Statement of
Ronald Shiffman
Member of the City Planning Commission
December 20, 1993

Regarding the
Amendment to the Special Lincoln Square District

I find myself in a difficult position. This is perhaps on of the last votes that we will cast while Richard Schaffer is still Chair of the Commission and Director of the Department. Since I have the utmost respect for him and the job that he has performed, I would normally have a hard time dissenting on a matter like this and at a time like this. However, I believe that the issues raised by the Amendment to the Lincoln Square Special District are too important to allow the timing of the vote to affect the substance of my decision.

I have always believed that planning must be a deliberative process in which the participation of citizenry is a critical 1 ment. I believe that participatory processes should inform and shape, not dictate, the planning debate and the resultant outcome. Effective participatory processes lead to effective planning. They are essential to a democratic society. Compromising those processes through narrowly conceived and interpreted "scopes" makes a mockery of this process and relegates the Planning Commission to a regulatory body whose only power is to reject or accept proposals, not to shape their outcome. This causes citizens to be alienated from government and the planning process.

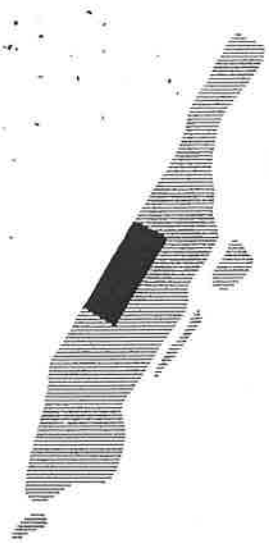
Substantive comments and proposals on issues such as density controls, height limits, inclusionary housing requirements, limits on zoning lot mergers, urban design considerations and special permit requirements that were put forth by Community Board 7 and the Manhattan Borough President's Office were dismissed as being too "broad" for consideration by the members of the City Planning Commission. They were considered outside of the narrowly conceived and interpreted "scope." The issue here is not the substance of what the Borough President and the Community Board proposed, or whether we individually or collectively agree with them. The issue is our obligation to hear testimony and to consider and debate those recommendations. Restrictive and narrow interpretations of "scope," the absence of "information" and the need for further "study" to assess the alternatives put forth (particularly after months of meetings with civic organizations, the community board, and members of this Commission) ar questionabl , at best.

The proposed amendments thems lv s only tinker at the edges. Whil they are better than what presently exists, they fall far short of what, in my opinion, should be adopted. The Lincoln Square Special District has not engendered good architecture or sensitivity to urban design criteria, and the architecture and development community that has worked in the Lincoln Square Area has not distinguished itself. We therefore need to amend the regulations so as to stimulate development that embodies good architecture and urban design. We need to be as sensitive to th articulation of the streetscape and the needs of pedestrians as we claim to be with the articulation and detail of the tops of buildings. We should not dismiss the idea of providing housing for all income groups within the boundaries of the Special District, nor should we ignore the need to retain and preserve existing tenement buildings.

Many people, including department staff, have worked too long and hard to allow this initiative to be wasted or compromised by a solution that does not address the myriad of problems engendered by the present Special District regulations. I therefore suggest that the scope of the working group that has been convened to review the work conducted to date be redefined so that it can plan for the area's enrichment, preservation and growth in a meaningful way. The major determinant of any future planning amendment should be the improvement of the quality of lif of those that live, work and visit in the Lincoln Square area.

Most importantly, the City Planning Department and the members of the City Planning Commission must recognize that the way in which the scope is conceived and interpreted determines our ability to plan. If we continue to define "scope" in a narrow sense in order to achieve predetermined outcomes, we make a mockery of the citizen participation process and we betray our charter responsibility "to properly plan for the orderly growth of the city."

I VOTE NO.



COMMUNITY BOARD SEVEN/Manhattan

RESOLUTION

DATE: NOVEMBER 3, 1993

COMMITTEE OF ORIGIN: LAND USE

FULL BOARD VOTE: 39 IN FAVOR 1 AGAINST 0 ABSTENTION 0 PRESENT

RE: ULURP APPLICATION #N940127ZRM BY DEPARTMENT OF CITY PLANNING FOR A ZONING TEXT AMENDMENT TO THE SPECIAL LINCOLN SQUARE DISTRICT.

