of December, 2018

Pascale Gabbey

PASCALE GABBEY
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 01GA6374695
Qualified in Bronx County
Commission Expires April 30, 2022

Revised March 8, 2012

2 - Statement of Facts

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]

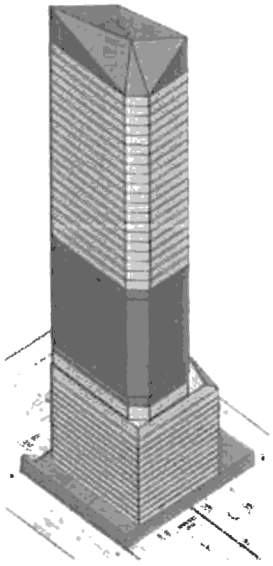

Diagram of George M. Janes

[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. The Fire Department

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.

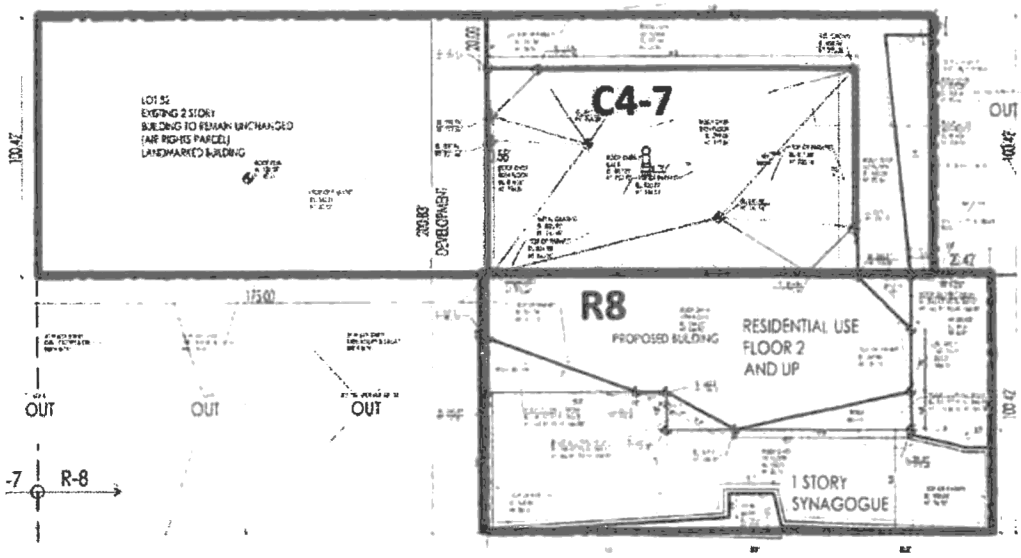


Diagram of George M. Janes

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.

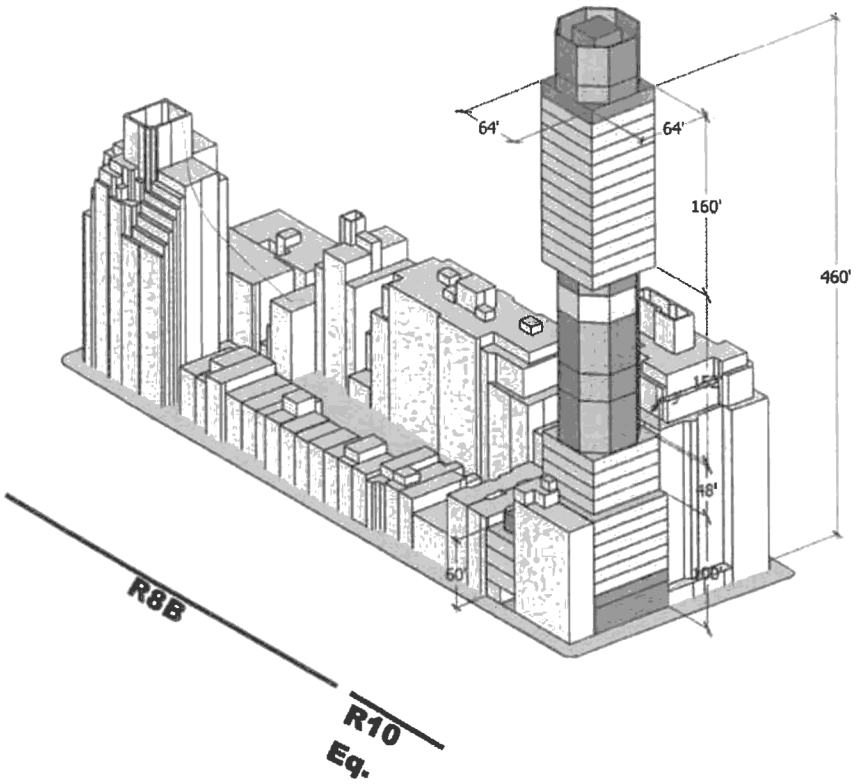
For example, directly to the west and south of the subject zoning lot, there are Lots 9 and 10, which contain existing buildings that are both entirely below 150 feet and are in the R8 District. Using the Owner's logic and interpretation of the SLSD and ZR § 77-02, the applicant could have expanded its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

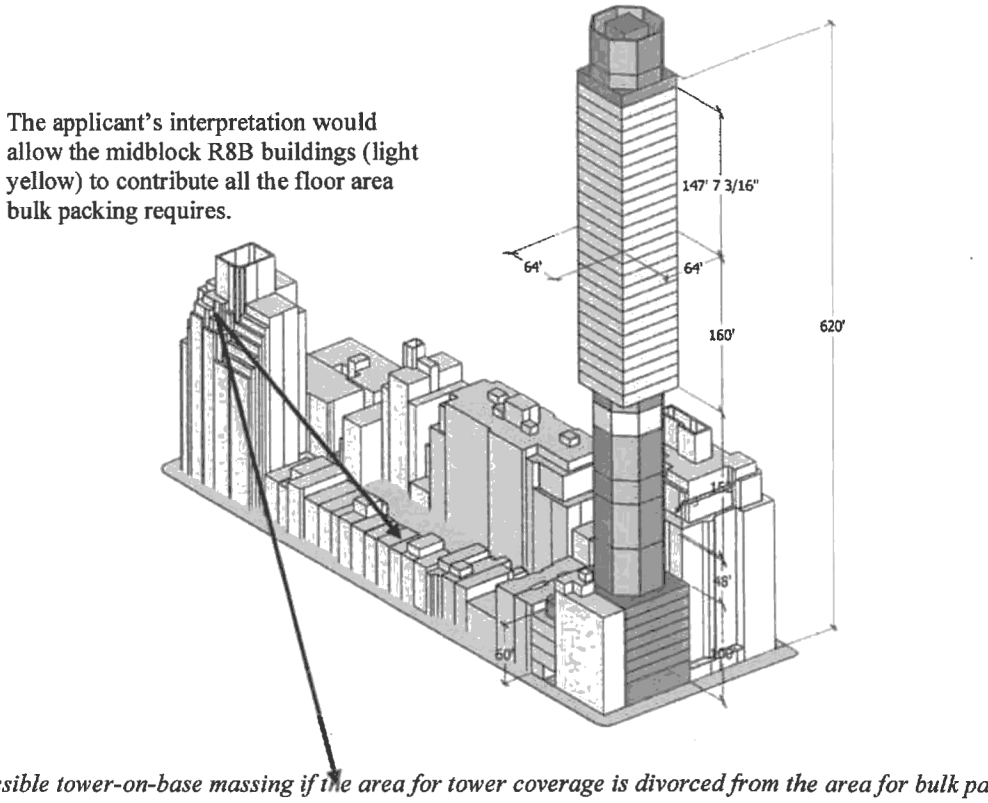
If the applicant's interpretation is correct, then there is no way that this CPC belief could be accurate. To demonstrate an even more absurd example of the applicant's interpretation, consider the following tower-on-base building proposed at 249 East 62nd Street.

[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:



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

3 - DOB Determination - ZRD2

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. 000566

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):

Authorized Signature: Date: Time:

Issuers: write signature, date, and time on each page of the challenge attached to this form.

Challenge Denied
Date: 11/19/2018

6/09

NYC Buildings

ZRD2: Zoning Challenge with response

Must be typewritten.

Scan sticker will be affixed by Department staff

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

R. 000568

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 Scott [redacted]

Reviewer's Signature: Date: Time: WO#:

Challenge Denied

Date: 11/19/2018

6/09

R. 000569

GEORGE M.
JANES &
ASSOCIATES

250 EAST 87TH STREET
NEW YORK, NY 10128

[redacted]

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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.

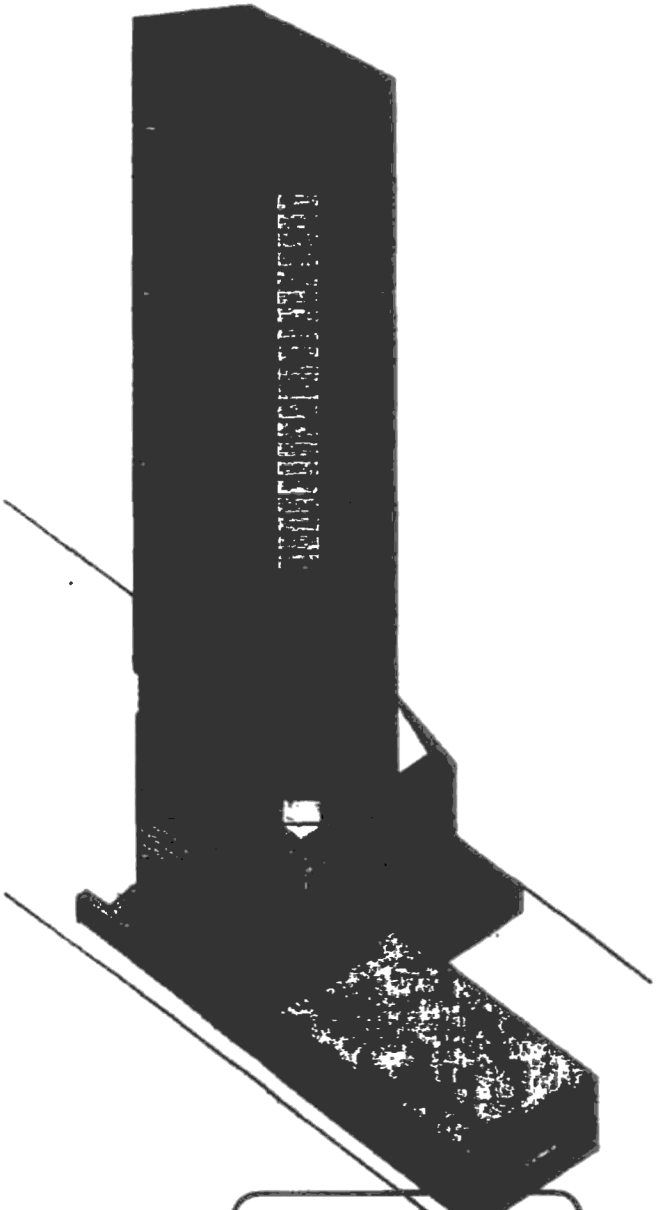
1) The ZD1 is not current and has errors. A new ZD1 or ZD1A should be filed.
2) The FDNY has unanswered questions regarding the safety of interbuilding voids. The Commissioner should not approve an unsafe building.
3) Tower coverage and bulk packing are calculated on different parts of the zoning lot. 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

REVIEW
Scott D
ner

By:

GEORGE M. JANES & ASSOCIATES

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 area described as "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 likely be a more accurate term, but the phrase "interbuilding void" now appears to be commonly used [illegible] continues its use.
[3] N 940127 (A) ZRM, December 2[illegible]
[4] The Millennium Tower at 101 West 6[illegible] Street.

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.

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Scott D. Pavan, RA
Borough Commissioner

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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

[redacted]
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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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[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

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[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 [redacted] not adopt 'vacuum-like' readings of statutes in 'isolation with absolute [redacted] is 'contrary to the purpose and intent of the underlying statutory [redacted] other operative features of the statute's core overview procedures.'"

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 obtaining the base 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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Borough Commissioner
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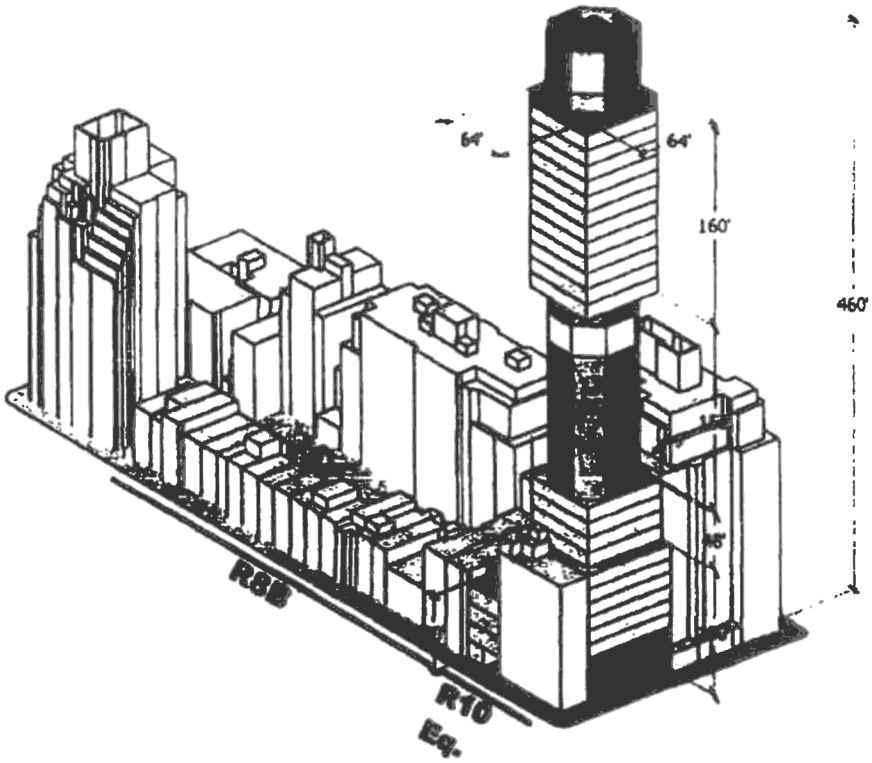
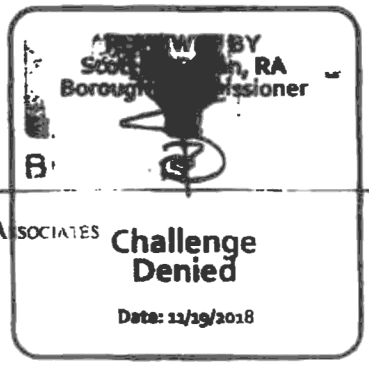
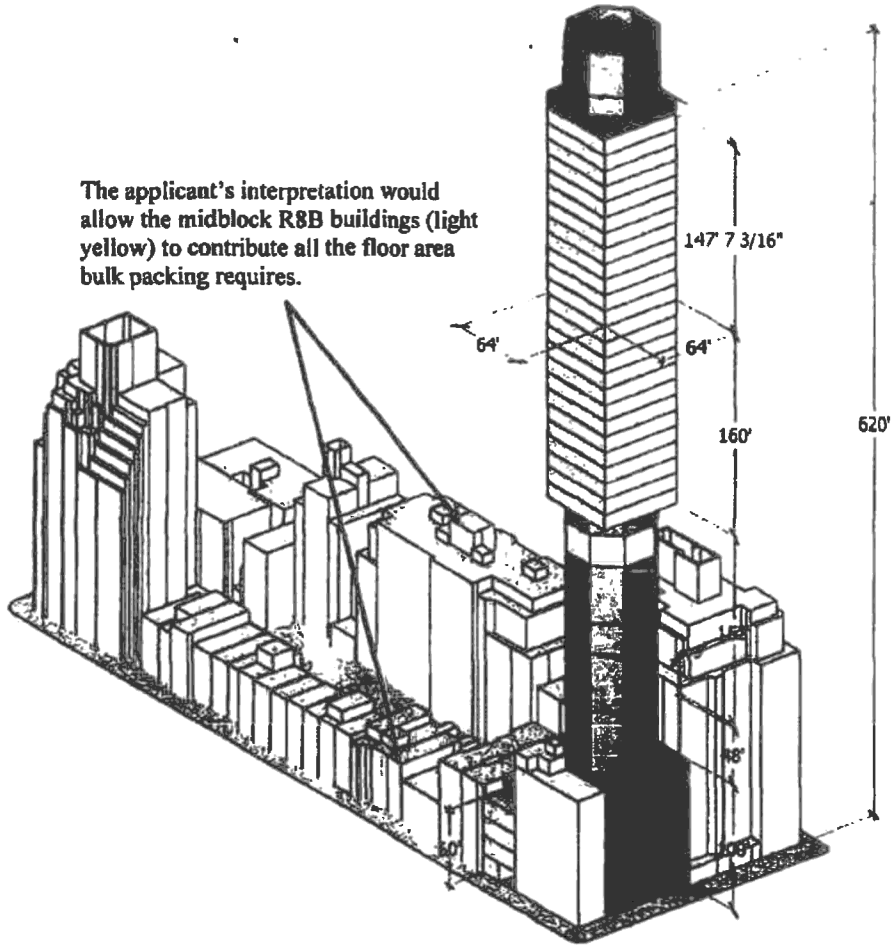


Actual tower-on-base proposal at 249 E. 62nd Street

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 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% 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 Towers [illegible] Issues and Options, 1989; and Special Lincoln Square District Zoning Review [illegible]

[13] The original Notice of Objections [illegible] requested under the Freedom of Information Law in October 2017. It has not yet been produced.

REVIEWED BY [illegible] Borough Commissioner [illegible] 'dings

Challenge Denied

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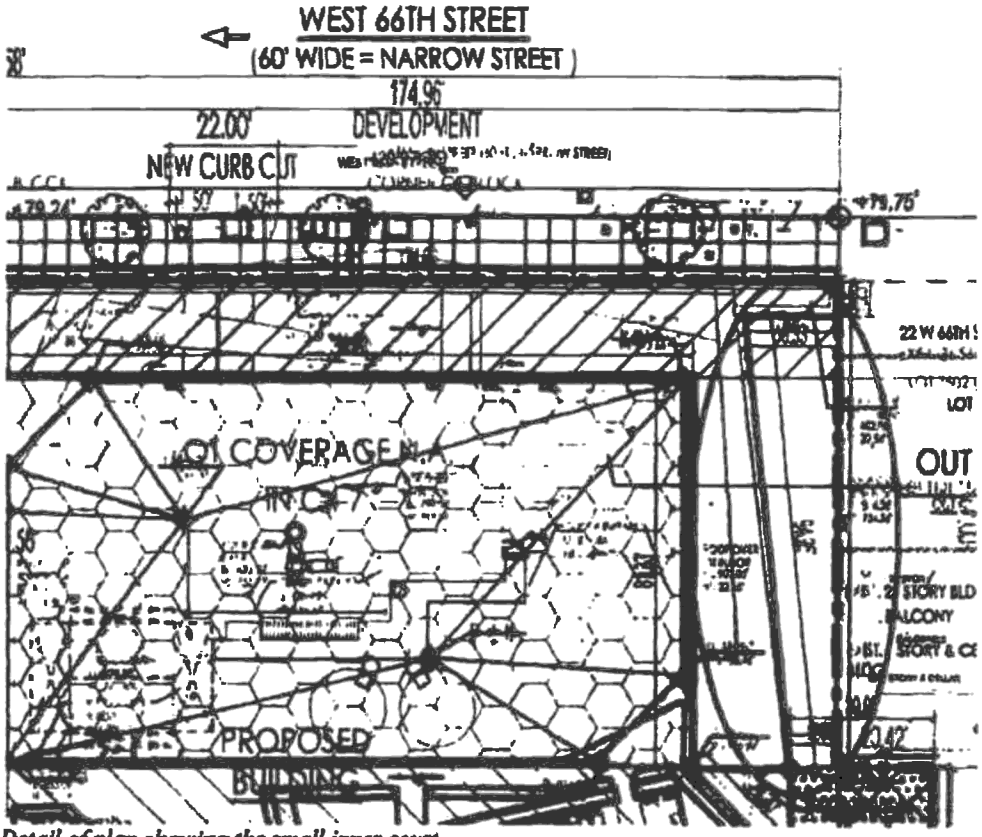
5. The small inner court is too small.

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

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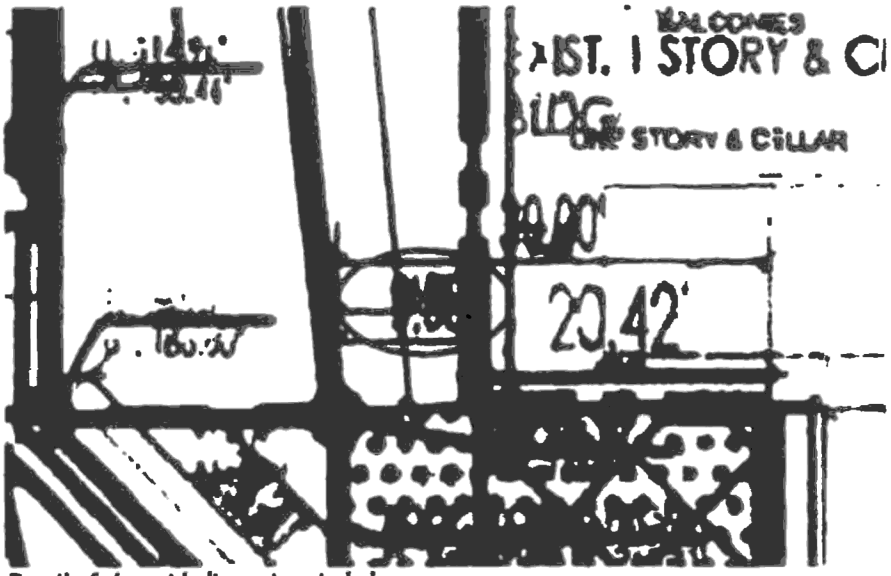

Detail of plan with dimension circled

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 [redacted] the substantial progress the applicant made on construction is [redacted] to the 18 months of construction activity between the DOB's initial approval of a building that was never intended to be

Buildings

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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
Borough Commissioner

GEORGE M. JANES & ASSOCIATES

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

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Challenge Denied
Date: 11/19/2018

ZONING CALCULATIONS

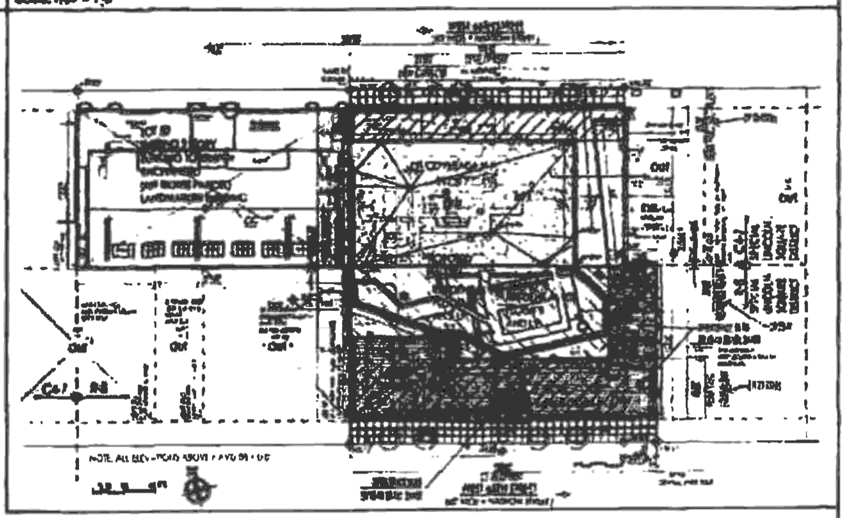
4) ZONING FLOOR AREA

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 23-15	Residential	10 FAR	351,050.00 SF
23-154	Inclusionary Bonus (see below)	2 FAR	70,210.00 SF
	[illegible] (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 Calc Z-013)	5.92 FAR	115,925.44 SF
	Max. Total	6.5 FAR	127,283.00 SF
	[illegible]		351,050.00 SF
	[illegible]		478,333.00 SF
	[illegible]		537,185.44 SF
	[illegible]		548,543.00 SF
	[illegible] Bonus in C4-7		
23-154	[illegible]	10 FAR	351,050.00 SF
	[illegible]	2 FAR	70,210.00 SF
	[illegible] Inclusionary	12 FAR	421,260.00 SF
	Low [illegible] Floor Area Provided		70,210.00 SF
	Off-site [illegible] 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
	C4-7 District (R10 equivalent)		
	Existing Lot 57 Commercial (See Alt 1 #120422726)		43,053.00 SF
	Proposed		
	Community Facility		6,350.69 SF
	Residential		371,855.27 SF
	Total		378,205.16 SF
	C4-7 Total		
	Commercial		43,053.00 SF
	Community Facility		6,350.69 SF
	Residential		371,855.27 SF
	Total		421,258.16 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 / 5,000 SF =	14		
	FAR @ H.F. 14 =	5.92		

OPEN SPACE CALCULATIONS IN R8

23-151	a. Height Factor for OSR			
24-163	H.F. for OSR = Residential FA / Residential Lot Coverage			
	H.F. for OSR = 111,228 SF / 9,099 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
- TOP OF BEAM WITHIN INTRA-OCCUPIABLE SPACE

DEPT OF BLDGS 121190200 Job Number

ES556372378 Scan Code

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) Luis P. [illegible]

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 EXAMINER'S SIGN AND DATE

REVIEWED BY Scott [illegible] Pavan RA Borough Commissioner

Challenge Denied

Date: 11/19/2018

R. 000586

NYC Buildings

ZD1 Zoning Diagram

Location Information

SECTION DIAGRAM

AXONOMETRIC DIAGRAM

LEGEND

ZONING CALCULATIONS

Challenge Denied

Date: 11/19/2018

R. 000587

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
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
Application Application No Authorizing Zoning Section
Application App. No. Authorizing Zoning Section
App. No.

Challenge Denied
Date: 11/19/2018

REVIEWED BY Borough Commissioner's Office

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

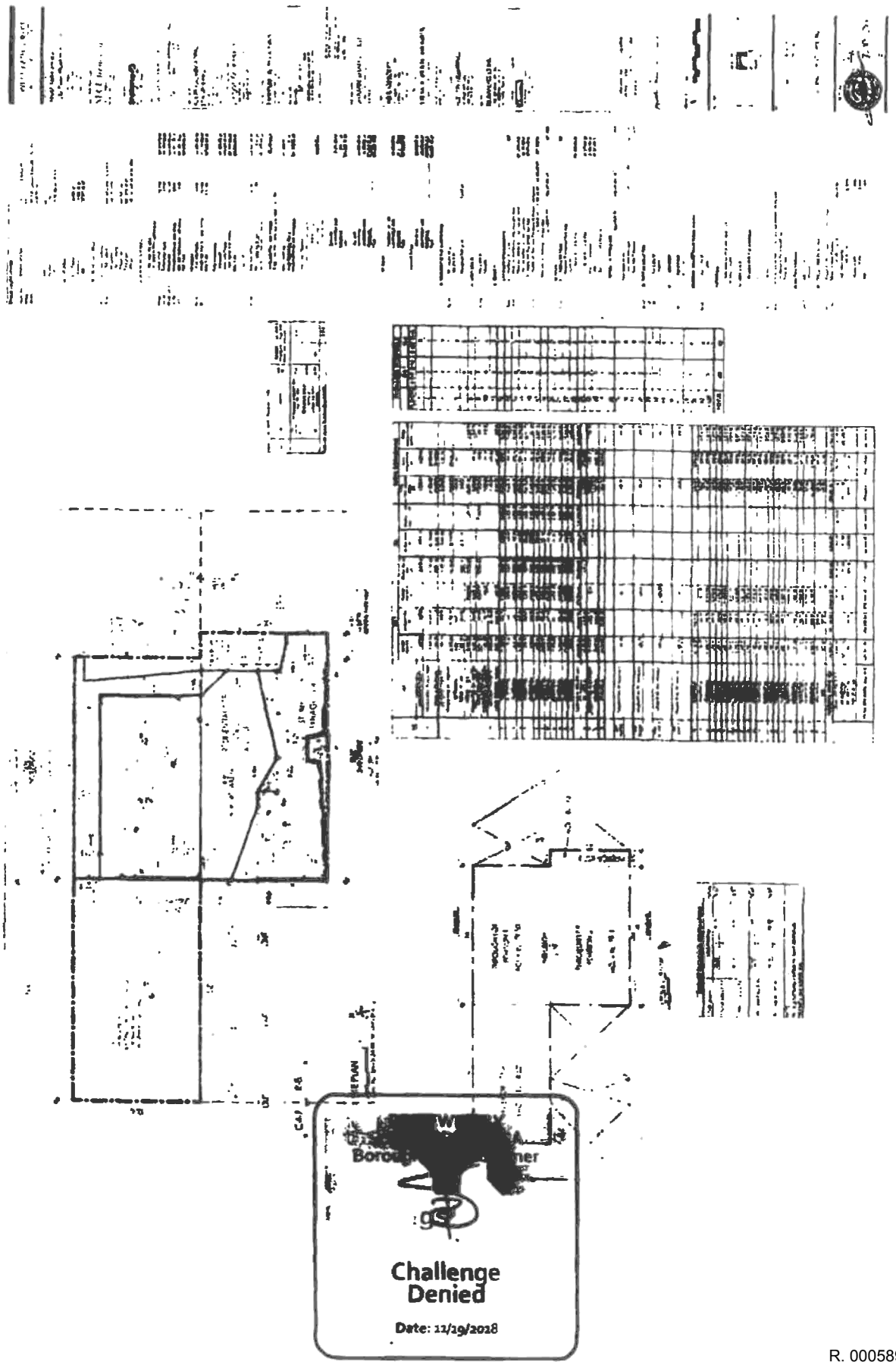
Floor Number	Building Code Gross Floor Area (sq. ft.)	Use Group	Zoning Floor Area (sq. ft.) Residential	Community Facility	Commercial	Manufacturing	FAR
SUB	27,751.62	2B	0				0
SUB	9,362.04	4A		0			0
CEL	27,721.93	2B	0				0
CEL	9,391.64	4A		0			0
001	9,370.60	2	8,923.74				0.15
001	22,405.49	4A		22,405.49			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	10,644.84	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



R. 000589

DEPT OF BLDGS 121190200 Job Number

ES673992433 Scan Code

NYC Buildings

25291A

PW1A: Schedule A - Occupancy / Use

Must be typewritten.

Sheet 1 of 13

Check and affix BIS job number label here

121190200

*Use 2008 Code equivalents only even for older Codes.

Floor	Existing Legal Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations?	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)	Proposed Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations only*	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)
SUB-SUB			☐Yes ☐No				7	OG	☒Yes	S-1, F-2, S-2		2B
	Description:						Description: SEWER EJECTOR, OIL TANK/FUEL OIL, POOL EQUIPMENT, BOWLING EQUIPMENT ROOM					
SUB-SUB			☐Yes ☐No				68	OG	☒Yes	R-2		2B
	Description:						Description: ACCESSORY AMENITY SPACE FOR RESIDENTIAL TENANTS (POOL & DECK, SPA)					
SUB-SUB			☐Yes ☐No				118	OG	☒Yes	R-2		2B
	Description:						Description: ACCESSORY AMENITY SPACE FOR RESIDENTIAL TENANTS (GAMING LOUNGE, BOWLING ALLEY, CHILDREN'S PLAYROOM, SCREENING ROOM & GOLF SIMULATOR)					
SUB-SUB			☐Yes ☐No				69	OG	☒Yes	R-2		2B
	Description:						Description: ACCESSORY AMENITY SPACE FOR RESIDENTIAL TENANTS (HEALTH CLUB, STUDIO, PILATES STUDIO)					
SUB-SUB			☐Yes ☐No				63	OG	☒Yes	R-2		2B
	Description:						Description: BASKETBALL COURT, SQUASH COURT(ACCESSORY TO RESIDENTIAL)					

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 hereby state all the above information is complete and correct to the best of my knowledge.

Applicant's Name (please print): Luigi Russo

Signature

Date: 8/28/18

STATE OF NEW YORK ... PIO ... ED

REVIEWED BY
Scott D. Pavan, RA
Borough Commissioner

Challenge Denied

Date: 11/19/2018

12/14

R. 000590

NYC Buildings

25291A

PW1A: Schedule A - Occupancy / Use

Must be typewritten.

Sheet 2 of 13

Check and affix BIS job number label here

121190200

*Use 2008 Code equivalents only even for older Codes.

Floor	Existing Legal Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designation?	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)	Proposed Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designation only*	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)
SUB-SUB			☐Yes ☐No				469	OG	☒Yes	A-3		4
Description							SYNAGOGUE (VACANT SPACE AT SUBCELLAR FLOOR SHALL NOT BE OCCUPIED UNLESS AN AMENDED CO IS OBTAINED)					
SUB-SUB			☐Yes ☐No				1	OG	☒Yes	R-2		2B
Description							RECEPTION AREA & LOUNGE (ACCESSORY TO RESIDENTIAL)					
SUB-SUB			☐Yes ☐No				47	OG	☒Yes	R-2		2B
Description							ACCESSORY AMENITY SPACE FOR RESIDENTIAL TENANTS (LOCKER ROOM, STEAM ROOMS, SAUNAS)					
			☐Yes ☐No						☒Yes			
Description												
CELLAR			☐Yes ☐No				51	OG	☒Yes	R-2		2B
Description							ACCESSORY TO RESIDENTIAL (BUILDNG SUPER SHOP, RES MANAGER'S OFFICE, STAFF LOUNGE, WOMEN'S LOCKER, MEN'S LOCKER, COMPACTOR, TENANT STORAGE, LAUNDRY, STORAGE ROOM, REFUSE ROOM & WINE CELLAR					

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Applicant's Name (please print): Luigi Russo

Signature: [signature]

Date: 8/20/18

REGISTERED ARCHITECT ... STATE OF NEW YORK ... 20741

REVIEWED BY Scott M. Pavan, RA Borough Commissioner

Challenge Denied

Date: 11/19/2018

12/14

R. 000591

NYC Buildings

25291A

PW1A: Schedule A - Occupancy / Use

Must be typewritten.

Sheet 3 of 15

Print and affix BIS job number label here

121190200

*Use 2008 Code equivalents only even for older Codes.

Floor	Existing Legal Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations?	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)	Proposed Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations only*	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)
CEL - CEL			☐Yes ☐No				3	OG	☒Yes	R-2		2B
Description							BIKE STORAGE ROOM (467 SF, 66 BIKES PROVIDED)					
CEL -CEL			☐Yes ☐No				31	OG	☒Yes	S-1		2B
Description							STORM WATER TANK, FIRE PUMP & WATER METER ROOM, GAS METER ROOM, ELECTRICAL SWITCHGEAR ROOM, TELEPHONE & IT SERVER, DOMESTIC HOT WATER ROOM, SATELITE TERMINAL, FIRE PUMP ATS ROOM,DAS ROOM, MEP ROOM,					
CEL -CEL			☐Yes ☐No				6	OG	☒Yes	A-3		4
Description							SYNAGOGUE MECHANICAL CELLAR (VACANT SPACE AT CELLAR FLOOR SHALL NOT BE OCCUPIED UNLESS AN AMEDED CO IS OBTAINED)					
CEL -CEL			☐Yes ☐No				6		☒Yes	A-3		4
Description							HABONIM (MEP ROOM)					
001-001			☐Yes ☐No				706	100	☒Yes	A-3		
Description							SYNAGOGUE (VACANT SPACE AT FIRST FLOOR SHALL NOT BE OCCUPIED UNLESS AN AMENDED CO IS OBTAINED)					

Re-work entire line →

REVIEWED BY
Scott D. Pavan, RA
Borough Commissioner

Denied

Date: 11/19/2018

STERED AP

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 hereby state all the above information is complete and correct to the best of my knowledge.

Applicant's Name (print) Luigi Hu 360

Signature

6/28/18

12/14

NYC Buildings

25291A

PW1A: Schedule A - Occupancy / Use

Must be typewritten.

Sheet 4 of 13

Orient and affix BIS job number label here

121190200

*Use 2008 Code equivalents only even for older Codes.

Floor	Existing Legal Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations?	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)	Proposed Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations only*	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)
001-001			☐Yes ☐N				16	100	☒Yes	R-2		2
	Description:						Description: RES LOBBY, MAIL ROOM, PACKAGE ROOM, MECHANICAL ROOM, CART ROOM & DOG SPA (ACCESSORY TO RESIDENTIAL)					
			☐Yes ☐N						☒Yes			
	Description:						Description: Delete Existing MZ 1 line and Add next two lines MZ-1					
MZ1-MZ			☐Yes ☐N				3	40	☒Yes	A-3		4
	Description:						Description: MEP ROOM (ACCESSORY TO RESIDENTIAL) (BETWEEN 1ST AND 2ND FLOOR)					
MZ1-MZ			☐Yes ☐N					40	☒Yes	R-2	6	2
	Description:						Description: SYNAGOGUE MEZZANINE(VACANT SPACE AT MZ1 FLOOR SHALL NOT BE OCCUPIED UNLESS AN AMENDED CO IS OBTAINED BETWEEN 1ST AND 2ND FLOOR)					
002-005			☐Yes ☐N					40	☒Yes	R-2	6	2
	Description:						Description: SIX (6) CLASS A DWELLING UNITS PER FLOOR					

REVIEWED BY [illegible] D. Pavan[illegible] Commissioner [illegible] Buildin[illegible]

Challenge Denied

Date: 11/19/2018

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 hereby state all the above information is complete and correct to the best of my knowledge.

Applicant's Name: Luigi Russo

8/28/18

REGISTERED ARCHITECT STATE OF NEW YORK

12/14

R. 000593

NYC Buildings

PW1A: Schedule A - Occupancy / Use

25291A

Must be typewritten.

Sheet 5 of 13

Check and affix BIS job number label here

121190200

Floor	Existing Legal Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations?	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)	Proposed Use (*Use 2008 Code equivalents only even for older Codes.): Maximum Number of Persons	Live Load (psf)	2014 Code Designations only*	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)	Description
002-002			☐Yes ☐No					40	☒Yes	R-2		2	PRIVATE DWELLING UNIT TERRACES (NORTH)
002-005			☐Yes ☐No				6	40	☒Yes	R-2		2	TENANT STORAGE ROOM ACCESSORY TO RESIDENTIAL PER FLOOR
002-002			☐Yes ☐No					40	☒Yes	R-2		2	PRIVATE DWELLING UNIT TERRACES (SOUTH)
			☐Yes ☐No						☒Yes				
			☐Yes ☐No						☒Yes				

Add new line

Delete M22

Delete M22

REVIEWED BY
Scott D. Pavan, RA
Borough Commissioner
Challenge Denied
Date: 11/9/2018

REGISTERED ARCHITECT
STATE OF NEW YORK

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 hereby state all the above information is complete and correct to the best of my knowledge.

Applicant's Name (please print): Luigi Russo

Signature

Date: 8/28/18

12/14

NYC Buildings

PW1A: Schedule A - Occupancy / Use

25291A

Must be typewritten.

Sheet 6 of 13

121190200

Floor	Existing Legal Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations?	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)	Proposed Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations only*	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)
			☐Yes ☐N						☒Yes			
Description	Delete line 003-003											
			☐Yes ☐N						☒Yes			
Description	Delete line 003-024											
			☐Yes ☐N						☒Yes			
Description	Delete line 004-004											
			☐Yes ☐N						☒Yes			
Description	Delete line 005-005 Delete line 006-006 (duplicate)											
006-006			☐Yes ☐N				40		☒Yes	R-2	7	2
Description							SEVEN (7)CLASS A DWELLING UNITS PER FLOOR					

Challenge Denied
Date: 12/19/2018

REGISTERED ARCHITECT
STATE OF NEW YORK

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 hereby state all the above information is complete and correct to the best of my knowledge.

Applicant's Name (print): Livio Russo

Signature: _____ 8/28/18

12/14

NYC Buildings

PW1A: Schedule A - Occupancy / Use

Must be typewritten.

25291A

Sheet 7 of 13

Orient and affix BIS job number label here

121190200

Floor	Existing Legal Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations?	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)	Proposed Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations only*	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)
007-008			☐Yes ☐No					40	☒Yes	R-2	7	2
Description							Description: SEVEN (7) CLASS A DWELLING UNITS PER FLOOR					
009-014			☐Yes ☐No					40	☒Yes	R-2	7	2
Description							Description: SEVEN (7)CLASS A DWELLING UNITS PER FLOOR					
15			☐Yes ☐No				28	100	☒Yes	S-2, F-2, S-1		2B
Description							Description: STORM WATER DENTENTION TANK, POOL EQUIPMENT ROOM,MECHANICAL 1 & 2, GENERATOR ROOM, TELEPHONE ROOM, ATS ROOM, ELECTRICAL ROOM					
			☐Yes ☐No						☒Yes			
Description												
016-016			☐Yes ☐No				60	40	☒Yes	R-2		2
Description							Description: ACCESSORY AMENITY SPACE FOR RES. TENANTS (LOUNGE ROOM, CONFERENCE ROOM, SERVING PANTRY)					

Challenge Denied

REVIEWED BY
Scott D. Pavan, RA
Borough Commissioner

Date: 11/19/2018

Delete M1-5

Re-write description →

STERED ARCHI
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STAT
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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 hereby state all the above information is complete and correct to the best of my knowledge.

Applicant's Name (please print): Luigi Rosso

6/28/18

12/14

NYC Buildings

PW1A: Schedule A - Occupancy / Use

Must be typewritten.

25291A

Sheet 8 of 13

Check and write this job number here: 121190200

Existing Legal Use

Floor	Description	Maximum Number of Persons	Live Load (psf)	2014 Code Designations?	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)
016-016				☐Yes ☐N			
016-016				☐Yes ☐N			
016-016				☐Yes ☐N			
016-016				☐Yes ☐N			
017-017				☐Yes ☐N			

Proposed Use **Use 2008 Code equivalents only even for older Codes.*

Floor	Description	Maximum Number of Persons	Live Load (psf)	2014 Code Designations only*	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)
016-016	LOBBY/VESTIBULES_1 & 2 (ACCESSORY TO RESIDENTIAL)	66	40	☒Yes	R-2		2
016-016	MECHANICAL ROOM	9		Yes			2
016-016	GREAT ROOM (ACCESSORY TO RESIDENTIAL)	160	40	☒Yes	A-3		2
016-016	POOL, POOL TERRACE & SPA, WALKWAY, EXTERIOR TERRACE(ACCESSORY TO RESIDENTIAL)	66	40	☒Yes	R-2		2
017-017	ELECTRICAL ROOM, MECHANICAL ROOM, BOILER ROOM, E.M.R., AV ROOM	19	40	☒Yes	S-1		2

Add new line

Re-write description →

Challenge Denied
Date: 11/19/2018

REGISTERED ARCHITECT
STATE 020741

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 hereby state all the above information is complete and correct to the best of my knowledge.

Applicant's Name: Luigi Russo

Signature:

Date: 9/28/18

12/14

NYC Buildings

25291A

PW1A: Schedule A - Occupancy / Use

Must be typewritten.

Sheet 9 of 13

Orient and affix BIS job number label here

121190200

Floor	Existing Legal Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations?	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)	Proposed Use* (*Use 2008 Code equivalents only even for older Codes): Maximum Number of Persons	Live Load (psf)	2014 Code Designations only*	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)
01B-018			☐Yes ☐N				30	100	☒Yes	R-2		2
Description							MECHANICAL ROOMS & ELECTRICAL ROOM_(2)					
019-019			☐Yes ☐N				34	100	☒Yes	S-1		2
Description							MECHANICAL ROOMS (4), ELECTRICAL ROOM, FIRE PUMP ROOM, FIRE RESERVE STORAGETANK.					
020-026			☐Yes ☐N				0	40	☒Yes	R-2	3	2
Description							PRIVATE DWELLING UNIT LOGGIA'S (3 PER FLOOR)					
020-026			☐Yes ☐N					40	☒Yes	R-2	3	2
Description							THREE (3) CLASS A DWELLINGS PER FLOOR					
027-033			☐Yes ☐N					40	☒Yes	R-2	2	2
Description							TWO (2) CLASS A DWELLINGS PER FLOOR					

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

Add new line

STERED ARC
STAT 1 RK

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 hereby state all the above information is complete and correct to the best of my knowledge.

Applicant's Name: Luigi Russo

Date 8/28/18

12/14

NYC Buildings

25291A

PW1A: Schedule A - Occupancy / Use

Must be typewritten.

Sheet 10 of 13

Check and attach BIS job number label here ☒
121190200

*Use 2008 Code equivalents only even for older Codes.

Floor	Existing Legal Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations?	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)	Proposed Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations only*	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)
027-033			☐Yes ☐N					40	☒Yes	R-2		2
Description							PRIVATE DWELLING UNIT LOGGIA'S (3)					
034-037			☐Yes ☐N					40	☒Yes	R-2	1	2
Description							ONE (1) CLASS A DWELLING UNIT PER FLOOR					
034-037			☐Yes ☐N					40	☒Yes	R-2	0	2
Description							PRIVATE DWELLING UNIT LOGGIA'S (2)					
038-038			☐Yes ☐N					40	☒Yes	R-2	0.5	2
Description							ONE-HALF (1/2) CLASS A DUPLEX DWELLING UNIT					
039-039			☐Yes ☐N					40	☒Yes	R-2	0.5	2
Description							ONE-HALF CLASS A DWELLINGS PER FLOOR					

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Applicant's Name (please print): Luigi Russo
Signature
8/28/18

EDARC STATE OF NEW YORK 741 ... P.E.

REVIEWED BY: ... RA ... Commissioner
Challenge Denied
Date: 11/19/2018

12/14

R. 000599

NYC Buildings

25291A

PW1A: Schedule A - Occupancy / Use

Must be typewritten.

Sheet 11 of 13

Orient and affix BIS job number label here

121190200

Floor	Existing Legal Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations?	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)	Proposed Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations only*	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)
039-039			☐Yes ☐N				12	40	☒Yes	S-1		2
Description							PLUMBING, TELEPHONE, ELECTRICAL ROOM #1, ELECTRICAL ROOM #2, FIRE PUMP ROOM, MECHANICAL					
038-038			☐Yes ☐N					40	☒Yes	R-2		2
Description							PRIVATE DWELLING UNIT LOGGIA'S (2)					
039-039			☐Yes ☐N					40	☒Yes	R-2		2
Description							PRIVATE DWELLING UNIT LOGGIA'S (1)					
Description			☐Yes ☐N						☐Yes			
				Delete 040-040								
Description			☐Yes ☐N						☒Yes			
				Delete 041-041								

REVIEWED BY
Scott D. Pavan, RA
Borough Commissioner
Challenge
Denied
Date: 12/19/2018

REGISTERED ARCHITECT
STATE OF NEW YORK

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 hereby state all the above information is complete and correct to the best of my knowledge.

Applicant's Name (print) Luigi Russo

Signature

Date 5/28/18

12/14

NYC Buildings

25291A

PW1A: Schedule A - Occupancy / Use

Must be typewritten.

Sheet 12 of 13

Ⓘ Orient and affix 2nd job number label here ☒

121190200

Floor	Existing Legal Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations?	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)	Proposed Use: Maximum Number of Persons	Live Load (psf)	2014 Code Designations only*	Building Code Occupancy Group(s)	Dwelling/ Rooming Units (BC)	Zoning Use Group(s)
RO F-R OF			☐Yes ☐No				3	40	☒Yes	S-1		2
	Description						Description: ELECTRICAL ROOM & STORAGE ROOMS					
RO F-R OF			☐Yes ☐No						☒Yes	S-1		2
	Description						Description: MECHANICAL UNITS					
RO F-R OF			☐Yes ☐No				5		☒Yes	S-1		2
	Description						Description: EMR & SATELLITE TERMINAL ROOM					
			☐Yes ☐No						☒Yes			
	Description						Description					
			☐Yes ☐No						☒Yes			
	Description						Description					

*Use 2008 Code equivalents only even for older Codes.

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Applicant's Name (please print): Luigi Russo

Signature: [signature]

Date: 6/28/18

F NEW ... if required

DARC ... CT ... RX ... 020741 ... STAT

REVIEWED BY
Scott [illegible], RA
Borough Commissioner
Challenge
Denied
Date: 11/19/2018

12/14

R. 000601

PW1A Sheet 13 of 13

2 Building Notes to appear on the Certificate of Occupancy

EXHIBIT 2: 2017000441503
EXHIBIT 4: 2017000441504
EXHIBIT 5: 2017000441505
ZLDA: 2017000441506

ACCESSORY USES RESTRICTED TO RESIDENTIAL OCCUPANTS OF THE BUILDING AND THEIR GUESTS FOR WHOM NO ADMISSION OR MEMEBERSHIP FEES MAY BE CHARGED (SUBCELLAR & 16TH FLOOR).

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

3 Applicant's Statements and Signatures *Required for all applications.*

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 hereby state all the above information is complete and correct to the best of my knowledge.

Name (please print) Luigi Russo

Signature ERED Date 8/28/18

STATE OF NEW YORK 020741

P.E. / R.A. Seal *(apply seal, then sign and date over seal)*

Internal Use Only

12/14

2019-94-A 05/14/2019

DEPT. BLDGS 110463418 Job Number
SC130530497 Scan Code

ZRD1/CCD1 Response Form

Location information (To be completed by a Buildings Department official if applicable)

House No(s): [redacted] Street Name: [redacted]

Borough: Manhattan Block: 1010 Lot: 7503 BIN: 1023723 Job No.: 120011192

DETERMINATION (To be completed by a Buildings Department official)

Request has been: ☒ Approved ☐ Denied ☐ Approved with conditions

Follow-up appointment required? ☐ Yes ☒ No

Primary Zoning Resolution or Code Section(s): ZR 12-10

Other secondary Zoning Resolution or Code Section(s): ZR 34-42 & ZR 34-422

Comments:

This CCD1 Response Form hereby supersedes the CCD1 previously issued on March 12, 2010.

Request for a determination to include the horizontal branches of the plumbing lines and their respective chases in calculating zoning mechanical deductions, under ZR 12-10, is hereby approved based on drawings submitted nos. Z-1, Z-10, Z-11 and Z-12, dated February 16, 2010.

CONTROL NO. 9631

Name of Authorized Reviewer (please print): Raymond Plumey, FAIA

Title (please print): Deputy Borough Commissioner

Authorized Signature: [signature] Date: 04-02-10 Time: 4:30 PM

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

Note: Determination will expire if construction, alteration, or equipment approval is not obtained within 12 months of issuance.

PG. 1 OF 4

6/09

[redacted] Borough Commissioner

Challenge Denied

Date: 11/19/2018

R. 000603

NYC Buildings

ZRD1: Zoning Resolution Determination Form

Must be typewritten.

110463418

Orient and affix BIS job number label here

9631

1 Location Information *Required for all requests on filed applications.* 05137 - obj -01,07

House No(s) 143 Street Name WEST 57TH STREET

Borough MANHATTAN Block 1010 Lot 7503 BIN 1023723 CB No. 105

2 Applicant Information *Required for all requests on filed applications.*

Last Name Davidson First Name James Middle Initial

Business Name SLCE Architects Business Telephone 212-979-8400

Business Address 841 Broadway, 7th Floor Business Fax

City New York State NY Zip 10003 Mobile Telephone

E-Mail License Number 014019

License Type ☐ P.E. ☒ R.A. DOB PENS ID # (if available)

3 Attendee Information *Required if different from Applicant in section 2 or no Applicant.*

Relationship to the property: ☒ Filing Representative ☐ Attorney ☐ Other:

Last Name Silberman First Name Nathan Middle Initial B.

Business Name Construction Consulting Associates, Inc. Business Telephone 212-385-1818

Business Address 100 CHURCH STREET, SUITE #1625 Business Fax 212-385-1911

City New York State NY Zip 10007 Mobile Telephone

E-Mail License/Registration # (if P.E./R.A./Attorney)

DOB PENS ID # (if available)

4 Nature of Request *Required for all requests. Only one request may be submitted per form.*

Note: Use this form only to request Zoning Resolution determination (for all other requests, use CCD1 form)

Determination request issued to: ☒ Borough Commissioner's Office ☐ Technical Affairs

Job associated with this request? ☒ Yes *(provide job#/doc#/examiner name below)* ☐ No

Job Number: 120011192 Document Number: 4 Examiner: K. Flayden

Has this request been previously denied? ☐ Yes *(attach all denied request form(s) and attachment(s))* ☒ No

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

Indicate relevant Zoning Resolution section(s): 12-10 Z.R., 34-42 Z.R., 34-422 Z.R.

Indicate all Buildings Department officials that you have previously reviewed this issue with (if any):

☐ Borough Commissioner ☐ Code & Zoning Specialist ☐ General Counsel's Office

☐ Deputy Borough Commissioner ☐ Chief Plan Examiner ☒ Other: High Rise Exam

ADMINISTRATIVE USE ONLY

Reference #: 9631 Appointment date: Appointment time:

Appointment Scheduled With:

Comments:

Reviewed By: Scott D. Pavan, RA Date 03/21/19 Time: 9:30AM

REVIEWED BY
Scott D. Pavan, RA
Borough Commissioner

Challenge Denied

Date: 11/19/2018

PC. 2 OF 4

6/09

R. 000604

ZRD1

PAGE 2

5	Description of Request (additional space is available on page 3)
	Note: Buildings Department officials will only interpret or clarify the Zoning Resolution. Any request for variations of the Zoning Resolution must be filed with the Board of Standards and Appeals (BSA) or the Department of City Planning (DCP).

Please itemize all attachments, including plans/sketches, submitted with this form. If request is based on a plan examiner objection, type in the applicable objection text exactly as it appears on the objection sheet.

Respectfully request determination that objection #1 and #7 to PAA dated 1/12/10 which states:

[1] SF Deductions – typical floors. The square footage taken for plumbing chases is excessive. Deductions have been taken where there appears to be no plumbing or ductwork. Correct zoning calculations.

[7] The mechanical deductions submitted on 2/5/10 are still excessive. There are deductions taken in areas where there does not appear to be mechanical equipment/plumbing to support the deductions. Revise the mechanical deductions. Deductions can only be taken where there is slab penetration. There are NO deductions for areas where plumbing/mechanical ductwork is running horizontally!

The mechanical deductions taken for plumbing vertical & horizontal chase are in compliance with the definition and intent of exclusion from floor area as per Sec. 12-10 ZR. for the following reasons:

1. Subject application is for the construction of a High Rise Luxury Transient Hotel and Residential Condominium above, requiring larger diameter piping to properly supply the water and waste demands requiring thicker pipe shafts.

2. The hotel room arrangements require multiple pipe risers because each unit has a full bath and in some units multiple bathrooms, thus increasing the typical percent of shaft deductions. Additionally the non typical luxurious hotel bathrooms often will have a shower in addition to a bathtub thus requiring additional horizontal and vertical pipe shafts. In many cases the showers are outfitted with shower heads in more than one wall of the shower requiring even more horizontal and vertical pipe runs/shafts.

3. The design of the residential condominium include many very large units with multiple bedrooms, many having their own bathroom, thus increasing the number of shafts and the percentage of plumbing and mechanical shaft deductions.

4. Many of the residential master bathrooms will have a shower in addition to the bathtub; these showers will have shower heads in more than one of the shower enclosure walls requiring additional horizontal and vertical shafts.

5. The residential kitchen designs call for fixtures on more than one or two walls to accommodate luxurious amenities i.e. more than one dishwasher, ice machine, separate cook tops and ovens, multiple sinks, etc. Thus the need for more than the typical number of wet horizontal or vertical shafts.

6. It is proposed to use vertical heat pumps to heat and cool the residential units and that fresh air is supplied to both the hotel and residential units, further increasing the percentage of mechanical (shaft) deductions.

7. It is important to note that special and construction cost economy has been sacrificed i.e. few back to back bathrooms or kitchens, to create luxurious layouts, all resulting in mechanical deductions at a higher range.

CONTROL NO. 9631

Note: Buildings Department Determination will be issued on the ZRD1 Response Form

ADMINISTRATIVE USE ONLY

Reviewed By: [redacted] Date: 03/2/10 Time: 3:30PM

PG. 3 OF 4

8/09

[redacted]

Challenge Denied

Date: 11/19/2018

R. 000605

ZRD1 PAGE 3

6 Description of Request - use this section if additional space is required for description

Note: Buildings Department Determination will be issued on the ZRD1 Response Form

7 **Statements and Signature** *Required for all requests*

I hereby state that all of the above information is correct and complete to the best of my knowledge. 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.

Name (please print) JAMES DAVIDSON

Signature Date FEB. 17 2010

REGISTERED ARCHITECT JAMES S. DAVIDSON No. 014019-1 STATE OF NEW YORK

P.E. / R.A. Seal *(apply seal, then sign and date over seal – not required for Attorneys on unfiled applications)*

CONTROL NO. 04631

ADMINISTRATIVE USE ONLY

Reviewed By: [illegible] RA Date 03/12/10 Time: 3:30 PM

PG. 4 OF 4

6/09

REVIEWED BY
Scott D. Pavan, RA
Borough Commissioner

Challenge Denied

Date: 11/19/2018

R. 000606

4 - Zoning and Construction Code Sections

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

Applicable Zoning and Construction Code Sections

1. Zoning Resolution

Article I – General Provisions
Chapter 2 – Construction of Language and Definitions

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#....

Article VII – Administration
Chapter 7 – Special Provisions for Zoning Lots Divided by District Boundaries

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#.

Article VIII – Special Purpose Districts
Chapter 2 – Special Lincoln Square District

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.

2. Administrative Code

Title 28 – New York City Construction Codes
Chapter 1 – Administration
Article 101 – General

§ 28-103.8 – Matters Not Provided For

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.

5 - Case Law

Matter of Avella v City of New York, 29 N.Y.3d 425

Matter of Avella v City of New York, 29 N.Y.3d 425

Copy Citation

Court of Appeals of New York

April 25, 2017, Argued ; June 6, 2017, Decided

No. 54

Reporter

29 N.Y.3d 425 * | 80 N.E.3d 982 ** | 58 N.Y.S.3d 236 *** | 2017 N.Y. LEXIS 1403 **** | 2017 NY Slip Op 04383 | 2017 WL 2427307

[1] In the Matter of Senator Tony Avella, et al., Respondents, v City of New York, et al., Respondents, Queens Development Group, LLC, et al., Appellants.

Prior History: 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 July 2, 2015. The Appellate Division (1) reversed, on the law, a judgment of the Supreme Court, New York County (Manuel J. Mendez, J.), entered in a hybrid CPLR article 78 proceeding and declaratory judgment action, which had denied the petition for a judgment pursuant to CPLR article 78 and for declaratory and injunctive relief in connection with the construction of Willets West, a retail entertainment center, on City parkland, and dismissed the proceeding; and (2) granted the petition to the extent of declaring that construction of Willets West on City parkland without the authorization of the state legislature violates the public trust doctrine, and enjoining any further steps toward its construction.
Matter of Avella v City of New York, 131 AD3d 77, 13 NYS3d 358, 2015 N.Y. App. Div. LEXIS 5643, 2015 NY Slip Op 5790 (July 2, 2015), affirmed.

Disposition: Order affirmed, with costs.

Core Terms

stadium, subdivision, parkland, purposes, authorization, alienated, facilities, leases, trade and commerce, grounds, appurtenant, constructed, public trust doctrine, parking area, municipality, state legislature, entertainment, shopping, contracts, financing, non-park, permits, rent, recreation, cultural, Jacket, legislative authorization, public purpose, rental agreement, public trust

Case Summary

Overview

hld Where plaintiffs sued defendants, a city, joint venture, and others, in connection with proposed development of parkland, the intermediate appellate court did not err in reversing the trial court's order of dismissal and enjoining the development because construction on city parkland without the state legislature's authorization violated the public trust doctrine; [2]-The plain language of Administrative Code of the City of NY 18-118, which concerned the stadium the city constructed on the

parkland, did not authorize the proposed construction of stores, a hotel, a public school, and housing, and § 18-118's legislative history indicated that it was intended to authorize the lease, rental, or licensing of the stadium, not the construction of unrelated facilities.

Outcome

The intermediate appellate court's order was affirmed.

LexisNexis® Headnotes

Governments > Local Governments > Duties & Powers
View more legal topics

HN1 **Local Governments, Duties & Powers**

The public trust doctrine is ancient and firmly established in New York's precedent. When a municipality takes land for the public use as a park, it holds it in trust for that purpose. Receiving the title in trust for an especial public use, the municipality may not convey the land without the sanction of the legislature. New York's courts have time and again reaffirmed the principle that parkland is impressed with a public trust, requiring legislative approval before it can be alienated or used for an extended period for non-park purposes. Only the state legislature has the power to alienate parkland (or other lands held in the public trust) for purposes other than those for which they have been designated. Even though a municipality may own the land dedicated to public use, the title of the municipal corporation to the public streets is held in trust for the public, and the power to regulate those uses is vested solely in the legislature. More like this Headnote

Shepardize - Narrow by this Headnote (1) 1

Governments > Local Governments > Duties & Powers
View more legal topics

HN2 **Local Governments, Duties & Powers**

Under the public trust doctrine, approval of the legislature in alienating parkland must be plainly conferred through the direct and specific approval of the state legislature. The principle also requires that a proposed use of parkland falls within the scope of legislative authorization once granted. When there is a fair, reasonable and substantial doubt concerning the existence of an alleged power in a municipality, the power should be denied. Legislative sanction must be clear and certain to permit a municipality to lease public property for private purposes. More like this Headnote

Shepardize - Narrow by this Headnote (1) 1

Governments > Legislation > Interpretation

HN3 **Legislation, Interpretation**

When interpreting a statute, the court's primary consideration is to discern and give effect to the legislature's intention. The text of a statute is the clearest indicator of such legislative intent and courts should construe unambiguous language to give effect to its plain meaning. More like this Headnote

Shepardize - Narrow by this Headnote (8)

Governments > Legislation > Interpretation

HN4 **Legislation, Interpretation**

All parts of a statute are intended to be given effect and a statutory construction which renders one part meaningless should

be avoided. Furthermore, a statute must be construed as a whole and its various sections must be considered together and with reference to each other. More like this Headnote

Shepardize - Narrow by this Headnote (3)

Governments > Local Governments > Duties & Powers
View more legal topics

HN5 **Local Governments, Duties & Powers**
Administrative Code of the City of NY 18-118(a) grants the city the right to enter into contracts, leases or rental agreements, etc., for persons wishing to use, occupy or carry on activities in, the whole or any part of a stadium, with appurtenant grounds, parking areas and other facilities. Nothing in that language authorizes the construction of a shopping mall or movie theater; rather, it authorizes the city to enter into agreements permitting others to use the stadium and its appurtenant facilities. The term "appurtenant" means annexed to a more important thing, or constituting a legal accompaniment or auxiliary, accessory to something else. Accordingly, the clear implication of the reference to "appurtenant facilities" is that any such facilities must be related to, part of, belonging to, or serving some purpose for, the stadium itself. More like this Headnote

Shepardize - Narrow by this Headnote (1)

Governments > Local Governments > Duties & Powers
View more legal topics

HN6 **Local Governments, Duties & Powers**
Administrative Code of the City of NY 18-118(b), like § 18-118(a), is limited to agreements the city might enter into for the right to use, occupy or carry on activities in, the whole or any part of such stadium, grounds, parking areas and other facilities. Here, "other facilities" in § 18-118(b) cannot be divorced from its statutory context: "appurtenant grounds, parking areas and other facilities to be constructed by the city," to be read as a legislative grant to authorize the private construction of anything deemed by the city to improve trade and commerce. Just as a general statute authorizing municipalities to construct railroads on lands held in the public trust did not authorize New York City to construct a street railroad, the 1961 legislation does not authorize the construction of a retail complex and movie theater. More like this Headnote

Shepardize - Narrow by this Headnote (1)

Headnotes/Summary

Headnotes

Parks and Parkways — Public Trust Doctrine — Development of Municipal Parkland — Legislative Authority Required

1. The plain language of Administrative Code of the City of New York § 18-118, which was enacted to provide for the financing and use of a municipal baseball stadium within a City park, did not authorize defendants' proposed development of a retail entertainment center on an undeveloped area of the parkland. Only the state legislature has the power to alienate parkland, or other lands held in the public trust, for purposes other than those for which they have been designated. Administrative Code § 18-118 (a) grants the City the right to "enter into contracts, leases or rental agreements" for persons wishing "to use, occupy or carry on activities in, the whole or any part of a stadium, with appurtenant grounds, parking areas and other facilities." Nothing in that language authorizes the construction of a shopping mall or movie theater; rather, it authorizes the City to enter into agreements permitting others to use the stadium and its appurtenant facilities. The clear implication of the reference to "appurtenant facilities" is that any such facilities must be related to, part of, belonging to, or serving some purpose for, the stadium itself. Moreover, Administrative Code § 18-118 (b) (1), which permits use of the

parkland for the "improvement of trade and commerce," is limited to agreements the City might enter into for "the right to use, occupy or carry on activities in, the whole or any part of such stadium, grounds, parking areas and other facilities." Here, "other facilities" in subdivision (b) cannot be divorced from its statutory context: "appurtenant grounds, parking areas and other facilities to be constructed by the city," to be read as a legislative grant to authorize the private construction of anything deemed by the City to improve trade and commerce.

Counsel: [****1] *Gibson, Dunn & Crutcher LLP*, New York City (*Caitlin J. Halligan* of counsel), *Skadden, Arps, Slate, Meagher &Flom LLP*, New York City (*Jonathan Frank* of counsel), and *Fox Rothschild LLP*, New York City (*Karen Binder* of counsel), for appellants. I. Text, structure, and precedent preclude rewriting section 18-118 of the Administrative Code of the City of New York to narrow the purposes for which Willets West can be used. (*People v Wragg*, 26 NY3d 403, 23 NYS3d 600, 44 NE3d 898; *Lederer v Wise Shoe Co.*, 276 NY 459, 12 NE2d 544; *Commonwealth of the N. Mariana Is. v Canadian Imperial Bank of Commerce*, 21 NY3d 55, 990 NE2d 114, 967 NYS2d 876; *Matter of Concrete Applied Tech. Corp. v County of Erie*, 130 AD3d 1578, 14 NYS3d 272; *Matter of DiMarino v Maher*, 76 AD3d 653, 906 NYS2d 605; *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 761 NE2d 1018, 736 NYS2d 291; *United States v Turkette*, 452 US 576, 101 S Ct 2524, 69 L Ed 2d 246; *Gooch v United States*, 297 US 124, 56 S Ct 395, 80 L Ed 522; *CSX Transp., Inc. v Alabama Dept. of Revenue*, 562 US 277, 131 S Ct 1101, 179 L Ed 2d 37; *Matter of Cahill v Rosa*, 89 NY2d 14, 674 NE2d 274, 651 NYS2d 344.) II. The Willets West development falls squarely within Administrative Code of the City of New York § 18-118 (b)'s enumerated purposes. (*Matter of Kaufmann's Carousel v City of Syracuse Indus. Dev. Agency*, 301 AD2d 292, 750 NYS2d 212; *Matter of Save Coney Is., Inc. v City of New York*, 27 Misc 3d 1221[A], 2010 NY Slip Op 50839[U]; *Matter of Kuntz v Castro*, 5 AD3d 1088, 773 NYS2d 707; *Grayson v Town of Huntington*, 160 AD2d 835, 554 NYS2d 269.) III. The remaining arguments advanced by respondents below are meritless. (*Friends of Van Cortlandt Park v City of New York*, 95 NY2d 623, 750 NE2d 1050, 727 NYS2d 2; *Zaldin v Concord Hotel*, 48 NY2d 107, 397 NE2d 370, 421 NYS2d 858; *Jones v Bill*, 10 NY3d 550, 890 NE2d 884, 860 NYS2d 769; *Rivers v Sauter*, 26 NY2d 260, 258 NE2d 191, 309 NYS2d 897; *People v English*, 242 AD2d 940, 662 NYS2d 890; *Squadrito v Griebsch*, 1 NY2d 471, 136 NE2d 504, 154 NYS2d 37; *City of New York v Stringfellow's of N.Y.*, 253 AD2d 110, 684 NYS2d 544; *People v Cintron*, 13 Misc 3d 833, 827 NYS2d 445.)

Zachary W. Carter, Corporation Counsel, New York City (*Richard P. Dearing* and *Michael Pastor* of counsel), for City of New York and others, respondents. I. State law plainly gives the City of New York the flexibility to place a retail and entertainment center next to Citi Field. (*Friends of Van Cortlandt Park v City of New York*, 95 NY2d 623, 750 NE2d 1050, 727 NYS2d 2; *Rosner v Metropolitan Prop. & Liab. Ins. Co.*, 96 NY2d 475, 754 NE2d 760, 729 NYS2d 658; *Matter of Comptroller of City of N.Y. v Mayor of City of N.Y.*, 7 NY3d 256, 852 NE2d 1144, 819 NYS2d 672; *Hudson Riv. Tel. Co. v Watervliet Turnpike & Ry. Co.*, 135 NY 393, 32 NE 148.) II. Willets West required no further authorization or different authorizations at the City level. (*New York Tel. Co. v Nassau County*, 1 NY3d 485, 808 NE2d 340, 776 NYS2d 205; *Board of Estimate of City of New York v Morris*, 489 US 688, 109 S Ct 1433, 103 L Ed 2d 717; *Matter of Waybro Corp. v Board of Estimate of City of N.Y.*, 67 NY2d 349, 493 NE2d 931, 502 NYS2d 707; *Turnpike Woods v Town of Stony Point*, 70 NY2d 735, 514 NE2d 380, 519 NYS2d 960; *Matter of Friends of Van Voorhis Park v City of New York*, 216 AD2d 259, 628 NYS2d 688; *Matter of Newsday, Inc. v Sise*, 71 NY2d 146, 518 NE2d 930, 524 NYS2d 35.)

John R. Low-Beer, Brooklyn and *Law Office of Lorna Goodman*, New York City (*Lorna B. Goodman* of counsel), for Tony Avella and others, respondents. I. The Court below correctly held that Administrative Code of the City of New York § 18-118 did not authorize construction of a shopping mall in the park. (*Friends of Van Cortlandt Park v City of New York*, 95 NY2d 623, 750 NE2d 1050, 727 NYS2d 2; *Aldrich v City of New York*, 208 Misc 930, 145 NYS2d 732; *People v New York & Staten Is. Ferry Co.*, 68 NY 71; *People ex rel. Swan v Doxsee*, 136 App Div 400, 120 NYS 962, 198 NY 605, 92 NE 1098; *Idaho v Coeur d'Alene Tribe of Idaho*, 521 US 261, 17 S Ct 2028, 138 L Ed 2d 438; *Williams v Gallatin*, 229 NY 248, 128 NE 121; *Martin v Lessee of Waddell*, 41 US 367, 10 L Ed 997; *Matter of New York County Lawyers' Assn. v Bloomberg*, 19 NY3d 712, 979 NE2d 1162, 955 NYS2d 835; *Council of City of N.Y. v Giuliani*, 93 NY2d 60, 710 NE2d 255, 687 NYS2d 609; *People v English*, 242 AD2d 940, 662 NYS2d 890.) II. Administrative Code of the City of New York § 18-118 does not exempt the City of New York and the developers from the uniform land use review process and zoning. (*Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 458 NE2d 1241, 470 NYS2d 564; *New York Tel. Co. v Nassau County*, 1 NY3d 485, 808 NE2d 340, 776 NYS2d 205; *Matter of P.M.S. Assets v Zoning Bd. of Appeals of Vil. of Pleasantville*, 98 NY2d 683, 774 NE2d 204, 746 NYS2d 440; *Bluebird Partners v First Fid. Bank*, 97 NY2d 456, 767 NE2d 672, 741 NYS2d 181; *Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 863 NE2d

1001, 831 NYS2d 749; *Schiavone v City of New York*, 92 NY2d 308, 703 NE2d 256, 680 NYS2d 445; *Matter of Waybro Corp. v Board of Estimate of City of N.Y.*, 67 NY2d 349, 493 NE2d 931, 502 NYS2d 707; *Besser v Squibb & Sons*, 146 AD2d 107, 539 NYS2d 734; *Board of Estimate of City of New York v Morris*, 489 US 688, 109 S Ct 1433, 103 L Ed 2d 717; *Council of City of N.Y. v Giuliani*, 172 Misc 2d 893, 664 NYS2d 197.)

Eric T. Schneiderman, Attorney General, New York City (*Anisha S. Dasgupta, Barbara D. Underwood* and *Andrew Rhys Davies* of counsel), for Attorney General of the State of New York, amicus curiae. I. The City of New York's proposed development fits within the public purposes that the legislature has authorized for Willets West. (*Union Sq. Park Community Coalition, Inc. v New York City Dept. of Parks & Recreation*, 22 NY3d 648, 985 NYS2d 422,8 NE3d 797; *Friends of Van Cortlandt Park v City of New York*, 95 NY2d 623, 750 NE2d 1050, 727 NYS2d 2; *Matter of New York County Lawyers' Assn. v Bloomberg*, 19 NY3d 712, 979 NE2d 1162, 955 NYS2d 835; *People v Marquan M.*, 24 NY3d 1, 994 NYS2d 554, 19 NE3d 480; *Bates v Holbrook*, 171 NY 460, 64 NE 181; *Brooklyn Park Commrs. v Armstrong*, 45 NY 234; *Ministers & Missionaries Benefit Bd. v Snow*, 26 NY3d 466, 25 NYS3d 21, 45 NE3d 917; *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 761 NE2d 1018, 736 NYS2d 291; *Matter of Westchester Joint Water Works v Assessor of the City of Rye*, 27 NY3d 566, 36 NYS3d 415, 56 NE3d 197; *Matter of Walker*, 64 NY2d 354, 476 NE2d 298, 486 NYS2d 899.) II. The proposed development will also help to advance the statutory public purposes in other ways.

Albert K. Butzel Law Office, New York City (*Albert K. Butzel* of counsel), and *Jonathan L. Geballe*, New York City, for Natural Resources Defense Council and others, amicus curiae. I. The construction of a shopping mall in Flushing Meadows Park has not been authorized by the state legislature and would violate the public trust doctrine. (*Meriwether v Garrett*, 102 US 472, 26 L Ed 197; *Brooklyn Park Commrs. v Armstrong*, 45 NY 234; *Williams v Gallatin*, 229 NY 248, 128 NE 121; *Friends of Van Cortlandt Park v City of New York*, 95 NY2d 623, 750 NE2d 1050, 727 NYS2d 2; *Matter of Ackerman v Steisel*, 104 AD2d 940, 480 NYS2d 556; *Aldrich v City of New York*, 208 Misc 930, 145 NYS2d 732; *Matter of Central Parkway*, 140 Misc 727, 251 NYS 577; *Matter of Lake George Steamboat Co. v Blais*, 30 NY2d 48, 281 NE2d 147, 330 NYS2d 336.) II. The appellants can, and should be required to, seek approval for the mall from the state legislature. (*Aldrich v City of New York*, 208 Misc 930, 145 NYS2d 732, 2 AD2d 760, 154 NYS2d 427; *Friends of Van Cortlandt Park v City of New York*, 95 NY2d 623, 750 NE2d 1050, 727 NYS2d 2.)

Judges: Opinion by Judge Wilson. Judges Rivera, Stein, Fahey and Garcia concur. Chief Judge DiFiore dissents in an opinion.

Opinion by: WILSON

Opinion

[**983] [***237] **[*429]** Wilson, J.

Plaintiffs—a state senator, not-for-profit organizations, businesses, taxpayers, and users of Flushing Meadows Park, brought this hybrid CPLR article 78 proceeding and declaratory judgment action in Supreme Court seeking to enjoin the proposed development of [2] parkland in Queens. The proposed development, "Willets West," involves the construction of a shopping mall and movie theater on Citi Field's parking lot, where Shea Stadium once stood.

Following New York's loss of both the Dodgers and Giants, Mayor Wagner, determined that New York City should have a National League Team, formed a Baseball Committee, led by William Shea, to work with Major League Baseball and others to obtain an expansion franchise for New York City. Major League Baseball approved the issuance of a franchise to the [**984] [***238] New York Metropolitan Baseball [****2] Club, conditioned upon the club's ability to secure the rights to use of a stadium that met League specifications (*see* Off of Mayor, Supp Mem in Support, Bill Jacket, L 1961, ch 729 at 41). In 1961, the state legislature enacted a law providing for the financing and use of a municipal baseball stadium within Flushing Meadows Park, later named Shea Stadium. As the State Department of Commerce noted in a memorandum supporting the bill, "[t]h[e] legislation [wa]s needed in order to get a second major league baseball team in New York City" (Bill Jacket, L 1961, ch 729 at 15). Shea Stadium was home to the New York Mets for nearly 50 years, before it was demolished in 2008 and replaced with a new stadium, Citi Field.

To the east of the parkland is an area known as Willets Point. As the Appellate Division noted, and as the parties agree, "Willets Point is a 61-acre area that has long been considered by the City to be blighted. Indeed, Willets Point has no sewers, sidewalks or

streetlights, is replete with potholed and rutted streets, and is prone to flooding" (131 AD3d 77, 78, 13 NYS3d 358 [1st Dept 2015]). Prior proposals to remediate and develop Willets Point have foundered.

[*430] In response to the City's request for proposals, in 2011, defendant Queens Development [****3] Group, LLC (QDG), 1 proposed a two-phase project for developing Willets Point. The current Willets Point Plan calls for construction, in several staged phases, of retail space, a hotel, an outdoor space, a public school, and affordable housing in the Willets Point neighborhood, and the construction of a large-scale retail complex on the parkland of Willets West. QDG included Willets West in the development proposal under the theory that "the creation of a retail and entertainment center at Willets West w[ould] spur a critical perception change of Willets Point, establishing a sense of place and making it a destination where people want to live, work, and visit."

The phases of the planned development project are as follows: Phase 1A, which was set to begin in 2015, included the construction of Willets West. That phase calls for a retail mall to be built on parkland—which is currently Citi Field's parking lot—and would include [3] over 200 retail stores and restaurants, as well as a movie theater. Phase 1A would also include the installation of sewage systems, roads and ramps, and a hotel in Willets Point. Phase 1B, expected to begin in 2026, would include construction of 2,490 housing units [****4] (35% of which would be affordable), a public school, and open outdoor space. Under the agreement between QDG and the New York City Economic Development Corporation, QDG could avoid phase 1B by paying $35 million. The City approved QDG's proposal in May of 2012.

Thereafter, plaintiffs commenced the instant action against defendants including, among others, the City, various municipal officers and entities, and QDG, alleging that because the Willets West development was located within parkland, the public trust doctrine required legislative authorization, which had not been granted. Supreme Court denied the petition for declaratory and injunctive relief and dismissed the proceeding. The Appellate Division unanimously reversed and granted the petition "to the extent of declaring that construction of Willets West on City parkland without the authorization of the state legislature violates the public trust doctrine, and enjoining any further steps toward [**985] [***239] its construction" (131 AD3d at 87). We **[*431]** granted defendant QDG and related entities leave to appeal (26 NY3d 912, 22 NYS3d 164, 43 NE3d 374 [2015]). 2 We now affirm.

I.

There is no dispute that the Willets West development is proposed to be constructed entirely on city parkland. *HN1* The public trust [****5] doctrine is ancient and firmly established in our precedent. In *Brooklyn Park Commrs. v Armstrong* we held that, when a municipality takes land "for the public use as a park, . . . [it holds] it in trust for that purpose . . . Receiving the title in trust for an especial public use, [the municipality] could not convey [the land] without the sanction of the legislature" (45 NY 234, 243 [1871]). Likewise, in *Matter of Petition of Boston & Albany R.R. Co.*, we held that parklands held by a village were held "upon a special trust and for public use. The village could not dispose of them or divert them from the purpose to which they were dedicated" (53 NY 574, 576 [1873]). Summarizing the long-standing history of the public trust doctrine in *Friends of Van Cortlandt Park v City of New York*, we explained that "our courts have time and again reaffirmed the principle that parkland is impressed with a public trust, requiring legislative approval before it can be alienated or used for an extended period for non-park purposes" (95 NY2d 623, 630, 750 NE2d 1050, 727 NYS2d 2 [2001]).

Only the state legislature has the power to alienate parkland (or other lands held in the public trust) for purposes other than those for which they have been designated. The parties here agree with that proposition. [****6] Even though a municipality may own the land dedicated to public use, "the title of the municipal corporation to the public streets [is] held in trust for the [4] public and the power to regulate those uses [is] vested solely in the legislature" (*Potter v Collis*, 156 NY 16, 30, 50 NE 413 [1898]).

HN2 The approval of the legislature in alienating parkland must be "plainly conferred" through the "direct and specific approval of the State Legislature" (*Friends of Van Cortlandt Park*, 95 NY2d at 632 [internal quotation marks and citation omitted]; *see Capruso v Village of Kings Point*, 23 NY3d 631, 639, 992 NYS2d 469, 16 NE3d 527 [2014]; *Williams v Gallatin*, 229 NY 248, 253, 128 NE 121 [1920]). Although we have often articulated that principle in the context of an initial alienation of lands held in the public trust (*see e.g. Friends of Van Cortlandt Park*, 95 NY2d at 631), the principle also **[*432]** requires that a proposed use of parkland falls within the *scope* of legislative authorization once granted. For example, in *Potter v Collis*, we held that, although the legislature's General Railroad Act of 1850 authorized municipalities to assent to the construction of railroads, that legislative authorization was not "sufficient to authorize a city street railroad," and the City's resolution granting a third party authorization to construct a railroad on public streets was therefore invalid under the public trust doctrine (156 NY at 30). As we held in [****7] *Matter of City of New York*, which involved New York City's right to alienate piers and wharves held in the public trust, "[w]hen there is a fair, reasonable and substantial doubt concerning the existence of an alleged power in a municipality, the power should be denied" (228 NY 140, 152, 126 NE 809, [1920]). We reiterated that rule in *Lake George Steamboat Co. v Blais* [**986]

[***240], in which we said, "legislative sanction must be clear and certain to permit a municipality to lease public property for private purposes" (30 NY2d 48, 52, 281 NE2d 147, 330 NYS2d 336 [1972]).

Keeping in mind that the current proposed alienation must plainly fall within the scope of the legislative direction authorizing alienation of the parklands at issue, we now turn to an examination of the statute relied on by defendants for the legislative authorization of Willets West.

II.

Defendants contend that the 1961 legislation concerning Shea Stadium, which the City constructed on parkland, constitutes legislative authorization for the Willets West development. That legislation, codified in section 18-118 of the Administrative Code of the City of New York, is titled: "Renting of stadium in Flushing Meadow park; exemption from down payment requirements." Section 18-118 (a) provides, as relevant here:

> "a. Notwithstanding any other provision of law, general, special or local, the city . . . is hereby authorized and empowered [****8] from time to time to enter into contracts, leases or rental agreements with, or grant licenses, permits, concessions or other authorizations to, any person or persons, upon such terms and conditions, for such consideration, and for such term of duration as may be agreed upon by the city and such person or persons, whereby **[*433]** such person or persons are granted the right, for [5] any purpose or purposes referred to in subdivision b of this section, to use, occupy or carry on activities in, the whole or any part of a stadium, with appurtenant grounds, parking areas and other facilities, to be constructed by the city on certain tracts of land described in subdivision c of this section, being a part of Flushing Meadow park . . . Prior to or after the expiration or termination of the terms of duration of any contracts, leases, rental agreements, licenses, permits, concessions or other authorizations entered into or granted pursuant to the provisions of this subdivision and subdivision b of this section, the city, in accordance with the requirements and conditions of this subdivision and subdivision b of this section, may from time to time enter into amended, new, additional or further contracts, [****9] leases or rental agreements with, and grant new, additional or further licenses, permits, concessions or other authorizations to, the same or any other person or persons for any purpose or purposes referred to in subdivision b of this section."

Section 18-118 (b), in turn, provides:

> "b. Any contract, lease, rental agreement, license, permit, concession or other authorization referred to in subdivision a of this section may grant to the person or persons contracting with the city thereunder, the right to use, occupy or carry on activities in, the whole or any part of such stadium, grounds, parking areas and other facilities, (1) for any purpose or purposes which is of such a nature as to furnish to, or foster or promote among, or provide for the benefit of, the people of the city, recreation, entertainment, amusement, education, enlightenment, cultural development or betterment, and improvement of trade and commerce, including professional, amateur and scholastic sports and athletic events, theatrical, musical or other entertainment presentations, and meetings, assemblages, conventions and exhibitions for any purpose, including meetings, assemblages, conventions and exhibitions held for business or trade [****10] purposes, and **[*434]** other events of [**987] [***241] civic, community and general public interest, and/or (2) for any business or commercial purpose which aids in the financing of the construction and operation of such stadium, grounds, parking areas and facilities, and any additions, alterations or improvements thereto, or to the equipment thereof, and which does not interfere with the accomplishment of the purposes referred to in paragraph one of this subdivision. It is hereby declared that all of the purposes referred to in this subdivision are for the benefit of the people of the city and for the improvement of their health, welfare, recreation and prosperity, [6] for the promotion of competitive sports for youth and the prevention of juvenile delinquency, and for the improvement of trade and commerce, and are hereby declared to be public purposes."

HN3 When interpreting a statute, "our primary consideration is to discern and give effect to the Legislature's intention" (*Matter of Albany Law School v New York State Off. of Mental Retardation & Dev. Disabilities*, 19 NY3d 106, 120, 968 NE2d 967, 945 NYS2d 613 [2012]). The text of a statute is the "clearest indicator" of such legislative intent and "courts should construe unambiguous language to give effect to its plain meaning" (*Matter of DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653, 660, 860 NE2d 705, 827 NYS2d 88 [2006]). We have also previously instructed that "[i]t is an accepted rule that *HN4* all parts [****11] of a statute are intended to be given effect and that a statutory construction which renders one part meaningless should be avoided" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 515, 583 NE2d 932, 577 NYS2d 219 [1991]). Furthermore, "a statute . . . must be construed as a whole and . . . its various sections must be considered together and with reference to each other" (*Matter of*

New York County Lawyers' Assn. v Bloomberg, 19 NY3d 712, 721, 979 NE2d 1162, 955 NYS2d 835 [2012]). Defendants' argument disregards these fundamental rules of statutory interpretation.

Beginning with the plain language, *HN5* subdivision (a) of section 18-118 grants the City the right to "enter into contracts, leases or rental agreements," etc., for persons wishing "to *use*, *occupy* or *carry on activities in*, the whole or any part of a *stadium*, with *appurtenant grounds*, parking areas and other facilities" (emphasis added). Nothing in that language authorizes the *construction* of a shopping mall or movie theater; rather, it authorizes the City to enter into agreements permitting others **[*435]** to *use* the stadium and its appurtenant facilities.3 The term "appurtenant" means "[a]nnexed to a more important thing," (Black's Law Dictionary [10th ed 2014], appurtenant); or [7] "constituting a legal accompaniment" or "auxiliary, accessory" to something else (Merriam-Webster Online Dictionary, appurtenant [https://www.merriam-webster.com/dictionary/appurtenant] [**988] [***242] [accessed May 17, 2017]). Accordingly, the clear implication of the reference to "appurtenant . . . facilities" is that [****12] any such facilities must be related to, part of, belonging to, or serving some purpose for, the stadium itself.

Defendants point to the last sentence of subdivision (a), authorizing "the city, in accordance with the requirements and conditions of this subdivision and subdivision b of this section, [to] . . . enter into amended, new, additional or further contracts, leases or rental agreements . . . for any purpose or purposes referred to in subdivision b of this section," arguing that subdivision (b) specifically authorizes this type of development on the parkland because one of the enumerated uses allowed is the "improvement of trade and commerce" (Administrative Code of the City of New York § 18-118 [b] [1]). That argument is also unpersuasive.4 The purposes enumerated in the legislation are consistent with typical uses of a park and/or stadium, including "scholastic sports and athletic events," "theatrical, **[*436]** musical or other entertainment presentations," and "meetings, assemblages, conventions and exhibitions."