WHEREAS, Community Board 7/Manhattan enthusiastically supports zoning revisions to the Special Lincoln Square District and has been meeting repeatedly since November, 1992 with the Department of City Planning, community groups and private consultants to review necessary revisions; and

WHEREAS, zoning revisions should foster the original 1969 goals of the Special District: "To preserve, protect and promote the character of the Special Lincoln Square District area as the location of a unique cultural and architectural complex"; and

WHEREAS, an extraordinary level of intense development in the Special District has resulted in extremely overcrowded and dangerous pedestrian and vehicular traffic conditions, particularly at the intersections of West 65 and 66 Streets, Broadway and Columbus Avenue, which are operating above capacity with extensive congestion and traffic delays, causing each to have been identified by recent environmental impact statements (EIS's) as exceeding the 1990 Clean Air Act carbon monoxide concentration standards; and

WHEREAS, the traffic conditions are to become further exacerbated by the 41,500 person trips per day, as projected by the Department of City Planning, generated by the now under construction "Lincoln Square" mixed use development at 1992 Broadway; and

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WHEREAS, the completion of the following City-approved developments to be located in and adjacent to the Special District will further add to the congestion: 9.7 million square feet at the Penn Yards site (Riverside South, Manhattan West and ABC); 700,000 square feet at the Alfred II and YMCA sites; and 2.5 million square feet at the New York Coliseum site; and

WHEREAS, the congestion already threatens to destroy both the quality of life of the surrounding residential community and the ability of the general public to gain access to Lincoln Center for the Performing Arts, one of the world's most treasured cultural institutions; and

WHEREAS, the allowable density, available bonuses, zoning lot mergers, and current design regulations have enabled the construction of oversized, out-of-context buildings and towers; and

WHEREAS, urban design controls in the Special District should respect the contiguous Central Park West Historic District; and

WHEREAS, the "bow tie" parks and Broadway Malls are unique features of the Special Lincoln Square District and special attention should be paid to their improvement; and

WHEREAS, the "Mayflower" site, the full square block bounded by West 61 and 62 Streets, Central Park West and Broadway, by its size and prominent location requires a mechanism that will encourage superlative urban design and excellent architecture consistent with its visible location at the gateway to the Central Park Historic District and its internationally recognized skyline; and

WHEREAS, the prominent location of the "bow tie" development sites, especially the Bank Leumi site, the gateway to the Upper West Side, also merits special consideration;

BE IT RESOLVED THAT Community Board 7/Manhattan **approves the text amendment subject to the following conditions**:

(1) **A maximum FAR of 10.0.** Community Board 7/Manhattan believes this is an appropriate allowable density given the crowded conditions in the Special District. 10.0 FAR could be achieved by either reducing the density to 8.0 FAR and allowing a 2.0 FAR bonus for affordable housing, or eliminating FAR bonuses and mandating affordable housing within 10 FAR.

(2) **Require a straightforward height limit of 275 feet throughout the Special District.** City Planning's proposal to limit building height with "packing the bulk" (requiring 60% of the bulk below 150 feet) has not been tested on actual buildings, and is therefore unpredictable. Community Board 7/Manhattan applauds the Department's proposals for height limits on the bow tie sites, and believes it is only logical to mandate a height limit throughout the Special District. Height limits have worked successfully in the Limited Height Districts on the Upper East Side, and are a major component of City Planning's soon to be certified application for text amendments to the Quality Housing Program. A straightforward height limit of 275 feet would achieve the height goal of "packing" (see page 14 in the May, 1993 Lincoln Square Zoning report) with a predictability which would be beneficial to both private developers and the general public.

(3) **Require special permit for new development throughout the Special District.** Community Board 7/Manhattan believes requiring a special permit provides the best means to achieve the original Special District goal to "preserve, protect and promote" Lincoln Center. The majority of buildings which have been constructed under the existing regulations bear little relationship to the Special District's focus - Lincoln Center - and underscore the inability of legislation to mandate appropriate design.