HN6 Subdivision (b), like subdivision (a), is limited to agreements the City might enter into for "the right to use, occupy or carry on activities in, the whole or any part of such stadium, grounds, parking areas and other facilities." Here, "other facilities" in subdivision [****13] (b) cannot be divorced from its statutory context: "appurtenant grounds, parking areas and other facilities, to be constructed by the city," to be read as a legislative grant to authorize the private construction of anything deemed by the City to improve trade and commerce. Just as a general statute authorizing municipalities to construct railroads on lands held in the public trust did not authorize New York City to construct a street railroad, the 1961 legislation does not authorize the [8] construction of a retail complex and movie theater.

Reading "improvement of trade and commerce" as the City suggests—namely, as authorization for the construction of anything that might improve trade or commerce—would lead to an absurd result. The purposes enumerated in (b) (1) could not be read to exclude any use of the parkland, if understood to mean that the land can be used for any purpose at all related to the "improvement of trade and commerce" or "education," "amusement," "cultural development" or "enlightenment" (Administrative Code of the City of New York § 18-118 [b] [1]). For example, defendants' interpretation of the statute would permit the conversion of the parkland into a second Times Square or Wall Street, which is decidedly not evidenced [****14] in the statutory language. Moreover, had the legislature truly intended to authorize *any* use of the parkland, including private for-profit business enterprises, those portions of the [**989] [***243] statute describing the authorized uses would be rendered superfluous.5

[*437] Defendants point to the differences between the 1961 legislation and the 2005 legislation authorizing the development of the new Yankee Stadium, arguing that when the legislature wanted to restrict its authorization to "development of a baseball stadium," it knew how to do so. That argument misses the mark for several reasons.

First, that the legislature used different words in 2005 does not shed any real light on what the 1961 legislature meant. Second, the language cited by defendants from the 2005 Yankee Stadium legislation, restricting the legislative grant to "contracts, leases or rental agreements for a term not to exceed ninety-nine years, *with the New York Yankees Limited Partnership*, its affiliate and/or another entity or entities . . . *for the purpose of developing, maintaining and operating thereon a professional baseball stadium* and related facilities" would [9] have been inapposite as to Shea Stadium, [****15] which was conceived as a multipurpose stadium that the City was free to lease to others (and which in fact housed the New York Jets football team from 1964-1983) (L 2005, ch 238 §2 (a)-(b)] [emphasis in defendants' brief]).

Defendants also contend that, whereas the 2005 Yankee Stadium legislation limits the City's authority to "stadium and related facilities," the 1961 legislation does not. However, the 1961 legislation limits the City's legislation to "appurtenant grounds, parking areas and other facilities," and we perceive no difference between "appurtenant" and "stadium related" in the context of these statutes.

III.

The plain language of the statute does not authorize the proposed construction, and we therefore need not consider the legislative history. However, that history also unambiguously demonstrates that the legislature did not authorize the City to do more than enter into agreements for use of the stadium for public—not commercial—purposes and avoid certain restrictions to ease the financial burden on the City of constructing the stadium.

As a starting point, the title of the statute, "Renting of a stadium in Flushing Meadow park; exemption from down payment [****16] requirements," suggests nothing at all about legislative **[*438]** authorization for anything other than a stadium and, indeed, pertains only to the renting of the stadium and exemption from statutory requirements that would have required a down payment. Although the title of the legislation may not "trump the clear language of the statute," it "may help in ascertaining the [legislative] intent" (*Suffolk Regional Off-Track Betting Corp. v New York State Racing and Wagering Bd.*, 11 NY3d 559, 571, 900 NE2d 970, [**990] 872 NYS2d 419 [***244] [2008]; *see* McKinney's Cons Laws of NY, Book 1, Statutes Law § 123).

Consistent with the bill's title, the legislative history demonstrates that the statute was intended to authorize the lease, rental or licensing of the stadium, not the construction of unrelated facilities. A Memorandum in Support of the bill from the Mayor's Office wrote that the bill

> "would authorize the City . . . to lease or rent, from time to time, for customary municipal stadium purposes, the 55,000-seat stadium with 5,500 parking places . . . proposed to be constructed by the City in Flushing Meadow Park, Borough of Queens, upon such terms and conditions . . . as may be agreed upon by the City and the persons leasing or renting the stadium" (Bill Jacket, L 1961, ch 729 at 32).

The City did not explain the need for the legislation in terms of authorization for the construction [****17] of anything at all—even a stadium; instead, the memorandum explained:

> "[s]ince the stadium is to be located on park lands, and since such lands are inalienable under the provisions of § 383 of the City Charter, the City will be unable to *lease* or *rent* the stadium for customary stadium purposes . . . without authorization by the Legislature. Moreover, without such authorization, the City will be unable to operate the stadium suitably as a revenue-producing [10] project" (*id.* at 33 [emphasis added]).

Thus, the City requested the legislation to grant it the right to rent the stadium to private entities, not to construct new and unrelated facilities for private business purposes.

In *Williams v Gallatin*, we noted that "park purposes" may include "playing grounds," which "contribute to the use and enjoyment of the park" (229 NY 248, 253-254, 128 NE 121 [1920]). A municipality may, without legislative authorization, make **[*439]** improvements to a park that are consistent with its status as "a pleasure ground set apart for recreation of the public, to promote its health and enjoyment. It need not and should not be a mere field or open space" (*id.* [citation omitted]). Our observation that municipalities may improve parks without legislative authorization by, among other things, [****18] the construction of playing fields, is consistent with the statutory language and legislative history of the 1961 legislation at issue here. The City explained:

> "This bill would confer upon the City the leasing and renting powers necessary to make the stadium available for professional, amateur and scholastic sports and athletic events and entertainment presentations, and the holding of meetings, conventions, exhibitions and events of civic, cultural and community interest. Such powers are essential to enable the City to cooperate in the establishment of a new National League baseball team in the City, and to operate the stadium as a revenue-producing project which, as is explained below, will be substantially self-sustaining" (Off of Mayor, Supp Mem in Support, Bill Jacket, L 1961, ch 729 at 38).

Thus, the City sought legislative approval because rental—not construction—of the stadium constituted an alienation.[6] Legislative [**991] [***245] authorization to rent Shea Stadium and its grounds to private parties cannot, under our long-standing construction of the public trust doctrine, constitute legislative authorization to build a shopping mall or movie theater.[7]

The budget report on the [****19] bill stated that "[t]he bill grants statutory authority for the City to lease or rent the stadium **[*440]** which could not otherwise be leased or rented because of its location on inalienable park lands" (Bill Jacket, L 1961, ch 729 at 27). A report on the bill from the Department of Audit and Control, addressed to the Governor, describes each subsection of the bill: paragraph (a), it says, "authorizes the Commissioner of Parks, with the approval of the Board of Estimate, to enter into contracts, leases or rental agreements . . . , or grant licenses, permits, concessions or other authorizations for the use of

the whole or any part of the new stadium" (Bill Jacket, L 1961, ch 729 at 28). The report then writes that "Paragraph b describes the purposes for which such use may be granted" (*id.*).

The statutory language and legislative history demonstrate that the legislation did not authorize further developments on the tract of parkland but, rather, ensured that the City was authorized to accommodate other public uses of the stadium and appurtenant facilities.

IV.

In sum, the text of the statute and its legislative history flatly refute the proposition that the legislature granted the City the authority to construct [****20] a development such as Willets West in Flushing Meadows Park.

We acknowledge that the remediation of Willets Point is a laudable goal. Defendants and various amici dedicate substantial portions of their briefs to the propositions that the Willets West development would immensely benefit the people of New York City, by transforming the area into a new, vibrant community, and that the present plan might be the only means to accomplish that transformation. Those contentions, however, have no place in our consideration of whether the legislature granted authorization for the development of Willets West on land held in the public trust. Of course, the legislature remains free to alienate all or part of the parkland for whatever purposes it sees fit, but it must do so through direct and specific legislation that expressly confers the desired alienation.

Plaintiffs' additional claims are rendered academic by our decision. Accordingly, the order of the Appellate Division should be affirmed, with costs.

Dissent by: DiFIORE

Dissent

DiFIORE, Chief Judge (dissenting):

Under the public trust doctrine, parkland in our State is dedicated to public use, and can only be alienated for non-park purposes if expressly authorized **[*441]** by the State Legislature. Our Court's jurisprudence demonstrates unwavering support for the public trust doctrine. In such cases as *Williams v Gallatin* (229 NY 248, 128 NE 121 [1920]) and *Friends of Van Cortlandt Park v City of New York* [**992] [***246] (95 NY2d 623, 750 NE2d 1050, 727 NYS2d 2 [2001]), we held that the contemplated use of parkland for other than a "park use" violated the public trust doctrine. Notably, in those cases, the legislature had not expressly authorized non-park use, and it was up to us to uphold the public trust and determine "what is and is not a park purpose" (*Union Sq. Park Community Coalition, Inc. v New York City Dept. of Parks and Recreation*, 22 NY3d 648, 655, 985 NYS2d 422, 8 NE3d 797 [2014]).

This case is different. Here, the legislature has spoken and directly and specifically authorized non-park uses of the property, as codified in Administrative Code of the City of New York § 18-118. Indeed, the specific parcel at issue, Willets West, presently covered in asphalt, is being used as a parking lot. Once the State Legislature alienates parkland for non-park purposes and expressly authorizes development on parkland, as it has done here, our only role is to ensure that the proposed development comports with the authorization expressed in the statute. We may not second-guess the legislature and such matters [****21] as the utility of the development, its aesthetics, or its benefit to the public are beyond our review. Rather, the only issue is the scope of the legislature's authorization in Administrative Code § 18-118 and whether the use contemplated falls within that authorization—a question of statutory interpretation.

To resolve this issue, we rely first and foremost on the plain language of the statute and canons of statutory interpretation. In my view, the statute expressly authorizes the proposed development of Willets West. Because I conclude that the development is specifically authorized by Administrative Code § 18-118 and would promote the specific public purposes set forth in the statute, I dissent from the majority view that the proposed development of Willets West, initiated by the City of New York and promoted and supported by the City and New York State, violates the public trust doctrine. I would therefore remit the case to the Appellate Division to consider the three additional issues raised in this appeal, but not addressed by the Appellate Division, which concern the applicability of land use regulations and zoning resolutions, and whether formal City Council approval is required for the plan to proceed.

[*442] I.

In 1961, the State Legislature [****22] enacted Administrative Code § 18-118, the law that led to the construction of Shea Stadium. This law also authorized the use of the adjacent parkland for a broad array of public purposes, including among others, to promote recreation, entertainment, amusement, and cultural betterment, and to improve trade and commerce. This legislation expressly authorized the entire alienated area, consisting of seventy-seven acres, for [11] non-park use.

Immediately to the east of the alienated parkland lies Willets Point, a blighted and contaminated tract of land in Queens. This toxic wasteland of sixty-one acres is known as the "Iron Triangle" or, as F. Scott Fitzgerald described it 92 years ago in The Great Gatsby, the "Valley of Ashes." 1 Willets Point is not parkland. Beginning in the 1960s, the decade when Administrative Code § 18-118 was enacted and Shea Stadium was built, City officials tried and failed to redevelop the area. Recent environmental studies show likely contamination in nearly every part of Willets Point and the groundwater beneath it. The risks to public health from this contamination [**993] [***247] are exacerbated by Willets Point's proximity to the Flushing River, in an area susceptible to constant flooding that lacks basic infrastructure, including [****23] sewers and storm drains.

In 2008, the City proposed a development plan that included remediation of the environmental waste in the land, new sewers and roads, and construction of a mixed-use community at Willets Point consisting of affordable housing, a school, a hotel, and several acres of public open space. The plan, however, was not economically feasible and was abandoned. In 2011, the plan was revised. This time the City partnered with the appellants, and included, in addition to the plan for Willets Point, a proposed entertainment and retail center at a neighboring site known as Willets West, where Shea Stadium once stood, and where asphalt parking lots for Citi Field are now located. The Willets West development would include, in addition to restaurants and shops, public programming performance spaces, meeting places, and a rooftop farm for educational purposes. According to the plan, the development of Willets West would facilitate the remediation and revitalization of Willets Point.

Petitioners commenced a hybrid CPLR article 78 proceeding and declaratory judgment action in Supreme Court, claiming **[*443]** that the Willets West portion of the project violated the public trust doctrine because it was not authorized [****24] by State legislation, and that the Willets West component of the development plan requires further formal approval by the City Council.

Supreme Court denied the petition for declaratory and injunctive relief and dismissed the proceeding. The court reviewed the statutory language in Administrative Code § 18-118 and determined that rather than authorizing the use of the property for a stadium alone, the legislature considered "alternate uses of the property" that would "benefit the public." The court held that the public trust doctrine was not violated because "use of the property for a shopping mall [would] serve the public purpose of improving trade or commerce"—one of the purposes specified in the statute—and that the intended use would likewise "serve the public purpose of ultimately altering the blighted Willets Point into a mixed-use community." Supreme Court further held that development of Willets West is not subject to the City's Uniform Land [12] Use and Review Procedure (ULURP), and that the City's land use determinations were not arbitrary or capricious.

The Appellate Division unanimously reversed and granted the petition "to the extent of declaring that construction of Willets West on City parkland without [****25] the authorization of the state legislature violates the public trust doctrine" (*Matter of Avella v City of New York*, 131 AD3d 77, 86-87, 13 NYS3d 358 [1st Dept 2015]). The Appellate Division held "that the overriding context of Administrative Code § 18-118 concerns the stadium to be built" and "[t]here is simply no basis to interpret the statute as authorizing the construction of another structure that has no natural connection to a stadium" (*id.* at 84-85). The Court enjoined any further steps toward the construction of Willets West, and did not address the other land use issues.

II.

The majority states, "[t]here is no dispute that the Willets West development is proposed to be constructed entirely on city parkland" (majority op at 5). That is not the case. The proposed Willets West development would be constructed entirely on *alienated* parkland. When the State Legislature codified Administrative Code § 18-118 [**994] [***248] in 1961, that seventy-seven acre tract in Flushing Meadows Park was alienated and designated to further the non-park purposes specifically set forth in the statute.

"[T]he starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning **[*444]** thereof" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583, 696 NE2d 978, 673 NYS2d 966 [1998]). A plain reading of Administrative Code § 18-118 shows that the legislature alienated the parkland at issue and authorized the City to enter into leases and other agreements with third [****26] parties for a variety of specific purposes, each of which it expressly declared to be a public purpose. Subdivision (a) of Administrative Code § 18-118 sets forth the City's authority to enter into agreements for use of the alienated parkland and specifies that the alienated parkland includes not only the stadium but appurtenant grounds, parking areas and other facilities. Subdivision (b) lists the purposes for which that alienated property may be used. Nowhere does the statute limit authorized uses to those that "relate to the stadium itself and the naturally expected uses of a stadium," as the Appellate Division held (131 AD3d at 86).

In *Friends of Van Cortlandt Park*, the legislature had not authorized non-park use for the disputed parcel, and the question was whether *any* legislative approval was required in the first place. In that case, we declared that parkland may be alienated for non-park purposes when there is " 'direct and specific approval of the State Legislature, plainly conferred'" (95 NY2d at 632 [citation omitted]).

Here, we have the legislature's categorical approval. In subdivision (a) of the statute, the legislature *directly* authorized the area which includes Willets West to be used for non-park purposes; in subdivision (b), the legislature *specifically* listed those purposes. The [****27] plain language of these provisions makes clear that the development of Willets West, as [13] summarized above, is well within this statutory authorization. The majority states, "[o]f course, the legislature remains free to alienate all or part of the parkland for whatever purposes it sees fit, but it must do so through direct and specific legislation that expressly confers the desired alienation" (majority op at 19). That is precisely what the legislature has done.

Administrative Code § 18-118 (a) begins by providing that the City may "from time to time" enter into agreements authorizing third parties "to use, occupy or carry on activities in, the whole or any part of a stadium, with appurtenant grounds, parking areas and other facilities, to be constructed by the city" (Administrative Code § 18-118 [a]). As of 1961, when Administrative Code § 18-118 was enacted, Black's Law Dictionary defined "appurtenant" as "[b]elonging to; accessory **[*445]** or incident to; adjunct, appended or annexed to" (Black's Law Dictionary 133 [4th ed 1951]). "Appurtenant grounds" in the statute was plainly a reference to the "adjunct" or additional acreage being alienated that would not be used for the stadium itself (*see id.* at 64 [defining "adjunct" as "[s]omething added to another"]).2

[**995] [***249] The second sentence of subdivision (a) specifies that "[p]rior to or after [****28] the expiration or termination" of the agreements referenced in the first sentence, the City may "enter into amended, new, additional or further" agreements or authorizations "for *any purpose or purposes referred to* in subdivision (b)" (Administrative Code § 18-118 [a] [emphasis added]). The majority would limit the second sentence of section 18-118 (a) to agreements that relate solely to the stadium. That, however, is not what it says. Moreover, if the second sentence of subdivision (a) merely allowed the City to enter into agreements that relate solely to a stadium, then this second sentence is superfluous since the first sentence of subdivision (a) already permits the City to enter into such agreements "from time to time."

The legislature concludes subdivision (a) by specifically limiting the purposes for which the City may lease the stadium, grounds, parking areas and facilities, to "any purpose or purposes referred to in subdivision (b)." Subdivision (b) (1), in turn, states that the City may enter into any agreements, leases, permits, contracts, or other authorizations "for any purpose or purposes which is of such a nature as to . . . provide for the benefit of, the people of the city, recreation, entertainment, amusement, [14] education, enlightenment, cultural development or betterment, and improvement of trade and commerce" [****29] (*id.* § 18-118 [b]).

The Willets West center would include retail shops, a movie theater, restaurants, a food court, public programming spaces, and a rooftop farm. These uses fit squarely within the specific purposes set out in subdivision (b) (1). Movie theaters and **[*446]** restaurants provide amusement and gathering places for patrons. Like spectator sports, films engage, inspire, and entertain viewers, and have the added potential to expose audiences to other cultures and viewpoints, promoting cultural development and betterment. Public programming spaces are available for art exhibitions and performances and meeting places provide areas for education and community development. Likewise, the rooftop farm would be available to schools and other organizations so they may learn about urban farming and the environment.

Subdivision (b) (1) also sets out, as another authorized purpose, "the improvement of trade and commerce"---something that a shopping center in this blighted area would promote. Indeed, although the legislature could have omitted the purpose of "improvement of trade and commerce" from the list of specifically authorized purposes in favor of loftier intellectual or cultural purposes, it did not. The notion that the specific reference [****30] to "improvement of trade and commerce" nonetheless

excludes a shopping center is as unsupportable as the notion that "entertainment" excludes a movie theater or that "cultural development" excludes exhibition or meeting spaces. Indeed, the development plan at issue would promote all of these specific statutorily authorized purposes.[3]

[**996] [***250] Subdivision (b) (2) provides independent authority for another purpose, separate from those in subdivision (b) (1): to permit the land to be used "for any business or commercial purpose which aids in the financing of the construction and operation of [the] stadium, grounds, [15] parking areas and facilities" (*id.* § 18-118 [b] [2]).

The legislature's inclusion of subdivision (b) (2) likewise supports reversal of the Appellate Division order for two independent reasons. First, if the legislature intended to authorize uses only "relate[d] to the stadium itself and the naturally **[*447]** expected uses of a stadium" (*Avella*, 131 AD3d at 86), the expansive public purposes specified in subdivision (b) (1) would be wholly unnecessary. In the same vein, if the broad purposes named in subdivision (b) (1) intended to substantially limit the City's authority to stadium-related uses, then subdivision (b) (2) would be superfluous because anything that aids in the financing of the construction and operation of the stadium necessarily [****31] relates to the stadium. Therefore, subdivision (b) (1) must permit uses of the alienated parkland that involve something other than a stadium.

Second, subdivision (b) (2) distinguishes between the "improvement of trade and commerce," as stated in subdivision (b) (1), and "any business or commercial purpose which aids in the financing of the construction and operation of [the] stadium, grounds, parking areas and facilities." Subdivision (b) (1) specifically authorizes uses that improve trade and commerce for the benefit of the people of the City. By contrast, minor commercial uses, such as individual food vendors and seasonal concession stands in the stadium, might not have an impact large enough to improve trade and commerce for the benefit of the people of the City. Nonetheless, if such concessions support the financing and operation of the stadium, its grounds, parking areas and facilities, and any additions thereto, they would be authorized by subdivision (b) (2). The inclusion of subdivision (b) (2) in the legislation does not mean that the statute *only* allows a business or commercial purpose that benefits the stadium or its grounds; rather, it carves out an exception that permits commercial and business uses of the property that are smaller in scale (and thus might not be deemed to "improve" [****32] trade and commerce) but are nevertheless authorized uses of the alienated land. Subdivision (b) (2) does not alter or qualify the purpose in (b) (1) that permits uses of the alienated property that will improve trade and commerce.

The legislature ended subdivision (b) by explaining, in direct and specific language, that

> "all of the purposes referred to in this subdivision are for the benefit of the people of the city and for the improvement of their health, welfare, recreation and prosperity, for the promotion of competitive sports for youth and the prevention of juvenile delinquency, and for the improvement of trade and commerce, and are hereby declared to be public purposes" (Administrative Code § 18-118 [b]).

[*448] Although I have no doubt that the majority's intention is to protect the public trust, the majority's concern about undermining the public trust doctrine in this case is misplaced. [16] Here, the legislature already decided to alienate the parkland at issue. The majority's narrow reading of Administrative Code § 18-118 is principally [**997] [***251] derived from the statute's title and immediate context—the construction of Shea Stadium—as opposed to the actual statutory language we are called upon to construe. The legislature sometimes speaks in broad terms and sometimes in targeted [****33] terms, but those distinctions have meaning, and it is this Court's task to give effect to that meaning. Notwithstanding the broad, flexible, and expansive language embedded in this statute, the majority concludes that the authorization does not directly and specifically provide for the development of Willets West. Consequently, the majority's implied holding is that the legislature must not only directly and specifically alienate parkland, but define the precise parameters of any development that may be built in the future. The necessary corollary of the majority's decision is that the legislature may not alienate parkland for specific public purposes without the threat of the courts stepping in to further limit and circumscribe those purposes. This is a major departure from our precedent,[4] and will limit the legislature's flexibility to craft statutes that allow for future development[5]. **[*449]** Furthermore, it is entirely [17] consistent with the statutory scheme to allow future development of the land at issue. As appellants pointed out during argument, and respondents did not (and cannot) refute, of the seventy-seven acres alienated by statute, only about sixteen acres were used to construct [****34] Shea Stadium (*see* Administrative Code § 18-118 [c]). There is nothing in the statute to suggest that it was the legislature's intent to allow 61 acres of alienated parkland to sit idle in perpetuity or, as they are now, covered in asphalt.

III.

While the text of a statute is always of prime importance, its legislative history may inform the analysis (*see* Nostrom v A.W. Chesterton Co [**998], [***252], 15 NY3d 502, 507, 940 NE2d 551, 914 NYS2d 725 [2010]). Here, the legislation's bill jacket shows that the immediate context of the law concerned the construction and use of the stadium. Nonetheless, while the legislature's primary objective in enacting the law was to authorize construction of Shea Stadium, the legislature chose to craft that authorization in broad terms: not only to allow use of the parkland for Shea Stadium, but to permit the City to enter into agreements and any other "authorizations" that would use the alienated parkland for several broad purposes. Thus, while the legislative history emphasizes the immediate objective of the statute, it is the plain meaning of the statutory language that should guide our interpretation today and it unequivocally permits further development to promote the listed purposes.

IV.

Finally, some historical context further supports reversal, as do the [****35] practical realities regarding stadiums. Although the Appellate Division concluded that "[t]here is simply no basis to interpret the statute as authorizing the construction of another structure that has no natural connection to a stadium" (*Avella*, 131 AD3d at 85), history suggests that shopping areas and public markets are frequently located alongside athletic **[*450]** stadiums. The largest and earliest [18] stadium in ancient Rome, the Circus Maximus, demonstrates this fact. As early as the sixth century B.C., shops existed adjacent to the Circus Maximus to serve the needs of the spectators; similarly, when the Romans conquered the Greeks, they renovated the stadium at Olympia and built inns and shops in the area.

The practical realities regarding modern stadiums further support reversal as stadiums are frequently accompanied by malls or retail centers, adjacent to or near the sporting venues, to provide avenues for commerce and recreation that complement stadium attractions. Camden Yards in Baltimore, Gillette Stadium in Foxboro, Massachusetts, and Busch Stadium in St. Louis are all examples of the modern trend of using stadiums as hubs for economic activity. In fact, the author of an April 2017 article that discussed the [****36] evolution of stadium design over the last forty years commented that "[f]rom pedestrian plazas to full-blown entertainment districts, the stadium projects of today are about much more than the game."[6] To be sure, Administrative Code § 18-118 envisioned that a stadium would be located on the parkland. But, as we have previously held, we should not assume that legislators intend "to confine the scope of their legislation to the present, and to exclude all consideration for the developments of the future" (*Matter of Comptroller of City of N.Y. v Mayor of City of N.Y.*, 7 NY3d 256, 266, 852 NE2d 1144, 819 NYS2d 672 [2006], quoting *Hudson Riv. Tel. Co. v Watervliet Turnpike & Ry. Co.*, 135 NY 393, 403-404, 32 NE 148 [1892])[7]. The Appellate Division's outdated and restrictive understanding of what is "natural[ly] connect[ed]" to a stadium does the opposite, and should be rejected.

V.

Our Court's fervent commitment to the public trust doctrine and our appreciation [**999] [***253] of natural parkland in our State is not undermined by a reversal in this case. The legislature expressly alienated the property at issue for non-park uses. More precisely, the legislature directly allowed for future development and use of this alienated parkland "for any purpose or **[*451]** purposes which is of such a nature as to furnish to, or foster or promote among, or provide for the benefit of, the people of the city, recreation, entertainment, amusement, [****37] education, enlightenment, cultural development or betterment, and improvement of trade and commerce" (Administrative Code § 18-118 [b] [1]). Permitting the Willets Point Plan to proceed certainly does not put parks elsewhere in our State at risk of being demolished and replaced with brick, [19] mortar, and plastic. Instead, the proposed development has the potential to turn vacant lots into a vibrant community, transform parking lots into places of public use and enjoyment, and replace asphalt with hope and aspirations for the blighted community of Willets Point.

In sum, the majority's holding ignores the statute's plain text. The majority's narrow view that the statute authorizes only the construction of a stadium, or facilities directly related to a stadium, disregards the prescient and forward-looking nature of the statutory language. Willets West is designed to achieve the legislative objectives laid out expressly in the statute—improvement of trade and commerce and the promotion of recreation, entertainment, amusement, and cultural betterment. If permitted, the development will be enjoyed by those going to Citi Field, as well as others seeking recreation, food, shops, and entertainment. An afternoon at the ball game [****38] could become a day-long event, where families can shop, see a movie, and share a meal together. The New York State Legislature specifically allowed for this eventuality when it enacted the statute, and we should therefore find that the contemplated development of Willets West is an authorized use of this alienated parkland.

Accordingly, I dissent.

Judges Rivera, Stein, Fahey and Garcia concur; Chief Judge DiFiore dissents in an opinion.

Order affirmed, with costs.

Footnotes

1 QDG is a joint venture formed by entities controlled by the Sterling Equities Associates, owner of the Mets, and The Related Companies, L.P., a real estate development firm.

2 The City did not seek leave to appeal in this case, but filed a brief in support of reversal.

3 Supreme Court relied on *Murphy v Erie County* (28 NY2d 80, 268 NE2d 771, 320 NYS2d 29 [1971]) for the proposition that a "municipality may lease improvements to property to a private operator, on the condition that it serves a public purpose, and that ownership of the improvement is retained by the municipality." In *Murphy*, the authorizing legislation, much like the statute here, allowed the county to "enter into contracts, leases, or rental agreements with, or grant licenses, permits, concessions, or other authorizations, to any person or persons." We held: "Quite obviously, it was designed to give the county the broadest latitude possible in the operation of the stadium" (*id.* at 87). Nothing in *Murphy* suggests that a grant of legislative authority to lease a stadium located in parkland to a private business constitutes a legislative grant to allow private businesses to build unrelated commercial enterprises on the parkland.

4 On its face, the statute permits use of the stadium and facilities for, among other things, the improvement of trade and commerce. It does not permit, however, the *construction* of other facilities for the purpose of improving trade and commerce. Even if the statutory language were ambiguous, "Guided by the familiar canon of construction of *noscitur a sociis*, we ordinarily interpret the meaning of an ambiguous word in relation to the meanings of adjacent words" (*Matter of Kese Indus. v Roslyn Torah Found.*, 15 NY3d 485, 491, 940 NE2d 530, 914 NYS2d 704 [2010]; *see State of New York v Mobil Oil Corp.*, 38 NY2d 460, 464, 344 NE2d 357, 381 NYS2d 426 [1976]) and, following that canon, the phrase "improvement of trade and commerce" (Administrative Code of the City of New York § 18-118 [b] [1])—in light of the examples given and the other purposes listed in the statute—cannot reasonably be interpreted to encompass a private for-profit enterprise constructing an entirely new development on the parkland.

5 The incompatibility between defendants' proposed use and the authorization provided by the statute is also illustrated by reference to subdivision (b) (2) of section 18-118. That subdivision authorizes leases for "any business or commercial purpose which aids in the financing of the construction and operation of such stadium, grounds, parking areas and facilities." This plainly refers to private for-profit enterprises, but applies *only* where the purposes aid in the financing of the stadium, which compels the conclusion that "business or commercial purpose[s]" are not authorized where the businesses or commercial use does not aid in the financing of the stadium (Administrative Code of the City of New York § 18-118 [b] [2]; *see generally Two Guys from Harrison-N.Y. v S.F.R. Realty Assoc.*, 63 NY2d 396, 404, 472 NE2d 315, 482 NYS2d 465 [1984] ["specification of certainpermitted activities . . . should be read as implicitly prohibiting other(s)" under doctrine of "*inclusio unius est exclusio alterius*"]).

6 Likewise, the bill jacket contains a telegram from William Shea to Governor Nelson Rockefeller, sent in anticipation of the legislation's passage, which said, "the approval by the state legislature of the leasing of the stadium is our last step" (Bill Jacket, L 1961, ch 729 at 8-9). In a memorandum summarizing the bill, the New York State Department of Commerce wrote that its purpose was to amend the code "in relation to financing the construction of a stadium to be erected by the City of New York . . . and authorizing, in aid of such financing, the renting of such a stadium and exemption from down payment requirements" (Bill Jacket, L 1961, ch 729 at 15).

7 The other legislative approval required by the City, captured in subdivision (e), related to the City's need for an exemption from the down-payment requirement of section 107.00 of the Local Finance Law, "[b]ecause of the impracticability of issuing 15-year bonds, and because of the indicated minor deficits preventing operation of the stadium

on a fully self-sustaining basis initially" (Off of Mayor, Supp Mem in Support, Bill Jacket, L 1961, ch 729 at 40; *see generally id.* at 38-40).

1 *See* F. Scott Fitzgerald, The Great Gatsby 16 (1925).

2 Indeed, in the first paragraph of section 18-118 (b), the use of "appurtenant" to describe the grounds is abandoned, and the City is authorized to grant any person or persons contracting with the City "the right to use, occupy or carry on activities in, the whole or any part of such stadium, *grounds*, parking areas and other facilities" (Administrative Code § 18-118 [b] [emphasis added]). Notably, the City may authorize third parties not only to "use" the grounds or parking areas, but to "occupy" these areas for any purpose specified in subdivision (b).

3 Following subdivision (b) (1)'s list of authorized purposes, the statute contains some examples of possible uses that would promote those purposes, such as theatrical presentations, trade conventions and exhibitions. Where, as here, a statute specifies that a list of general purposes "includes" certain specific items, those items are no more than a nonexhaustive list of examples (*see e.g. Matter of Walker*, 64 NY2d 354, 358, 476 NE2d 298, 486 NYS2d 899 [1985] [" (W)ords of a general bequest followed by enumerated articles are not limited to things similar to the specific items listed"]; *Matter of Cahill v Rosa*, 89 NY2d 14, 21, 674 NE2d 274, 651 NYS2d 344 [1996]). Here, the legislature chose to use the word "including" before the list of examples and omit any limiting language, thereby not restricting the statute's application to the examples listed.

4 *See e.g. Union Sq. Park*, 22 NY3d at 654 ("Under the public trust doctrine, dedicated parkland cannot be converted to a nonpark purpose for an extended period of time absent the approval of the State Legislature"); *Friends of Van Cortlandt Park*, 95 NY2d at 632 (alienating parkland "requires the direct and specific approval of the State Legislature, plainly conferred" [quotation marks and citation omitted]); *Brooklyn Park Commrs. v Armstrong*, 45 NY 234, 243 [1871] ("Receiving the title in trust for an especial public use, [the city] could not convey without the sanction of the legislature; and the act of 1870 expresses the legislative sanction. . . . It was within the power of the legislature to relieve the city from the trust to hold [the land] for a use only, and to authorize it to sell and convey").

5 The majority cites *Potter v Collis* (156 NY 16, 50 NE 413 [1898]) as part of our Court's public trust jurisprudence. However, in that case we held that the Common Council of New York City could not "invest private parties with an exclusive interest in [the public] streets" because the Railroad Act in question did not grant any contracting authority to the City; that authority remained "vested solely in the legislature" (156 NY at 30-31). Here, the legislature expressly alienated the property at issue and granted the City specific contracting authority to promote the purposes set out in the statute. Although the majority cites *Matter of City of New York* (228 NY 140, 126 NE 809 [1920]) for the proposition that "'[w]hen there is a fair, reasonable and substantial doubt concerning the existence of an alleged power in a municipality, the power should be denied' " (majority op at 6-7, quoting *Matter of City of New York*, 228 NY at 152), in that case we explicitly held that the statute at issue demonstrated that the legislature intended "to *prohibit* the alienation of all water front property owned by the city" (*id.* at 151 [emphasis added]). Clearly, that case should not guide our interpretation of a statute that expressly alienates public land. The majority's citation to *Matter of Lake George Steam Boat Co. v Blais* (30 NY2d 48, 281 NE2d 147, 330 NYS2d 336 [1972]) is equally inapposite, since that case does not involve any legislative enactment that expressly alienates parkland.

6 Paul Steinbach, *Stadium Design Evolution from 1977 to 2017*, Athletic Business, April 2017, http://www.athleticbusiness.com/stadium-arena/stadium-design-evolution-from-1977-to-2017.html [accessed May 30, 2017].

7 That is particularly so where, as here, the statute specifically contemplates and permits new contracts, leases, agreements, and authorizations after the initial ones have expired.

Buffalo v. Roadway Transit Co., 303 N.Y. 453

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CITY OF BUFFALO, Appellant, *v.* ROADWAY TRANSIT COMPANY et al., Respondents.

Prior History: [***1]. *City of Buffalo v. Roadway Tr. Co.*, 278 App. Div. 69, reversed.

APPEAL from a judgment in favor of defendants, entered May 5, 1951, upon an order of the Appellate Division of the Supreme Court in the fourth judicial department, which (1) reversed, on the law and the facts, a judgment of the Supreme Court in favor of plaintiff, entered in Erie County upon a decision of an Official Referee (ALONZO G. HINKLEY, Off. Ref.), restraining defendants from using premises in a residential section of the city of Buffalo as a truck and freight terminal in violation of certain zoning ordinances of the city of Buffalo, and (2) dismissed the complaint. Stated findings of fact and conclusions of law contained in the decision of the Official Referee were reversed and new findings and conclusions made by the Appellate Division in lieu thereof.

Disposition: LOUGHRAN, Ch. J., LEWIS, CONWAY, DESMOND, DYE and FULD, JJ., concur.

Judgment accordingly.

Core Terms

terminal, freight, ordinance, premises, truck, public garage, garage, industrial, nonconforming use, trailers, business district, zoning ordinance, restricted use, residential, lease, subdivision, conforming, permission, tractors

Case Summary

Procedural Posture
Plaintiff city brought an action against defendant company to restrain the company from violating the city's residential zoning laws. The trial court found for the city. The Appellate Division of the Supreme Court in the Fourth Judicial Department (New York) reversed and dismissed the complaint. The city appealed.

Overview
The company leased premises within the city for use as a private garage for the storage and repair of trucks and as a terminal for freight shipping. The property was located in a residential area and was nonconforming to the city's zoning ordinances. The premises had earlier been used for a public garage in an area zoned for business use. The area was then rezoned residential. The court found that the use of the public garage was a lawful nonconforming use. The company's subsequent use of the structure as freight terminal was not a continuation of that prior use. The ordinance restricted freight terminals to industrial zones. The ordinance only allowed a change in a nonconforming use only to a more restrictive use. The transformation of the public garage to the freight terminal was not a change to a more restrictive nonconforming use. Also, the nonconforming use altered the essential character of the residential area.

Outcome

The court reversed the ruling of the appellate court and affirmed the trial court's ruling.

LexisNexis® Headnotes

Governments > Legislation > Interpretation

HN1 **Legislation, Interpretation**

A legislative body need not act anew each time scientific progress introduces some incidental variation into a situation already covered by general language in the statutes. The words of the statute are to be interpreted according to their natural and obvious meaning, and, as the terms employed are not ambiguous, extrinsic facts are not available to restrict the authority which it plainly confers. More like this Headnote

Shepardize - Narrow by this Headnote (2)

Business & Corporate Compliance > ... > Real Property Law > Zoning > Nonconforming Uses
Environmental Law > Land Use & Zoning > Nonconforming Uses
Real Property Law > Zoning > Judicial Review

HN2 **Zoning, Nonconforming Uses**

Zoning statutes are to be strictly construed in favor of the landowner, but it is likewise true that the court may not disregard the intention of the legislature when it is clearly to be found in the language used. More like this Headnote

Shepardize - Narrow by this Headnote (3)

Headnotes/Summary

Headnotes

Municipal corporations - Buffalo, City of - zoning - (1) after permit had been obtained for use of building for "Garage & Truck Terminal", motor carrier leased building and remodeled it for use as truck terminal for delivery and loading of freight; [***2] activities carried on twenty-four hours a day; premises were in residence district under amended zoning ordinance of city and use by carrier was nonconforming; at time zoning was adopted premises were placed in business district and used as public garage, and owners legally continued operation of garage as lawful prior use; in action by city to restrain use of premises in alleged violation of ordinance, judgment in favor of city affirmed - (2) present use of premises not continuation of former nonconforming use, nor equivalent thereof; activities of carrier fall within term "freight terminal" as used in ordinance and permitted in industrial district - (3) words "freight terminal", as used in ordinance in 1925, deemed to include motor truck freight terminals, although none such then existed; means of transporting freight to terminal of no moment - (4) defendants may not change nonconforming use to one of equal industrial classification since ordinance prohibits change except to more restricted use; since present use not more restricted than former nonconforming use, it is illegal and may be enjoined - (5) use to which defendants now put property cannot fail to alter residential character [***3] of neighborhood - (6) issuance of permit cannot confer rights in contravention of zoning laws which provide that such permit shall be void - (7) claim of unconstitutionality of ordinances overruled.

1. Under a lease permitting lessee motor carrier to use premises for a truck terminal and other activities in connection therewith, and after a revocable permit had been obtained from the director of buildings of the city of Buffalo to use the building for a "Garage & Truck Terminal" subject to the zoning ordinance, defendant interstate motor carrier used the premises as a terminal for freight shipped into, or out of, said city. Some remodeling of the premises was done when defendant went into possession, including the installation of a loading dock, and operations are presently carried on twentyfour hours a day by about 71 employees. Each day about 12 of the carrier's trailers arrive at and depart from the premises, and about twice that many tractors, and freight is delivered for shipment by other carriers in their own trucks. Under the provisions of the present zoning ordinances of the city of Buffalo, the premises are in a second residence district, and the use above outlined [***4] is clearly nonconforming. At the time the original ordinances were adopted, the premises were placed in a business district and were then being used as a public garage. A public garage was a permitted use only in a first industrial district. As a matter of right, the owners of the property thereafter continued to operate the garage as a continuation of a use lawful prior to the adoption of the zoning ordinances. In this action by the city of Buffalo to restrain the carrier and lessor from using the premises in alleged violation of the zoning ordinances, judgment in favor of the city should be affirmed.

2. The present use is not a continuation of the former use, nor the equivalent thereof, but is that of a freight terminal rather than a "public garage" within the definition thereof in the ordinance. The activities of the carrier resemble neither the ordinance definition nor the common concept of a public garage but fall within the term "freight terminal" as used in the ordinance for a use permitted in the first industrial district.

3. A contention that the words "freight terminal", as used in the ordinance, cannot be applied to motor truck freight terminals since such were [***5] not within the contemplation of the framers of the ordinance in 1925, is without merit. Such a terminal is not essentially different from any other freight terminal. What was originally confined to an industrial district was the operation of handling freight at a terminal point, and it can make no difference what the means of transporting the freight to that point may be.

4. Originally the ordinance provided that a nonconforming use should not be changed "except" to a more restrictive use, but this was later amended to read that premises devoted to a nonconforming use "may be changed in use, when changed to a more restricted use". While zoning statutes are to be strictly construed in favor of the landowner, courts may not disregard the intention of the legislative body when it is clearly to be found in the language used. Here, in view of the language, no distinction can be made between the original, and the present, wording of the ordinance. Since the present use is not more restrictive than the former nonconforming use, it is illegal and may be enjoined.

5. The neighborhood has an established residential character, as was recognized by the 1946 amendment rezoning the [***6] area from business to second residential, but the use to which defendants have now put that property cannot fail to alter the essential character of an otherwise residential neighborhood and to render it not merely commercial but industrial in nature.

6. The issuance of a permit by the director of buildings cannot help defendant, for such a permit cannot confer rights in contravention of the zoning laws. Moreover, the ordinance provides that any permit for the use of premises contrary to the provisions thereof shall be void. In addition, the permit was issued for a "Garage & Truck Terminal", not for a freight terminal.

7. The asserted unconstitutionality of the ordinance rests upon a claim that the city means to limit use of the property to second residential purposes, despite the prior use and the impossibility of adapting the building to residential use, but the record discloses no such intent or threat on the part of the city.

Counsel: *Fred C. Maloney, Corporation Counsel (Herbert B. Forbes* of counsel), for appellant. I. The use of the premises by defendant transit company as a truck terminal is not equivalent to a public garage. II. The use of the premises is governed [***7] by the zoning law in effect on October 10, 1946. III. The use of the premises is inherently and necessarily noxious and offensive. IV. The present use of the premises constitutes a "freight terminal" within the meaning of the zoning ordinances. (*Lyman-Richey Sand & Gravel Co. v. Nebraska*, 123 Neb. 674.) V. Defendants have no right under the zoning ordinances to use the premises or any part thereof for a freight terminal or for any other industrial use.VI. Even if the zoning ordinances of 1926 are not applicable herein, the use by defendants is in violation of the ordinances in effect when their use commenced. VII. Assuming that the prior use of the premises was a nonconforming first industrial use, defendants may not substitute therefor a different or extended nonconforming use. (*Goodrich v. Selligman*, 298 Ky. 863; *Cole v. City of Battle Creek*, 298 Mich. 98; *Piccolo v. West Haven*, 120 Conn. 449; *Westchester Co. S.P.C.A. v. Mengel*, 266 App. Div. 151, 292 N.Y. 121; *People ex rel. Wood v. Lacombe*, 99 N.Y. 43; *President & Trustees of Vil. of Ossining v. Meredith*, 190 Misc. 142, 275 App. Div. 850.) VIII. Issuance of a use [***8] permit by the director of buildings gave defendants no vested rights where the permit was issued in violation of the zoning ordinances. (*Marcus v. Village of Mamaroneck*, 283 N.Y. 325; *Rollins v. Armstrong*, 226 App. Div. 687, 251 N.Y. 349; *Matter of S.B. Garage Corp. v. Murdock*, 185 Misc. 55; *People ex rel. Copcutt v. Board of Health*, 140 N.Y. 1.)

James R. Ulsh for Roadway Transit Company, respondent. I. The use of the premises in question by Roadway Transit Company is that of a public garage. II. The established use of the premises prior to the enactment of the zoning ordinance in 1926 and thereafter makes permissible use thereof as a nonconforming industrial use. (*Matter of 440 E. 102nd St. Corp. v. Murdock*, 285 N.Y. 298; *Matter of Monument Garage Corp. v. Levy*, 266 N.Y. 339; *City of Albany v. Anthony*, 262 App. Div. 401; *People ex rel. Ortenberg v. Bales*, 224 App. Div. 87, 250 N.Y. 598; *City of Olean v. Conkling*, 157 Misc. 63; *Sweet v. Campbell*, 282 N.Y. 146.) III. The certificate of use and occupancy issued by the director of buildings constitutes an administrative determination of the application [***9] of the zoning ordinance and should be followed as a reasonable interpretation thereof.(*Matter of Washington St. Asylum & Park R.R. Co.*, 115 N.Y. 442; *Louisville & N.R. Co. v. U.S.*, 282 U.S. 740; *United States v. Alabama Railroad Co.*, 142 U.S. 615.) IV. The use of the premises is not a noxious or offensive use within the meaning of the ordinance. (*Bove v. Donner-Hanna Coke Corp.*, 142 Misc. 329; *Haber v. Paramount Ice Corp.*, 239 App. Div. 324; *People v. Brooklyn & Queens Tr. Corp.*, 258 App. Div. 753; *People v. Cooper*, 200 App. Div. 413; *People v. Transit Development Co.*, 131 App. Div. 174; *Ruggiero v. Lockstrip Mfg. Corp.*, 254 App. Div. 783.) V. Enforcement of the zoning ordinance against the transit company in the manner sought by the city would deprive defendant of its property without due process of law. (*Arverne Bay Constr. Co. v. Thatcher*, 278 N.Y. 222; *Matter of Eaton v. Sweeny*, 257 N.Y. 176; *Cordts v. Hutton Co.*, 146 Misc. 10, 266 N.Y. 399; *Dowsey v. Village of Kensington*, 257 N.Y. 221.)

Louis W. Manchester for Alfred B. Dexter, respondent. I. The use of the premises [***10] by these defendants is that of a public garage as defined in the zoning law. II. Defendants had the right under the zoning ordinance to any use of the premises listed in the category of first industrial uses of the ordinance. (*Matter of 440 E. 102nd St. Corp. v. Murdock*, 285 N.Y. 298; *Matter of Multiplex Garages v. Walsh*, 241 N.Y. 527; *People ex rel. Ortenberg v. Bales*, 224 App. Div. 87, 250 N.Y. 598; *Matter of Monument Garage Corp. v. Levy*, 266 N.Y. 339; *People ex rel. Sheldon v. Board of Appeals*, 234 N.Y. 484; *Clason v. Baldwin*, 129 N.Y. 183; *Matter of Wheelock*, 51 Hun 640, 121 N.Y. 664.) III. The construction of the zoning ordinance by the director of buildings of the city of Buffalo is entitled to great weight. (*Effell Realty Corp. v. City of New York*, 165 Misc. 176, 256 App. Div. 972, 282 N.Y. 541; *Matter of Gordon v. Board of Appeals*, 131 Misc. 346.) IV. This respondent, as purchaser and owner of an industrial property, should have available precise and definite information as to his rights and liabilities. (*People v. Perkins*, 282 N.Y. 329; *Arverne Bay Constr. Co. v. Thatcher*, 278 N.Y. [***11] 222; *People ex rel. St. Albans-Springfield Corp. v. Connell*, 257 N.Y. 73; *Matter of Eaton v. Sweeny*, 257 N.Y. 176; *Vangellow v. Rochester*, 71 N.Y.S. 2d 672; *Dowsey v. Village of Kensington*, 257 N.Y. 221; *Nectow v. Cambridge*, 277 U.S. 183.)

Opinion by: FROESSEL

Opinion

[*457] [**96] FROESSEL, J. The City of Buffalo seeks to restrain defendants from using certain premises in alleged violation of the zoning ordinances (Ordinances of the City of Buffalo, ch. LXX).

The premises in question are leased by defendant Roadway Transit Company (hereinafter called Roadway) from defendant Dexter. The lease permits Roadway "to use the said premises hereby let and for the term of this lease for a truck terminal, a private garage for the storage and repair of its trucks and other motor vehicles used in its business, and other activities in connection with its trucking business". [**97] The parties also provided that the lessor - and, after the third year, the lessee - might elect to terminate the lease, "In the event that the **[*458]** lessee or the lessor is enjoined from using the said premises in the operation of the business of the lessee, as [***12] hereinabove defined," and the lessee shall save the lessor harmless from all liability for damages. A revocable permit was obtained from the director of buildings to use the building for "Garage & Truck Terminal", subject to "all conditions of the Zoning Ordinances".

The property is located in a residential section. With other parcels not here involved it forms a commercial island in the center of a block otherwise devoted to residence uses, and is connected with West Utica Street by a driveway. The building is a large, one-story brick structure, 101 by 232 feet in area. When Roadway went into possession in November, 1946, it caused some remodeling to be done, including the installation of a loading dock or platform 40 by 95 feet at the east end of the building.

Roadway is engaged in interstate shipping as a motor carrier, its premises being used as a terminal for freight shipped into or out of Buffalo. At this building, shipments from out of State are broken down for delivery within the city. Outgoing freight is also brought in from other cities in trucks other than those belonging to Roadway, and more loading is done within the building than over the dock. No other use [***13] is made of the building, except that goods are stored there for periods not exceeding twenty-four hours, and routine maintenance, consisting only of oiling and greasing, is done on the tractors. These operations are carried on twenty-four hours a day.

The company operates about 12 gasoline-powered tractor and trailer units weighing over 6 tons unladen, and as much as 30,000 pounds when loaded. In addition, diesel-powered tractors are hired.The tractor and trailer combination is about 43 feet in length. Additional short wheel-base trucks are also operated.Four shifts of personnel, in addition to the drivers on the Buffalo payroll, are utilized in around the clock operation, the total number of employees in a week being about 71. The greatest number of men on the dock at one time worked during the afternoon shift, when at least 14 are needed. Sleeping arrangements are provided for 9 cross-country drivers.

Each day about 12 Roadway trailers arrive and depart from the premises, and about twice that many tractors. In addition, **[*459]** about 2 hired trailers arrive and depart each day, and freight is delivered for shipment by other carriers in their own trucks and trailers. [***14] The building accommodates about 16 trailers, and 10 are usually there at one time. The dock accommodates 9 trailers and the presence of that many is a daily occurrence.

Under the provisions of the present zoning ordinances, pursuant to the amendment effective August 5, 1946, the premises are in a second residence district, and the use above outlined is clearly nonconforming. Defendants have sought to justify it as a continuation or lawful change of a prior nonconforming use, and, although unsuccessful in the trial court, have prevailed in the Appellate Division.

The original ordinances of 1926 placed these premises in a business district. Prior to and at that time they were being used as a public garage, with the exception of a plot connecting the building with West Utica Street and then used for a two-family residence, but which was demolished in 1935. For present purposes, that plot need not be differentiated from the garage building. The use as a public garage was continued until the time of the afore-mentioned lease to Roadway, except for a time, not now material, during the war years, when secret materials were stored there, under guard, for "the government."

Under [***15] the original 1926 enactment (ch. LXX, § 17, subd. A, par. [5]; § 18, subd. A, par. [1]), and the amendments thereto in 1930, a public garage was a permitted [**98] use only in a first industrial district, but it was also provided that such use might be allowed in a business district by special permission of the board of appeals, upon certain conditions. The owners of the property in suit never availed themselves of the provisions for such special permission, but continued to operate the garage as a matter of right, as a continuance of a use lawful prior to the adoption of the zoning ordinance, as permitted by section 23 of chapter LXX. The Official Referee and the Appellate Division erroneously found the use as a public garage to be a conforming use in a business district. As we construe the ordinance, that use was a lawful nonconforming use of the first industrial classification in the absence of lawful special permission required for conformance in a business district. It antedated the passage of **[*460]** the zoning ordinances. Since this is a question of statutory construction, we are not bound by the finding below.

The city argued - and the Official Referee [***16] found - that the present use is not a continuation of the former use, nor the equivalent thereof, but is that of a freight terminal, while the Appellate Division adopted defendants' contention that the use as a truck terminal is the equivalent of public garage. The 1926 definition of the term "public garage", which has not been substantially varied since, was contained in subdivision 25 of section 34 of chapter LXX, as follows: "a use or building or portion of a building other than a private garage, but not including exhibition or show rooms for the storage of new vehicles for sale, its purposes being in general a place for the storage, rental or sale of used vehicles and a place devoid of major facilities such as mechanical or other power for commercial repair work." It is apparent that the activities above described resemble neither the ordinance definition nor the common concept of a public garage. On the contrary, it seems plain to us that the business conducted by Roadway clearly falls within the term "freight terminal" as used in paragraph (7) of subdivision A, section 18 of chapter LXX, the same being a permitted use in a first industrial district.

Defendants concede that [***17] the words "freight terminal" as used in the ordinances apply to either railroad or waterway freight terminals, but urge that they cannot be applied to motor truck freight terminals, because these were not within the contemplation of the framers of the ordinance in the year 1925. But a motor freight terminal is not essentially different from any other freight terminal, as the evidence here shows. What was confined to an industrial district in the original ordinances was the operation of handling freight at a terminal point; it can make no difference what is the *mode of transporting* the freight to that point. Broad, general language was used, and it must be assumed that there was a purpose in such use. It is well settled that *HNI* a legislative body need not act anew each time scientific progress introduces some incidental variation into a situation already covered by general language in the statutes (*Hudson Riv. Tel. Co. v Watervliet Turnpike & Ry. Co.*, 135 N.Y. 393, 403-404). In that case, where it was contended that the use of electric power to run trolleys **[*461]** was not included in a statutory franchise, we said: "The words of the statute are to be interpreted according [***18] to their natural and obvious meaning, and, as the terms employed are not ambiguous, extrinsic facts are not available to restrict the authority which it plainly

confers. The language, literally construed, includes undiscovered, as well as existing modes of operation. * * * It would be an unjust reflection upon the wisdom and intelligence of the law-making body to assume that they intended to confine the scope of their legislation to the present, and to exclude all consideration for the developments of the future." More recently, and in *Matter of Di Brizzi (Proskauer)* (303 N.Y. 206, 214), we held to the same effect: "The Legislature, in enacting the statute, however, utilized general terms, and did not, either expressly or by implication, limit its operation [**99] to a time of war. We may not do so now."

As the ordinance provides that a use specified in any industrial district is not permitted in a business district (§ 17, subd. A, par. [6]), defendants cannot successfully maintain that they have changed to a more restrictive, or business, use, but must rely upon the claimed right to change the nonconforming use to one of an equal, industrial classification. Subdivision [***19] A of section 23 of the original ordinance contained the following language: "A non-conforming use shall not be changed except to a more restrictive use." The 1930 amendment substituted therefor the following: "A premises, building or structure arranged, designed or devoted to a non-conforming use, may be changed in use, when changed to a more restricted use". Section 23 also provides: "A use shall be deemed to be changed to a more restrictive use if the new use be one that is permitted in a section of this chapter with a lower number than the section under which the former use was permitted."

It is defendants' contention that the amendment of 1930 must be read strictly in their favor, and that since such amendment does not expressly *prohibit* any change, they have the right to change the use to one of an equal grade. Reliance is placed chiefly on *Matter of 440 E. 102nd st. Corp. v. Murdock* (285 N.Y. 298). That case, however, is not in point, since there the resolution expressly provided for change to an equal nonconforming use (see pp. 306-307). It is true that *HN2* zoning statutes are to be strictly construed in favor of the landowner **[*462]** (*Matter of Monument Garage* [***20] *Corp. v. Levy*, 266 N.Y. 339), but it is likewise true that we may not disregard the intention of the Legislature when it is clearly to be found in the language used (*id.*, p. 344; *Westchester County S.P.C.A. v. Mengel*, 292 N.Y. 121, 126). Giving the language of the ordinances its plain and obvious meaning, we fail to perceive the distinction urged by defendants between the original and the present wording. As we read the amendment of 1930, it retains the same prohibition against change to any but a *more restrictive* use, for it is clearly stated that a change in use is permitted "when changed to a more restricted use", and not otherwise. That language plainly imposes a condition on the permissive right to change the nonconforming use, in harmony with the basic purpose of zoning laws, to bring about ultimate conformity in the various use districts. Since the present use is not more restrictive than the former nonconforming use, it is illegal and may be enjoined. The Legislature could never have intended that a public garage could thus be converted into a freight terminal, a railroad yard or a crematory, all of which are placed in the same classification (§ 18, [***21] subd. A, par. [7]).

Especially is this true when we contemplate the result if defendants are allowed to continue with the present use. This neighborhood has an established residential character, despite the presence for a number of years of the garage and the other nonconforming parcels in the center of the block. This was recognized by the 1946 amendment, rezoning this area from business to second residential. But the use to which defendants have now put this property is such that it cannot fail to "alter the essential character of an otherwise residential neighborhood" (*Matter of Taxpayers' Assn. v. Board of Appeals*, 301 N.Y. 215, 219) and to render it not merely commercial, but industrial, in nature. Neither the home nor the shop, permitted in the business district, will long survive in close proximity to Roadway's terminal, for precisely the same reasons that would obtain in the case of a rail or water terminal.

In summary, then, the premises (except the 28 by 98 foot plot connecting the garage with West Utica Street) having been used as a public garage when the zoning ordinances were first adopted, their use [**100] as such thereafter was lawful though [***22] not conforming. No permission ever having been sought to make it **[*463]** conforming, its status remains unchanged. When in 1946 defendants leased it for a freight truck terminal as well as a garage, as admitted in their answers, its use as such violated the ordinance. Converting it from a public garage to a freight terminal was not authorized, since both are in the first industrial classification. A nonconforming use may only be changed to a more restrictive use, not to an equally restrictive one.

The issuance of a permit by the director of buildings cannot help defendants, for such a permit cannot confer rights in contravention of the zoning laws (*Marcus v. Village of Mamaroneck*, 283 N.Y. 325, 330; see, also, *Matter of 440 E. 102nd St. Corp. v. Murdock, supra*, p. 305). Moreover, the ordinance expressly provides that "any permit issued for * * * the use of any premises contrary to the provisions of this ordinance *shall be void* " (ch. LXX, § 26, subd. A; emphasis supplied). Finally, the permit was issued for a "Garage & Truck Terminal", not for a freight terminal.

The alleged unconstitutionality of the ordinances rests upon the claim that the city [***23] means to limit use of the property to second residential purposes, despite the prior use and the impossibility of adapting the building to residential use. Suffice it to say that the record discloses no such intent or threat on the part of plaintiff.

In the view taken herein, it is unnecessary to consider defendants' contention that the present use is a business use falling within the general language of paragraph 6 of subdivision A of section 17 of chapter LXX, permitting any business use *not* specified in an industrial district and not "noxious or offensive by reason of dust, odor, smoke, gas, fumes, noise or vibration." Neither is it necessary to decide whether the weight of the evidence lies with the trial court's finding that the current use is offensive within the meaning of that subdivision, or with the Appellate Division's finding that it is not inherently so.

The judgment of the Appellate Division should be reversed and that of the Supreme Court affirmed, with costs in this court and in the Appellate Division.

Dalton v. Pataki, 11 A.D.3d 62

Dalton v. Pataki, 11 A.D.3d 62

Supreme Court of New York, Appellate Division, Third Department

July 7, 2004, Decided ; July 7, 2004, Entered

94493

Reporter

11 A.D.3d 62 * | 780 N.Y.S.2d 47 ** | 2004 N.Y. App. Div. LEXIS 9338 ***

Joseph Dalton et al., Appellants, v. George Pataki, as Governor of the State of New York, et al., Respondents. (Action No. 1.) Lee Karr, Appellant v. George Pataki, as Governor of the State of New York, et al., Respondents. (Action No. 2.)

Subsequent History: Motion granted by *Dalton v. Pataki*, 3 N.Y.3d 746, 821 N.E.2d 137, 2004 N.Y. LEXIS 3539, 787 N.Y.S.2d 711 (2004)
Motion granted by *Dalton v. Pataki*, 4 N.Y.3d 754, 823 N.E.2d 1292, 2005 N.Y. LEXIS 46, 790 N.Y.S.2d 644 (2005)
Motion granted by *Dalton v. Pataki*, 4 N.Y.3d 754, 823 N.E.2d 1291, 2005 N.Y. LEXIS 41, 790 N.Y.S.2d 643 (2005)
Affirmed in part and modified in part by *Dalton v. Pataki*, 5 N.Y.3d 243, 835 N.E.2d 1180, 2005 N.Y. LEXIS 1059, 802 N.Y.S.2d 72 (N.Y., May 3, 2005)

Prior History: Appeal from an order of the Supreme Court, Albany County (Joseph Teresi, J.), entered July 17, 2003. The order granted defendants' cross motions for summary judgment dismissing the complaints and declared parts B, C and D of chapter 383 of the Laws of 2001 constitutional as challenged.
Saratoga County Chamber of Commerce, Inc. v. Pataki, 100 N.Y.2d 801, 798 N.E.2d 1047, 2003 N.Y. LEXIS 1470, 766 N.Y.S.2d 654 (2003)

Disposition: Order affirmed as modified.

Core Terms

gaming, lottery, gambling, tribes, tickets, compact, prize, permits, players, vendor, reinvestment, regulation, electronic, breeding, funds, gaming activity, net proceeds, purposes, plaintiffs', video, multistate, casino, slot machine, state law, numbers, lottery ticket, tribal-state, purses, winning, Racing

Case Summary

Procedural Posture
Plaintiffs, taxpayers and others, challenged an order of the Supreme Court, Albany County (New York), which granted the cross motions for summary judgment filed by defendants, the governor and others, and dismissed the taxpayers' complaint that challenged the constitutionality of 2001 N.Y. Laws 383, pts. B, C, and D. Plaintiffs contended that these provisions, which authorized certain types of lotteries, violated N.Y. Const. art. I, § 9.

Overview
The challenged bill authorized the governor to enter into tribal-state compacts for casino gaming activities on Indian lands, 2001 N.Y. Laws 383, pt. B, pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C.S. §§ 2701-2721, 18 U.S.C.S. §§ 1166-1168; permitted video lottery gaming, 2001 N.Y. Laws 383, pt. C; and authorized participation in a multistate lottery, 2001 N.Y. Laws 383, pt. D. Affirming in part but modifying in part, the court held that (1) because New York permitted the gaming activities authorized by 2001 N.Y. Laws 383, pt. B for charitable purposes, subject to heavy regulation, the gaming was properly the subject of a tribal-state compact; (2) video lottery gaming constituted a valid, state-operated lottery and was excepted from the general ban on gambling, but the requirement that vendor fees be dedicated to breeding funds violated the constitutional mandate that "the net proceeds" be applied exclusively to education under N.Y. Const. art. I, § 9(1); and (3) New York retained sufficient control over the multistate lottery within its borders to meet the requirement that lotteries be "operated by the State" under N.Y. Const. art. I, § 9(1).

Outcome

The court affirmed the portion of the supreme court's decision holding that the provisions authorizing casino gaming on Indian lands and the participation in the multistate lottery was constitutional. It also affirmed the finding that video lottery gaming was constitutional, but because the provision authorizing that type of gaming did not apply net proceeds exclusively to education, the whole provision was struck as unconstitutional.

LexisNexis® Headnotes

Governments > Legislation > Enactment

HN1 **Legislation, Enactment**

Under N.Y. Const. art. III, § 14, it is the governor who must express the opinion that an immediate vote is desirable. The facts on which the governor forms that opinion must satisfy him or her. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Business & Corporate Compliance > ... > Governments > Native Americans > Indian Gaming Regulatory Act

HN2 **Governments, Indian Gaming Regulatory Act**

The Indian Gaming Regulatory Act (IGRA), 25 U.S.C.S. §§ 2701-2721, 18 U.S.C.S. §§ 1166-1168, both preempts the field in the governance of gaming activities on Indian lands and sets forth a mechanism by which states may exert some measure of control over gambling on Indian lands. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Business & Corporate Compliance > ... > Governments > Native Americans > Indian Gaming Regulatory Act

HN3 **Governments, Indian Gaming Regulatory Act**

Pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C.S. §§ 2701-2721, 18 U.S.C.S. §§ 1166-1168, a state may enter into tribal-state compacts permitting particular Class III, casino-type gaming activities on tribal lands if the state permits any person to conduct those particular gaming activities for any purpose, including a charitable purpose. That a compact permits a certain game to be conducted in a manner that is otherwise inconsistent with state law will not render it invalid if the game is not completely prohibited. More like this Headnote

Shepardize - Narrow by this Headnote (1)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries
View more legal topics

HN4 **State & Territorial Government Licensing, Gaming & Lotteries**

Because New York permits the gaming activities at issue in 2001 N.Y. Laws 383, pt. B for charitable purposes, subject to heavy regulation, the gaming is properly the subject of a tribal-state compact. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries
View more legal topics

HN5 **State & Territorial Government Licensing, Gaming & Lotteries**

While the Supreme Court of New York, Appellate Division, Third Department concludes that video lottery gaming itself is a "lottery" within the meaning of N.Y. Const. art. I, § 9, it declares the entirety of 2001 N.Y. Laws ch. 383, pt. C to be unconstitutional due to the impermissible revenue distribution scheme set forth therein. More like this Headnote

Shepardize - Narrow by this Headnote (2)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries
View more legal topics

HN6 **State & Territorial Government Licensing, Gaming & Lotteries**

New York retains sufficient control over the operation of the multistate lottery within its borders to meet the constitutional requirement that lotteries be "operated by the state," N.Y. Const. art. I, § 9(1). The net proceeds generated by the multistate lottery remain in New York and are dedicated "exclusively to or in aid or support of education in this state" as required by N.Y. Const. art. I, § 9(1). Thus, 2001 N.Y. Laws 383, pt. D is constitutional. More like this Headnote

Shepardize - Narrow by this Headnote (1)

Constitutional Law > Separation of Powers
Governments > Courts > Authority to Adjudicate

HN7 **Constitutional Law, Separation of Powers**

Courts are not concerned with questions of legislative policy. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries
View more legal topics

HN8 **State & Territorial Government Licensing, Gaming & Lotteries**

Class III gaming, the type of gaming permitted by 2001 N.Y. Laws 383, pt. B, is defined as all forms of gaming that are not Class I gaming or Class II gaming. 25 U.S.C.S. § 2703(8). Class III gaming is the most heavily regulated of the three categories of gaming and is lawful on Indian lands only if three conditions are met. First, the gaming activities must be authorized by an ordinance or resolution of the governing body of the Indian tribe. 25 U.S.C.S. § 2710(d)(1)(A)(i). Second, like Class II gaming, Class III gaming activities are permitted on Indian lands only if such activities are located in a state that permits such gaming for any purpose by any person, organization, or entity. 25 U.S.C.S. § 2710(d)(1)(B). Finally, Class III gaming must be conducted in conformance with a tribal-state compact entered into by the Indian tribe and the state. 25 U.S.C.S. § 2710(d)(1)(C). More like this Headnote

Shepardize - Narrow by this Headnote (2)

Business & Corporate Compliance > ... > Governments > Native Americans > Indian Gaming Regulatory Act

HN9 **Governments, Indian Gaming Regulatory Act**

The compacting requirement of 25 U.S.C.S. § 2710(d)(1)(C) allows states to negotiate with tribes that are located within their borders regarding aspects of Class III Indian gaming that might affect legitimate state interests, 25 U.S.C.S. § 2710(d)(3)(C). Although states are required under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C.S. §§ 2701-2721, 18 U.S.C.S. §§ 1166-1168, to negotiate in good faith upon receiving a request to enter into negotiations with an Indian tribe, 25 U.S.C.S. § 2710 (d)(3)(A), nothing in the statute compels a state to accept a proposed compact, 25 U.S.C.S. § 2710 (d)(7)(B)(vii), 25 C.F.R. pt. 291. Moreover, compacts will take effect only if approved by the Secretary of the Interior. 25 U.S.C.S. § 2710(d)(3)(B). More like this Headnote

Shepardize - Narrow by this Headnote (0)

Business & Corporate Compliance > ... > Governments > Native Americans > Indian Gaming Regulatory Act

HN10 **Governments, Indian Gaming Regulatory Act**

The term "gambling" excludes Class III gaming conducted under a tribal-state compact approved by the Secretary. 18 U.S.C.S. § 1166(c)(2). That is, under 18 U.S.C.S. § 1166, state laws regulating gambling do not apply to Class III gaming otherwise permitted under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C.S. §§ 2701-2721, 18 U.S.C.S. §§ 1166-1168. Class III gaming is allowed on Indian lands by IGRA if it is conducted in conformance with a tribal-state compact, 25 U.S.C.S. § 2710(d)(1)(C) and in a state that permits such gaming for any purpose by any person, organization, or entity, 25 U.S.C.S. § 2710(d)(1)(B). More like this Headnote

Shepardize - Narrow by this Headnote (2)

Business & Corporate Compliance > ... > Governments > Native Americans > Indian Gaming Regulatory Act

HN11 **Governments, Indian Gaming Regulatory Act**

The term "permits such gaming for any purpose by any person, organization, or entity" in 25 U.S.C.S. § 2710(d)(1)(B) defines the scope of Class III games in which Indians may engage and that a tribal-state compact may address. More like this Headnote

Shepardize - Narrow by this Headnote (2)

Business & Corporate Compliance > ... > Governments > Native Americans > Indian Gaming Regulatory Act

HN12 **Governments, Indian Gaming Regulatory Act**

The phrase "such gaming" in 25 U.S.C.S. § 2710(d)(1)(B) refers to the antecedent term "Class III gaming" - a type of gaming defined by the rules of the particular games contained therein, rather than by the purpose for which the games are played, such as for profit or for charity. This interpretation is consistent with the legislative history of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C.S. §§ 2701-2721, 18 U.S.C.S. §§ 1166-1168, which indicates that the relevant inquiry is whether a particular game is criminally prohibited, not whether the game is played for commercial, charitable or governmental purposes. More like this Headnote

Shepardize - Narrow by this Headnote (1)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries
View more legal topics

HN13 **State & Territorial Government Licensing, Gaming & Lotteries**
In determining whether New York "permits such gaming" for purposes of satisfying the condition contained in 25 U.S.C.S. § 2710(d)(1)(B), the question is not whether these games may be characterized as Las Vegas-style or commercialized gambling, but whether a particular game is permitted under New York's Constitution, statutes and applicable regulations. If a state does not permit "such gaming," the matter is at an end and a compact purporting to authorize prohibited gambling will not be valid. If a particular Class III game is not permitted by New York law under any circumstances, a tribal-state compact will not be upheld insofar as it purports to authorize a tribe to conduct that game on Indian lands. More like this Headnote

Shepardize - Narrow by this Headnote (2)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries

HN14 **State & Territorial Government Licensing, Gaming & Lotteries**
See N.Y. Const. art. I, § 9(1). More like this Headnote

Shepardize - Narrow by this Headnote (0)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries

HN15 **State & Territorial Government Licensing, Gaming & Lotteries**
See N.Y. Const. art. I, § 9(2). More like this Headnote

Shepardize - Narrow by this Headnote (0)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries

HN16 **State & Territorial Government Licensing, Gaming & Lotteries**
See N.Y. Const. art. I, § 9(2). More like this Headnote

Shepardize - Narrow by this Headnote (0)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries

HN17 **State & Territorial Government Licensing, Gaming & Lotteries**
N.Y. Const. art. I, § 9(2) directs the legislature to pass appropriate laws to effectuate the purposes of the subdivision and to ensure that such games are rigidly regulated to prevent commercialized gambling, N.Y. Const. art. I, § 9(2). Notably, subdivision two expressly permits the legislature to pass laws restricting the gambling permitted by that section. N.Y. Const. art. I, § 9(2). More like this Headnote

Shepardize - Narrow by this Headnote (0)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries
View more legal topics

HN18 **State & Territorial Government Licensing, Gaming & Lotteries**
While the New York Constitution generally bans gambling and evinces a strong policy against commercialized gambling, at least some form of gambling has been authorized throughout most of the state's history. Indeed, the New York Constitution contained a complete prohibition on gambling only from 1894 to 1939 and now permits several forms of gambling, some of which would be deemed Class III gaming under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C.S. §§ 2701-2721, 18 U.S.C.S. §§ 1166-1168, specifically, 25 U.S.C.S. § 2703 (7), (8). The legalization of certain forms of gambling indicates that the New York public does not consider authorized gambling a violation of some prevalent conception of good morals, or some deep-rooted tradition of the common weal. Instead, the trend in New York State demonstrates an acceptance of licensed gambling transactions as a morally acceptable activity, not objectionable under the prevailing standards of lawful and approved social conduct. More like this Headnote

Shepardize - Narrow by this Headnote (2)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries

HN19 **State & Territorial Government Licensing, Gaming & Lotteries**
Regarding "games of chance," the 1975 amendment to N.Y. Const. art. I, § 9 permits, on its face, games in which prizes are awarded on the basis of a winning number or numbers, color or colors, or symbol or symbols determined by chance. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries

HN20 **State & Territorial Government Licensing, Gaming & Lotteries**

The 1975 amendment to N.Y. Const. art. I, § 9 was intended to except from the general prohibition on gambling the precise types of casino gaming contemplated by 2001 N.Y. Laws 383, pt. B, provided that such gaming is conducted for charitable purposes. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries

HN21 **State & Territorial Government Licensing, Gaming & Lotteries**

See former N.Y. Gen. Mun. Law § 186(3). More like this Headnote

Shepardize - Narrow by this Headnote (0)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries
View more legal topics

HN22 **State & Territorial Government Licensing, Gaming & Lotteries**

Despite a ban on commercialized gambling, a general prohibition on all gambling except that expressly authorized and a history that includes a 45-year period during which gambling was banned completely, New York now constitutionally permits a substantial amount of gambling. The 1975 amendment to N.Y. Const. art. I, § 9 and implementing legislation and regulations, N.Y. Gen. Mun. Law § 186(3); N.Y. Comp. Codes R. & Regs. tit. 9, § 5620.1, in particular, were intended to permit charities, religious organizations and other nonprofit groups to conduct the types of gaming categorized as Class III by the Indian Gaming Regulatory Act (IGRA), 25 U.S.C.S. §§ 2701-2721, 18 U.S.C.S. §§ 1166-1168. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries
View more legal topics

HN23 **State & Territorial Government Licensing, Gaming & Lotteries**

For purposes of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C.S. §§ 2701-2721, 18 U.S.C.S. §§ 1166-1168, New York "permits such gaming for any purpose by any person, organization or entity." 25 U.S.C.S. § 2710(d)(1)(B). More like this Headnote

Shepardize - Narrow by this Headnote (0)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries

HN24 **State & Territorial Government Licensing, Gaming & Lotteries**

2001 N.Y. Laws 383, pt. B is consistent with the requirement in N.Y. Const. art. I, § 9 that the legislature pass appropriate laws to ensure that such games are rigidly regulated to prevent commercialized gambling. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries
View more legal topics

HN25 **State & Territorial Government Licensing, Gaming & Lotteries**

Because Indian tribes retain attributes of sovereignty, state law applies on Indian lands only if Congress so provides or state law is not preempted. In the context of casino gaming on Indian lands, the Indian Gaming Regulatory Act (IGRA), 25 U.S.C.S. §§ 2701-2721, 18 U.S.C.S. §§ 1166-1168, both determines the extent to which state law applies to gaming on Indian lands and preempts the field in the governance of gaming activities on Indian lands. More like this Headnote

Shepardize - Narrow by this Headnote (1)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries
View more legal topics

HN26 **State & Territorial Government Licensing, Gaming & Lotteries**

States do not have the authority to regulate Class III gaming on Indian lands other than through the compacting procedure outlined in the Indian Gaming Regulatory Act (IGRA), 25 U.S.C.S. §§ 2701-2721, 18 U.S.C.S. §§ 1166-1168. States are not required by IGRA to agree to compacts, 25 U.S.C.S. § 2710(d)(7)([B)(vi), (vii), although they may choose to enter, via the compacting process, an otherwise preempted field if their actions are in compliance with the federal standards embodied in IGRA. Should a state refuse to participate in the negotiation process, the result would be only that the state would lose its ability to influence the terms on which gaming will occur, with such authority reverting to the Secretary of the Interior. 25

U.S.C.S. § 2710(d)(7)(B)(vii); 25 C.F.R. pt. 291. Thus, IGRA cannot be interpreted as a federal directive that requires states to assume a regulatory role in violation of the anti-commandeering principle contained in the Tenth Amendment of the U.S. Constitution. Instead, the IGRA compacting process is best understood as providing states with the opportunity to establish some measure of authority over gaming on Indian lands, a power withheld from them by the Constitution. More like this Headnote

Shepardize - Narrow by this Headnote (2)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries
View more legal topics

HN27 **State & Territorial Government Licensing, Gaming & Lotteries**
The Indian Gaming Regulatory Act (IGRA), 25 U.S.C.S. §§ 2701-2721, 18 U.S.C.S. §§ 1166-1168, does not force New York to accept a particular compact. It simply affords the State the opportunity to assert authority over gaming on Indian lands, a power that the State otherwise lacks. Because 2001 N.Y. Laws 383, pt. B permits the governor to enter into tribal-state compacts extending state regulatory authority to commercialized casino gambling on Indian lands - where such authority would not otherwise exist - the court cannot say that the legislature has violated the constitutional mandate to pass laws limiting commercialized gambling. Rather, part B permits the governor to assume a role in setting the terms and restrictions pursuant to which Indian gaming will occur, and thereby limit such gaming in a manner consistent with the State's interests. More like this Headnote

Shepardize - Narrow by this Headnote (1)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries
View more legal topics

HN28 **State & Territorial Government Licensing, Gaming & Lotteries**
Before gaming may occur on lands held in trust by the federal government for the benefit of Indian tribes, the governor's concurrence is required, 25 U.S.C.S. § 2719(b)(1)(A). The statute leaves the decision to the governor whether, in his judgment, gaming on Indian lands would be detrimental - i.e., have adverse social and economic consequences - on the surrounding communities. 25 U.S.C.S. § 2719(b)(1)(A). It does not require a determination that the gaming would fall within one of the constitutional exceptions to the state's general prohibition on gambling or that the gaming would be lawful if conducted on state land. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries
View more legal topics

HN29 **State & Territorial Government Licensing, Gaming & Lotteries**
2001 N.Y. Laws 383, pt. B adequately sets forth the parameters for compacts between New York and Indian tribes. It indicates the number of casinos permitted, the general location of those casinos, and a number of provisions that must be included in the compacts regarding, among other things, access of labor unions for purposes of soliciting employee support for representation, binding arbitration of labor disputes, assurances that the tribes have adequate civil recovery systems to protect the rights of visitors and guests, and assurances that the tribes will maintain sufficient liability insurance to compensate visitors and guests for injuries that might occur. In part B, the basic policy decisions underlying the executive action have been made and articulated by the legislature. That part B leaves discretion to the governor in negotiating compacts with Indian tribes merely permits compliance with the State's obligation to engage in good- faith negotiations, 25 U.S.C.S. § 2710(d)(3)(A) and does not render the provision an unlawful delegation of authority. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview
Evidence > Burdens of Proof > General Overview

HN30 **Case or Controversy, Constitutionality of Legislation**
A legislative enactment may be found unconstitutional only upon a demonstration of the statute's invalidity beyond a reasonable doubt. More like this Headnote

Shepardize - Narrow by this Headnote (1)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries
Governments > Legislation > Interpretation

HN31 **State & Territorial Government Licensing, Gaming & Lotteries**
Video lottery terminals (VLTs) are simply a new method of presenting lottery games to the public and, therefore, the operation of VLTs by the State of New York falls within the constitutional exception to the general ban on gambling. However, the 1966 amendment to N.Y. Const. art. I, § 9 creating the exception that authorized a state-run lottery - pursuant to which 2001 N.Y. Laws 283, pt. C was enacted - must be strictly construed to ensure that the exception does not swallow the rule. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries

HN32 **State & Territorial Government Licensing, Gaming & Lotteries**

In its general prohibition, N.Y. Const. art. I, § 9 refers to a lottery as one of several forms of gambling, stating that except as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, bookmaking, or any other kind of gambling shall hereafter be authorized or allowed within the State. N.Y. Const. art. I, § 9(1). "Lottery," as used in art. I, § 9, can thus be understood to mean a distinct, narrower form of the broad term "gambling," which is defined by the three elements of consideration, chance and prize, N.Y. Penal Law § 225.00(2). More like this Headnote

Shepardize - Narrow by this Headnote (2)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries

HN33 **State & Territorial Government Licensing, Gaming & Lotteries**

The lottery exception itself authorizes lotteries operated by the state and the sale of lottery tickets in connection therewith. N.Y. Const. art. I, § 9(1). On its face, the constitutional exception contemplates that state-run lotteries involve the sale of tickets, i.e., lots or chances. N.Y. Const. art I. § 9(1). More like this Headnote

Shepardize - Narrow by this Headnote (0)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries

HN34 **State & Territorial Government Licensing, Gaming & Lotteries**

In addition to the elements of consideration, chance, and prize traditionally employed by New York's case law in defining the term "lottery" for law enforcement purposes, N.Y. Const. art. I, § 9(1) sanctions only those state-run lotteries that involve tickets and multiple participation. More like this Headnote

Shepardize - Narrow by this Headnote (2)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries
Criminal Law & Procedure > ... > Miscellaneous Offenses > Gambling > General Overview

HN35 **State & Territorial Government Licensing, Gaming & Lotteries**

See N.Y. Penal Law § 225.00(10). More like this Headnote

Shepardize - Narrow by this Headnote (0)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries
Criminal Law & Procedure > ... > Miscellaneous Offenses > Gambling > General Overview

HN36 **State & Territorial Government Licensing, Gaming & Lotteries**

In referring to "players" participating in a "drawing" or some other random event, N.Y. Penal Law § 225.00(10) contemplates multiple participation, as opposed to a single player competing against a single machine. The statute also refers to consideration in the form of "something of value" paid by players, determination of winners by a method based on chance, and a prize to be paid to the holders of the winning "chances," or lots. More like this Headnote

Shepardize - Narrow by this Headnote (1)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries

HN37 **State & Territorial Government Licensing, Gaming & Lotteries**

Video lottery terminal electronic tickets are the functional equivalent of paper tickets - they are evidence of one's entitlement to a prize over claims by competing ticket holders. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries

HN38 **State & Territorial Government Licensing, Gaming & Lotteries**

The fact that the tickets used in video lottery terminal (VLT) play are electronic, as opposed to paper, does not defeat a finding that VLTs are permissible within the meaning of N.Y. Const. art. I, § 9. In short, play on VLTs involves the elements of consideration, chance, prize, multiple participation and tickets and, thus, the operation of VLTs by the State falls within the constitutional exception to the general ban on gambling. More like this Headnote

Shepardize - Narrow by this Headnote (2)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries
Criminal Law & Procedure > ... > Miscellaneous Offenses > Gambling > General Overview

HN39 **State & Territorial Government Licensing, Gaming & Lotteries**

The Penal Law defines a slot machine as a gambling device which, as a result of the insertion of a coin or other object, operates, either completely automatically or with the aid of some physical act by the player, in such a manner that, depending upon elements of chance, it may eject something of value. N.Y. Penal Law § 225.00(8). A "gambling device," however, is defined to exclude lottery tickets and other items used in the playing phases of lottery. N.Y. Penal Law § 225.00(7). Because VLTs are devices used in the playing phases of a lottery, they cannot be considered slot machines as a matter of law, regardless of their outward resemblance to such machines. More like this Headnote

Shepardize - Narrow by this Headnote (1)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries
Criminal Law & Procedure > ... > Miscellaneous Offenses > Gambling > General Overview

HN40 **State & Territorial Government Licensing, Gaming & Lotteries**

Although display terminals outwardly resemble slot machines, video lottery terminal (VLT) play involves the elements of a lottery - consideration, chance, prize, multiple participation and tickets - and, therefore, VLTs do not fulfill the legal definition of slot machine, N.Y. Penal Law § 225.00(7), (8). More like this Headnote

Shepardize - Narrow by this Headnote (3)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries

HN41 **State & Territorial Government Licensing, Gaming & Lotteries**

The New York Constitution contains no bar to the modernization of the lottery or the introduction of new technological methods of delivering lottery tickets to the public. Nor is the state limited to the precise types of lotteries familiar to the public in 1966. Indeed, "Quick Draw," a nontraditional form of lottery, has been upheld as constitutional. Similarly, the fact that video lottery was not contemplated at the time of the amendment does not render it unconstitutional. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Constitutional Law > Elections, Terms & Voting > General Overview
View more legal topics

HN42 **Constitutional Law, Elections, Terms & Voting**

A state is not prohibited from recognizing the distinctive interests of the residents of its political subdivisions, even in reference to voter classification. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries
Governments > State & Territorial Governments > Legislatures

HN43 **State & Territorial Government Licensing, Gaming & Lotteries**

The New York Legislature lacks the discretion to direct that lottery revenues may be used for noneducational purposes. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries

HN44 **State & Territorial Government Licensing, Gaming & Lotteries**

The New York Constitution does not define "net proceeds," but the term is generally defined by the courts as gross proceeds less any expenses or costs that may be properly deducted. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries

HN45 **State & Territorial Government Licensing, Gaming & Lotteries**

Reinvestment in breeding funds and enhanced purses is not a reasonable, necessary expense or cost of maintaining video lottery terminals and, thus, funds dedicated for that purpose cannot be deducted from the net proceeds of the lottery without violating the requirement in N.Y. Const. art. I, § 9(1) that lottery revenues be used to support education. More like this Headnote

Shepardize - Narrow by this Headnote (1)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries

HN46 **State & Territorial Government Licensing, Gaming & Lotteries**

Under N.Y. Const. art. I, § 9, the phrase "as the legislature may prescribe" does give the legislature discretion in the allocation of the "net proceeds" of lottery revenues. This discretion, however, is subject to the limitation that net proceeds must go exclusively to or in aid or support of education. N.Y. Const. art. I, § 9(1). More like this Headnote

Shepardize - Narrow by this Headnote (0)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries

HN47 **State & Territorial Government Licensing, Gaming & Lotteries**

To the extent that 2001 N.Y. Laws 383, pt. C, N.Y. Tax Law § 1612(c)(1), artificially inflates vendor fees and then requires that a portion of those fees be applied to noneducational purposes, 2001 N.Y. Laws 282, pt. C violates N.Y. Const. art. I, § 9(1). More like this Headnote

Shepardize - Narrow by this Headnote (0)

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview
Governments > Legislation > Interpretation

HN48 **Case or Controversy, Constitutionality of Legislation**

See 2001 N.Y. Laws 383, pt. C, § 3. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview
Governments > Legislation > Interpretation

HN49 **Case or Controversy, Constitutionality of Legislation**

In determining whether an invalid portion may be severed and the remainder of the statute preserved, the test is whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether. The answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries
Governments > Legislation > Interpretation

HN50 **State & Territorial Government Licensing, Gaming & Lotteries**

The first two paragraphs of 2001 N.Y. Laws 383, pt. C, § 2, amending former N.Y. Tax Law § 1612 by adding paragraphs (a)(5)(A) and (B) and setting forth the distribution of video lottery terminal revenue and directing vendors to reinvest a portion of their fee are inextricably intertwined. More like this Headnote

Shepardize - Narrow by this Headnote (1)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries

HN51 **State & Territorial Government Licensing, Gaming & Lotteries**

2001 N.Y. Laws 383, pt. D directs the Division of Lottery to operate and administer within the state a multi- jurisdiction and out-of-state lottery in cooperation with a government-authorized lottery of one or more jurisdictions. 2001 N.Y. Laws 383, pt. D; N.Y. Tax Law § 1604(a). Part D further authorizes the Director of the Lottery to enter into agreements for a multistate game, which may include a combined drawing, a combined prize pool, the transfer of sales and prize monies to other jurisdictions as may be necessary, and such other cooperative arrangements as the director deems necessary or desirable. 2001 N.Y. Laws 383, pt. D, § 3; N.Y. Tax Law § 1617. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries

HN52 **State & Territorial Government Licensing, Gaming & Lotteries**

N.Y. Const. art. I, § 9(1) generally prohibits gambling, but exempts state-run lotteries, among other things, from the ban. The New York Constitution permits lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in the state as the legislature may prescribe. N.Y. Const. art. I, § 9(1). More like this Headnote

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Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries

HN53 **State & Territorial Government Licensing, Gaming & Lotteries**

Nothing in the New York Constitution forbids the Division of Lottery from contracting with outside parties to perform administrative functions. N.Y. Const. art. I, § 9(1) requires only that authorized lotteries be "operated by the State," i.e., supervised or controlled by the state, as opposed to a private entity; it does not mandate that the state alone must perform all aspects of lottery operation. More like this Headnote

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Headnotes/Summary

Headnotes

Constitutional Law -- Messages of Necessity

1. Legislation authorizing the Governor to enter into tribal-state compacts with Indian tribes to allow casino gaming on Indian lands and also authorizing the Division of the Lottery to license and implement the operation of video lottery gaming at certain pari-mutuel racetracks, as well as to operate, administer and enter into agreements for multistate lotteries within the state in cooperation with government-authorized lotteries of one or more jurisdictions (L 2001, ch 383) was validly enacted in conformance with the constitutional requirement of a "message of necessity" from the Governor for an immediate vote by the Legislature. The "message of necessity" provision requires that a bill in final form be on legislators' desks for "at least three calendar legislative days [before] final passage, unless the governor ... shall have certified ... the facts which ... necessitate an immediate vote thereon" (N.Y. Const., art III, § 14). The Governor's "message of necessity" indicated that "[b]ecause the bills have not been on your desks in final form for three calendar legislative days, the Leaders of your Honorable Bodies have requested this message to permit their immediate consideration." It further stated that the "facts necessitating an immediate vote on the bills" are that the "bills are necessary to enact certain provisions of law." The "message of necessity" literally and reasonably conformed with the constitutional requirements.