The device of a special permit would allow the developer's architect freedom to design an appropriate building for this world famous Special District. The special permit review process would ensure a design agreeable to the surrounding community. The precedent for design review exists in the current review requirements for alterations to landmarked buildings and new construction within landmark districts. As a prerequisite, any development within the Special District must abide by the following regulations:

Throughout the District: Maximum 10.0 FAR; 275 foot height limit;

Sites facing Broadway (excluding bow tie sites): 85 foot street wall, 15 foot setback;

East side of Broadway (61-65 Streets) and east side of Columbus (65-66 Streets): Arcade requirement without bonus;

Mayflower site: 125 foot street wall, 15 foot setback on Central Park West;

Northern bow tie site: Specific regulations to be determined during ULURP, though Community Board 7/Manhattan notes preference for the following proposal over City Planning's proposal for the northern bow tie site: No setback for 60% of linear frontage on 66 Street, Columbus and Broadway; 85 foot street wall on remaining 30% of linear frontage on Broadway; 55-60 foot street wall on remaining 30% of linear frontage on Columbus;

Sewage and sanitation facilities must be adequate to meet the needs of the new construction.

(4) **Theaters should not be restricted to 1 FAR.** Controlling the height of buildings could be achieved more directly by requiring a straightforward building height limit of 275 feet rather than restricting the FAR of theaters. One of the goals of the Special District is to attract uses which will enhance the cultural character of the area. By restricting the FAR for theaters, cultural and entertainment uses other than film may be inadvertently and regrettably restricted. To avoid facades without transparency, City Planning should devise a mechanism to require transparency from the curb level to the ceiling of the theater.

(5) **Restrict zoning lot mergers to 20% of floor area.** As proposed in "West Side Futures", the comprehensive planning report for the Upper West Side completed by Community Board 7/Manhattan and The Municipal Art Society, a maximum zoning lot merger of 20% of the floor area on the original lot would control the potential for overly bulky buildings. A 20% restriction already applies to development rights transfers from landmark sites; and

BE IT FURTHER RESOLVED THAT Community Board 7/Manhattan calls on the Department of City Planning to work with Community Board 7/Manhattan and the appropriate City agencies to restore the open space and improve pedestrian and vehicular traffic in the Special District; and

BE IT FURTHER RESOLVED THAT if the Department of City Planning determines that the Community Board's recommendations are not in the scope of the ULURP application, Community Board 7/Manhattan urges the Department to complete the necessary analysis for a major modification as expeditiously as possible.

Committee vote: 10-0-0-0; Board members vote: 2-0-0-0.

THE CITY OF NEW YORK
OFFICE OF THE PRESIDENT
OF THE
BOROUGH OF MANHATTAN

MUNICIPAL BUILDING
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RUTH W MESSINGER
BOROUGH PRESIDENT

93 NOV 15 PM 3:14
DEPT.

November 15, 1993

ULURP NOS.:

N940127 ZRM
N940128 ZRM

APPLICANT:

Department of City Planning

REQUESTS:

The Department of City Planning (DCP) proposes two alternative zoning text amendments (Text Amendment #1 and Text Amendment #2) to the Special Lincoln Square District, located in the southern portion of Community Board 7. The proposed text amendments would add additional urban design controls, modify existing commercial use regulations, mandate subway improvements in certain locations, amend existing mandatory arcade requirements, and permit public parking and curb cuts through different regulatory requirements. Some portions of the text amendment would affect the entire district as a whole; others would affect only specific subdistricts. The two alternative proposed text amendments are identical except for the issue of arcades.

N940127 ZRM proposes to amend existing mandatory arcade requirements.
(Text Amendment #1)

N940128 ZRM proposes to eliminate existing mandatory arcade requirements.
(Text Amendment #2)

PROJECT DESCRIPTION:

The Special Lincoln Square District, established in 1969, is bounded by Amsterdam Avenue on the west; West 68th Street on the north; West 60th Street on the south; and on the east by a line 100 feet east of Columbus Avenue between West 68th Street and West 67th Street; Columbus Avenue between West 67th Street and West 66th Street; a line 200 feet west of Central Park West between West 66th Street and West 62nd Street; Central Park West between West 62nd

Street and West 61st Street; and the west side of Broadway between West 61st Street and West 60th Street.