Constitutional Law -- Validity of Statute -- Casino Gaming on Indian Lands Pursuant to Federal Indian Gaming Regulatory Act

2. Legislation authorizing the Governor to enter into tribal-state compacts with Indian tribes to allow class III casino gaming on Indian lands (L 2001, ch 383, part B) pursuant to the Indian Gaming Regulatory Act (IGRA) (25 U.S.C. §§ 2701-2721; 18 U.S.C. §§ 1166-1168) was not violative of the State's constitutional prohibition against commercialized gambling activities (N.Y. Const., art I, § 9). IGRA authorizes a state to enter into tribal-state compacts permitting particular class III, casino-type gaming activities (*see* 25 U.S.C. § 2703 [8]) on tribal lands so long as the state "permits such gaming for any purpose by any person, organization, or entity" (25 U.S.C. § 2710 [d] [1] [B]). Under IGRA, class III games that are not criminally prohibited by state laws are properly the subject of negotiation in tribal-state compacts even if those games are heavily regulated and permitted to be played only by charities. Because New York permits casino gaming activities for charitable purposes, subject to heavy regulation (*see* General Municipal Law § 186 [3]; 9 NYCRR 5620.1), the gaming was properly the subject of a tribal-state compact. Furthermore, the legislation did not constitute an unlawful delegation of legislative authority to the Governor. The fact that the statute leaves discretion to the Governor in negotiating compacts with Indian tribes merely permits compliance with the State's obligation to engage in good-faith negotiations (*see* 25 U.S.C. § 2710 [d] [3] [A]).

Lotteries -- Video Lottery Gaming -- Constitutionality of Operation of Video Lottery Terminals at Pari-mutuel Racetracks

3. Legislation authorizing the Division of the Lottery to license and implement the operation of video lottery terminals (VLTs) at certain pari-mutuel racetracks (L 2001, ch 383, part C; Tax Law § 1617-a) was not violative of the State's constitutional prohibition against commercialized gambling activities. VLTs do not fall within the definition of illegal slot machines (Penal Law § 225.00 [8]). Even though VLTs outwardly resemble slot machines, video lottery gaming, as implemented by the Division, falls within the constitutional exception to the general ban on gambling for state-operated "lotteries" (N.Y. Const., art I, § 9 [1]). The games offered on VLTs involve the elements of consideration, chance, prize, tickets and multiple participation necessary to constitute "lotteries" (*see* Penal Law § 225.00 [10]). Play on VLTs involves electronic tickets, which are transferred from the central system to site controllers and then to display terminals upon purchase, but which are not printed or reduced to paper. The electronic tickets are thus the functional equivalent of paper tickets. The State Constitution contains no bar to the introduction of new technological methods of delivering lottery tickets to the public.

Lotteries -- Video Lottery Gaming -- Constitutionality of Operation of Video Lottery Terminals at Pari-mutuel Racetracks - Invalidity of Revenue Distribution Scheme

4. Legislation authorizing the Division of the Lottery to license and implement the operation of video lottery terminals (VLTs) at certain pari-mutuel racetracks (L 2001, ch 383, part C; Tax Law § 1617-a) was not violative of the State's constitutional prohibition against commercialized gambling activities, since video lottery gaming, as implemented by the Division, fell within the constitutional exception to the general ban on gambling for state-operated "lotteries" (N.Y. Const., art I, § 9 [1]). However, that portion of the law requiring racetracks to transfer a portion of their vendor fees to breeding funds and for the purpose of enhancing purses at the racetracks where VLTs are located (*see* L 2001, ch 383, part C, § 2; Tax Law § 1612 [c] [1]), was violative of the constitutional mandate that "the net proceeds" of state-run lotteries "be applied exclusively to or in aid or support of

education in this state." Reinvestment in breeding funds and enhanced purses is not a reasonable, necessary expense or cost of maintaining VLTs, and thus, funds dedicated for that purpose cannot be deducted from the net proceeds of the lottery without violating the constitutional requirement that lottery revenues be used to support education. Furthermore, the invalid revenue distribution scheme could not be severed to permit the statute to otherwise operate in a constitutional manner.

Lotteries -- Validity of Multistate Lotteries -- Compliance with Constitutional Requirement That Net Proceeds from State-Operated Lottery be used Exclusively for Educational Purposes

5. Legislation that directed the Division of the Lottery to operate and administer multistate lotteries within the state in cooperation with a government-authorized lottery of one or more jurisdictions (*see* L 2001, ch 383, part D, § 1; Tax Law § 1604 [a]), and further authorized the Director of the Lottery to enter into agreements for a multistate game, fell within the constitutional exception to the general ban on gambling for state-operated "lotteries" (N.Y. Const., art I, § 9 [1]). While certain joint functions and necessary operating costs of the "Mega Millions" multistate lottery game are shared, New York retains sufficient control over the operation of the multistate lottery within its borders (*see* 21 NYCRR part 2806) to satisfy the constitutional requirement that lotteries be "operated by the state." Furthermore, the transfer of funds to other states for operational expenses and prizes does not violate the constitutional requirement that the net proceeds from a state-operated lottery be devoted "exclusively to or in aid or support of education in this state." The funds transferred by New York to other states may be used only for payment of jackpot prizes and reimbursement of preapproved operational expenses. New York funds are not used by other states to reduce their administrative costs or to fund their governmental purposes.

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Bleakley, Platt & Schmidt L.L.P., White Plains (*Frederick J. Martin* of counsel), for Yonkers Racing Association Corporation, respondent.

Judges: Before: Cardona, P.J., Mercure, Peters, Spain and Carpinello, JJ., concur.

Opinion by: Mercure

Opinion

[*65] [**51], [***2] Mercure, J.

These consolidated actions have their roots in a prior Court of Appeals decision holding that defendant Governor lacks the authority to unilaterally execute tribal-state compacts with Indian tribes to allow casino gaming on Indian reservations (*see* *Saratoga County Chamber of Commerce v Pataki*, 100 N.Y.2d 801, 798 N.E.2d 1047, 766 N.Y.S.2d 654 [2003], *cert denied* 157 L. Ed. 2d 430, 540 [**52], U.S. 1017, 124 S. Ct. 570 [2003]). The Court concluded that the negotiation of such compacts involves issues affecting the health and welfare of state residents, implicating policy choices that lie solely within the province of the Legislature (*id.* at 822-823). 1 In 2001, the Legislature enacted a bill which, among other things, authorizes the Governor to enter into four tribal-state compacts for the operation of casino gaming **[*66]** activities at up to six facilities on Indian lands [***3] (*see* L 2001, ch 383, part B) pursuant to the Indian Gaming Regulatory Act (hereinafter IGRA) (25 U.S.C. §§ 2701-2721; 18 U.S.C. §§ 1166-1168). As relevant here, part C of the law also permits the Division of the Lottery (hereinafter Division) to license and implement the operation of video lottery gaming at several pari-mutuel racetracks; part D of the law authorizes the Division to participate in a multistate lottery.

[***4] Plaintiffs, a group of citizen taxpayers, two state legislators, nonprofit organizations and an unincorporated association opposed to the spread of gambling, commenced these actions seeking a judgment declaring parts B, C and D of chapter 383 of the Laws of 2001 to be unconstitutional. Supreme Court granted defendants' cross motions for summary judgment dismissing the complaints and declared that parts B, C and D are constitutional and in conformance with federal law. Plaintiffs now appeal, asserting that these provisions violate N.Y. Constitution, article I, § 9, which generally bans gambling in the state with certain exceptions. Plaintiffs argue in the alternative that parts B, C and D were enacted in violation of the "message of necessity" provision of the NY Constitution, which requires that a bill in final form be on legislators' desks for "at least three calendar legislative days [before] final passage, unless the governor ... shall have certified, under his or her hand and the seal of the state, the facts which in his or her opinion necessitate an immediate vote thereon" (N.Y. Const., art III, § 14).

Addressing the latter argument first, we conclude that the Governor's message [***5] of necessity satisfied the constitutional obligation. The message of necessity indicates that "[b]ecause the bills have not been on your desks in final form for three calendar legislative days, the Leaders of your Honorable

Bodies have requested this message to permit their immediate consideration." It states that the "facts necessitating an immediate vote on the bills" are that the "bills are necessary to enact certain provisions of law."

Although the message is brief, we note that HN1 "[i]t is the Governor who must express the opinion that an immediate vote is desirable. The facts on which [the Governor] forms that opinion must satisfy [him or her]" (*Finger Lakes Racing Assn. v New York State Off-Track Pari-Mutuel Betting Commn.*, 30 N.Y.2d 207, 219, 282 N.E.2d 592, 331 N.Y.S.2d 625 [1972], *appeal dismissed* 409 U.S. 1031, 34 L. Ed. 2d 481, 93 S. Ct. 525 [1972]). Here, the message of necessity is reasonable and conforms to other such messages that have been upheld in the past (*see Norwick* **[*67]** *v Rockefeller*, 70 Misc. 2d 923, 931-934, 334 N.Y.S.2d 571 [1972], *affd without op* 40 A.D.2d 956, [**53] 338 N.Y.S.2d 384 [1972], *affd without op* 33 N.Y.2d 537, 301 N.E.2d 422, 347 N.Y.S.2d 435 [1973] [upholding a message of necessity that [***6] stated "(b)ecause the bill in its final form has not been on your desks three calendar legislative days the Leaders of your Honorable bodies have requested this message to permit its immediate consideration"]; *see also Finger Lakes Racing Assn. v New York State Off-Track Pari-Mutuel Betting Commn., supra* at 219-220; *Matter of Joslin v Regan*, 63 A.D.2d 466, 468-469, 406 N.Y.S.2d 938 [1978], *affd* 48 N.Y.2d 746, 397 N.E.2d 1329, 422 N.Y.S.2d 662 [1979]). We note that "[t]he Legislature could [have said that] the time for consideration was too short. It did not say that, but accepting the Governor's certificate and considering the proposal in the time available, it passed it" (*Finger Lakes Racing Assn. v New York State Off-Track Pari-Mutuel Betting Commn., supra* at 220). Given that the message of necessity "literally and reasonably conforms with [the] constitutional requirements" (*id.* at 220), we will not intervene to nullify the act.

Turning to the substance of plaintiffs' arguments, we will first address plaintiffs' challenges to part B of chapter 383 of the Laws of 2001. As explained in depth below, IGRA HN2 both "preempt[s] the field in the governance [***7] of gaming activities on Indian lands" (S Rep No. 100-446, 100th Cong, 2d Sess, at 6, reprinted in 1988 US Code Cong & Admin News, at 3071, 3076) and sets forth a mechanism by which states may exert some measure of control over gambling on Indian lands (*see Seminole Tribe of Fla. v Florida*, 517 U.S. 44, 58, 134 L. Ed. 2d 252, 116 S. Ct. 1114 [1996]). We determine that, HN3 pursuant to IGRA, a state may enter into tribal-state compacts permitting particular class III, casino-type gaming activities on tribal lands if the state permits any person to conduct those particular gaming activities for any purpose, including a charitable purpose. That a compact permits a certain game to be conducted in a manner that is otherwise inconsistent with state law will not render it invalid if the game is not completely prohibited. HN4 Because New York permits the gaming activities at issue here for charitable purposes, subject to heavy regulation, the gaming is properly the subject of a tribal-state compact.

[3], [4] Next, regarding part C of chapter 383 of the Laws of 2001, we conclude that video lottery gaming, as implemented by the Division, constitutes a valid, state-operated lottery and, thus, falls within the exception [***8] of such lotteries from the general ban on gambling in N.Y. Constitution, article I, § 9 (1). We agree with plaintiffs, however, that the requirement **[*68]** in part C that a portion of video lottery terminal (hereinafter VLT) vendor fees be dedicated to breeding funds and enhanced purses violates the constitutional mandate that "the net proceeds" of state-operated lotteries "be applied exclusively to or in aid or support of education in this state as the [L]egislature may prescribe" (N.Y. Const., art I, § 9 [1]). Moreover, we find that severing the portion of part C directing reinvestment does not cure the constitutional defect because severance would result only in an inflated vendor fee. Thus, HN5 while we conclude that video lottery gaming itself is a "lottery" within the meaning of N.Y. Constitution, article I, § 9, we must modify Supreme Court's order to declare the entirety of part C of chapter 383 to be unconstitutional due to the impermissible revenue distribution scheme set forth therein.

Finally, we conclude that plaintiffs' challenges to part D of chapter 383 of the Laws of 2001 are meritless. HN6 New York retains sufficient control over the operation [**54] of the multistate lottery within its [***9] borders to meet the constitutional requirement that lotteries be "operated by the state" (N.Y. Const., art I, § 9 [1]). Contrary to plaintiffs' further argument, the net proceeds generated by the multistate lottery remain in New York and are dedicated "exclusively to or in aid or support of education in this state" as required by N.Y. Constitution, article I, § 9 (1). Thus, part D is constitutional.

Although plaintiffs also advance a number of policy-laden arguments before us, HN7 courts are not concerned with questions of legislative policy. While we determine that parts B and D of chapter 383 are constitutional and, generally speaking, video lottery may constitute a valid lottery within the meaning of that term in N.Y. Constitution, article I, § 9, our inquiry in this case is limited to the constitutionality of the challenged legislation.

I. *Tribal-State Compacts*

An understanding of both this state's historical approach to gambling, as well as the legislative history of IGRA and its interplay with state law, is essential to an analysis of the issues raised in connection with part B of chapter 383 of the Laws of 2001. Accordingly, we first examine the statutory and constitutional [***10] background of the case and then address the merits of plaintiffs' challenge to part B.

[*69] A. *IGRA*

1. *Statutory Provisions*

The stated purpose of IGRA is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments" (25 U.S.C. § 2702 [1]). The statute also provides a federal regulatory framework to shield such gaming "from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly" (25 U.S.C. § 2702 [2]; *see* 25 U.S.C. § 2702 [3]). Congress enacted IGRA upon a finding that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by [f]ederal law and is conducted within a [s]tate which does not, as a matter of criminal law and public policy, prohibit such gaming activity" (25 U.S.C. § 2701 [5]).

The statute divides gaming into three categories that are subject [***11] to differing levels of regulatory oversight depending on the type of gaming within each category. Class I gaming consists of "social games solely for prizes of minimal value or traditional" tribal games (25 U.S.C. § 2703 [6]). Class I gaming on Indian lands 2 is within the exclusive jurisdiction of Indian tribes (25 U.S.C. § 2710 [a] [1]). Class II gaming [**55] includes bingo and card games that are either expressly authorized or not explicitly prohibited by the state and legally played in the state (25 U.S.C. § 2703 [7] [A]). Class II gaming is defined to exclude "any banking card games, including baccarat, chemin defer, or blackjack (21), or ... electronic or electromechanical facsimiles of any game of chance or slot machines of any kind" (25 U.S.C. § 2703 [7] [B]). **[*70]** Class II gaming on Indian lands is within the jurisdiction of the Indian tribes, subject to the provisions of IGRA, if "such Indian gaming is located within a [s]tate that permits such gaming for any purpose by any person,

organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by [f]ederal [***12] law)" (25 U.S.C. § 2710 [b] [1] [A]; *see* 25 U.S.C. § 2710 [a] [2]).

[***13] ***HN8*** Class III gaming, the type of gaming permitted by part B of chapter 383, is defined as "all forms of gaming that are not class I gaming or class II gaming" (25 U.S.C. § 2703 [8]). Class III gaming is the most heavily regulated of the three categories of gaming and is lawful on Indian lands only if three conditions are met. First, the gaming activities must be authorized by an ordinance or resolution of the governing body of the Indian tribe (*see* 25 U.S.C. § 2710 [d] [1] [A] [i]). Second, like class II gaming, class III gaming activities are permitted on Indian lands "only if such activities are ... located in a [s]tate that permits such gaming for any purpose by any person, organization, or entity" (25 U.S.C. § 2710 [d] [1] [B]). Finally, class III gaming must be "conducted in conformance with a [t]ribal-[s]tate compact entered into by the Indian tribe and the [s]tate" (25 U.S.C. § 2710 [d] [1] [C]). ***HN9*** The compacting requirement "allows states to negotiate with tribes that are located within their borders regarding aspects of class III Indian gaming that might affect legitimate state [***14] interests" (*Artichoke Joe's Cal. Grand Casino v Norton*, 353 F.3d 712, 716 [2003]; *see* 25 U.S.C. § 2710 [d] [3] [C]). Although states are required under IGRA to negotiate in good faith upon receiving a request to enter into negotiations with an Indian tribe (*see* 25 U.S.C. § 2710 [d] [3] [A]), nothing in the statute compels a state to *accept* a proposed compact (*see* 25 U.S.C. § 2710 [d] [7] [B] [vii] [describing the procedure to be followed by the Secretary of the Interior to permit class III gaming on state lands where a state does not consent to a compact]; 25 C.F.R. part 291 [same]). Moreover, compacts will take effect only if approved by the Secretary of the Interior (*see* 25 U.S.C. § 2710 [d] [3] [B]).

Here, plaintiffs assert that while state laws, including constitutions, do not normally apply on Indian lands because Congress has exclusive authority over Indian affairs unless it vests such power in the states (*see McClanahan v State Tax Commn. of Ariz.*, 411 U.S. 164, 170-171, 36 L. Ed. 2d 129, 93 S. Ct. 1257 [1973]), IGRA [***15] provides that *all* state laws regarding gambling apply on Indian lands. Specifically, plaintiffs note that IGRA makes "all [s]tate laws **[*71]** pertaining to the licensing, regulation, or prohibition of *gambling*, including but not limited to criminal sanctions applicable ... in Indian country in the same manner and to the same extent as such laws apply elsewhere in the [s]tate" (18 U.S.C. § 1166 [a] [emphasis added]). Plaintiffs' argument fails, however, because ***HN10*** the term "gambling" *excludes* "class III gaming conducted under a [t]ribal-[s]tate compact approved by the Secretary" (18 U.S.C. § 1166 [c] [2]). That is, under 18 U.S.C. § 1166, state laws regulating gambling do not apply to class III gaming otherwise permitted under IGRA. Class III gaming is allowed on Indian lands by IGRA if, as relevant here, it is "conducted in conformance with a [t]ribal-[s]tate compact" (25 U.S.C. § 2710 [d] [1] [C]) and "in a [**56] [s]tate that *permits such gaming for any purpose by any person, organization, or entity*" (25 U.S.C. § 2710 [d] [1] [B] [emphasis added]).

Plaintiffs argue [***16] in the alternative that New York does not "permit[] such gaming"--i.e., casino gambling--and, thus, the condition contained in 25 U.S.C. § 2710 (d) (1) (B) is not met here. Plaintiffs point to a ban on commercialized gambling--as opposed to gambling for charitable purposes--in N.Y. Constitution, article I, § 9 as evidence that New York does not permit the type of casino gaming that is to be authorized in the four tribal-state compacts contemplated by part B of chapter 383. Defendants counter that because the NY Constitution permits class III gaming for some purposes, New York cannot unilaterally prohibit such gaming on Indian lands. Indisputably, ***HN11*** the term "permits such gaming for any purpose by any person, organization, or entity" defines the scope of class III games in which Indians may engage and that a tribal-state compact may address (*see Artichoke Joe's Cal. Grand Casino v Norton, supra* at 720-723; *United States v Santee Sioux Tribe of Neb.*, 135 F.3d 558, 563-564 [1998], *cert denied* 525 U.S. 813, 142 L. Ed. 2d 37, 119 S. Ct. 48 [1998]; *Citizen Band Potawatomi Indian Tribe of Okla. v Green*, 995 F.2d 179, 181 [1993] [***17] ; *United States v Santa Ynez Band of Chumash Mission Indians of Santa Ynez Reservation, Cal.*, 33 F. Supp. 2d 862, 863 [1998]). While that term may be susceptible to more than one interpretation, a review of the legislative history of IGRA convinces us that defendants have the better argument regarding the meaning of the term.

2. *Legislative History of IGRA*

Our review of the background of IGRA necessarily begins with *California v Cabazon Band of Mission Indians* (480 U.S. 202, 94 L. Ed. 2d 244, 107 S. Ct. 1083 [1987]). Congress developed IGRA in response to *Cabazon* **[*72]** (*see* S Rep No. 100-446, 100th Cong, 2d Sess, reprinted in 1988 US Code Cong & Admin News, at 3071), a case addressing California's regulation of bingo games conducted by Indian tribes on reservation land. Ruling that the tribes were not required to adhere to state regulation of the games (*see California v Cabazon Band of Mission Indians, supra* at 211-212), the US Supreme Court began its analysis by reaffirming the long-settled principle that "Indian tribes retain attributes of sovereignty over both their members and their territory ... and that tribal [***18] sovereignty is dependent on, and subordinate to, only the [f]ederal [g]overnment, not the [s]tates" (*id.* at 207 [internal quotation marks and citations omitted]; *see New Mexico v Mescalero Apache Tribe*, 462 U.S. 324, 332, 76 L. Ed. 2d 611, 103 S. Ct. 2378 [1983]). Nevertheless, the Court explained, state law may apply on Indian lands if Congress expressly so provides or, in the absence of express congressional consent, where state law is not preempted (*see California v Cabazon Band of Mission Indians, supra* at 207, 215-216).

The Court concluded that the particular statute at issue, Public Law 280 (Pub L 83-280, 67 U.S. Stat 588 [1953]), did not make California law applicable to bingo played on Indian lands. The Court explained that Public Law 280 drew a distinction between "criminal/prohibitory" laws and "civil/regulatory" state laws, stating:

> "if the intent of a state law is generally to prohibit certain conduct, it falls within Pub.L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub.L. 280 does not [**57] authorize its enforcement [***19] on an Indian reservation. The shorthand test is whether the conduct at issue violates the [s]tate's public policy" (*California v Cabazon Band of Mission Indians*, 480 U.S. at 209).

After noting that in addition to bingo, California permits a substantial amount of gambling activity--including a state lottery, pari-mutuel horse betting and various card games--the Court determined that "California regulates rather than prohibits gambling in general and bingo in particular" (*id.* at 211), despite a prohibition in the California Penal Code on bingo for noncharitable purposes. In addition, after balancing the interests of the federal government and Indian tribes against the state's interest in regulating high-stakes bingo played on **[*73]** Indian lands, the Court concluded that California law was preempted by Public Law 280, explaining that "[s]tate regulation would impermissibly infringe on tribal government" (*id.* at 222).

While *Cabazon* involved a different statute than that before us, the case remains instructive. Congress enacted IGRA, in part, to clarify that courts should *not* engage in the balancing test used by the US Supreme Court to determine whether state law is preempted with [***20] respect to gaming on Indian lands. In

this regard, the Select Committee on Indian Affairs report on IGRA indicates that "in the final analysis, it is the responsibility of the Congress, consistent with its plenary power over Indian affairs, to balance competing policy interests and to adjust, where appropriate, the jurisdictional framework of regulation of gaming on Indian lands" (S Rep No. 100-446, 100th Cong, 2d Sess, at 3, reprinted in 1988 US Code Cong & Admin News, at 3071, 3073). Congress also incorporated into IGRA a modified version of the prohibitory/regulatory distinction articulated in *Cabazon*. Under the statute, "courts will consider the distinction between a [s]tate's civil and criminal laws to determine whether a body of law is applicable, as a matter of [f]ederal law, to either allow or prohibit certain activities" (S Rep No. 100-446, 100th Cong, 2d Sess, at 6, reprinted in 1988 US Code Cong & Admin News, at 3071, 3076).

The report discusses in depth the requirement that class II gaming be permitted if "located within a [s]tate that permits such gaming for any purpose by any person, organization or entity" (25 U.S.C. § 2710 [b] [1] [A])--language which also appears in the portion of the statute relating to class III gaming and defines the scope of class III gaming that [***21] a tribal-state compact may address, as noted above. The report makes clear:

> "The phrase 'for any purpose by any person, organization or entity' makes no distinction between [s]tate laws that allow class II gaming for charitable, commercial, or governmental purposes, or the nature of the entity conducting the gaming. If such gaming is not criminally prohibited by the [s]tate in which tribes are located, then tribes, as governments, are free to engage in such gaming" (S Rep No. 100-446, 100th Cong, 2d Sess, at 12, reprinted in 1988 US Code Cong & Admin News, at 3071, 3082).

The report thus demonstrates that with respect to class II gaming, "Congress intended to permit a particular gaming activity, **[*74]** even if conducted in a manner inconsistent with state law, if the state law merely regulated, as opposed to completely barred, that particular gaming activity" (*United States v Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 365 [1990]). Although the report expressly addressed language in 25 U.S.C. § 2710 (b) (1) (A) relating to class II gaming, the identical phrase--providing that gaming may be located only in "a [s]tate that permits such gaming for any purpose by any person, organization or entity"--appears in section 2710 (d) (1) (B) [***22] with respect to class III gaming. Inasmuch as the **same word** or [**58] phrase used in different parts of a statute will be presumed to have the same meaning throughout in the absence of an indication of an intent to the contrary (*see* **McKinney's** Cons Laws of NY, **Book 1, Statutes § 236**, at 401), we agree with defendants that under IGRA, class III games that are not prohibited are properly the subject of negotiation in tribal-state compacts even if those games are heavily regulated and permitted to be played only by charities (*see Mashantucket Pequot Tribe v State of Connecticut*, 913 F.2d 1024, 1029-1030 [1990], *cert denied* 499 U.S. 975, 113 L. Ed. 2d 717, 111 S. Ct. 1620 [1991]; *Coeur d'Alene Tribe v State*, 842 F. Supp. 1268, 1274-1275 [1994], *affd* 51 F.3d 876 [1995], *cert denied* 516 U.S. 916, 133 L. Ed. 2d 209, 116 S. Ct. 305 [1995]; *see also Saratoga County Chamber of Commerce v Pataki*, 100 N.Y.2d 801, 842, 798 N.E.2d 1047, 766 N.Y.S.2d 654 [2003], *supra* [Read, J., dissenting] ["IGRA mandates that, if a state allows *any* class III gaming by *any* person, a tribe may seek to conduct the same games on its [***23] lands"]).

Plaintiffs' interpretation--that the term "such gaming" in the phrase "permits such gaming for any purpose by any person, organization, or entity" should be read to mean "gaming for commercial purposes"--renders 25 U.S.C. § 2710 (d) (1) (B) incoherent. If "such gaming" is read to refer to gaming for a particular purpose, as "commercialized gambling" refers to gambling for the purpose of commercial gain, the phrase "for any purpose" would be rendered meaningless. Because "[i]t is an accepted rule that all parts of a statute are intended to be given effect and that a statutory construction which renders one part meaningless should be avoided" (*Rocovich v Consolidated Edison Co.*, 78 N.Y.2d 509, 515, 583 N.E.2d 932, 577 N.Y.S.2d 219 [1991]), plaintiffs' interpretation must be rejected. We agree with defendants that ***HN12*** the phrase "such gaming" refers to the antecedent term "class III gaming"--a type of gaming defined by the rules of the particular games contained therein, rather than by the purpose for which the games are played, such as for profit or for charity. Again, this interpretation is consistent with the legislative history **[*75]** of IGRA, which indicates that the relevant [***24] inquiry is whether a particular game is criminally prohibited, not whether the game is played for commercial, charitable or governmental purposes (*see* S Rep No. 100-446, 100th Cong, 2d Sess, at 12, reprinted in 1988 US Code Cong & Admin News, at 3071, 3082).

Defendants err, however, in asserting that simply because any class III gaming is allowed by a state, *all* class III gaming is properly the subject of a tribal-state compact. While the Select Committee on Indian Affairs report explains that tribes are prohibited from operating bingo--a class II game--in the five states which criminally prohibit the game, the report analyzed other class II games, such as card games, separately, stating that such games "are permitted by far fewer [s]tates" (S Rep No. 100-446, 100th Cong, 2d Sess, at 11-12, reprinted in 1988 US Code Cong & Admin News, at 3071, 3082). We find the report's differing treatment of specific games within a gaming class significant inasmuch as it is indicative of a congressional intent that courts look to state law to determine whether *particular* gaming activities are permitted (*see Cheyenne Riv. Sioux Tribe v State of South Dakota*, 3 F.3d 273, 278-279 [1993]; *Mashantucket Pequot Tribe v State of Connecticut, supra* at 1029; *Coeur d'Alene Tribe v State, supra* at 1276-1280; [***25] *Lac du Flambeau Band of Lake Superior Chippewa Indians v State of Wisconsin*, 770 F. Supp. 480, 487-488 [1991], *appeal dismissed* 957 F.2d 515 [1992], *cert denied* 506 U.S. 829, 121 L. Ed. 2d 53, 113 S. Ct. 91 [1992]; *see also Saratoga County Chamber of Commerce v Pataki, supra* at 843 n 10 [**59] [Read, J., dissenting]; *cf. Rumsey Indian Rancheria of Wintun Indians v Wilson*, 64 F.3d 1250, 1258-1259 [1994], *amended* 99 F.3d 321 [1996], *cert denied* 521 U.S. 1118, 138 L. Ed. 2d 1012, 117 S. Ct. 2508 [1997] [concluding that class II legislative history is not applicable to class III gambling, but nevertheless holding that a state need not negotiate with Indian tribes regarding particular gaming activities in which the state forbids others to engage]). 3

[***26] **[*76]** Accordingly, ***HN13*** in determining whether New York "permits such gaming" for purposes of satisfying the condition contained in 25 U.S.C. § 2710 (d) (1) (B), "the question is not whether these games may be characterized as Las Vegas-style or commercialized gambling, but whether a particular game is" permitted under our Constitution, statutes and applicable regulations (*Saratoga County Chamber of Commerce v Pataki*, 100 N.Y.2d 801, 843, 798 N.E.2d 1047, 766 N.Y.S.2d 654 n 10 [2003], *supra* [Read, J., dissenting]). "[I]f a state does not permit 'such gaming,' the matter is at an end" (*Mashantucket Pequot Tribe v State of Connecticut, supra* at 1028-1029) and a compact purporting to authorize prohibited gambling will not be valid (*see Artichoke Joe's Cal. Grand Casino v Norton*, 353 F.3d 712, 720-723 [2003], *supra*; *United States v Santee Sioux Tribe of Nebraska*, 135 F.3d 558, 563-564 [1998], *supra*; *Citizen Band Potawatomi Indian Tribe of Okla. v Green*, 995 F.2d 179, 181 [1993], *supra*; *United States v Santa Ynez Band of Chumash Mission Indians of Santa Ynez Reservation, Cal.*, 33 F. Supp. 2d 862, 863 [1998], *supra* [***27]). Contrary to defendants' argument that the "permits such gaming" requirement is satisfied if the state allows *any* class III gaming, we conclude that if a particular class III game is not permitted by New York law under any circumstances, a tribal-state compact will not be upheld insofar as it purports to authorize a tribe to conduct that game on Indian lands.

To summarize, while IGRA "preempt[s] the field in the governance of gaming activities on Indian lands" (S Rep No. 100-446, 100th Cong, 2d Sess, at 6, reprinted in 1988 US Code Cong & Admin News, at 3071, 3076; *see Gaming Corp. of Am. v Dorsey & Whitney*, 88 F.3d 536, 546 [1996]), it also gives

states, through the tribal-state compacting process, a power withheld from them by the [**60] US Constitution--i.e., "some measure of authority over gaming on Indian lands" (*Seminole Tribe of Fla.* **[*77]** *v Florida*, 517 U.S. 44, 58, 134 L. Ed. 2d 252, 116 S. Ct. 1114 [1996], *supra*). Nevertheless, this authority does not amount to a blanket imposition on tribes of all state laws regarding gambling activity. Instead, consistent with traditional principles of tribal sovereignty, the compacting process constitutes "a framework for the regulation of gaming activities [***28] on Indian lands which provides that in the exercise of its sovereign rights, unless a tribe affirmatively elects to have [s]tate laws and [s]tate jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow [s]tate jurisdiction on Indian lands for the regulation of Indian gaming activities" (S Rep No. 100-446, 100th Cong, 2d Sess, at 5-6, reprinted in 1988 US Code Cong & Admin News, at 3071, 3075). We emphasize, however, that Indian tribes may not engage in class III gaming activities if those particular activities are not "located in a [s]tate that permits such gaming for any purpose by any person, organization, or entity" (25 U.S.C. § 2710 [d] [1] [B]). That is, gaming activities that are not permitted by a state cannot be the subject of a tribal-state compact or played on Indian lands. We must therefore determine what gaming activities are permitted under the NY Constitution and laws regulating gambling.

B. *Gaming in New York*

New York has generally prohibited gambling throughout its history, with certain exceptions. The state's first Constitution, in 1777, did not mention gambling or lotteries and numerous statutes authorized public lotteries to raise money for a variety of purposes by [***29] the colony and state from 1746 through 1821 (*see* 3 Lincoln, The Constitutional History of New York, at 34-43 [1906]; *see also People ex rel. Ellison v Lavin*, 93 App. Div. 292, 300, 87 N.Y.S. 776 [1904], *revd on other grounds* 179 N.Y. 164, 71 N.E. 753, 18 N.Y. Cr. 480 [1904]; *Matter of Dwyer*, 14 Misc. 204, 205-206, 35 N.Y.S. 884 [1894]). The second Constitution, approved in 1821, however, expressly prohibited lotteries not already authorized by law stating: "No lottery shall hereafter be authorized in this state; and the [L]egislature shall pass laws to prevent the sale of all lottery tickets within this state, except in lotteries already provided for by law" (1821 N.Y. Const., art VII, § 11). An amendment prohibiting horse racing was also proposed but rejected by the Constitutional Convention of 1821 (*see* 3 Lincoln, The Constitutional History of New York, at 45 [1906]).

The third Constitution contained a similar provision that prohibited lotteries but remained silent on other forms of gambling, providing: "nor shall any lottery hereafter be authorized, **[*78]** or any sale of lottery tickets allowed within this state" (1846 N.Y. Const., art I, § 10). In 1887, the Legislature enacted the Ives [***30] Pool Law, authorizing gambling on horse racing during certain times of the year with a five percent tax on revenues to be used for the support of horse breeding (L 1887, ch 479). This form of gambling was subsequently forbidden by the fourth Constitution, approved in 1894 (*see* 3 Lincoln, The Constitutional History of New York, at 47 [1906]). Article I, § 9 provided: "nor shall any lottery or the sale of lottery tickets, pool-selling, book making, or any other kind of gambling hereafter be authorized or allowed within this [s]tate" (1894 N.Y. Const., art. I, § 9). An identical provision appeared in the current Constitution, when it was approved in 1938.

Since that time, N.Y. Constitution, article I, § 9 has been amended five times. 4 [**61] The effect of these amendments has been to broaden the scope of permissible gambling in the state through a series of exceptions to the general prohibition on gambling. In 1939, the section was amended to except pari-mutuel betting on horse races from the prohibition on gambling. A 1957 amendment authorized localities to permit religious, charitable and nonprofit organizations to conduct bingo or lotto. A 1966 amendment permitted the state to conduct [***31] a lottery, with the net proceeds to be used to support education. Most relevant here, section 9 (2) was amended in 1975 to allow localities to permit, in addition to bingo and lotto, "games in which prizes are awarded on the basis of a winning number or numbers, color or colors, or symbol or symbols determined by chance from among those previously selected or played, whether determined as the result of the spinning of a wheel, a drawing or otherwise by chance." Subsequently, in 1984, the Constitution was amended again to provide that the previously mandatory $ 250 limit on single prizes and $ 1,000 limit on a series of prizes in games permitted by the 1957 and 1975 amendments could be varied by law.

As amended, the current version of N.Y. Constitution, article I, § 9 (1) thus reads in pertinent part:

> *HN14* "except as hereinafter provided, no lottery or the sale of lottery [***32] tickets, pool-selling, bookmaking, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in **[*79]** connection therewith as may be authorized and prescribed by the [L]egislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the [L]egislature may prescribe, and except pari-mutuel betting on horse races as may be prescribed by the [L]egislature and from which the state shall derive a reasonable revenue for the support of government, shall hereafter be authorized or allowed within this state."

N.Y. Constitution, article I, § 9 (2) provides:

> *HN15* "any city, town or village within the state may by an approving vote of the majority of the qualified electors … authorize, subject to state legislative supervision and control, the conduct of one or both "any city, town or village within the state may by an approving vote of the majority of the qualified electors … authorize, subject to state legislative supervision and control, the conduct of one or both of the following categories of games of chance commonly known as: (a) bingo or lotto, in which prizes are awarded on the basis of designated numbers or symbols on a card conforming to numbers or symbols selected at random; (b) games in which prizes are awarded on the basis of a winning number or numbers, color or colors, or symbol or symbols [***33] determined by chance from among those previously selected or played, whether determined as the result of the spinning of a wheel, a drawing or otherwise by chance."

Subdivision (2) imposes a number of restrictions on permissible gaming, in addition to any others that the Legislature may prescribe. Specifically, subdivision (2) provides that *HN16* "only bona fide religious, charitable or non-profit organizations of veterans, volunteer firefighter and similar non-profit organizations shall be permitted to conduct such games; … the entire net proceeds of any game shall be exclusively devoted to the lawful purposes of such organizations; … no person except a bona fide member of any such organization shall participate in the management or operation of such game; … no person shall receive any remuneration for participating in the management or operation of any such game[; and u]nless otherwise provided by law, no single prize shall [**62] exceed [$ 250], nor shall any series of prizes on one occasion aggregate more than [$ 1,000]" (N.Y. Const., art I, § 9 [2]). *HN17* Subdivision (2) further directs the Legislature to "pass appropriate laws to effectuate the purposes of this subdivision [***34] [and to] ensure that such games are rigidly regulated to prevent commercialized gambling" (N.Y. Const., art I, § 9 [2]). Notably, **[*80]** subdivision (2) expressly permits the Legislature to pass laws restricting the gambling permitted by that section (N.Y. Const., art I, § 9 [2]).

The foregoing illustrates that HN18 while the NY Constitution generally bans gambling and evinces a strong policy against *commercialized* gambling, at least some form of gambling has been authorized throughout most of the state's history. Indeed, the NY Constitution contained a complete prohibition on gambling only from 1894 to 1939 and now permits several forms of gambling, some of which would be deemed class III gaming under IGRA (*see* 25 U.S.C. § 2703 [7], [8]). The legalization of certain forms of gambling "indicate[s] that the New York public does not consider authorized gambling a violation of 'some prevalent conception of good morals, [or] some deep-rooted tradition of the common weal'" (*Intercontinental Hotels Corp. [Puerto Rico] v Golden*, 15 N.Y.2d 9, 15, 203 N.E.2d 210, 254 N.Y.S.2d 527 [1964], quoting *Loucks v Standard Oil Co.*, 224 N.Y. 99, 111, 120 N.E. 198 [1918]), as plaintiffs would [***35] have us hold. Instead, "[t]he trend in New York State demonstrates an acceptance of *licensed* gambling transactions as a morally acceptable activity, not objectionable under the prevailing standards of lawful and approved social conduct" (*Intercontinental Hotels Corp. [Puerto Rico] v Golden*, *supra* at 15; *see* generally *Ramesar v State of New York*, 224 A.D.2d 757, 759, 636 N.Y.S.2d 950 [1996], *lv denied* 88 N.Y.2d 811, 672 N.E.2d 604, 649 N.Y.S.2d 378 [1996] [noting that public policy generally continues to disfavor gambling and, thus, regulations pertaining thereto must be strictly construed]).

HN19 Regarding "games of chance," the 1975 amendment permits, on its face, "games in which prizes are awarded on the basis of a winning number or numbers, color or colors, or symbol or symbols determined by chance." Plaintiffs do not dispute that this provision allows Las Vegas or casino nights, subject to the limits imposed in N.Y. Constitution, article I, § 9 (2), and that charities currently engage in millions of dollars worth of casino gambling per year (*see Saratoga County Chamber of Commerce v Pataki*, 100 N.Y.2d 801, 844, 798 N.E.2d 1047, 766 N.Y.S.2d 654 [2003], *supra* [***36] [Read, J., dissenting]). Nor do plaintiffs assert that the state prohibits charities and nonprofit organizations, during their Las Vegas or casino nights, from engaging in any of the 31 games listed in the compact that the Governor executed with the Seneca Nation pursuant to part B of chapter 383 of the Laws of 2001. In this regard, we note that the 1975 Senate debate leading to this constitutional amendment indicates that the purpose of the amendment was to expand the types of games in which religious, **[*81]** charitable or nonprofit organizations could legally engage to include Las Vegas night casino-type gambling, such as roulette, blackjack and dice games (*see* New York State Senate Debate on Senate Bill S 2509, June 19, 1975, at 8234-8235, 8239-8242, 8259, 8266-8268, 8271-8272)--games authorized in the Seneca Nation compact, as well.

For example, Senator B.C. Smith, in answering Senator Lewis's objection to the amendments allowing "Las Vegas night" and "roulette wheel[s]" in houses of worship (*id.* at 8234-8235), stated that "your synagogues, your churches and your fire [**63] departments in certain sections of the state are doing just this, just the very thing that is legalized by this proposition"([***37] *id.* at 8239). He explained that many fire departments and churches could not survive without "their bazaars and fairs" (*id.* at 8241) and that, while people operating such fairs were arrested in certain counties (*id.* at 8239-8240), "when [he] was District Attorney of [his] county, ... [he] wouldn't arrest anybody that was running a firemen's affair ... [with] big six" (*id.* at 8241-8242). Indeed, Senator Lewis, who strongly opposed the amendment on the ground that it could potentially "make every one of the institutions, religious and eleemosynary, a pseudo or partial casino," conceded that roulette wheels "exist[] in my community and they have [them] in the fairs all around me, and the police, if they are involved, look the other way" (*id.* at 8245). Further, Senator Rolison, in explaining the bill, indicated that dice games, such as craps, would be permitted under the amendment (*id.* at 8259). These excerpts from the debates demonstrate that HN20 the 1975 amendment was intended to except from the general prohibition on gambling the precise types of casino gaming contemplated by part B of chapter 383 of the Laws of 2001, provided that such gaming was [***38] conducted for charitable purposes.