DCP's recommendations for the Special Lincoln Square District would include the following elements:

Underlying Zoning/Density

- The amount of commercial floor area allowed would be limited to 3.4 FAR in the northern portion of the district, where residential and institutional development predominates, and would permit a full commercial build out by City Planning Commission (CPC) special permit only.

Use Restrictions

- Use Group 8, including movie theaters, would be limited to 1 FAR in all areas of the district, except the area dominated by Lincoln Center.

- Retail continuity and transparency regulations would be mandated at the ground level.

Urban Design

The following urban design changes would apply in the Special District. Additional site-specific recommendations would apply to Broadway, the bow-tie sites (Blocks 111 and 113) and the Mayflower block (Block 1114).

The following would apply to development throughout the Special District:

- Envelope controls would be established to govern the massing and height of new buildings throughout the district. A minimum of 60 percent of a development's total floor area would be required to be located below an elevation of 150 feet. This floor area would result in buildings ranging from the mid-20 to 30 stories in height.

- A minimum tower coverage control would be applied throughout the district.

- The requirement of a minimum tower coverage for penthouses would be eliminated.

The following would apply to development on Broadway sites:

- The current control requiring an 85 foot high base along Broadway would be maintained. Towers would be set back from the streetline for a minimum of 15 feet on wide streets and a minimum of 20 feet on narrow streets.

- Recesses below 85 feet for a minimum of 15 percent and a maximum of 30 percent would be required to provide articulation of a building's facade.

- Dormer controls would be permitted above 85 feet.

The following would apply to development on the two bow-tie sites:

- Each site would be required to be developed with a streetwall building, requiring setbacks after 150 feet. The regulations would require new buildings to be constructed to the streetlines of West 63rd Street and West 66th Street and continue around the adjoining corners for one-half of the Broadway and Columbus Avenue block frontages.

- Development with frontage along the remaining portion of Broadway would be required to provide an 85 foot streetwall, to relate to the surrounding context.

- An expression line would be required at 20 feet, in addition to transparency requirements for the ground floor.

- Two range of recesses would be required -- one below and the other above 85 feet. Recesses below 85 feet would be required for a minimum of 15 percent of the length of the streetwall and would be permitted for a maximum of 30 percent. Recesses between 85 feet and 150 feet would be required for a minimum of 30 percent of the streetwall and would be permitted up to 50 percent.

- Above a height of 150 feet, a setback of at least 10 feet from the street line would be required, and a dormer would be permitted for a maximum of 60 percent of the streetwall width, reducing at a rate of 1 percent as the dormer's height rises by a foot.

- A height limit of 300 feet would be established, with the penthouse regulations applied for up to 4 stories above the height limit.

In addition to the controls applicable to Broadway sites, the following would apply to development on the Mayflower block site:

- Contextual regulation would be imposed on the Central Park West frontage.

- The arcade requirement would be eliminated from the north side of West 61st Street, but the mandated arcade along Broadway would be maintained.

- **Mandatory Arcades**

Text Amendment #1 proposes to:

- Retain the arcade as a mandated urban design requirement, with a reduced bonus from seven square feet per square foot of arcade to three square feet per square foot of arcade.

- Eliminate the requirement for an arcade on the north side of West 61st Street.

Text Amendment #2 proposes to:

- Eliminate the arcade as a mandated urban design requirement. The bonus generated by the provision of such arcade would also be eliminated from the Special District.

Subway Access

- New subway stair access would be required to be provided in the development of sites adjacent to the West 66th Street and the West 59th Street/Columbus Circle subway stations, i.e., the Bank Leumi, Tower Records and Mayflower sites.

- Improvements to the subway, such as improving general accessibility, safety, adding escalators or elevators and improving circulation, would be eligible to generate a bonus.

- **Parking and Loading Requirements**

  - The district's special permit requirement for public parking garages would be eliminated, since a special permit mechanism is provided in the underlying zoning regulations, Section 74-52.

  - Loading docks would be permitted pursuant to underlying regulations. A CPC authorization would be established for curb cuts on wide streets or 50 feet from the intersection of a wide street.

Right to Construct

The right to continue to construct would terminate in the Special District if the provisions of Section 11-30 are not met by the date of adoption of this zoning text amendment by CPC.

SUMMARY OF COMMUNITY BOARD ACTION:

On October 28, 1993, Community Board 7 held a public hearing on the DCP applications. On November 3, 1993, Community Board 7 voted 39 in favor, 1 opposed and 0 abstentions, to approve DCP's zoning text proposal subject to the following conditions:

Density -- The Community Board recommended that the residential density of the Special District be reduced from a maximum of 12 FAR to a maximum of 10 FAR.

Building Height Limit -- The Board voted to require a building height limit of 275 feet throughout the Special District, which it felt would be consistent with evidence noted in the May, 1993 DCP Lincoln Square Zoning Report and which it felt would ensure more predictable development in the future. According to the Board, DCP's proposal for limiting building height by "packing the bulk" (requiring 60 percent of the bulk below 150 feet) had not been tested on actual buildings, and was therefore unpredictable. However, the Board commended DCP's proposals for height limits on the bow-tie sites, and believed it was therefore only logical to mandate a height limit throughout the Special District. In addition, the Board stated that height limits had worked successfully in Limited Height Districts on the Upper East Side and were a major component of CPC's soon-to-be certified application for text amendments to the Quality Housing Program.

Special Permit -- The Community Board voted to require a special permit for each new development throughout the Special District. The Board stated that a special permit requirement provided the best means to achieve the original goal of the district which was to "preserve, protect and promote" Lincoln Center and that the device of a special permit would allow the developer's architect freedom to design an appropriate building for this "world famous" District.

Additional Urban Design Controls for Specific Areas -- The Board recommended an 85 foot streetwall and a 15 foot setback requirement for buildings facing Broadway as well as mandated arcades requirements without a bonus for the east side of Broadway between West 61st and 65th Streets and the east side of Columbus Avenue between West 65th and 66th Streets (excluding bow-tie sites); and a 125 foot streetwall and a 15 foot setback requirement for the Mayflower site on Central Park West. With regard to the northern bow-tie site, specific regulations would be determined during the review cycle. However, Community Board 7 noted that it preferred the following design controls for this site over DCP's proposed controls: no setback for 60 percent of the linear frontage on 66th Street, Columbus Avenue and Broadway; an 85 foot streetwall on the remaining 30 percent of the linear frontage on Broadway; and a 55-60 foot streetwall on the remaining 30 percent of the linear frontage on Columbus Avenue.

Theaters -- Controlling the height of a building, the Board argued, could be achieved more directly by requiring a building height limit of 275 feet rather than requiring a floor area limit on theaters. Further, the Board stated that by limiting the floor area for theaters, cultural and entertainment uses other than film might be inadvertently restricted. To avoid facades without transparency, the Board recommended that DCP devise a mechanism to require transparency from the curb level to the ceiling of the theater.

Zoning Lot Mergers -- The Board recommended that zoning lot mergers be restricted to 20 percent of floor area of the original lot as proposed in "West Side Futures," the comprehensive planning report for the Upper West Side completed by Community Board 7 and The Municipal Art Society. Such a restriction would control the potential for overly bulky buildings.

Infrastructure --The Community Board called on DCP to work with Board members and appropriate City agencies to restore open space and improve pedestrian and vehicular traffic in the Special District.

Scope Issues -- The Board urged DCP to move expeditiously to complete the necessary analysis on the above recommendations if DCP deemed them outside the scope of the current actions.

Sewage -- The Board stated that sewer and sanitation facilities had to be adequate to meet the needs of the new construction.

With regard to density and design issues, the Board made the following observations:

The allowable density, available bonuses, zoning lot mergers and current design regulations had enabled the construction of oversized, out-of-context buildings and towers.

- The urban design controls in the Special District should respect the contiguous Central Park West Historic District.
- The bow-tie parks and Broadway Malls were unique features of the District.
- The bow-tie development sites, especially the Bank Leumi site, the gateway to the Upper West Site, merited special consideration.
- The Mayflower site, by virtue of its size and prominent location, required a mechanism that would encourage superlative urban design and excellent architecture consistent with its visible location at the gateway to the Central Park Historic District and its internationally recognized skyline.

With regard to traffic and congestion issues, the Board noted that:

Traffic conditions would become further exacerbated, with a DCP projection of 41,500 person trips per day, once the mixed-use development at 1992 Broadway (Millennium I) was completed.