This conclusion is further supported by reference to the text and history of General Municipal Law article 9-A, which the Legislature enacted pursuant to the 1975 amendment and which codifies the definition of permissible games of chance. At the time it was enacted, General Municipal Law former § 186 (3) provided:

> HN21 "'Games of chance' shall mean and include specific games of chance, in which prizes are awarded on the basis of a designated winning number or numbers, color or colors, symbol or symbols determined by chance, but not including games commonly known as 'bingo or lotto' which are controlled under **[*82]** article [14-H] of this chapter and also not including 'slot machines', 'bookmaking', and 'policy or numbers games' as defined in [Penal Law § 225.00]. No game of chance shall involve wagering of money by one player against another player."

The legislative debates and history regarding the enactment of General Municipal Law article 9-A [***39] similarly evince an acknowledgment that the definition contained in section 186 was intended to include casino-type games (*see e.g.* New York State Senate Debate on Senate Bill S 9101, June 26, 1976, at 9649-9651 [stating that dice games, blackjack and baccarat are among the games permitted under the statute]; Mem of State Racing and Wagering Board, at 2, Bill Jacket, L 1976, ch 960 [indicating that "roulette, dealer blackjack and baccarat" would be permissible]). 5 These games, such as blackjack, craps, roulette and baccarat, generally would be considered class III gaming under IGRA (*see* 25 U.S.C. § 2703 [8]). [**64] Pursuant to General Municipal Law § 186 (3), the Racing and Wagering Board lists a number of casino-type games, such as craps, roulette, blackjack and big six, that may be conducted in this state (*see* 9 NYCRR 5620.1). Again, these games fall into the category of class III gaming under IGRA (*see* 25 U.S.C. § 2703 [8]).

[***40] In sum, HN22 despite a ban on commercialized gambling, a general prohibition on all gambling except that expressly authorized and a history that includes a 45-year period during which gambling was banned completely, New York now constitutionally permits a substantial amount of gambling. The 1975 amendment to the Constitution and implementing legislation and regulations (*see* General Municipal Law § 186 [3]; 9 NYCRR 5620.1), in particular, were intended to permit charities, religious organizations and other nonprofit groups to conduct the types of gaming categorized as class III by IGRA.

Inasmuch as the state permits, subject to heavy regulation and various restrictions, others to engage in the type of gaming activities at issue here, it merely regulates, as opposed to **[*83]** completely bars, **those gaming activities.** 6 [***42] HN23 For purposes of IGRA, then, the state "permits such gaming for any purpose by any person, organization, **or entity" (25 U.S.C. § 2710 [d] [1] [B]). Accordingly,** the class III gaming at issue is properly the subject of a tribal-state compact and part B of chapter 383 **of the Laws of 2001 authorizing** [***41] **the G**overnor to enter into such compacts is consistent with both IGRA and N.Y. Constitution, article I, § 9. 7

[***43] We similarly conclude that *HN24* **part B is consistent** with the requirement in N.Y. Constitution, article I, § 9 that the Legislature "pass appropriate laws to … ensure that such **games are rigidly** [**65] **regulated** to prevent commercialized gambling." Plaintiffs' argument that part B violates this requirement is premised on their incorrect **belief that New York** laws relating to gaming activities apply with the same force and effect on Indian lands as they do elsewhere within the state. As **explained above,** *HN25* because Indian tribes retain attributes of sovereignty, state law applies on Indian lands only if Congress so provides or state law is not preempted (*see California v Cabazon* **[*84]** *Band of Mission Indians*, 480 U.S. 202, 207, 215-216, 94 L. Ed. 2d 244, 107 S. Ct. 1083 [1987], *supra*). In the context of casino gaming on Indian lands, IGRA both determines the extent to which state law applies to gaming on Indian lands (*see Seminole Tribe of Fla. v Florida*, 517 U.S. 44, 58, 134 L. Ed. 2d 252, 116 S. Ct. 1114 [1996], *supra*; *see also Artichoke Joe's Cal. Grand Casino v Norton*, 353 F.3d 712, 716 [2003], *supra*; *Keweenaw Bay Indian Community v United States*, 136 F.3d 469, 472 [1998] [***44], *cert denied* 525 U.S. 929, 142 L. Ed. 2d 277, 119 S. Ct. 335 [1998]) and "preempt[s] the field in the governance of gaming activities on Indian lands" (S Rep No. 100-446, 100th Cong, 2d Sess, at 6, reprinted in 1988 US Code Cong & Admin News, at 3071, 3076).

HN26 States do not have the authority to regulate class III gaming on Indian lands other than through the compacting procedure outlined in IGRA. States are not *required* by IGRA to agree to compacts (*see* 25 U.S.C. § 2710 [d] [7] [B] [vi], [vii]), although they may choose to enter, via the compacting process, an otherwise preempted field if their actions are in compliance with the federal standards embodied in IGRA. Should a state refuse to participate in the negotiation process, the result would be only that the state would lose its ability to influence the terms on which gaming will occur, with such authority reverting to the Secretary of the Interior (*see* 25 U.S.C. § 2710 [d] [7] [B] [vii]; 25 C.F.R. part 291). Thus, IGRA cannot be interpreted as a federal directive that requires states to assume a regulatory role in violation of the anticommandeering principle contained in the 10th Amendment of the U.S. Constitution [***45] (*see Ponca Tribe of Okla. v State of Oklahoma*, 37 F.3d 1422, 1432-1435 [1994], *revd on other grounds* 517 U.S. 1129, 134 L. Ed. 2d 537, 116 S. Ct. 1410 [1996]; *Yavapai-Prescott Indian Tribe v State of Arizona*, 796 F. Supp. 1292, 1297 [1992]; *see generally Printz v United States*, 521 U.S. 898, 926, 138 L. Ed. 2d 914, 117 S. Ct. 2365 [1997]). Instead, the IGRA compacting process is best understood as providing states with the opportunity to establish "some measure of authority over gaming on Indian lands[,] … a power withheld from them by the Constitution" (*Seminole Tribe of Fla. v Florida*, *supra* at 58).

Stated differently, *HN27* IGRA does not force New York to accept a particular compact. It simply affords the state the opportunity to assert authority over gaming on Indian lands, a power that the state otherwise lacks. Because part B of chapter 383 of the Laws of 2001 permits the Governor to enter into tribal-state compacts *extending* state regulatory authority to commercialized casino gambling on Indian lands--where such authority would not otherwise exist--we cannot say that the Legislature **[*85]** has violated the constitutional [***46] mandate to pass laws limiting **commercialized gambling.** 8 Rather, part B permits the Governor [**66] to assume a role in setting the terms and restrictions pursuant to which Indian **gaming will occur, and thereby** limit such gaming in a manner consistent with the state's interests.

[***47] Plaintiffs' remaining arguments regarding part B of chapter 383 require little discussion. Plaintiffs **contend that the Governor cannot,** consistent with New York public policy as set forth in the NY Constitution, concur with the Secretary of the Interior that **gaming on Indian lands other than** an existing reservation would not be detrimental to surrounding communities. Plaintiffs' argument is unpersuasive. *HN28* **Before gaming may occur on** lands held in trust by the federal government for the benefit of Indian tribes, the Governor's concurrence is required (*see* 25 U.S.C. § 2719 [b] [1] [A]). We note that the statute leaves the decision to the Governor whether, in his judgment, gaming on Indian lands would be detrimental--i.e., have adverse social and economic consequences--on the surrounding communities (*see* 25 U.S.C. § 2719 [b] [1] [A]). It does not require a determination that the gaming would fall within one of the constitutional exceptions to the state's general prohibition on gambling or that the gaming would be lawful if conducted on state land. Second, while New York does have a strong policy against *commercialized* [***48] gambling, "the New York public does not consider authorized gambling a violation of 'some prevalent conception of good morals, [or] some deep-rooted tradition of the common weal'" (*Intercontinental Hotels Corp. of [Puerto Rico] v Golden*, 15 N.Y.2d 9, 15, 203 N.E.2d 210, 254 N.Y.S.2d 527 [1964], *supra* [citation omitted]). Hence, the Governor's concurrence cannot be said to violate New York public policy.

Finally, we reject plaintiffs' argument that part B of chapter 383 represents an unlawful delegation of power to the Governor because it provides no legislative guidance with respect to future compacts in Ulster and Sullivan Counties. *HN29* Part B adequately **[*86]** sets forth the parameters for compacts between New York and Indian tribes. It indicates the number of casinos permitted, the general location of those casinos, and a number of provisions that must be included in the compacts regarding, among other things, access of labor unions for purposes of soliciting employee support for representation, binding arbitration of labor disputes, assurances that the tribes have adequate civil recovery systems to protect the rights of visitors and guests, and assurances that the tribes will maintain sufficient [***49] liability insurance to compensate visitors and guests for injuries that might occur. We conclude that in part B, "'the basic policy decisions underlying the [executive action] have been made and articulated by the Legislature'" (*Bourquin v Cuomo*, 85 N.Y.2d 781, 785, 652 N.E.2d 171, 628 N.Y.S.2d 618 [1995] [citation omitted]). That part B leaves discretion to the Governor in negotiating compacts with Indian tribes merely permits compliance with the state's obligation to engage in good-faith negotiations (*see* 25 U.S.C. § 2710 [d] [3] [A]) and does not render the provision an unlawful delegation of authority.

II. *VLTs*

Part C of chapter 383 of the Laws of 2001 authorizes the Division to license and operate VLTs at eight licensed pari-mutuel [**67] racetracks. Pursuant to the statute, five racetracks--Aqueduct, Monticello, Yonkers, Finger Lakes and Vernon Downs--are automatically eligible to apply for a license to install VLTs (*see* L 2001, ch 383, part C, § 1; Tax Law § 1617-a [a]). Upon approval from the governing body of the appropriate counties, certain harness racetracks--Saratoga Equine Sportscenter, Batavia and Buffalo--may [***50] also install VLTs (*see* L 2001, ch 383, part C, § 1; Tax Law § 1617-a [a]; Racing, Pari-Mutuel Wagering & Breeding Law art 3). 9 [***51] Three other racetracks--Belmont Park, Saratoga Thoroughbred Racetrack and the New York State Exposition in Onondaga County--are not eligible to install VLTs (*see* L 2001, ch 383, part C, § 1; Tax Law § 1617-a [a]). The statute directs that the payout for prizes is to be 90% of sales (*see* L 2001, ch 383, part C, § 2; Tax Law § 1612 [c] [3]). As originally enacted, part C provided that the balance of the total revenue was to be paid to education after deducting 15% for the Division's operating and administrative costs and a "vendor's fee" of between 12% and 25% to be paid to the racetrack (*see* L 2001, ch 383, part C, § 2). The statute required that each racetrack reinvest a percentage **[*87]** of its vendor fee to support higher purses and the appropriate breeding fund at the racetrack (*see* L 2001, ch 383, part C, § 2). 10

The operation of VLTs is described in requests for proposals (hereinafter RFPs) issued by the Division inviting potential vendors to submit proposals for the implementation and operation of a VLT system. The system is to be comprised of three components: (1) video display terminals that accept players' paper currency, [***52] credit or account cards, game identifier and price selections, and permit players to view the results of their purchased electronic instant lottery tickets; (2) site controllers that link a number of video display terminals to a central system, store and manage unpurchased electronic ticket series and are programmed to dispense electronic lottery tickets in the sequence received from and determined by the central system; and (3) a central system that randomly shuffles and stores electronic ticket series, distributes the tickets to site controllers, monitors all system activity, and performs accounting and security functions. The RFPs contemplate participation by multiple VLT players who will compete against each other by purchasing electronic instant lottery tickets from a finite depleting pool of tickets in a given series. Indeed, video display terminals *must* be linked electronically to allow players to compete against other players for a chance to purchase winning electronic lottery tickets. An electronic ticket series consists of a finite set of tickets from a particular instant game pool and, upon creation, is intermixed to ensure randomness. The ticket series is stored in [***53] the central system until divided into smaller quantities and sent to site controllers.

To play video lottery, a player inserts paper currency or another Division-approved [**68] representative of value into a video display terminal to purchase one or more electronic instant lottery tickets. The player determines the particular game and amount to be wagered. The next situated electronic ticket is then dispensed from the site controller to the display terminal, **[*88]** which shows the outcome associated with that ticket. The player cannot affect the outcome associated with the ticket beyond selecting the type of game to be played; the tickets are predetermined to be either winners or losers before the time of purchase. Once a player has purchased a ticket, it is removed from the pool of available electronic tickets in a given series and cannot be selected or dispensed again. Upon completion of play, the player receives a redemption ticket that can be used for wagering at another display terminal or presented for verification and payment at a validation terminal.

VLTs thus may be understood as presenting electronic versions of the instant-ticket lottery games conducted by the Division. As with "scratch-off" [***54] tickets, an electronic instant lottery ticket is a winning or nonwinning ticket at the time of its creation and no skill on the part of the player is involved in the game. The distribution of electronic tickets, like scratch-off tickets, is random. In both paper and electronic instant lottery games, players compete against each other in the sense that once an instant ticket is removed from a series, the finite pool of tickets in that series shrinks for all players. The only other game permitted on VLTs is electronic keno, in which players compete against each other by choosing a series of numbers, colors or symbols from a finite pool in the hope that their selections will match those later randomly drawn by the central system.

Plaintiffs challenge part C of chapter 383 on two primary grounds. First, they argue that VLTs are slot machines and, thus, do not fit within the exception of state-run lotteries from the general ban on gambling in N.Y. Constitution, article I, § 9. Second, plaintiffs assert that the directive in part C that racetracks reinvest a percentage of their vendor fees in purses and breeding funds violates the constitutional mandate that the net proceeds of state-operated [***55] lotteries "be applied exclusively to or in aid or support of education in this state as the [L]egislature may prescribe" (N.Y. Const., art I, § 9 [1]). We address each of these arguments in turn.

A. *VLTs and Slot Machines*

Plaintiffs contend that VLTs are, in reality, slot machines. They assert that slot machines cannot be "lotteries" within the meaning of that term in N.Y. Constitution, article I, § 9 (1) and, thus, part C of chapter 383 of the Laws of 2001 is unconstitutional. Plaintiffs compare the description of the video display **[*89]** terminals used in video lottery gaming that is found in the Division's RFPs to the definition of "[s]lot machine" contained in Penal Law § 225.00 (8), which states in relevant part: "'Slot machine' means a gambling device which, as a result of the insertion of a coin or other object, operates, either completely automatically or with the aid of some physical act by the player, in such manner that, depending upon elements of chance, it may eject something of value."

Plaintiffs aver that the 1966 amendment to N.Y. Constitution, article I, § 9 authorizing the state to conduct lotteries permits only traditional sweepstakes lotteries [***56] with periodic drawings. Specifically, they assert that the NY Constitution permits only those types of lotteries in which licensed vendors sell tickets for later drawings to occur with extremely limited frequency and at which winning numbers would be selected at some central headquarters. If the lottery ticket purchased by [**69] the consumer contained the winning number, that consumer would collect a pool of winnings that depended on the total number of tickets purchased. Plaintiffs contend that machines or gaming systems, such as VLTs, that permit games to be played with infinite frequency are slot machines and therefore cannot be considered to offer "lottery" games. Alternatively, plaintiffs contend that under the definition in General Municipal Law § 186 (3), as amended by part B, § 5 of chapter 383 of the Laws of 2001, video lottery cannot be a "lottery." We disagree.

In determining whether games offered on the VLTs implemented by the Division pursuant to part C constitute "lotteries," we are mindful of the rule that ***HN30*** a legislative enactment may be found unconstitutional only upon a "demonstrat[ion of] the statute's invalidity 'beyond a reasonable doubt'" [***57]. (*La Valle v Hayden*, 98 N.Y.2d 155, 161, 773 N.E.2d 490, 746 N.Y.S.2d 125 [2002], quoting *People v Tichenor*, 89 N.Y.2d 769, 773, 680 N.E.2d 606, 658 N.Y.S.2d 233 [1997], *cert denied* 522 U.S. 918, 139 L. Ed. 2d 237, 118 S. Ct. 307 [1997]). Defendants note that the NY Constitution does not define the term "lotteries." They urge us to adopt a broad definition of that term, used by the courts primarily in interpreting the penal statutes, that a game is a lottery if it involves the three elements of consideration, chance and prize (*see e.g. People v Himes*, 284 N.Y. 93, 101-103, 29 N.E.2d 483 [1940]; *People v Miller*, 271 N.Y. 44, 47, 2 N.E.2d 38 [1936]; *see also Trump v Perlee*, 228 A.D.2d 367, 368, 644 N.Y.S.2d 270 [1996] [defining lottery as containing those three elements in a taxpayers' action seeking to enjoin the defendants from operating the game known as "Quick Draw"];*Harris v Economic Opportunity Commn. of Nassau County*, 171 A.D.2d 223, 227, 575 N.Y.S.2d 672 [1991] [holding **[*90]** that, in an action by the winner of a raffle to recover a prize, a raffle had elements of consideration, chance and prize and was therefore an illegal lottery]). Inasmuch as play on VLTs indisputably involves those three elements, defendants argue [***58] that part C of chapter 383 is constitutional.

We agree with defendants that ***HN31*** VLTs are simply a new method of presenting lottery games to the public and, therefore, the operation of VLTs by the state falls within the constitutional exception to the general ban on gambling. We conclude, however, that the 1966 amendment creating the exception that authorized a state-run lottery--pursuant to which part C was enacted--must be strictly construed to ensure that the exception does not swallow the rule (*see generally Molina v Games Mgt. Servs.*, 58 N.Y.2d 523, 529, 449 N.E.2d 395, 462 N.Y.S.2d 615 [1983]; *Matter of New York Racing Assn. v Hoblock*,

270 A.D.2d 31, 33-34, 704 N.Y.S.2d 52 [2000]; *People v Kim*, 154 Misc. 2d 346, 351, 585 N.Y.S.2d 310 [1992]; *see also* **McKinney's** Cons Laws of NY, Book 1, Statutes § 213, at 372).

The elements of consideration, chance and prize are present in all forms of gambling or games of chance (*see generally* Penal Law § 225.00 [2] [defining "gambling"]). Pursuant to the definition advanced by defendants, *any* game of chance--including such casino games as poker, blackjack, craps and roulette--could be a lottery if operated by [***59] the state. Such a broad interpretation would expand the constitutional exception permitting state-run lotteries to such an extent that it would swallow the general constitutional prohibition on gambling (*see* 1984 Ops Atty Gen No. 84-F1, at 19-24; 1981 Ops Atty Gen 68, at 72). N.Y. Constitution, article I, § 9 cannot support such a broad reading. Nevertheless, we conclude that even pursuant to a stricter reading of [**70] the term "lotteries," video lottery gaming passes muster.

The term "lotteries" must be interpreted with reference to the language of the constitutional exception itself and the legislative history of the amendment, as well as related statutory and constitutional provisions. *HN32* In its general prohibition, N.Y. Constitution, article I, § 9 refers to a lottery as one of several forms of gambling, stating that "except as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, bookmaking, or any other kind of gambling … shall hereafter be authorized or allowed within this state" (N.Y. Const., art I, § 9 [1]). "[L]ottery," as used in article I, § 9, can thus be understood to mean a distinct, narrower form of the broad term "gambling," which is defined [***60] by the three elements of consideration, chance and prize (*see* Penal Law § 225.00 [2] [defining "gambling" as **[*91]** "stak(ing) or risk(ing) something of value upon the outcome of a contest of chance 11 or a future contingent event not under (one's) control or influence, upon an agreement or understanding that he (or she) will receive something of value in the event of a certain outcome"]; *see also Johnson v Collins Entertainment Co.*, 333 S.C. 96, 101, 508 S.E.2d 575, 577-578 [1998] [concluding that where a state constitution distinguishes between lottery and gambling or other games of chance, lottery must be defined in a narrow sense]; *Poppen v Walker*, 520 N.W.2d 238, 244-245 [SD 1994] [same]; Eisenrauch, *Video Poker and the Lottery Clause: Where Common Law and Common Sense Collide*, 49 SC L Rev 549, 567-572 [1998] [same]).

[***61] *HN33* The lottery exception itself authorizes "lotteries operated by the state and the sale of lottery tickets in connection therewith" (N.Y. Const., art I, § 9 [1]). On its face, the constitutional exception contemplates that state-run lotteries involve the sale of tickets, i.e., lots or chances (*see* N.Y. Const., art I, § 9 [1]; *see also* 1981 Ops Atty Gen 68, at 72). The Senate debates on the lottery amendment 12 also indicate that the Legislature conceived of the sale of tickets and multiple participation as integral elements of lotteries (*see* New York State Senate Debate on Senate Bill S 289, June 14, 1965, at 4808 ["(L)ottery is … a prize, a consideration and multiple participation"]; *see also* New York State Senate Debate on Senate Bill S 289, June 14, 1965, at 4764-4765, 4796-4800; New York State Senate Debate on Senate Bill S 897, Feb. 7, 1966, at 290, 298, 309, 311, 360-361). Indeed, one of the sponsors of the amendment, Senator Brownstein, predicted that millions of tickets would be sold (New York State Senate Debate on Senate Bill S 289, June 14, 1965, at 4769).

[***62] Moreover, while the debates reflect an intent to leave the amendment deliberately vague with respect to the mechanics of the lottery (*see* New York State Senate Debate on Senate Bill S 897, Feb. 7, 1966, at 319 ["(W)hen we passed the pari-mutuel betting amendment in 1939, … it did not include the mechanics of how it was to be worked. What we are only involved with here is the question of whether or not we should allow the general practice of lottery"]; *see also* New York State Senate Debate **[*92]** on Senate Bill S 897, Feb. 7, 1966, at 331-332, 341-342, 351, 363; New York State Senate Debate on Senate Bill S 289, [**71] June 14, 1965, at 4796, 4807-4809), the amendment does expressly refer to the sale of tickets. This explicit reference to tickets emphasizes that, despite an intent to leave to the Legislature's discretion the details of the operation of the lottery, the use of randomly-drawn tickets to determine a winner or winners is a necessary component of any state-run lottery authorized pursuant to the NY Constitution. Similarly, the implementing legislation, enacted contemporaneously in 1967, refers to the sale of tickets and multiple players (*see* L 1967, ch 278, § 1 [creating Tax Law former § 1305 (a), (b)]). Hence, we conclude that [***63] *HN34* **in addition to the elements of consideration, chance** 13 and prize traditionally employed by this state's case law in defining the term "lottery" for law enforcement purposes (*see e.g. People v Hines*, 284 N.Y. 93, 101-103, 29 N.E.2d 483 [1940]], *supra*; *People v Miller*, 271 N.Y. 44, 47, 2 N.E.2d 38 [1936], *supra*), N.Y. Constitution, article I, § 9 (1) sanctions only those state-run lotteries that involve tickets and multiple participation.

Support for our conclusion that a lottery is defined by the elements of consideration, chance, prize, [***64] tickets and multiple participation may also be found in the Penal Law. The requirement that a lottery involve multiple participation can be found in the definition of lottery contained in the 1965 Penal Law revision, enacted by the same Legislature that drafted and initially approved the lottery amendment. Although the scope of the constitutional amendment authorizing lotteries is not determined by the Penal Law, we note that the Legislature had before it the new definition of lottery contained in that statute when crafting the lottery exception and, thus, that definition informs our reading of the amendment. The relevant statutory language has not been altered since the 1965 revision. Specifically, Penal Law § 225.00 (10) defines "[l]ottery" as:

> *HN35* "an unlawful gambling scheme in which (a) the players pay or agree to pay something of value for chances, represented and differentiated by numbers or by combinations of numbers or by some other **[*93]** media, one or more of which chances are to be designated the winning ones; and (b) the winning chances are to be determined by a drawing or by some other method based upon the element of chance; and (c) the holders of the [***65] winning chances are to receive something of value."

HN36 In referring to "players" participating in a "drawing" or some other random event, the statute contemplates multiple participation, as opposed to a single player competing against a single machine. The statute also refers to consideration in the form of "something of value" paid by players, determination of winners by a method based on chance, and a prize to be paid to the holders of the winning "chances," or lots (*see* Penal Law § 225.00 [10]; *see also* 1981 Ops Atty Gen 68, at 74).

Pursuant to the definition of lottery contemplated by N.Y. Constitution, article I, § 9, the video lottery gaming offered on VLTs authorized by part C of chapter 383 of the Laws of 2001, as described in the Division's RFPs, is permissible. As explained above, to play video lottery on VLTs, players give consideration--paper currency or another lottery-approved representative [**72] of value inserted into a display terminal--and, after selecting the game identifier and price per ticket, receive an electronic ticket from a series in which winning tickets are selected in advance and randomly distributed among all [***66] tickets to be sold. To play electronic keno, players select numbers, colors or symbols in the hope of matching those randomly drawn by the

central system from a larger finite pool of numbers, colors or symbols. The player's success is a matter of pure chance, dependent only on the random distribution of predetermined winning tickets by the central system to site controllers or randomly drawn keno numbers, colors or symbols. If the player wins, he or she receives a prize which may be redeemed by printing an electronically encoded instrument that can be presented for payment at a validation terminal or used for play at another display terminal. The element of multiple participation is present because players compete against each other by purchasing tickets from a finite depleting pool of electronic instant lottery tickets, with a set number of predetermined winning tickets, or in choosing a series of keno numbers, colors or symbols from a finite pool in the hope that they, as opposed to other players, will have matched those colors, numbers or symbols later drawn.

Further, play on VLTs involves tickets, albeit electronic tickets, which are transferred from the central system to site [***67] **[*94]** controllers and then to display terminals upon purchase, but which are not printed or reduced to paper. *HN37* These electronic tickets are the functional equivalent of paper tickets--they are "evidence of one's entitlement to a prize over claims by competing ticket-holders" (*Johnson v Collins Entertainment Co.*, 333 S.C. 96, 104 n 10, 508 S.E.2d 575, 579 n 10 [1998], *supra*). Similarly, the player's recorded keno choices to be played in a later drawing are also the functional equivalent of a paper ticket. Indeed, keno is no different from current lottery games, such as "Quick Draw," which have been upheld as constitutional under N.Y. Constitution, article I, § 9 (1) (*see Trump v Perlee*, 228 A.D.2d 367, 368, 644 N.Y.S.2d 270 [1996], *supra*). To play Quick Draw, individuals select a subset of numbers, in the hope of matching numbers drawn by the Division.

In our view, *HN38* the fact that the tickets used in VLT play are electronic, as opposed to paper, does not defeat a finding that VLTs are permissible within the meaning of N.Y. Constitution, article I, § 9. In short, play on VLTs involves the elements of consideration, chance, prize, multiple participation and tickets and, [***68] thus, the operation of VLTs by the state falls within the constitutional exception to the general ban on gambling.

We reject plaintiffs' argument that VLTs are slot machines within the meaning of the Penal Law and, thus, the games offered on VLTs cannot be "lotteries." As noted above, *HN39* the Penal Law defines a slot machine as "a *gambling device* which, as a result of the insertion of a coin or other object, operates, either completely automatically or with the aid of some physical act by the player, in such [a] manner that, depending upon elements of chance, it may eject something of value" (Penal Law § 225.00 [8] [emphasis added]). A "[g]ambling device," however, is defined to exclude "lottery tickets ... and other items used in the playing phases of lottery" (Penal Law § 225.00 [7]). Because VLTs are devices used in the playing phases of a lottery, they cannot be considered slot machines as a matter of law, regardless of their outward resemblance to such machines (*see People v Kim*, 154 Misc. 2d 346, 353-354, 585 N.Y.S.2d 310 [1992], *supra* [concluding that a lotto machine used [***73] for play in a lottery did not qualify [***69] as a gambling device]; *cf. Matter of Black N. Assoc. v Kelly*, 281 A.D.2d 974, 975-976, 722 N.Y.S.2d 666 [2001] [vending machine that dispensed calling cards and sweepstakes game pieces and instantly displayed the results in a slot machine-like video display, in the absence of a finding that the game was a lottery, was a slot machine]).

Plaintiffs' reliance on General Municipal Law § 186 (3) for the proposition that VLTs are impermissible slot machines is **[*95]** misplaced. While General Municipal Law § 186 (3), as originally enacted, defined "[g]ames of chance" to exclude both "slot machines" and lotteries, the statute was amended pursuant to part B of chapter 383 to remove the exclusion of slot machines from the definition of "[g]ames of chance" (*see* L 2001, ch 383, part B, § 5). Inasmuch as slot machines now fall within the statutory definition of "[g]ames of chance" while lotteries do not, plaintiffs reason that the two games are mutually exclusive. Plaintiffs then argue that because VLTs resemble impermissible slot machines, they cannot be "lotteries." This mutual exclusivity, however, does not advance plaintiffs' argument that [***70] VLTs are impermissible slot machines. Again, a slot machine is a type of "gambling device" (Penal Law § 225.00 [8]) and gambling devices are defined to exclude "items used in the playing phases of lottery" (Penal Law § 225.00 [7]). *HN40* Although display terminals outwardly resemble slot machines, VLT play involves the elements of a lottery--consideration, chance, prize, multiple participation and tickets--and, therefore, VLTs do not fulfill the legal definition of slot machine (*see* Penal Law § 225.00 [7], [8]).

Moreover, there is no merit to plaintiffs' argument that because video lottery gaming is not the precise type of lottery contemplated by the 1966 Legislature in drafting the constitutional amendment, it is impermissible. Although, as plaintiffs assert, the Senate debates on the amendment include references to sweepstakes lotteries with infrequent drawings (*see e.g.* New York State Senate Debate on Senate Bill S 289, June 14, 1965, at 4765, 4777, 4807; New York State Senate Debate on Senate Bill S 897, Feb. 7, 1966, at 315), the 1966 amendment authorizing lotteries neither refers to any particular kind of lottery nor places limits [***71] on the number of drawings or methods of operating a lottery. Indeed, although certain senators opposed the amendment on the ground that the constitutional language was "indefinite," had no limit on the number of drawings to be held in a given year and did not specify the type of lottery authorized (*see* New York State Senate Debate on Senate Bill S 289, June 14, 1965, at 4796-4797, 4814; New York State Senate Debate on Senate Bill S 897, Feb. 7, 1966, at 315, 335-336, 341), the amendment, as passed, left these issues to the Legislature's discretion.

We conclude that *HN41* the N.Y. Constitution contains no bar to the modernization of the lottery or the introduction of new technological methods of delivering lottery tickets to the public. Nor is the state limited to the precise types of lotteries familiar to the public in 1966. Indeed, we note again that "Quick Draw," **[*96]** a nontraditional form of lottery, has been upheld as constitutional (*see Trump v Perlee*, 228 A.D.2d 367, 368, 644 N.Y.S.2d 270 [1996], *supra*). Similarly here, the fact that video lottery was not contemplated at the time of the amendment does not render it unconstitutional.

Plaintiffs' reliance on 1981 and 1984 New York Attorney General opinions in arguing that [***72] the video lottery games offered on VLTs are not lotteries is similarly unwarranted. Those opinions were given in regard to games that are distinguishable. The 1981 opinion addressed proposed video games, such as computer poker and blackjack, that did not involve [**74] multiple participation or electronic tickets (*see* 1981 Ops Atty Gen 68). Instead, the games there involved a single player pitting his or her skill against a machine (*see id.* at 72-75). The 1984 opinion involved a proposal by the Division to permit betting on the outcome of professional sports events (*see* 1984 Ops Atty Gen No. 84-F1). The Attorney General concluded that such betting is more in the nature of pool-selling and bookmaking than a lottery and, thus, did not fall within the exception of state-run lotteries from the general ban on gambling (*see id.* at 11-12). While those opinions do indicate that the 1966 Senate debates on the lottery amendment refer to traditional sweepstakes lotteries (*see* 1984 Ops Atty Gen No. 84-F1, at 19-24; 1981 Ops Atty Gen 68, at 75-76), nothing in the opinions suggests that the constitutional authorization was limited to those types of lotteries. Further, although the opinions [***73] conclude that the lottery exception must be interpreted narrowly and that lotteries must include the elements of consideration, chance, prize, tickets and multiple participation, there is no indication that electronic games meeting those criteria would be impermissible (*see* 1984 Ops Atty Gen No. 84-F1, at 19-24; 1981 Ops Atty Gen 68, at 72-75). 14

[***74] Finally, we reject plaintiffs' assertion that part C of chapter 383 violates plaintiff Lee Karr's rights to equal protection **[*97]** because it does not give his local legislative body the opportunity to disapprove the siting of VLTs at the Monticello racetrack, despite requiring the approval of the relevant local legislatures to permit VLTs to be operated at the Saratoga Equine Sportscenter, Batavia and Buffalo harness racetracks. Plaintiffs assert that part C infringes upon Karr's right to vote. Even assuming that part C, in drawing a geographic distinction among different racetracks, somehow implicates an individual citizen's right to vote, ***HN42*** "a [s]tate is not prohibited from recognizing the distinctive interests of the residents of its political subdivisions" even in reference to voter classification (*City of New York v State of New York*, 76 N.Y.2d 479, 486, 562 N.E.2d 118, 561 N.Y.S.2d 154 [1990]; *see Town of Lockport N.Y. v Citizens for Community Action at Local Level Inc.*, 430 U.S. 259, 269-273, 51 L. Ed. 2d 313, 97 S. Ct. 1047 [1977]). Here, the difference in classification could have been justified by a legislative conclusion that while the racetracks that needed no further approval had poor attendance [***75] records and would benefit the most from the installation of VLTs, the need for assistance at other tracks was not as critical even though those tracks could benefit from the additional business that VLTs would bring (*see generally Matter of Roosevelt Raceway v County of Nassau*, 18 N.Y.2d 30, 40-41, 218 N.E.2d 539, 271 N.Y.S.2d 662 [1966], *appeal dismissed* 385 U.S. 453, 17 L. Ed. 2d 510, 87 S. Ct. 614 [1967]). This justification forecloses plaintiffs' equal protection challenge.

B. *Application of Lottery Revenues to Education*

Plaintiffs argue that part C of chapter 383 of the Laws of 2001, in requiring [**75] vendors to dedicate a portion of their fees to breeding funds and for the purpose of enhancing purses at the racetracks where VLTs are located (*see* L 2001, ch 383, part C, § 2; Tax Law § 1612 [c] [1]), violates the constitutional mandate that "the net proceeds" of state-run lotteries "be applied exclusively to or in aid or support of education in this state" (N.Y. Const., art I, § 9 [1]). Plaintiffs concede that a vendor fee is a legitimate cost of operating a lottery and may be deducted from net lottery proceeds consistent with N.Y. Constitution, article I, § 9. [***76] Nevertheless, they challenge the vendor fee here on the ground that it is not based solely on the cost of housing VLTs because a portion of that fee is set aside for reinvestment in enhanced purses and breeding funds. 15

Defendants contend that the reinvestment requirement cannot be considered a deduction from [***77] the "net proceeds" within **[*98]** the meaning of N.Y. Constitution, article I, § 9 because the reinvestment comes from the vendor fee and the ultimate disposition of that fee is not subject to the constitutional limitation that net proceeds be applied to support education. We disagree and hold instead that ***HN43*** the Legislature lacks the discretion to direct that lottery revenues may be used for noneducational purposes.

As defendants observe, ***HN44*** the NY Constitution does not define "net proceeds," but the term is generally defined by the courts as gross proceeds less any expenses or costs that may be properly deducted (*see Matter of Boerner*, 58 Misc 2d 144, 147, 294 N.Y.S.2d 725 [1968]; *Matter of von Seidlitz*, 6 Misc 2d 583, 584, 161 N.Y.S 2d 195 [1957]; *see also* Black's Law Dictionary 1222 [7th ed 1999] [defining "net proceeds" as "(t)he amount received in a transaction minus the costs of the transaction (such as expenses and commissions)"]). While we agree with the parties that vendor fees generally constitute a necessary administrative cost of housing and installing VLTs, those fees may not be artificially inflated to include expenses that are not necessary administrative costs. [***78] We are unpersuaded that reinvestment in breeding funds and enhanced purses is a necessary expense of the vendors housing VLTs, unlike such costs as space, staffing and security needs. In our view, by providing that 40%-50% of the vendor fee is to be reinvested in breeding funds and enhanced purses, the Legislature has signaled that the vendors themselves do not require that portion of the fee as compensation. Simply put, ***HN45*** reinvestment in breeding funds and enhanced purses is not a reasonable, necessary expense or cost of maintaining VLTs and, thus, funds dedicated for that purpose cannot be deducted from the net proceeds of the lottery without violating the requirement in N.Y. Constitution, article I, § 9 (1) that lottery revenues be used to support education.

Fundamentally, defendants err in asserting that this allocation of revenue is a permissive legislative judgment. To be sure, the NY Constitution provides that "the net proceeds of [state-run lotteries] shall be applied exclusively to or in aid or support of education in this state *as the [**76] [L]egislature may prescribe*" (N.Y. Const., art I, § 9 [1] [emphasis added]). ***HN46*** The phrase "as the **[*99]** [L]egislature may prescribe" does give the [***79] Legislature discretion in the allocation of the "net proceeds" of lottery revenues. This discretion, however, is subject to the limitation that net proceeds must go "exclusively to or in aid or support of education" (N.Y. Const., art I, § 9 [1]). 16 Here, defendants make no argument that the reinvestment in breeding funds and enhanced purses somehow aids or supports education, except to the extent that such reinvestment *may* draw more people to racetracks who *might*, in turn, use VLTs and generate more lottery revenues. Such a tenuous, incidental connection between the reinvestment requirement and education simply does not satisfy the constitutional requirement that net proceeds be devoted to educational purposes.

[***80] Indeed, the Senate and Assembly debates on part C of chapter 383 indicate that the purpose of the reinvestment requirement was not to benefit education, but to contribute to the enhancement of horse racing, specifically, and agriculture, generally (*see* New York State Senate Debate on Senate Bill S 5828, Oct. 24, 2001, at 11599; New York State Assembly Debate on Assembly Bill A 9459, Oct. 25, 2001, at 22-23). Contrary to defendants' argument, the racing industry is not merely an indirect beneficiary of part C of chapter 383; instead, the racing industry is a direct recipient of lottery revenues via the reinvestment requirement. In our view, a holding that the Legislature has the discretion to divert a portion of lottery revenues to noneducational purposes, regardless of the laudable nature of those purposes, would defeat the requirement that the amendment authorizing state-run lotteries be construed narrowly, as an exception to the general ban on gambling (*see generally Molina v Games Mgt. Servs.*, 58 N.Y.2d 523, 529, 449 N.E.2d 395, 462 N.Y.S.2d 615 [1983], *supra*; *Matter of New York Racing Assn. v Hoblock*, 270 A D 2d 31, 33-34, 704 N.Y.S.2d 52 [2000], *supra*; *People v Kim*, 154 Misc 2d 346, 351, 585 N.Y.S.2d 310 [1992], *supra* [***81]), as well as the spirit of the amendment, which requires that lottery revenues be earmarked for the support of education (*see* New York State Senate Debate on Senate Bill S 289, June 14, 1965, at 4764, 4787-4788; New York State Senate Debate on Senate Bill S 897, Feb. 7, 1966, at 251, 290, 300-301).

The cases relied upon by defendants in arguing that the reinvestment of revenues in breeding funds and enhanced **[*100]** purses does not violate N.Y. Constitution, article I, § 9 are distinguishable (*see Finger Lakes Racing Assn. v New York State Off-Track Pari-Mutuel Betting Commn.*, 30 N.Y.2d 207, 217, 282 N.E.2d 592, 331 N.Y.S.2d 625 [1972], *supra*; *Saratoga Harness Racing Assn. v Agriculture & N.Y. State Horse Breeding Dev. Fund*, 22 N.Y.2d 119, 122-123, 238 N.E.2d 730, 291 N.Y.S.2d 335 [1968]). Those cases were decided pursuant to the 1939 constitutional amendment permitting pari-mutuel betting on horse racing. Specifically, that amendment authorizes "pari-mutuel betting on horse races as may be prescribed by the [L]egislature and from which the state shall derive *a reasonable revenue for the support of government*" (N.Y. Const., art I, § 9 [1] [emphasis added]). The cases interpret the

language "reasonable revenue for the support of government" (N.Y. Const., art I, § 9 [1]; [***82], *see Finger Lakes Racing Assn. v New York State Off-Track Pari-Mutuel Betting Commn., supra* at [**77], 217 [concluding that distribution of a portion of horse racing revenues to municipalities constituted reasonable revenue for political subdivisions of state government]; *Saratoga Harness Racing Assn. v Agriculture & N.Y. State Horse Breeding Dev. Fund, supra* at 122-123 [concluding that the statute does not require that all revenue in excess of expenses be devoted to the direct support of the government]). They do not involve the constitutional requirement that "net proceeds" from state-run lotteries "be applied exclusively to or in aid or support of *education*" (N.Y. Const., art I, § 9 [1] [emphasis added]).

We note that if the amendment had been intended to require that only such portion of lottery revenues as the Legislature deemed reasonable be dedicated to education, it could have included the same "reasonable revenue" language used in the 1939 amendment permitting pari-mutuel betting on horse racing. The lottery amendment, however, refers to net proceeds, not reasonable revenue. Moreover, although the breeding funds [***83] are "the instrument through which the Legislature has chosen to effectuate [the] legitimate public interest and purpose" of applying a certain portion of the revenues from racing to the "general improvement of the sport and the facilities used" (*Saratoga Harness Racing Assn. v Agriculture & N.Y. State Horse Breeding Dev. Fund, supra* at 123), the distribution of lottery revenues to these breeding funds or to enhanced purses cannot be said to aid or support education, as required by the amendment authorizing state-run lotteries. Hence, HN47 to the extent that the statute artificially inflates vendor fees and then requires that a portion of those fees be applied to noneducational **[*101]** purposes, part C of chapter 383 of the Laws of 2001 violates N.Y. Constitution, article I, § 9 (1). 17

[***84] Defendants assert that even if racetracks may not be directed to transfer a portion of their vendor fees to purses and breeding funds under N.Y. Constitution, article I, § 9, the invalid portion of part C should be severed. As defendants observe, part C provides that HN48 "[i]f any clause, sentence, provision, paragraph, subdivision, section, or part of this act" is found invalid, the remainder of the act "shall not be affected" (L 2001, ch 383, part C, § 3). Defendants urge us, in the event of a holding that part C violates N.Y. Constitution, article I, § 9, to sever only the invalid reinvestment portion of the legislation.

HN49 In determining whether an invalid portion may be severed and the remainder of the statute preserved, the test is "'whether the [L]egislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether. [**78] The answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots'" (*Matter of Westinghouse Elec. Corp. v Tully*, 63 N.Y.2d 191, 196, 470 N.E.2d 853, 481 N.Y.S.2d 55 [1984], [***85] quoting *People ex rel. Alpha Portland Cement Co. v Knapp*, 230 N.Y. 48, 60, 129 N.E. 202 [1920], *cert denied* 256 U.S. 702, 65 L. Ed. 1179, 41 S. Ct. 624 [1921]). Here, the inclusion of the severability clause indicates that the Legislature would have wished the statute enforced with the invalid portion severed (*see* L 2001, ch 383, part C, § 3; *Matter of New York State Superfund Coalition v New York State Dept. of Envtl. Conservation*, 75 N.Y.2d 88, 94, 550 N.E.2d 155, 550 N.Y.S.2d 879 [1989]). Were we to excise only the reinvestment portion of part C, however, the vendors would simply retain the inflated fee. That is, if the portion of part C, § 2 imposing the reinvestment requirement were struck from the statute, the revenues dedicated to enhanced purses and breeding funds would not be paid into the state treasury **[*102]** to the credit of the state lottery fund created by State Finance Law § 92-c and earmarked for education, along with the balance of revenue generated by VLTs. Instead, under the remaining language of part C, the vendors would retain a fee that the Legislature, in directing that a portion should be reinvested elsewhere, has determined those vendors do not require to [***86] assure the availability of VLTs for public convenience (*see generally* Tax Law § 1604 [a] [2]). Such a result cannot stand.

In short, merely severing the reinvestment portion of the legislation does not cure the constitutional defect because the statute was drafted in such a way that severance would result in distributing to vendors the funds that are constitutionally required to be earmarked for education. Nor can we substitute our judgment for that of the Legislature by establishing a fee percentage that we would deem reasonable. We conclude that HN50 the first two paragraphs of part C, § 2 of chapter 383 of the Laws of 2001, amending Tax Law former § 1612 by adding paragraphs (a) (5) (A) and (B) and setting forth the distribution of VLT revenue and directing vendors to reinvest a portion of their fee are inextricably intertwined. As a practical matter, the language of the statute regarding reinvestment cannot be removed so as to permit the statute to operate in a constitutional manner. Further, severing the entire revenue distribution scheme as set forth in Tax Law former § 1612 (a) (5) (A) and (B), while leaving the remainder of the statute intact, [***87] would essentially leave the statute inoperable--the result of severance would be either an inflated vendor fee or no fee at all. Under these circumstances, severance is inappropriate. "'It would be pragmatically impossible, as well as jurisprudentially unsound, for us to attempt to identify and excise particular provisions while leaving the remainder ... intact, since the product of such an effort would be a regulatory scheme that ... the Legislature ... [never] intended'" (*Matter of New York State Superfund Coalition v New York State Dept. of Envtl. Conservation, supra* at 94, quoting *Boreali v Axelrod*, 71 N.Y.2d 1, 14, 517 N.E.2d 1350, 523 N.Y.S.2d 464 [1987]). We therefore must modify Supreme Court's order to declare the entirety of part C of chapter 383 unconstitutional.

III. *Multistate Lottery*

Part D of chapter 383 of the Laws of 2001 HN51 directs the Division to operate and administer within the state a multijurisdiction and out-of-state lottery in cooperation with a government-authorized **[*103]** lottery of one or more jurisdictions (*see* L 2001, ch [**79] 383, part D, § 1; Tax Law § 1604 [a]). Part D further authorizes the Director of the Lottery [***88] to enter into agreements for a multistate game, which may include "a combined drawing, a combined prize pool, the transfer of sales and prize monies to other jurisdictions as may be necessary, and such other cooperative arrangements as the director deems necessary or desirable" (L 2001, ch 383, part D, § 3; Tax Law § 1617). Pursuant to the statute, the Division entered into an agreement (hereinafter the Mega Millions agreement), along with the operators of lotteries in nine other states, 18 for the joint operation of a multistate lottery game known as Mega Millions or other games that may be offered from time to time. Under the Mega Millions agreement, the parties share operating costs equally, liability for prize payments is determined by the percentage of the state's Mega Millions sales as a proportion of the total sales, and revenues generated within each state that are not allocated to prizes or joint operating expenses remain within the state for distribution in accordance with the state's constitutional, statutory and regulatory requirements.

[***89] Plaintiffs assert that part D, as implemented by the Mega Millions agreement, violates N.Y. Constitution, article I, § 9 because the multistate game is not "operated" by New York alone, but by several states. Further, plaintiffs challenge part D on the ground that the "net proceeds," within the meaning of article I, § 9, raised by other states participating in the multistate lottery cannot be dedicated exclusively to education within this state. We are not persuaded by plaintiffs' arguments.

As discussed above, N.Y. Constitution, article I, § 9 (1) *HN52* generally prohibits gambling, but exempts state-run lotteries, among other things, from the ban. The NY Constitution permits "lotteries *operated by the state* and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the [L]egislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the [L]egislature may prescribe" (N.Y. Const., art I, § 9 [1] [emphasis added]). Under the Mega Millions agreement, while certain joint functions and necessary operating costs are shared, New York controls the operation of the lottery within its borders. New York [***90] determines the allocation of net proceeds raised within the state, the manner in which Mega Millions **[*104]** tickets are sold and distributed within the state, the commissions paid for the sale of tickets, and the advertising and marketing of Mega Millions. The agreement expressly provides that "[i]n the event of [a] conflict between this [a]greement and the constitution, statutes, rules or regulations of any [p]arty [l]ottery, the [p]arty [l]ottery's constitution, statutes, rules and regulations shall control." That is, New York law will control in the state should there be a conflict with a provision of the agreement. Further, all claims regarding tickets purchased in New York must be resolved according to New York law and the state is not responsible for the negligent acts or omission of the officers, appointed officials, employees or agents of any other state.

Under these circumstances, it cannot be said that New York has ceded control of the multistate lottery. Although New York has contracted in the Mega Millions agreement to reimburse other states for the performance of administrative functions such as possession and transfer of grand prize funds and the actual drawing of the multistate lottery [***91] numbers, *HN53* nothing [**80] in the NY Constitution forbids the Division from contracting with outside parties to perform administrative functions. N.Y. Constitution, article I, § 9 (1) requires only that authorized lotteries be "operated by the state," i.e., supervised or controlled by the state, as opposed to a private entity (*see generally* 3 Lincoln, The Constitutional History of New York, at 34-37 [discussing the historical distinction between public and private lotteries]); it does not mandate that the state alone must perform all aspects of lottery operation (*cf.* 2002 SC Ops Atty Gen, 2002 WL 735341, 2002 SC AG LEXIS 56 [Mar. 25, 2002] [Where the South Carolina Constitution provides that "(*o*)*nly* the (s)tate may conduct lotteries" (*see* S.C. Const., art XVII, § 7 [emphasis added]), the state may not delegate any functions in operation of lottery to private entities or other states]). Indeed, the Division routinely contracts for equipment, technology and services needed in the operation of other lottery games and plaintiffs do not dispute that such delegation of administrative functions in other games is proper.

Contrary to plaintiffs' argument, we perceive no [***92] significant distinction between the state's contracting with private parties to perform administrative functions and similar contracts with other states (*see State ex rel. Ohio Roundtable v Taft*, 2003 WL 21470307, *5-6, 2003 Ohio App. LEXIS 3042, *15-18 [2003], *appeal denied* 100 Ohio St. 3d 1484, 2003 Ohio 5992, 798 N.E.2d 1093 [2003]). Although plaintiffs assert that New York may not treat its coequal **[*105]** sovereigns in the same manner that it treats private vendors, we note that New York may withdraw from the Mega Millions agreement upon six months' notice or at any time if the multistate game is conducted in a manner that violates New York law. We conclude that even under a narrow interpretation of the constitutional provision, New York retains sufficient supervision over the multistate lottery, through the Mega Millions agreement and regulations issued pursuant to that agreement (*see* 21 NYCRR part 2806), to satisfy the constitutional requirement that a lottery be "operated by the state" (N.Y. Const., art I, § 9 [1]; *see generally Tichenor v Missouri State Lottery Commn.*, 742 S.W.2d 170, 174 [1988] [***93] [Multistate lottery is permissible under a constitutional provision authorizing establishment of a "Missouri state lottery"]; 1990 Del Ops Atty Gen No. 90-I019, 1990 WL 482340, *1, 1990 Del. AG LEXIS 3, *1 [Nov. 19, 1990] [Multistate lottery, as conducted by unincorporated association of state agencies through member lotteries' on-line systems is in accordance with Delaware constitutional requirement that lotteries be "under [s]tate control" (Del. Const., art II, § 17 [a])]; 1987 Kan Ops Atty Gen No. 87-16, 1987 WL 290413, *1, 1987 Kan. AG LEXIS 178, *1 [Jan. 29, 1987] [Multistate lottery is not precluded by Kansas constitutional provision allowing "state-owned and operated lottery" (Kan. Const., art XV, § 3c)]). In sum, nothing in the NY Constitution mandates that the lottery be operated exclusively by New York. In fact, the legislative history of the amendment permitting a lottery indicates that the specific details of the operation of the lottery were to be determined by the Legislature (*see e.g.* New York State Senate Debate on Senate Bill S 897, Feb. 7, 1966, at 319, 331-332, 363; New York State Senate Debate on Senate Bill S 289, June 14, 1965, at 4796, 4807-4809).

Similarly, plaintiffs err [***94] in asserting that New York has yielded an essential element of its sovereignty by agreeing to delegate administrative functions to other states' agencies. As explained above, New York law controls in the event of a conflict with a provision of the Mega Millions agreement. We note, in addition, that the Mega Millions agreement provides that New York "does not waive the defense of Sovereign [**81] Immunity … which [states] may have relating to disputed ticket claims and/or player prize claims, nor does [it] pledge the credit (if applicable) of the respective states in relation to such disputed claims." The cases relied upon by plaintiffs in arguing that interstate entities, public authorities and public benefit corporations are not "the **[*106]** state" are inapposite because, here, the Mega Millions agreement creates no such entity (*cf. Hess v Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 40-51, 130 L. Ed. 2d 245, 115 S. Ct. 394 [1994]; *Collins v Manhattan & Bronx Surface Tr. Operating Auth.*, 62 N.Y.2d 361, 366, 465 N.E.2d 811, 477 N.Y.S.2d 91 [1984]; *John Grace & Co. v State Univ. Constr. Fund*, 44 N.Y.2d 84, 88, 375 N.E.2d 377, 404 N.Y.S.2d 316 [1978]; *Braun v State of New York*, 203 Misc. 563, 564-565, 117 N.Y.S.2d 601 [1952]). [***95]

Finally, we reject plaintiffs' contention that the net proceeds from the multistate lottery are not devoted "exclusively to or in aid or support of education in this state" (N.Y. Const., art I, § 9 [1]). Plaintiffs challenge the Mega Millions agreement on the ground that monies transferred pursuant to it by New York for operational expenses and prizes promote the operation of lotteries in other states that generate funds for purposes other than education in this state. The central premise of this argument--that it is improper to deduct from net proceeds costs that are incurred by a "central administrative apparatus" operating the multistate lottery in other states--mischaracterizes the nature of the Mega Millions agreement. The administrative costs paid by New York do not go to a central administrative apparatus that promotes the lotteries in other states--there is no such central entity operating the multistate lottery. Instead, the funds in question are transferred by New York to other states to reimburse those states for actual operational expenses incurred in providing services to the Division in conjunction with the multistate game.

It bears emphasizing that the [***96] funds transferred by New York to other states may be used only for payment of jackpot prizes and reimbursement of preapproved operational expenses. New York funds simply are not used by other states to reduce their administrative costs or to fund their governmental purposes, as plaintiffs allege. Moreover, unlike the revenue distribution system established under part C of chapter 383 of the Laws of 2001, there is no evidence that the administrative expenses approved in connection with the multistate game are artificially inflated to include expenses that are not necessary for the operation of the game itself. Accordingly, given that the net revenues of the multistate game--the gross proceeds less expenses or costs that may be properly deducted (*see Matter of Boerner*, 58 Misc. 2d 144, 147, 294 N.Y.S.2d 725 [1968], *supra*; *Matter of von Seidlitz*, 6 Misc. 2d 583, 584, 161 N.Y.S.2d

195 [1957], *supra*; Black's Law Dictionary 1222 [7th ed 1999])--remain in New York and are dedicated to education in this state, as required by the lottery exception in N.Y. Constitution, article I, § 9, plaintiffs' challenges in this regard to part D of chapter 383 fail.

[*107] *Conclusion*

[***97] We determine that parts B and D of chapter 383 of the Laws of 2001 are constitutional as challenged. While VLTs themselves constitute a valid "lottery" within the meaning of N.Y. Constitution, article I, § 9, the revenue distribution scheme set forth in part C, directing vendors to reinvest a portion of their fee in breeding funds and enhanced horse-racing purses, violates the constitutional requirement that "the net proceeds" of state-operated [**82] lotteries "be applied exclusively to or in aid or support of education in this state as the [L]egislature may prescribe" (N.Y. Const, art I, § 9 [1]), rendering part C invalid.

Cardona ▾, P.J., Peters ▾, Spain ▾ and Carpinello ▾, JJ., concur.

Ordered that the order is modified, on the law, without costs, by reversing so much thereof as declares part C of chapter 383 of the Laws of 2001 constitutional; part C of chapter 383 of the Laws of 2001 declared unconstitutional; and, as so modified, affirmed.

Footnotes

1▾ The Court also concluded that Indian tribes are not indispensable parties to litigation challenging the Governor's authority to enter into tribal-state compacts (*Saratoga County Chamber of Commerce v Pataki*, *supra* at 819-822). Although defendants argue that the decision was incorrect, their petition for a writ of certiorari has been denied (*Saratoga County Chamber of Commerce v Pataki*, 157 L. Ed. 2d 430, 540 U.S. 1017, 124 S. Ct. 570 [2003]). Therefore, we do not address defendants' argument that the tribes are indispensable parties in this action.

2▾ The term "Indian lands" is defined as "all lands within the limits of any Indian reservation[,] and … any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power" (25 U.S.C. § 2703 [4]). Gaming on lands acquired after October 17, 1988 by the Secretary of the Interior and held in trust for the benefit of an Indian tribe--other than land within or contiguous to a reservation--is sharply curtailed (*see* 25 U.S.C. § 2719 [a]). As relevant here, gaming is permitted on after-acquired lands only if the Secretary finds, after consultation, that such gaming "would be in the best interest of the Indian tribe [and] would not be detrimental to the surrounding community," and the governor of the state concurs with the Secretary's determination; or the lands are taken in trust as part of (i) a land claim settlement, (ii) an initial reservation, or (iii) the restoration of Indian lands (25 U.S.C. § 2719 [b] [1] [B]).

3▾ To the extent that defendants rely upon *Mashantucket Pequot Tribe v State of Connecticut* (*supra*) for the proposition that Indian tribes may engage in *all* types of class III gaming if a state permits *any* type of class III gaming, they misinterpret that case. In *Mashantucket*, the Second Circuit held that Connecticut must negotiate in good faith with tribes that seek to offer the same types of casino games of chance that the state permitted nonprofit organizations to conduct (*id.* at 1029-1032). We note that in its analysis, the court relied upon a statement by the Eighth Circuit that "'the legislative history reveals that Congress intended to permit *a particular gaming activity*, even if conducted in a manner inconsistent with state law, if the state law merely regulated, as opposed to completely barred, that *particular gamingactivity*'" (*id.* at 1029, quoting *United States v Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 365 [1990] *supra* [emphasis added]). Contrary to defendants' arguments, we conclude that *Mashantucket* should be read as holding that the "permits such gaming" language in 25 U.S.C. § 2710 (d) (1) (B) refers to the state allowing the *specific* gaming activities at issue (*see Coeur d' Alene Tribe v State of Idaho*, 842 F. Supp. 1268, 1277 [1994], *supra*; *Seminole Tribe of Fla. v Florida*, 1993 WL 475999, 1993 U.S. Dist. LEXIS 21387 [SD FLa, Sept. 22, 1993, Marcus, J.]; *cf. Artichoke Joe's Cal. Grand Casino v Norton*, 353 F.3d 712, 716-717 [2003], *supra* [stating that in *Mashantucket*, the Second Circuit agreed with the argument that where a state permits other types of class III gaming, it cannot refuse to negotiate over any type of class III gaming];*Yavapai-Prescott Indian Tribe v State of Arizona*, 796 F. Supp. 1292, 1296 [1992] [same]).

4▾ In addition to these five amendments, article I, § 9 was amended in 2001 to render it gender neutral, as was the rest of the Constitution.

5▾ It is worth noting that the Legislature was not unfamiliar with the term "game of chance" or "contest of chance" at the time that the 1975 amendment was approved and the General Municipal Law was enacted (*see* Penal Law § 225.00; Donnino, Practice Commentary, **McKinney's** Cons Laws of NY, Book 39, Penal Law art 225, at 196-197). In fact, the term has an extensive legal history (*see People ex rel. Ellison v Lavin*, 179 N.Y. 164, 168-171, 71 N.E. 753, 18 N.Y. Cr. 480 [1904]) and has been interpreted to include such games as "stud" poker (*see People v Dubinsky*, 31 N.Y.S.2d 234, 237 [Ct of Special Sessions 1941])--a class III game under IGRA (*see* 25 U.S.C. § 2703 [8]).

6▾ Because plaintiffs do not challenge the constitutionality of any of the specific games contemplated by the Seneca Nation compact and none of the parties provides any analysis of how each game is played in their briefs before us, we do not address whether any particular game listed, as opposed to class III gaming in general, is a "game of chance" within the meaning of N.Y. Constitution, article I, § 9 or General Municipal Law article 9-A. Although we recognize that the determination of whether a state "permits such gaming" should be made on a game-by-game basis (*see Saratoga County Chamber of Commerce v Pataki*, 100 N.Y.2d 801, 843, 798 N.E.2d 1047, 766 N.Y.S.2d 654 n 10 [2003], *supra* [Read, J., dissenting]), in the absence of any challenge or analysis by the parties, we assume that the particular class III games in the compact are constitutional for the purposes of this decision only and confine our ruling to the issue advanced before us--whether the ban in N.Y. Constitution, article I, § 9 on "commercialized gambling" amounts to a prohibition of *all* class III gaming for purposes of IGRA.

7 Plaintiffs make much of our statement in *Saratoga County Chamber of Commerce v Pataki* (293 A.D.2d 20, 740 N.Y.S.2d 733 [2002], *affd* 100 N.Y.2d 801, 798 N.E.2d 1047, 766 N.Y.S.2d 654 [2003], *cert denied* 157 L. Ed. 2d 430, 540 U.S. 1017, 124 S. Ct. 570 [2003]) that "the commercialized Las Vegas style gambling authorized by the compact is the antithesis of the highly restricted and 'rigidly regulated' forms of gambling permitted by the NY Constitution ... and New York's established public policy disfavoring gambling" (*id.* at 24, quoting N.Y. Const., art I, § 9 [2]). In *Saratoga*, we addressed only the issue of whether the Governor had the authority to execute tribal-state compacts in the absence of legislative approval (*id.* at 21). Thus, the statement on which defendants rely was dictum and their reliance is misplaced. In any event, we also noted in that case that the state's "restrictive statutes and constitutional provisions ... , although generally banning gambling and at all times evidencing a strong policy against commercialized gambling, may have unwittingly opened the door to Indian casino gaming through the subsequently enacted IGRA" (*id.* at 25).

8 Plaintiffs observe that 25 U.S.C. §§ 232 and 233 grant New York criminal and civil jurisdiction over Indian lands and suggest that this authority extends to gaming activities on Indian lands. To the extent that 25 U.S.C. §§ 232 and 233 conflict with IGRA--i.e., insofar as those statutes provide that the state retains authority over gaming other than that agreed to in a tribal-state compact--we conclude that IGRA impliedly repealed those statutes (*see generally State of Rhode Island v Narragansett Indian Tribe*, 19 F.3d 685, 703-705 [1994], *cert denied* 513 U.S. 919, 130 L. Ed. 2d 211, 115 S. Ct. 298 [1994], abrogated by statute as stated in *Narragansett Indian Tribe v National Indian Gaming Commn.*, 332 U.S. App. D.C. 429, 158 F.3d 1335, 1337-1338 [1998]).

9 The parties indicate that each of the jurisdictions authorized to approve the operation of VLTs at local racetracks has now done so.

10 As amended, the Tax Law caps the operational and administrative costs for the Division at 10% and sets the vendor fee at a flat rate of 29% (*see* Tax Law § 1612 [b]). The statute has also been amended to alter the reinvestment percentages for purses and breeding funds. Reinvestment was initially set at 35% in the first year and 45% in subsequent years for purses, and at no less than 5% for breeding funds (*see* L 2001, ch 383, part C, § 2). Reinvestment percentages for purses are now set at 25.9% for the first three years, 26.7% in the fourth and fifth years and 34.5% in subsequent years; for breeding funds, the rate is set at 4.3% in the first five years and 5.2% for subsequent years (*see* Tax Law § 1612 [c] [1]).

11 "Contest of chance" is defined as "any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein" (Penal Law § 225.00 [1]).

12 The debate of the Assembly on the amendment evidently was not transcribed (*see* 1981 Ops Atty Gen 68, at 75).

13 The parties do not dispute that the games offered on VLTs involve pure chance, in the sense that electronic tickets are randomly drawn with no element of skill involved. Therefore, it is not necessary for us to decide whether a lottery may incorporate any element of skill (*see generally People ex rel. Ellison v Lavin*, 179 N.Y. 164, 170-171, 71 N.E. 753, 18 N.Y. Cr. 480 [1904]; Donnino, Practice Commentary, **McKinney's** Cons Laws of NY, Book 39, Penal Law art 225, at 196).

14 Similarly, the cases from other states relied upon by plaintiffs involve gaming that is distinguishable from VLTs, such as video poker and other games that did not involve multiple-participant drawings or tickets (*see Johnson v Collins Entertainment Co.*, 333 S.C. 96, 104, 508 S.E.2d 575, 579 [1998], *supra*; *Crochet v Priest*, 326 Ark. 338, 345-347, 931 S.W.2d 128, 132-133 [1996]; *Poppen v Walker*, 520 N.W.2d 238, 247-248 [1994], *supra*) or do not address the merits of the issue (*see State of West Virginia ex rel. Mountaineer Park v Polan*, 190 W. Va. 276, 283-285, 438 S.E.2d 308, 315-317 [1993]; *cf. State ex rel. Cities of Charleston, Huntington & Its Counties of Ohio & Kanawha v West Virginia Econ. Dev. Auth.*, 214 W. Va. 277, 588 S.E.2d 655, 665-670 [2003]).

15 Breeding funds are public benefit corporations that are statutorily required to distribute assets to a variety of entities, including 4-H societies, New York State exposition breeding farms, and county and town agriculturalsocieties (*see* Racing, Pari-Mutuel Wagering and Breeding Law § 332). The vendor fee originally was set by the Division at 25% of the total sales remaining after payout of prizes (*see* L 2001, ch 383, part C, § 2 [permitting the Division to establish a vendor's fee of 12%-25% of the revenue remaining after payout for prizes]). The statute has been amended to set the vendor fee at 29% (*see* Tax Law § 1612 [b]).

16 In this regard, Tax Law § 1612 (b) provides that lottery revenues are to be paid into the state treasury to the credit of the state lottery fund created by State Finance Law § 92-c, which then earmarks the funds for educational purposes.

17 Our analysis is not dependent on the particular percentages of the vendor fee to be reinvested. Instead, we conclude that the Legislature lacks the authority to direct *any* reinvestment in purses or breeding funds under N.Y. Constitution, article I, § 9. Thus, the Legislature's amendments to Tax Law § 1612 modifying the percentages of the vendor fee to be reinvested and the amount of the vendor fee itself (*see* Tax Law § 1612 [c] [1]; L 2003, ch 63, part W, §§ 2, 3; ch 62, part Z3, § 1) do not render the issue moot or materially alter our analysis (*cf. Flanders Assoc. v Town of Southampton*, 198 A.D.2d 328, 328, 603 N.Y.S.2d 176 [1993]; *Matter of Schulz v State of New York*, 182 A.D.2d 3, 4-5, 587 N.Y.S.2d 444 [1992], *appeal dismissed* 80 N.Y.2d 924, 602 N.E.2d 1126, 589 N.Y.S.2d 310 [1992], *lv denied* 80 N.Y.2d 761, 607 N.E.2d 817, 592 N.Y.S.2d 670

[1992];*Lake v Regan*, 135 A.D.2d 312, 316, 525 N.Y.S.2d 425 [1988], *appeal dismissed* 72 N.Y.2d 840, 526 N.E.2d 46, 530 N.Y.S.2d 555 [1988], *lv denied* 72 N.Y.2d 807, 529 N.E.2d 424, 533 N.Y.S.2d 56 [1988]).

18 The other states participating at the time were Georgia, Illinois, Maryland, Massachusetts, Michigan, New Jersey, Ohio, Virginia and Washington.

Flynn v. Prudential Ins. Co., 207 N.Y. 315

Flynn v. Prudential Ins. Co., 207 N.Y. 315

Copy Citation

Court of Appeals of New York

January 15, 1913, Submitted ; February 4, 1913, Decided

No Number in Original

Reporter

207 N.Y. 315 * | 100 N.E. 794 ** | 1913 N.Y. LEXIS 1274 ***

Minnie Flynn, Respondent, v. The Prudential Insurance Company of America, Appellant

Prior History: [***1] Appeal from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered July 31, 1911, in favor of plaintiff upon the submission of a controversy under section 1279 of the Code of Civil Procedure.

Flynn v. Prudential Ins. Co., 145 App. Div. 704, reversed.

Disposition: Judgment reversed, etc.

Core Terms

infant's, policies, insured

Case Summary

Procedural Posture

Insurance company appealed from a judgment of the Appellate Division of the Supreme Court in the third judicial department (New York) in favor of plaintiff in suit brought to recover proceeds of insurance policies on plaintiff's daughter which insurance company argued to be invalid under N.Y. Ins. Law § 55.

Overview

Plaintiff took out multiple insurance policies on the life of her daughter, each with the maximum benefit allowed by law. N.Y. Ins. Law § 55 prohibits insurance policies on the life of a child except by a parent and then limited to a certain amount. When plaintiff's daughter died, the first such policy was paid. The defendant insurance company refused to pay its policies saying they were void under the statute limiting the amount of insurance on an infant's life. Plaintiff prevailed below, and defendant insurance company appealed. The court reversed, saying that the purpose of the statute was to limit the amount of insurance available to prevent anyone from benefiting from bringing about the death of a child. The construction of the statute which would limit the amount of one policy but permit multiple policies would defeat the purpose of the limiting provision and render it absurd.

Outcome

The court reversed the decision below, holding that the statute limited the total amount of insurance which could be paid upon the death of a child whether by a single or multiple policies, because this was the only construction which advanced the purpose of the statute.

▼ LexisNexis® Headnotes

Insurance Law > ... > Life Insurance > Insurable Interests > General Overview
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HN1 **Life Insurance, Insurable Interests**
See N.Y. Ins. Law § 55. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Governments > Legislation > Interpretation

HN2 **Legislation, Interpretation**
Two rules of construction are well settled: First. Every interpretation that leads to an absurdity should be rejected. Second. In the interpretation of statutes, the great principle which is to control is the intention of the legislature in passing the same, which intention is to be ascertained from the cause or necessity of making the statute as well as other circumstances. A strict and literal interpretation is not always to be adhered to, and where the case is brought within the intention of the makers of the statute, it is within the statute, although by a technical interpretation it is not within its letter.
More like this Headnote

Shepardize - Narrow by this Headnote (2)

▼ Headnotes/Summary

Headnotes

Insurance (life) -- restriction on insurance on life of a child -- Insurance Law, section 55, construed.

Syllabus

The provision of the Insurance Law (Cons. Laws, ch. 28, § 55) fixing the amount of insurance which may be taken on the life of a child by a person liable for its support does not alone restrict the amount of insurance by a single policy, but limits the total amount of such insurance.

The nature of the controversy and the facts, so far as material, are stated in the opinion.

Counsel: *H. C. Mandeville* for appellant. The Laws of 1892, chapter 690, section 55, limit the amount of insurance to be obtained upon the life of an infant to the sums named in the schedule therein contained and by reason of the earlier insurance in force the two policies of the defendant are absolutely void. (*People ex rel. Swift* v. *Luce*, 97 N. E. [***2] Rep. 850; *People ex rel. Wood* v. *Lacombe*, 99 N. Y. 43; *Spencer* v. *Myers*, 150 N. Y. 269; *People* v. *N. Y. C. R. R. Co.*, 13 N. Y. 78; *People* v. *Fitzgerald*, 180 N. Y. 269; *People ex rel. 23d St. Ry. Co.* v. *Comr. of Taxes*, 95 N. Y. 554; *Hudson Iron Works* v. *Alger*, 54 N. Y. 173; *Bell* v. *Mayor, etc.*, 105 N. Y. 139; *Meade* v. *Stratton*, 87 N. Y. 493; *People* v. *Feitner*, 168 N. Y. 360; *Chase* v. *N. Y. C. R. R. Co.*, 26 N. Y. 523.)

Alexander C. Eustace for respondent. Section 55 of the Insurance Law (L. 1892, ch. 690) is in derogation of the common law and should, therefore, be strictly construed. (*Grattan* v. *Nat. Life Ins. Co.*, 15 Hun, 74; *Geoffrey* v. *Gilbert*, 5 App. Div. 98, 100; 154 N. Y. 741; *Warnock* v. *Davis*, 104 U.S. 775; *Mitchell* v. *Union Life Ins. Co.*, 45 Me. 104; *Loomis* v. *E. L. & H. Ins. Co.*, 6 Gray [Mass.], 396; *Dean* v. *Met. El. Ry. Co.*, 119 N. Y. 510; *McCluskey* v. *Cromwell*, 11 N. Y. 593; *Burnside* v. *Whitney*, 21 N. Y. 148; *People ex rel. Hatzel* v. *Hall*, 80 N. Y. 7; *Bertles* v. *Nunan*, 92 N. Y. 153; *People* v. *Palmer* [***3] , 109 N. Y. 110; *Fitzgerald* v. *Quinn*, 109 N. Y. 441; *Village of Stamford* v. *Fisher*, 140 N. Y. 187; *Johnson* v. *So. Pac. Co.*, 117 Fed. Rep. 462.) The fair and logical construction of the language of section 55 of the Insurance Law, reading the section as a whole, is that the legislature intended the phraseology in respect of insurance upon an infant's life to relate only to a single policy. (*O'Rourke* v. *J. H. L. Ins. Co.*, 10 Misc. Rep. 405; *Markey* v. *County of Queens*, 154 N. Y. 675.)

Judges: Cullen, Ch. J. Chase, J., concurring. Werner, Willard Bartlett, Hiscock, Collin and Hogan, JJ., concur with Cullen, Ch. J., and Chase, J., concurs in memorandum.

Opinion by: CULLEN

Opinion

[*317] [**795] The controversy in this case involves the construction of section 55 of the Insurance Law. Helen M. Flynn, a daughter of the plaintiff, was born January 23d, 1902, and died January 16th, 1910. On February 9th, 1903, the plaintiff obtained from the Metropolitan Life Insurance Company a policy

of insurance upon the life of said infant by which, on the infant's death between the ages of seven and eight years, she was to be paid the sum of eighty dollars. On [***4] March 2d, 1903, she obtained from the same company another policy on the same life for the same sum. On May 11th, and December 19th, 1903, respectively, the plaintiff insured the same infant's life with the defendant under the terms of which on the daughter's death she was entitled to receive the sum of $ 162.40.

The Metropolitan Company paid the plaintiff the amount of the policies it had issued. The defendant has refused to pay the amount prescribed by its policies, claiming that under section 55 of the Insurance Law the policies were void. It does, however, offer to return the amount of the premiums paid by the plaintiff, being the sum of $ 39.72. The section of the Insurance Law is as follows: "No HN1 policy or agreement for insurance shall be issued upon the life or health of another or against loss by disablement by accident except upon the application of the persons insured; but a wife may take a policy of insurance upon the life or health of her husband or against loss by his disablement by accident; an employer may take out a policy of accident insurance covering his employees collectively for the benefit of such as may be injured, and a person liable for the support of a [***5] child of **[*318]** the age of one year and upward may take a yearly renewable term policy of insurance thereon, the amount payable under which may be made to increase with advancing age and which shall not exceed the sums specified in the following table, the ages wherein specified being the age at time of death, and which, after the age of thirteen, may become an ordinary life policy for an amount not exceeding the sum specified in the table: * * *

"Between the ages of seven and eight years, one hundred and sixty-eight dollars."

The learned Appellate Division has held that the statutory provision in question limits only the amount for which a person liable for the support of a child may insure its life by a single policy, but in no respect limits the total amount of insurance that may be effected upon such life. This conclusion was reached by the court upon the authority of the decision of the General Term of the Court of Common Pleas of the city of New York in *O'Rourke* v. *John Hancock Mut. Life Ins. Co.* (31 N. Y. Supp. 130). This construction seems to me to render the statutory provision simply absurd. What possible ground can be suggested by the most ingenious mind [***6] for the requirement that unlimited insurance should be effected only by several policies, each of which should not exceed the sum prescribed by the statute? The evil sought to be guarded against by the statute is the neglect or actual maltreatment of infants of tender years by those liable for their support, for the purpose of making pecuniary profit out of the infant's death. This result could be effected by limiting the amount of insurance permitted on the infant's life, not at all by limiting the amount of a single policy, if other policies were to be permitted. HN2 Two rules of construction are well settled: *First.* "Every interpretation that leads to an absurdity should be rejected." (Kent's Com. 462; Potter's Dwarris on Statutes, p. 128; *Matter of Folsom*, 56 N. Y. 60, 66.) *Second.* **[*319]** "In the interpretation of statutes, the great principle which is to control is the intention of the legislature in passing the same, which intention is to be ascertained from the cause or necessity of making the statute as well as other circumstances. A strict and literal interpretation is not always to be adhered to, and where the case is brought within the intention of the makers [***7] of the statute, it is within the statute, although by a technical interpretation it is not within its letter." (*People ex rel. Wood* v. *Lacombe*, 99 N. Y. 43, 49; *Matter of Folsom, supra.*) In reality, however, it is not necessary to invoke either of these rules. The learned judge who wrote the opinion in *O'Rourke* v. *John Hancock Mut. Life Ins. Co.* (*supra*), while conceding that the statute was aimed against obtaining excessive [**796] insurance by parents upon the lives of their children, felt that the statute was in derogation of the common law and, therefore, could not be extended beyond its terms, but must be construed strictly. But the case falls within the precise letter of the statute. The first provision is: "No policy or agreement for insurance shall be issued upon the life or health of another or against loss by disablement by accident except upon the application of the person insured." This inhibition is general and absolute, and had the section ceased there, all insurance on the lives or persons of infants of such tender years as to be unable to make application therefor would be void. The general rule, however, is followed by an exception, but [***8] to take any particular case without the rule it must be shown to fall within the exception. The exception is "but * * * a person liable for the support of a child of the age of one year and upward may take a yearly renewable term policy of insurance thereon, the amount payable under which may be made to increase with advancing age and which shall not exceed the sums specified," etc. If the statute is to be construed literally, the exception is confined to "a policy," that is to say, a single policy. Of course, it would be unreasonable to so **[*320]** limit it. But the point of this analysis is to show that a construction of the statute which allows the issue of more than one policy of insurance, but restricts the total amount of insurance, is an extension of the language, not of the rule, but of the exception; not of the inhibition against insurance, but of the permission allowing it to a certain extent. Therefore, that construction is not at all subject to the objection to it urged by the learned court in the *O'Rourke* case, and as it concededly effectuates the purpose and intent of the legislature, it should be adopted.

The judgment appealed from should be reversed and [***9] judgment rendered for the plaintiff for $ 39.72, without costs.

Concur by: CHASE

Concur

Chase, J. I concur. Although the *O'Rourke* case was decided more than eighteen years ago, it does not appear that the insurance department, or any of the insurance companies, have since acted upon the authority of that case, or accepted through long acquiescence the judicial construction asserted by that decision as claimed by the respondent. The policies in suit were obtained by the plaintiff falsely stating in the application therefor that the child was not insured in any other company.


Simon v Usher, 17
N.Y.3d 625

Simon v Usher, 17 N.Y.3d 625

Copy Citation

Court of Appeals of New York

September 15, 2011, Argued; October 20, 2011, Decided

No. 172

Reporter

17 N.Y.3d 625 * | 958 N.E.2d 540 ** | 934 N.Y.S.2d 362 *** | 2011 N.Y. LEXIS 3131 **** | 2011 NY Slip Op 7305

[1] Allen Simon et al., Respondents, v Sol M. Usher et al., Appellants, and Sheldon Alter et al., Respondents.

Subsequent History: Appeal after remand at Simon v. Usher, 93 A.D.3d 401, 938 N.Y.S.2d 887, 2012 N.Y. App. Div. LEXIS 1490 (N.Y. App. Div. 1st Dep't, 2012)

Prior History: Appeal, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that Court, entered May 4, 2010. The Appellate Division (1) reversed, on the law, an order of the Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), which had granted the motion of defendants Usher, Chait, Hartsdale Medical Group, P.C. and White Plains Hospital Center to change venue from Bronx County to Westchester County, and (2) denied the motion. The following question was certified by the Appellate Division: "Was the order of this Court, which reversed the order of the Supreme Court, properly made?"
Simon v. Usher, 73 A.D.3d 415, 899 N.Y.S.2d 601, 2010 N.Y. App. Div. LEXIS 3715 (N.Y. App. Div. 1st Dep't, 2010)

Disposition: [****1] Order reversed, with costs, case remitted to the Appellate Division, First Department, for consideration of issues raised but not determined on the appeal to that court, and certified question answered in the negative.

Core Terms

days, mail, papers, change of venue, responding, five-day, served by mail, prescribed, measured, place of trial, delays, venue

Headnotes/Summary

Headnotes

Trial -- Place of Trial -- Demand for Change of Venue -- Timeliness of Motion

A defendant who serves a demand for change of venue by mail is entitled to a five-day extension of the 15-day time period prescribed by CPLR 511 (b) to move for change of venue pursuant to CPLR 2103 (b) (2), which provides that "where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to

the prescribed period." Thus, defendants' motion for change of venue made 20 days after their service of a demand for change of venue by mail was timely. While plaintiffs contended that CPLR 2103 (b) (2)'s five-day extension for time periods measured from service by mail did not apply because defendants' motion did not constitute response papers, that provision contains no language restricting its application to instances where a party is responding to papers served by an adversary. Moreover, since a defendant is permitted to move to change venue only in the event that the plaintiff does not consent in writing within five days after defendant's service of the demand, the motion to change venue was effectively a response to plaintiff's lack of consent to the change of venue.

Counsel: *Kopff, Nardelli & Dopf LLP*, New York City (*Martin B. Adams* of counsel), for appellants. I. A defendant who mails a demand to change venue is entitled under CPLR 2103 (b) (2) to an additional five days above and beyond the 15-day statutory time period under CPLR 511 to move to change venue as of right. (*Matter of Saunders v Smith*, 99 AD2d 671, 472 NYS2d 47; *Cahen v Boyland*, 1 NY2d 8, 132 NE2d 890, 150 NYS2d 5; *Oliver v Alcog*, 155 AD2d 1001, 548 NYS2d 132; *O'Connor v Lansdown Entertainment*, 231 AD2d 970, 648 NYS2d 489; *Thompson v Cuadrado*, 277 AD2d 151, 717 NYS2d 109; *Singh v Becher*, 249 AD2d 154, 672 NYS2d 60.) II. Public policy supports a ruling that a motion to change venue as of right is timely where defendant serves by mail a demand to change venue and the motion is served within 20 days of service of the demand to change venue. III. The trial court properly transferred venue and the place of trial from Bronx County to Westchester County, as respondents reside in Westchester County, and the basis for respondents' selection of venue in Bronx County was improper. (*Toms v Estate of Hughes*, 177 AD2d 994, 578 NYS2d 16; *Simpson v Sears, Roebuck &Co.*, 212 AD2d 473, 622 NYS2d 956.)

Gair, Gair, Conason, Steigman, Mackauf, Bloom & Rubinowitz, New York City (*Howard S. Hershenhorn* and *Rhonda E. Kay* of counsel), for Allen Simon and another, respondents. I. Absent specific provision to the contrary, the party who mails a document is not entitled to the extra five days under CPLR 2103 (b) (2). (*Sultana v Nassau Hosp.*, 188 AD2d 647, 591 NYS2d 854; *Corradetti v Dales Used Cars*, 102 AD2d 272, 477 NYS2d 779; *Thompson v Cuadrado*, 277 AD2d 151, 717 NYS2d 109; *Trustees of Columbia Univ. v Bruncati*, 77 Misc 2d 547, 356 NYS2d 15; *Matter of Harvey v New York State Dept. of Envtl. Conservation*, 235 AD2d 625, 651 NYS2d 720; *Trump v Cheng*, 2009 NY Slip Op 30014[U].) II. Application of CPLR 511 (b) as written will not result in hardship or prejudice to defendants moving to change venue as of right. (*Too Pyo Hong v Byung Wha Yoo*, 231 AD2d 657, 648 NYS2d 114.)

Rende, Ryan & Downes, LLP, White Plains (*Roland T. Koke* of counsel), for Sheldon Alter and others, respondents. I. The lower court decision which changed venue from Bronx County to Westchester County should be reinstated. (*Binder v Metropolitan St. Ry. Co.*, 68 App Div 281, 74 NYS 54; *Peerless Motor Co. v Hambleton*, 219 App Div 268, 219 NYS 641; *Chason v Airways Hotel*, 18 Misc 2d 96, 184 NYS2d 125; *Hughes v Nigro*, 108 AD2d 722, 484 NYS2d 889; *Williams v Albany Med. Ctr. Hosp.*, 86 AD2d 915, 448 NYS2d 254; *Vacant Lots v Town Bd. of Town of Liberty*, 116 AD2d 865, 498 NYS2d 187; *Podolsky v Nevele Winter Sports*, 233 AD2d 605, 649 NYS2d 104; *Tri-City Furniture Dist. v Reubens*, 79 AD2d 886, 434 NYS2d 532.) II. Since defendant seeking to move venue has a choice to file a motion in the county where the venue is desired in the event plaintiff fails to meaningfully oppose the demand, the motion is responsive and thus entitled to an extension of time under the Civil Practice Law and Rules.

Judges: Opinion by Judge Jones. Chief Judge Lippman and Judges Ciparick, Graffeo, Read and Smith concur. Judge Pigott dissents and votes to affirm in an opinion.

Opinion by: JONES

Opinion

[**541] **[*627]** [***363] Jones, J.

The question presented for our review is whether the five-day extension under CPLR 2103 (b) (2) applies to the 15-day time period prescribed by CPLR 511 (b) to move for change of venue when a defendant serves its demand for change of venue by mail. We hold that it does.

On July 17, 2009, plaintiffs Allen and Barbara Simon commenced this medical [2] malpractice action against defendants in Supreme Court, Bronx County. Defendants Sol M. Usher, Sol M. Usher, M.D., P.C., Maxwell M. Chait, White Plains Hospital Center and Hartsdale Medical Group, P.C., (collectively, the Usher defendants) served their verified answers and demands to change venue to Westchester County on August 20, 2009. Twenty days later, [****2] on September 9th, the Usher defendants moved to change venue to Westchester County on the grounds that, except for Usher and Usher, M.D., P.C., all of the defendants and the plaintiffs reside in Westchester County; Usher's and Usher, M.D., P.C.'s primary offices are in Westchester County; and plaintiff Allen Simon received the medical care at issue in Westchester County. The remaining defendants Sheldon Alter, Mid-Westchester Medical Associates, LLP, Westchester Medical Group, P.C. and Marianne Monahan served their answer on September 3rd and filed an affirmation in support of the motion to change venue on September 15th.

Supreme Court granted the motion to change venue to Westchester because "none of the parties to this action reside in Bronx County." The Appellate Division unanimously reversed **[*628]** and denied the motion (73 AD3d 415, 899 NYS2d 601 [2010]). The court, among other things, rejected the Usher defendants' motion for a change of venue as untimely because it was made 20 days after service of the demand. It concluded that CPLR 2103 (b) (2)'s five-day extension for time periods measured from service by mail did not apply to CPLR 511. The Appellate Division granted the Usher defendants leave to appeal to this Court [****3] and certified the following question for review: "Was the order of this Court, which reversed the order of the Supreme Court, properly made?" (2010 N.Y. App. Div. LEXIS 10112, 2010 NY Slip Op 92286[U] [2010]). We answer the certified question in the negative and now reverse.

When construing a statute, we must begin with the language of the statute and "give effect to its plain meaning" (*Kramer v Phoenix Life Ins. Co.*, 15 NY3d 539, 550, 940 NE2d 535, 914 NYS2d 709 [2010]). Pursuant to CPLR 511 (a), a defendant shall serve with the answer, or prior to service of the answer, a demand "for change of place of trial on the ground that the county designated for that [***364] [**542] purpose is not a proper county." Subsection (b) permits defendant to "move to change the place of trial within fifteen days after service of the demand, unless within five days after such service plaintiff serves a written consent to change the place of trial to that specified by the defendant." CPLR 2103 (b) (2) provides "where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period." "The extension provided in CPLR 2103 (b) (2) constitutes legislative recognition of and compensation for delays inherent in mail delivery" (*Sultana v Nassau Hosp.*, 188 AD2d 647, 591 NYS2d 854 [2d Dept 1992]).