The completion of additional City-approved developments in and adjacent to the Special District would further add to the congestion.

An extraordinary level of intense development had resulted in extremely overcrowded and dangerous pedestrian and vehicular traffic conditions: the intersections at West 65th and 66th Streets, Broadway and Columbus Avenue were operating above capacity with extensive congestion and traffic delays and each had been identified by recent environmental impact statements as exceeding the 1990 Clean Air Act carbon monoxide concentration standards.

The Community Board called on DCP to work with the Board and the appropriate City agencies to restore open space and improve pedestrian and vehicular traffic in the Special District.

- Existing congestion threatened to destroy both the quality of life of the surrounding residential community and the ability of the public to gain access to Lincoln Center, one of the world's most treasured cultural institutions.

SUMMARY OF MBPO "ROUNDTABLE" DISCUSSION:

On November 10, 1993, the Manhattan Borough President held a "roundtable" discussion on the two DCP zoning proposals. Participants in the discussion included: Elizabeth Starkey, Chairperson of Community Board 7; Madeleine Polayes, President of Coalition for a Livable West Side; David J. Myerson, General Media: Philip E. Aarons, Millennium Partners; Gary Handel, Kohn Pedersen Fox; Rafael Pelli, Cesar Pelli & Associates; Paul Phillips, Abeles Phillips; Robert E. Flahive, Director of the Manhattan Office, DCP; Paul Selver, Esq., Brown & Wood; Arlene Simon, President, Landmark West!; and Bruce Simon, Landmark West!.

Robert Flahive of DCP started the discussion and gave a brief description of the DCP proposals and the rationale for them.

In opening remarks, the Manhattan Borough President acknowledged that she was likely to hear divergent opinions concerning the proposed amendments. Nonetheless, she thanked the efforts of the participants in the evening's discussion. The Borough President noted that without the diligent work of DCP, Community Board 7, Landmark West!, all the elected officials and many others, the zoning text amendments would not have been prepared and referred out for public review so expeditiously.

The Borough President commended DCP's efforts to deal with the district's problems and for developing recommendations that DCP staff believed would address these concerns. She noted, however, that these modifications. while significantly better than the existing zoning text, might not be sufficient to make a meaningful improvement in this neighborhood. She also added that Community Board 7's and Landmark West!'s proposed modifications to DCP's proposals provided viable options which should be considered, not just by the Borough President but also by CPC and ultimately the City Council.

Elizabeth Starkey, Chair of Community Board 7, summarized the position of Community Board 7 as stated in its resolution.

Bruce Simon, of Landmark West!, stated that there was no substantive difference between the positions of Community Board 7 and Landmark West!. Nevertheless, he criticized the process by which DCP had arrived at its proposal. Fifteen months ago the community learned of the Millennium I project and was promised by the City that a proposal would be developed to stop similar projects from occurring again in the future. Mr. Simon was specifically opposed to DCP's proposal to limit height by "packing the bulk." He said that if the intention was to limit height in the district, then it should be done directly rather than resorting to "packing the bulk."

Madeleine Polayes, President of Coalition for a Livable West Side, stated that the Community Board's resolution represented the consensus of the community. She said that nobody would come to Lincoln Center if the area continued to be impacted. She pointed out that a traffic study needed to be conducted. Furthermore, the traffic congestion would be so great that pedestrian bridges would have to be built. She stated that CPC estimated 41,500 person trips per day for the Millennium I project and raised questions about the other trips from the already approved developments on the western side of the district. Ms. Polayes added that the City could not plan in this manner; density had to be limited otherwise Lincoln Center would be destroyed.

In regard to the inclusionary housing bonus, Elizabeth Starkey said that, in the past, the Board would not have eliminated the inclusionary housing bonus. However, the northern part of the district had been the recipient of many units of affordable housing, and now there was a dividing line between north and south of 96th Street which had become noticeable.

Robert Flahive responded that having all the affordable housing units at the northern end of the district was not a good idea. He added, however, that the Board's recommendation raised issues which had citywide implications and therefore could not be adopted at this late stage. without further study.