Here, [****4] defendants who served their motion papers by mail 20 days after they served their demand to change venue are entitled to a five-day extension of the 15-day period prescribed in CPLR 511 (b). Plaintiffs, citing *Sultana*, contend that defendants cannot rely upon section 2103 (b) (2) for the five-day extension because the motion did not constitute response papers. Section 2103 (b) contains no language restricting its application to instances where a party is responding to papers served by an adversary. Moreover, defendants are permitted to move to [3] change venue only in the event that plaintiffs do not consent in writing within five days after service of the demand. Although the motion papers are not directly responding to papers served by plaintiffs, defendants are effectively responding to plaintiffs' lack of consent to the change of venue. Simply put, defendants' motion papers are not initiatory and, because the demand was **[*629]** served by mail, defendants were entitled to the benefit of section 2103 (b) (2)'s five-day extension.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the case remitted to that court for consideration of issues raised but not determined [****5] on the appeal to that court, and the certified question answered in the negative.

Dissent by: PIGOTT

Dissent

PIGOTT, J. (dissenting). While I fear adding further confusion to what, up until now, seemed to be a fairly simple statute, I respectfully dissent from the judicial creation of what I will label an "anticipatory five-day rule" amending CPLR § 2103 (b) (2).

On July 17, 2009, plaintiffs commenced this medical malpractice action against multiple defendants by filing their summons and complaint in Supreme Court, Bronx County, basing their choice of venue on the fact that defendant Sol M. Usher had a place of business in the Bronx. Defendants answered by mail on August 20, 2009 and, pursuant to CPLR § 511 (b), simultaneously served a demand for a change of venue from Bronx County to Westchester County. Plaintiffs did not respond within five days after the date

of service of the demand, i.e. by August 25, 2009. This permitted defendants, if they so chose, to move to change the place of trial by filing a motion in either Bronx or Westchester County on or before September 4, 2009. However, defendants' motion was served by mail on September 9, 2009.

Plaintiffs objected, and I think properly so, that the motion [****6] was untimely, under CPLR 511 (b), which provides that a defendant that has served a written demand for a change of venue "may move to change the place of trial *within fifteen days after service of the demand*, unless within five days after such service plaintiff serves a written consent" (emphasis added). Defendants enlisted CPLR 2103 (b) (2), to argue that their motion was timely because it was served within twenty days of service of their demand, despite the fact that CPLR 511 specifies 15 days. Supreme Court, [***365] [**543] Bronx County, granted defendants' motion to change the venue, but the Appellate Division reversed, and denied the motion, holding that defendants "were not entitled to the five-day extension in CPLR 2103 (b) (2) for time periods measured from service by mail" (73 AD3d 415, 899 NYS2d 601 [1st Dept 2010]).

Under CPLR 2103 (b) (2), the statute being mangled here, "where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall **[*630]** be added to the prescribed period." The legislative history of the statute makes it abundantly clear that its purpose is to give a party, on whom a paper has been served by mail, additional time to *respond*, [****7] because of the delays inherent in mailing. The five-day extension was created in the early 1980s (L 1982, ch 20, § 1, effective January 1, 1983); [4] it had been three days before. At that time, the Advisory Committee on Civil Practice clearly described the extension as applying to a party's "responding time" or "responding period" (1982 Report of the Advisory Committee on Civil Practice to the Chief Administrator of the Courts of the State of New York, 1982 McKinney's Session Laws of NY, at 2651). The Committee wrote that "[t]he traditional three days by which a *responding period* is extended when the paper to be *responded to* is served by mail has proved too short in recent years, as the mails have been increasingly delayed" (*id.* at 2651-2652 [emphasis added]). The legislative intent could not be more obvious. The purpose of CPLR 2103 (b) (2) was to compensate for mail delays, and allow an adverse party more time to assemble responsive papers.

The Appellate Division has understood this, writing that "[t]he extension provided in CPLR 2103 (b) (2) constitutes legislative recognition of and compensation for delays inherent in mail delivery" (*Sultana v Nassau Hosp.*, 188 AD2d 647, 591 NYS2d 854 [2d Dept 1992], [****8] quoting *Corradetti v Dales Used Cars*, 102 AD2d 272, 273, 477 NYS2d 779 [3d Dept 1984]) and "does not benefit the party making the service by mail" (*Thompson v Cuadrado*, 277 AD2d 151, 152, 717 NYS2d 109 [1st Dept 2000]; *see also Matter of Harvey v New York State Dept. of Envtl. Conservation*, 235 AD2d 625, 651 NYS2d 720 [3d Dept 1997]). Consistently, Professor Siegel, recognizing the intent of CPLR 2103, has noted that the statute

> "provides that whenever a period of time is measured from the service of a paper and the paper is served by mail, *the party required to take the responsive step* gets 5 additional days. This recognizes that the service was deemed complete upon posting and it compensates for the delay in mail delivery. . . . The 5 days are added to the stated period when any mail-served paper *requires a responsive step* within a stated period" (Siegel, NY Prac § 202, at 346 [5th ed] [emphases added]).

It is noteworthy that the Legislature, in the context of measuring time from the service of a judgment or order, has taken the trouble to add a provision that clarifies that "[w]here **[*631]** service of the judgment or order to be appealed from and written notice of its entry is made by mail . . . [under CPLR 2103], the additional days provided [****9] by such paragraphs shall apply to this action, regardless of which party serves the judgment or order with notice of entry" (CPLR 5513 [d]). This 1999 amendment to CPLR 5513 gives an additional five days to take an appeal when a notice of entry is served by mail, regardless of which party serves the notice of entry. The Legislature has not acted to alter statutes other than CPLR 5513, so as to make corresponding clarifications in areas other than appeals.

[***366] [**544] Here, defendants benefitted from the rule that papers are deemed served upon mailing--in this case on August 20. Plaintiffs, who would have received the papers some days after that, would have known that, while the statute requires a response within five days, i.e. by August 25, they could add five days and serve their response, if they chose to make one, on or before August 30. The five-day timetable is indisputably subject to extension under CPLR 2103 (b) (2), because it is a *responsive* deadline (*Podolsky v Nevele Winter Sports*, 233 AD2d 605, 605-606, 649 NYS2d 104 [3d Dept 1996]; *Hughes v Nigro*, 108 AD2d 722, 723, 484 NYS2d 889 [2d Dept 1985]). [5] Defendants, on the other hand, were "not directly responding" to any papers, as the majority concedes [****10] (majority op at 628). Having no doubt marked plaintiffs' August 30 deadline on their calendar, defendants had until September 4, to serve, by mail if they chose, their motion for change of place of trial. That they did not is, in my view, fatal to their motion.

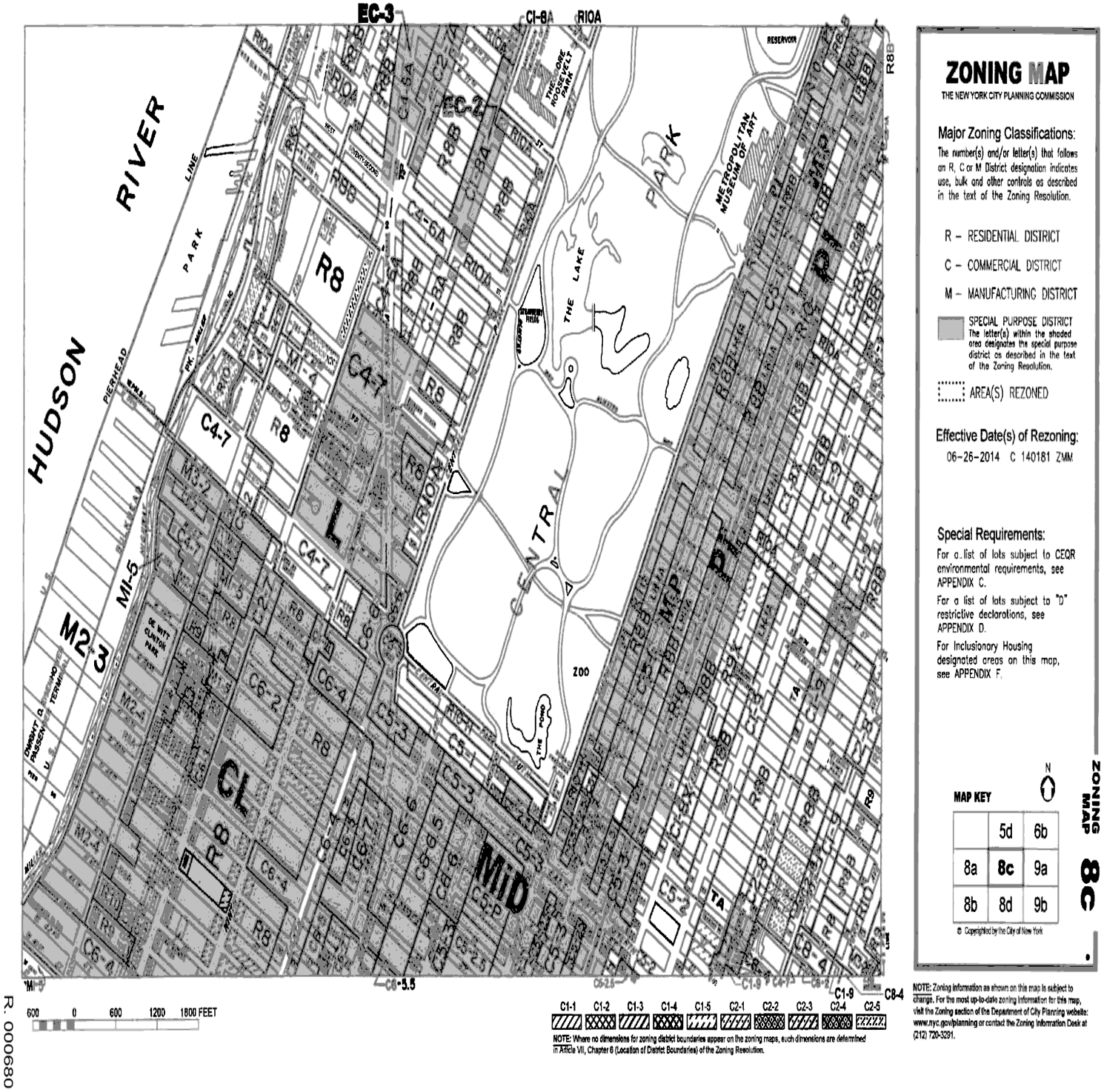
Defendants argue that plaintiffs' reading of CPLR 2103 (b) (2) creates practical difficulties for litigants. Given that plaintiffs have 10 days to decide about consent, the 15-day deadline for the motion means that defendants may have only five days between a service by mail of consent to change of venue and the motion deadline. If the mailing delay is three days, the time for preparing and filing the motion would end up being two days. Giving both parties the benefits of the extended period might be a good idea, practically. But one need only refer to CPLR § 2214 (b), which allows reply papers to be served by mail *one* day before the return date of a motion, to know that the rules have not always been drafted with practicality in mind. In such a situation, an appellate court may signal the practical difficulties to the Legislature, so that it may consider amending the statute. But it is up to the Legislature to enact such a law.

In light [****11] of the legislative history and standard interpretations of CPLR 2103 (b) (2) in case law and commentary, I think it **[*632]** clear that 2103 (b) benefits only the party responding to the service, and I would therefore affirm the order of the Appellate Division.

Chief Judge Lippman and Judges Ciparick, Graffeo, Read and Smith concur with Judge Jones; Judge Pigott dissents and votes to affirm in a separate opinion.

Order reversed, etc.

6 - Zoning Map



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.

MAP KEY

	5d	6b
8a	8c	9a
8b	8d	9b

N

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.

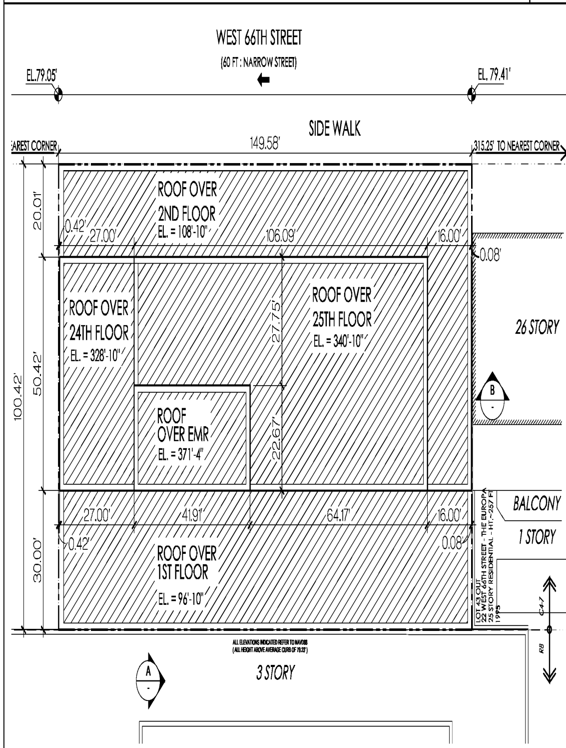
7 - plans

2016 ZD1 Zoning Diagram (Superseded)

2019-94-A

DEPT OF BLDGS 121190200 Job Number
ES336402953 Scan Code

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



ZONING CONSIDERATION

ZONE	C4-7 / R10 Eq	Map 8D, Special Lincoln Square District Subdistrict A
SITE AREA	[illegible] SF	[illegible]
MAX. BASE FAR	10	
MAX. BASE ZONING FLOOR AREA	[illegible] SF	
INCLUSIONARY HOUSING INCREASE	20% [illegible] SF	ZR [illegible]
TOTAL ALLOWED ZONING FLOOR AREA	[illegible] SF	
PERMITTED COMMERCIAL FLOOR AREA	100,000 SF	ZR [illegible]
MAXIMUM TOWER COVERAGE	40% [illegible] SF	ZR [illegible]
MINIMUM TOWER COVERAGE	30% 4,506 SF	ZR [illegible]
MAXIMUM STREET WALL	85 FT	
MINIMUM SETBACK ABOVE STREET WALL	20 FT	NARROW STREET ZR 82-36(b)
MINIMUM BULK DISTRIBUTION	60%	BELOW 150 FT ZR [illegible]
MINIMUM FLOOR AREA BELOW 150 FT	[illegible] SF	

LEGEND

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

PROPOSED BUILDING

ZONING LOT

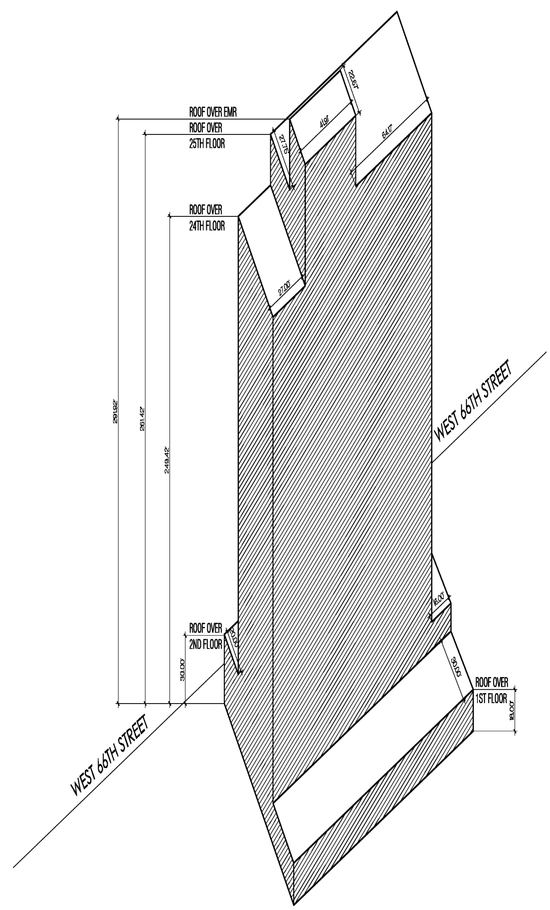
AXONOMETRIC DIAGRAM
SCALE: 1/64" = 1'-0"

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. [illegible]

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. 000684

05/14/2019

NYC 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. 000685

Diagram

2019-94-A

DEPT OF BLDGS 121190200 Job Number ES555372378 Scan Code

ZONING CALCULATIONS

ZONING DISTRICT : C4-7 (R10 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

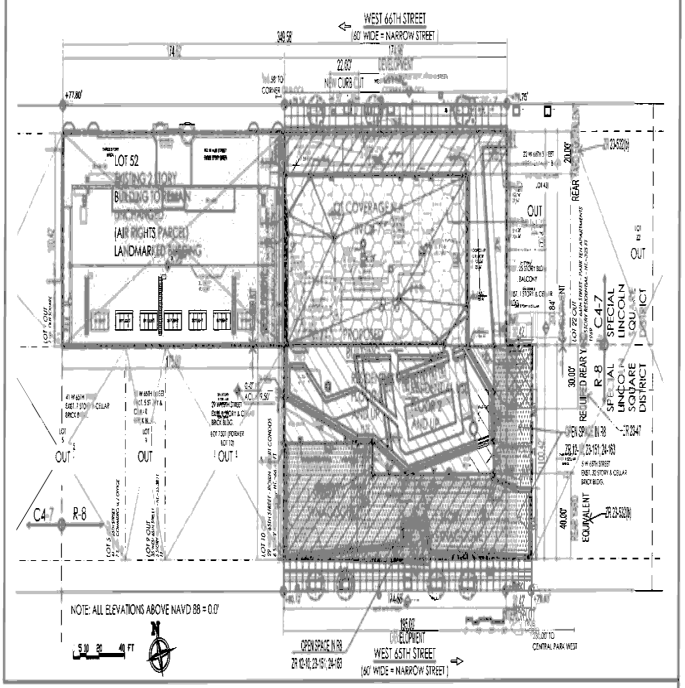
23-154	Base Residential	10 FAR	351,050.00 SF
	Max. Inclusionary Bonus	2 FAR	70,210.00 SF
	Max. Residential with Inclusionary	12 FAR	421,260.00 SF
	Low Income Floor Area Provided Off-site, see HPD Certificates and Table 1 on Z-001		70,210.00 SF
	Base Residential		351,050.00 SF
	Actual Inclusionary Bonus		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		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 Tota		
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 / 8,699 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 / 8,699 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
- TOB 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 (PLEASE PRINT) Luigi P. R

SIGNATURE DATE

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

Internal Use Only

BIS Doc #

PLAN EXAMINERS SIGN AND DATE

R. 000688

05/14/2019

2019-94-A

ZONING CALCULATIONS

HEIGHT & SETBACK IN BOTH ZONES

35-21 Maximum Height of Wall and Required Setbacks
23-641 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		10,770.86 SF	Complies
	Proposed Tower at floor 18		11,092.68 SF	Complies
	Proposed Tower at floor 19		11,208.99 SF	Complies
	Proposed Tower at floors 20-33		11,208.57 SF	Complies
	Proposed Tower at floors 34		11,208.51 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.

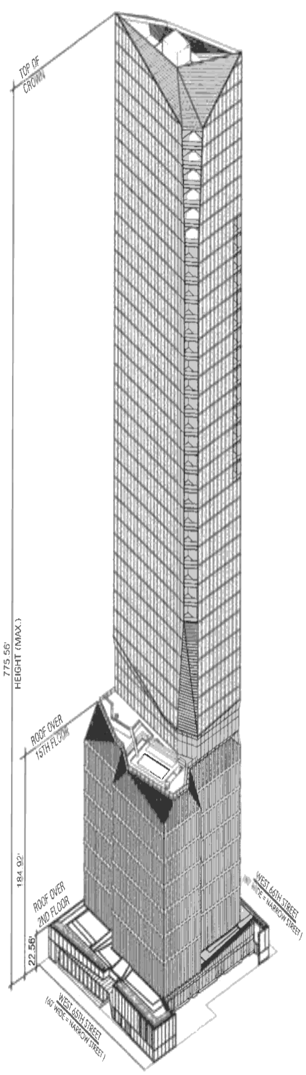
Proposed tower at 42nd Floor, Bulkhead (Ht. 752.73')		8,311.00 SF	
Max. 80% of 41st Floor	80% x 10,538 SF =	8,430.40 SF	Complies

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

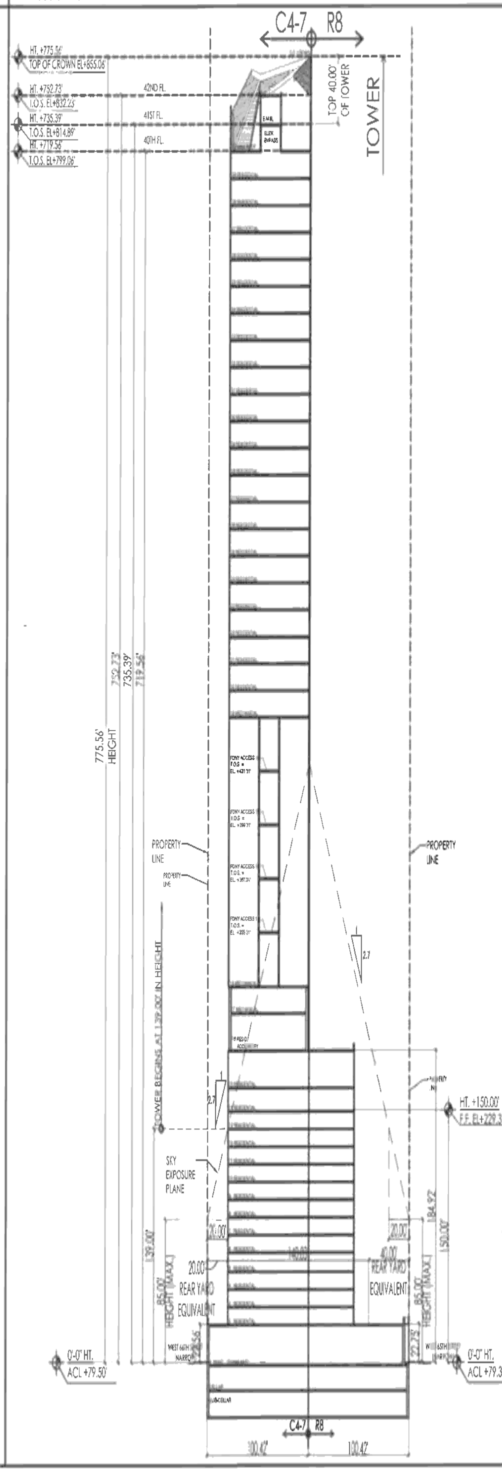
Scale: NTS



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. Russo

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. 000689

05/14/2019

2019-94-A

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. 000690

05/14/2019

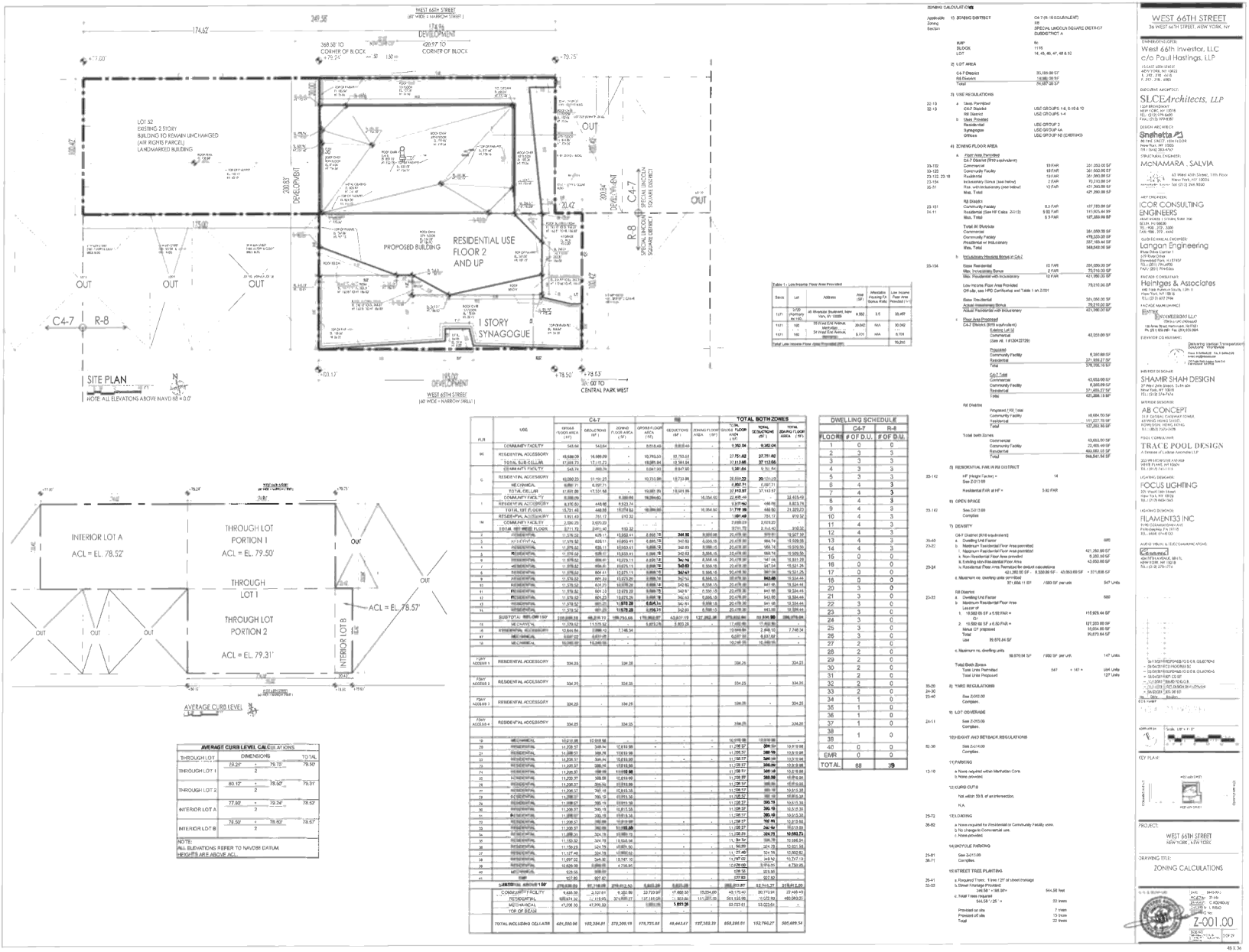

Table 1: Low-Income Floor Area Provided

Secs	Lot	Address	Area (SF)	Affordable Housing FA Bonus Ratio	Low Income Floor Area Provided (=)
1371	1/100 (Formerly Lot 135)	48 Riverside Boulevard, New York, NY 10069	8,552	3.6	30,467
1121	160	39 West 67th Street, Manhattan	20,042	N/A	30,042
1121	160	34 West 61st Avenue	8,701	N/A	8,701
Total Low-Income Floor Area Provided (SF)					69,210

ZONING CALCULATIONS

Applicable Zoning Section	1) ZONING DISTRICT	C4-7 (R-10 EQUIVALENT) R8 SPECIAL LINCOLN SQUARE DISTRICT SUBDISTRICT A	
	MAP	8c	
	BLOCK	1115	
	LOT	14, 45, 46, 47, 48 & 52	
	2) LOT AREA		
	C4-7 District	35,100.00 SF	
	R8 District	19,980.00 SF	
	Total	54,987.00 SF	
	3) USE REGULATIONS		
22-10	a Uses Permitted		
32-10	C4-7 District	USE GROUPS 1-6, 8-10 & 12	
	R8 District	USE GROUPS 1-4	
	b Uses Provided		
	Residential	USE GROUP 2	
	Synagogue	USE GROUP 4A	
	Offices	USE GROUP 6B (CERTIFIED)	
	4) ZONING FLOOR AREA		
	a Floor Area Permitted		
	C4-7 District (R10 equivalent)		
23-152	Commercial	10 FAR	351,000.00 SF
33-123	Community Facility	10 FAR	351,000.00 SF
23-152, 23-18	Residential	10 FAR	351,000.00 SF
23-154	Inclusionary Bonus (see below)	2 FAR	70,210.00 SF
35-31	Res. with Inclusionary (see below)	12 FAR	421,200.00 SF
	Max. Total		421,200.00 SF
	R8 District		
23-151	Community Facility	6.5 FAR	137,353.00 SF
34-11	Residential (See HF Calcs. 2013)	9.92 FAR	515,925.44 SF
	Max. Total	6.5 FAR	137,353.00 SF
	Total All Districts		
	Commercial		351,000.00 SF
	Community Facility		478,353.00 SF
	Residential w/ Inclusionary		537,163.44 SF
	Max. Total		948,843.00 SF
	b Inclusionary Housing Bonus in C4-7		
23-154	Base Residential	10 FAR	351,000.00 SF
	Max. Inclusionary Bonus	2 FAR	70,210.00 SF
	Max. Residential with Inclusionary	12 FAR	421,200.00 SF
	Low Income Floor Area Provided		79,210.00 SF
	Off-site, see HPD Certificate and Table 1 on Z-001		
	Base Residential		351,000.00 SF
	Actual Inclusionary Bonus		79,210.00 SF
	Actual Residential with Inclusionary		430,210.00 SF
	c Floor Area Proposed		
	C4-7 District (R10 equivalent)		
	Existing Lot 52		
	Commercial		43,553.00 SF
	(See att. # 20427229)		
	Proposed		
	Community Facility		6,380.88 SF
	Residential		371,666.37 SF
	Total		378,056.19 SF
	C4-7 Total		
	Commercial		43,553.00 SF
	Community Facility		6,380.88 SF
	Residential		371,666.37 SF
	Total		421,598.19 SF
	R8 District		
	Proposed (HS) Total		
	Community Facility		68,664.50 SF
	Residential		111,227.75 SF
	Total		137,892.56 SF
	Total both Zones		
	Commercial		43,553.00 SF
	Community Facility		22,465.48 SF
	Residential		482,982.12 SF
	Total		548,541.59 SF
	5) RESIDENTIAL FAR IN R8 DISTRICT		
23-142	HF (Height Factor) =	14	
	See Z-001.09		
	Residential FAR at HF =	5.82 FAR	
	6) OPEN SPACE		
33-142	See Z-001.09		
	Complies.		
	7) DENSITY		
	C4-7 District (R10 equivalent)		
35-40	a Dwelling Unit Factor		680
23-22	b Maximum Residential Floor Area permitted		
	i. Maximum Residential Floor Area permitted		421,200.00 SF
	ii. Non-Residential Floor Area provided		8,282.00 SF
	iii. Existing non-Residential Floor Area		43,553.00 SF
23-24	iv. Residential Floor Area Permitted for conduit calculations	421,200.00 SF - 8,282.00 SF - 43,553.00 SF	= 371,656 SF
	c. Maximum no. dwelling units permitted	371,656.11 SF / 680 SF per unit	= 547 Units
	R8 District		
23-22	a. Dwelling Unit Factor		680
	b. Maximum Residential Floor Area		
	Lesser of		
	i. 19,980.00 SF x 5.92 FAR =		118,605.40 SF
	or		
	ii. 19,980.00 SF x 6.50 FAR =		127,370.00 SF
	Minus CF proposed		18,054.00 SF
	Total		99,870.64 SF
	Use	99,870.64 SF	
	c. Maximum no. dwelling units		
	99,870.64 SF / 680 SF per unit		= 147 Units
	Total Both Zones		
	Total Units Permitted	547 + 147 =	694 Units
	Total Units Proposed		127 Units
35-20	8) YARD REGULATIONS		
24-30	See Z-002.00		
23-40	Complies.		
	9) LOT COVERAGE		
24-11	See Z-003.00		
	Complies.		
	10) HEIGHT AND SETBACK REGULATIONS		
82-30	See Z-004.00		
	Complies.		
	11) PARKING		
13-10	a None required within Manhattan Core.		
	b None provided.		
	12) CURB CUT 0		
	Not within 50 ft. of an intersection.		
	N/A		
25-72	13) LOADING		
36-62	a None required for Residential or Community Facility uses.		
	b No change to Commercial use.		
	c None provided.		
	14) BICYCLE PARKING		
25-81	See Z-013.00		
36-71	Complies.		
	15) STREET TREE PLANTING		
26-41	a Required Trees - 1 tree / 25' of street frontage		
33-03	b Street Frontage Provided		
	346.58' + 180.00' =	544.58 feet	
	c Total Trees required		
	544.58 / 25' =	22 trees	
	Provided on site	7 trees	
	Provided off site	15 trees	
	Total	22 trees	

WEST 66TH STREET
36 WEST 66TH STREET, NEW YORK, NY

OWNER/DEVELOPER:
West 66th Investor, LLC
c/o Paul Hastings, LLP
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Delivering Vertical Transportation Solutions Worldwide
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ELEVATOR CONSULTANT:
Delivering Vertical Transportation Solutions Worldwide
Two Penn Plaza, Suite 1500
New York, NY 10121-1500
(212) 629-7441 (212) 629-7442

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INTERIOR DESIGNER:
AB CONCEPT
3131 CENTRAL CHERRY COURT
KISSIMMEE, FLORIDA 34741
TEL: (407) 344-4000

POOL CONSULTANT:
TRACE POOL DESIGN
A Division of Lifetime Aquatics LLC
2333 MICHIGAN AVE #B2
SANTA MONICA, CA 90404
TEL: (917) 741-1119

LIGHTING DESIGNER:
FOCUS LIGHTING
25 West 18th Street
New York, NY 10011
TEL: (917) 940-1441

LIGHTING DESIGNER:
FILAMENT33 INC
PO BOX 1000
Hollidaysburg, PA 16648
TEL: (484) 374-4133

AUDIO VISUAL & TELECOMMUNICATIONS:
Cerasimo
404 FIFTH AVENUE, 6th FL
NEW YORK, NY 10018
TEL: (212) 279-1774

KEY PLAN:

PROJECT:
WEST 66TH STREET
NEW YORK, NEW YORK

DRAWING TITLE:
ZONING CALCULATIONS

Z-001.00

FLR	USE	C4-7 GROSS FLOOR AREA (SF)	C4-7 DEDUCTIONS (SF)	C4-7 ZONING FLOOR AREA (SF)	R8 GROSS FLOOR AREA (SF)	R8 DEDUCTIONS (SF)	R8 ZONING FLOOR AREA (SF)	TOTAL BOTH ZONES GROSS FLOOR AREA (SF)	TOTAL BOTH ZONES DEDUCTIONS (SF)	TOTAL BOTH ZONES ZONING FLOOR AREA (SF)
CELLAR	COMMUNITY FACILITY	543.64	543.64	-	8,818.46	8,818.46	-	9,362.04	9,362.04	-
BC	RESIDENTIAL ACCESSORY	16,586.09	16,586.09	-	10,793.53	10,793.53	-	27,751.62	27,751.62	-
	TOTAL SUB-CELLAR	17,089.73	17,089.73	-	19,611.99	19,611.99	-	37,113.66	37,113.66	-
	COMMUNITY FACILITY	543.64	543.64	-	8,947.90	8,947.90	-	9,291.54	9,291.54	-
C	RESIDENTIAL ACCESSORY	10,090.23	10,090.23	-	10,733.98	10,733.98	-	20,824.20	20,824.20	-
	MECHANICAL	6,897.71	6,897.71	-	-	-	-	6,897.71	6,897.71	-
	TOTAL CELLAR	17,531.58	17,531.58	-	19,681.88	19,681.88	-	37,213.47	37,213.47	-
1	COMMUNITY FACILITY	8,388.09	-	8,388.09	18,284.60	-	18,284.60	22,465.48	-	22,465.48
	RESIDENTIAL ACCESSORY	8,476.60	448.98	8,027.62	-	-	-	8,476.60	448.98	8,027.62
	TOTAL 1ST FLOOR	16,791.45	448.98	16,415.53	18,284.60	-	18,284.60	31,776.98	448.98	31,329.23
	RESIDENTIAL ACCESSORY	9,961.49	781.17	9,180.32	-	-	-	9,961.49	781.17	9,180.32
1M	COMMUNITY FACILITY	2,080.39	2,080.39	-	-	-	-	2,080.39	2,080.39	-
	TOTAL 1ST MEZZ FLOOR	12,041.88	2,861.56	9,180.32	-	-	-	12,041.88	2,861.56	9,180.32
2	RESIDENTIAL	11,578.52	609.11	10,969.41	8,806.15	-	348.80	20,478.80	609.11	19,877.26
3	RESIDENTIAL	11,578.52	609.11	10,969.41	8,806.15	342.63	8,555.15	20,478.80	951.74	19,509.56
4	RESIDENTIAL	11,578.52	609.11	10,969.41	8,806.15	342.63	8,555.15	20,478.80	951.74	19,509.56
5	RESIDENTIAL	11,578.52	609.11	10,969.41	8,806.15	342.63	8,555.15	20,478.80	951.74	19,509.56
6	RESIDENTIAL	11,578.52	609.11	10,969.41	8,806.15	342.63	8,555.15	20,478.80	951.74	19,509.56
7	RESIDENTIAL	11,578.52	609.11	10,969.41	8,806.15	342.63	8,555.15	20,478.80	951.74	19,509.56
8	RESIDENTIAL	11,578.52	804.41	10,774.11	8,806.15	342.63	8,555.15	20,478.80	951.74	19,509.56
9	RESIDENTIAL	11,578.52	804.41	10,774.11	8,806.15	342.63	8,555.15	20,478.80	951.74	19,509.56
10	RESIDENTIAL	11,578.52	804.41	10,774.11	8,806.15	342.63	8,555.15	20,478.80	951.74	19,509.56
11	RESIDENTIAL	11,578.52	804.41	10,774.11	8,806.15	342.63	8,555.15	20,478.80	951.74	19,509.56
12	RESIDENTIAL	11,578.52	804.41	10,774.11	8,806.15	342.63	8,555.15	20,478.80	951.74	19,509.56
13	RESIDENTIAL	11,578.52	804.41	10,774.11	8,806.15	342.63	8,555.15	20,478.80	951.74	19,509.56
14	RESIDENTIAL	11,578.52	804.41	10,774.11	8,806.15	342.63	8,555.15	20,478.80	951.74	19,509.56
	SUBTOTAL RESIDENTIAL	208,888.36	68,318.72	189,793.65	170,862.97	4,963.13	167,262.49	379,832.86	73,336.98	356,979.84
15	MECHANICAL	11,276.52	11,276.52	-	5,873.76	5,873.76	-	17,450.28	17,450.28	-
15	RESIDENTIAL ACCESSORY	10,644.84	3,896.76	7,748.34	-	-	-	10,644.84	3,896.76	7,748.34
R7	MECHANICAL	6,697.22	6,697.22	-	-	-	-	6,697.22	6,697.22	-
16	MECHANICAL	10,090.23	10,090.23	-	-	-	-	10,090.23	10,090.23	-
FURY ACCESS 1	RESIDENTIAL ACCESSORY	334.25	-	334.25	-	-	-	334.25	-	334.25
FURY ACCESS 2	RESIDENTIAL ACCESSORY	334.25	-	334.25	-	-	-	334.25	-	334.25
FURY ACCESS 3	RESIDENTIAL ACCESSORY	334.25	-	334.25	-	-	-	334.25	-	334.25
FURY ACCESS 4	RESIDENTIAL ACCESSORY	334.25	-	334.25	-	-	-	334.25	-	334.25
18	MECHANICAL	10,818.98	10,818.98	-	-	-	-	10,818.98	10,818.98	-
20	RESIDENTIAL	11,208.57	348.54	10,818.98	-	-	-	11,208.57	389.59	10,818.98
21	RESIDENTIAL	11,208.57	389.59	10,818.98	-	-	-	11,208.57	389.59	10,818.98
22	RESIDENTIAL	11,208.57	348.54	10,818.98	-	-	-	11,208.57	389.59	10,818.98
23	RESIDENTIAL	11,208.57	389.59	10,818.98	-	-	-	11,208.57	389.59	10,818.98
24	RESIDENTIAL	11,208.57	389.59	10,818.98	-	-	-	11,208.57	389.59	10,818.98
25	RESIDENTIAL	11,208.57	389.59	10,818.98	-	-	-	11,208.57	389.59	10,818.98
26	RESIDENTIAL	11,208.57	348.54	10,818.98	-	-	-	11,208.57	389.59	10,818.98
27	RESIDENTIAL	11,208.57	389.59	10,818.98	-	-	-	11,208.57	389.59	10,818.98
28	RESIDENTIAL	11,208.57	389.59	10,818.98	-	-	-	11,208.57	389.59	10,818.98
29	RESIDENTIAL	11,208.57	389.59	10,818.98	-	-	-	11,208.57	389.59	10,818.98
30	RESIDENTIAL	11,208.57	389.59	10,818.98	-	-	-	11,208.57	389.59	10,818.98
31	RESIDENTIAL	11,208.57	389.59	10,818.98	-	-	-	11,208.57	389.59	10,818.98
32	RESIDENTIAL	11,208.57	389.59	10,818.98	-	-	-	11,208.57	389.59	10,818.98
33	RESIDENTIAL	11,208.57	389.59	10,818.98	-	-	-	11,208.57	389.59	10,818.98
34	RESIDENTIAL	11,208.57	389.59	10,818.98	-	-	-	11,208.57	389.59	10,818.98
35	RESIDENTIAL	11,208.57	348.54	10,818.98	-	-	-	11,208.57	389.59	10,818.98
36	RESIDENTIAL	11,208.57	389.59	10,818.98	-	-	-	11,208.57	389.59	10,818.98
37	RESIDENTIAL	11,208.57	389.59	10,818.98	-	-	-	11,208.57	389.59	10,818.98
38	RESIDENTIAL	11,208.57	389.59	10,818.98	-	-	-	11,208.57	389.59	10,818.98
39	RESIDENTIAL	11,208.57	389.59	10,818.98	-	-	-	11,208.57	389.59	10,818.98
40	RESIDENTIAL	11,208.57	389.59	10,818.98	-	-	-	11,208.57	389.59	10,818.98
41	RESIDENTIAL	11,208.57	389.59	10,818.98	-	-	-	11,208.57	389.59	10,818.98
	SUBTOTAL ABOVE 1 ST	278,888.89	97,116.68	278,412.50	5,873.76	5,873.76	-	284,807.87	62,944.77	278,981.20
	COMMUNITY FACILITY	9,555.50	2,107.61	9,180.90	23,709.97	17,666.50	15,254.00	43,175.40	26,173.91	22,465.48
	RESIDENTIAL	189,471.36	21,135.05	171,591.01	137,151.05	2,303.80	111,207.28	326,622.36	23,438.85	482,982.12
	MECHANICAL	47,200.33	47,200.33	-	1,001.15	1,001.15	-	53,023.61	53,023.61	-
	TOP OF BEAM									
	TOTAL INCLUDING CELLARS	425,560.96	102,384.91	372,296.19	178,725.93	44,443.67	197,182.39	658,286.51	152,796.27	505,489.34

DWELLING SCHEDULE		
	C4-7	R-8
FLOOR	# OF D.U.	# OF D.U.
1	0	0
2	3	3
3	3	3
4	3	3
5	3	3
6	4	3
7	4	3
8	4	3
9	4	3
10	4	3
11	4	3
12	4	3
13	4	3
14	4	3
15	0	0
16	0	0
17	0	0
18	0	0
20	3	0
21	3	0
22	3	0
23	3	0
24	3	0
25	3	0
26	3	0
27	2	0
28	2	0
29	2	0
30	2	0
31	2	0
32	2	0
33	2	0
34	1	0
35	1	0
36	1	0
37	1	0
38	1	0
39	1	0
40	0	0
EMR	0	0
TOTAL	88	39

AVERAGE CURB LEVEL CALCULATIONS				
THROUGH LOT	DIMENSIONS			TOTAL
THROUGH LOT 1	79.24'	+	79.76' =	79.50'
	80.12'		2	
THROUGH LOT 2		+	79.50' =	79.31'
	77.90'		2	
INTERIOR LOT A		+	79.24' =	78.52'
	78.50'		2	
INTERIOR LOT B		+	78.50' =	78.57'

NOTE:
ALL ELEVATIONS REFER TO NAVD88 DATUM.
HEIGHTS ARE ABOVE ACL.