Paul Selver, Esq., of Brown & Wood, and representing ABC, said that ABC had two issues regarding DCP's proposals: design controls and the use restrictions. He added that the setback on the bow-tie site was an inappropriate solution; a better approach would be a lot line building similar to the Flatiron Building. He stated that the proposed use restrictions inhibited ABC's potential to use property it owned for corporate purposes.

David J. Myerson, owner of the Tower Records/Penthouse Magazine site, said that he had not been aware of the deep emotions running in the community. He added that he had invested a lot of money in the purchase of this site. Further, he stated that the City's development process had become irrational and it deprived flexibility. Also, if the recommendations of the Board were accepted, development costs would become too high. According to Mr. Myerson, the Lincoln Center area was the only place in the city where development was occuring.

Phil Aarons of Millennium Partners said that what he found exciting about the Lincoln Center area was the power, intensity and diversity of the area. He noted that he agreed with DCP that there were problems with the bow-tie site; but, he was concerned that the public response to the Millennium I project was strongly driving a process which would impact the site to the south. That process would hurt the area and the city. He further cautioned tht the process was pushing to stop the building of a small, likable building.

Gary Handel, architect for the Millennium II project, said that he had consulted with DCP and Community Board 7. He recognized the strategic importance of the site but pointed out that if people could sit down and have a rational dialogue they would discover that the proposed building was closer to the guidelines proposed by Landmark West! than by those proposed by DCP. DCP's proposal called for a building on the site with a 150 foot setback and a total height of of 350 to 360 feet. Millennium's proposal called for a 260-315 foot building, which was in line with what had been proposed by Landmark West!. He added that the recess regulation proposed by DCP was a carry-over from what was on the East Side and it was not appropriate for the West Side. He further noted that the Flatiron building would not comply with the DCP proposal.

Paul Phillips of Abeles Phillips reported on the Mayflower site. A survey of the area was conducted and he said that the findings buttressed DCP's findings. He noted that most of the DCP's proposed changes worked well with his firm's own research. His main objection, he stated, was to Community Board 7's proposal to limit height throughout the area because it would be difficult to make a commercial building economically viable with this restriction.

Madeleine Polayes asked Robert Flahive to explain how the Community Board's proposal could be reviewed by the Planning Commission. He responded that the proposal raised serious issues of scope, i.e., between what zoning allowed and what was advertised by DCP. Further, he said that the owners and the public had a right to know the maximum extent of changes that could be made. He pointed out that the Board's theater proposal did not raise scope issues, but others did. He added that DCP had not studied the issue of the community's proposal for a maximum 10 FAR within the district, and therefore a study would be legally required before the Commission could review this recommendation. With regard to the community's proposed height limit of 275 ft, of the six soft sites, he noted DCP had only recommended the two bow-tie sites for proposed height limits. Each of the other sites would require study which would take months, and DCP would probably come up with a different height limit than that proposed by Community Board 7.

Victor Caliandro, architect for Landmark West!, advocated for the following:

- Reducing density to 10 FAR;
- Limiting each building's height to 275 feet throughout the district; and
- Opposing "packing the bulk" building form.

He added that under the "packing the bulk" proposal, the Saloon site could still result in a 30 story building. He noted that it was time to rethink the building type itself as an urban planning concept. His proposal was for 10 FAR streetwall buildings that were contextual. He disagreed with criticism that design should not be regulated and pointed out that such buildings had been successful, e.g., on Central Park West.

COMMENTS:

HISTORY/BACKGROUND

The Special Lincoln Square District was established in 1969. The area is characterized by a number of relatively recent mixed-use developments along Broadway as well as by major institutions, such as Lincoln Center for the Performing Arts and Fordham University.

The Special Lincoln Square District was established with the following purposes:

- To promote the area as a "location of a unique cultural and architectural complex" including "office headquarters and a cosmopolitan residential community";

  To improve circulation by improving subway stations and providing arcades, open space and subsurface concourses;

- To attract retail uses that would complement and enhance the area; and

  To encourage a "desirable urban design relationship of each building to its neighbors and to Broadway."

Since it was created, certain changes have been made to the District relating to public amenities, bonuses and floor area. Originally, bonuses could be granted for a variety of amenities, including arcades, plazas, pedestrian malls, covered plazas, subsurface connections to the subway and low-or moderate-income housing. The amount of development on a zoning lot was restricted to 14.4 FAR, with no more than 12 FAR for residential uses.

After the adoption, in 1984, of Upper West Side contextual zoning and the citywide inclusionary housing program amendments in 1987, all bonusable public amenities were eliminated, except for the arcade required along Broadway, subway improvements and low-or moderate-income housing. The contextual zoning amendment reduced the permitted maximum FAR from 14.4 to 12. The inclusionary housing program substituted the as-of-right inclusionary housing program for the lower-income housing bonus.

Nineteen buildings have been constructed since the enactment of the Special District.
Ten of the 19 buildings are primarily residential with either ground floor retail, and offices or institutions in the base; five are entirely residential; three are institutions and one is an office building.

In addition, there is one project, Lincoln Square (also known as Millennium I) that is under construction, and two other projects (Alfred Court and the West Side YMCA) which were approved by the Board of Estimate, but have not commenced construction.

Lincoln Square -- This development is currently under construction on a full block site bounded by Broadway, Columbus Avenue, West 67th Street and West 68th Street. It

will be a 12 FAR building (662,428 square feet) with 4.9 FAR devoted to commercial uses and 7.1 FAR designated to residential use.

- Alfred Court -- This project would contain 253 residential units and ground floor retail uses along Amsterdam Avenue when completed.

West Side YMCA -- This proposal would include the renovation and expansion of the YMCA facilities and the construction of 120 - 140 market rate residential units and 59 permanent low-income units.

There are at least six remaining development sites in the District. The sites are as follows:

Bank Leumi -- A full-block site between Broadway, Columbus Avenue, West 66th Street and West 67th Street;

Tower Records/Penthouse Magazine Building -- A five story commercial building on Broadway, just north of Lincoln Center between West 66th Street and West 67th Street;

Regency Theater -- Located at West 67th Street and Broadway;

Saloon/Chemical Bank Buildings -- A possible assemblage located on Broadway between West 64th Street and West 65th Street;

Mayflower Block -- A full-block site bounded by Broadway, Central Park West, West 61st Street and West 62nd Street, containing a vacant parcel facing Broadway and the Mayflower Hotel on Central Park West; and

ABC Assemblage -- Three low-rise structures located on the south side of West 66th Street, between Columbus Avenue and Central Park West.

LINCOLN SQUARE ZONING: DENSITY/BONUS DISCUSSION

The Borough President agrees with the Community Board that sound planning principles compel the conclusion that the Lincoln Square area is fast reaching, and indeed exceeding, its capacity to sustain development at the density which is now mapped. It is no longer clear that this neighborhood can absorb such density. Conditions such as the acute traffic congestion, overcrowding on the transit lines, potential landmarking of Lincoln Center (with possible attendant air rights transfers) and pressures on the strained capacity of city service delivery are but a few of the issues that now compel a reconsideration of the area's generally high (10-12 FAR) mapped density.

In the West Side, from West 59th to West 72nd Streets, *West Side Futures* reported a then-built density of 3.78 FAR. The Community Board acknowledged that substantial floor area legitimately remained to be built out; however, it recommended that the future build-out be limited to an overall density of R8 (6.02 FAR).

By way of comparison. Riverside South was approved in 1992 at an overall FAR of 4.1, and the neighboring Manhattan West project was approved at 6.7 FAR. Similarly, the recently-approved ABC project has a residential density of about 2.89 FAR, within a total density (including the studio development) of 6.02 FAR. The Lincoln Towers area was built out at 4.3. A more typical R10/R8 Upper West Side context has an FAR of about 7.25, and the as-built context of the entire Upper West Side is about 6 FAR, very near the allowable R8 zoning benchmark of 6.02 FAR.

Nevertheless, within the Lincoln Square Special District, there are wide variations in the built density, and some noteworthy examples of disparity between what is mapped and what is built.

North of West 64th Streets and west of Columbus Avenue, virtually all of the area has an as-built context of approximately 10 FAR, and much of the area north of West 68th Street has an as-built density of 6 FAR or less.

Above West 68th Street, this as-built character largely conforms to the mapped zoning density, which is mainly R8B.

Below West 68th Street, while some areas are mapped R8, much of the rest of the district is mapped C4-7, or 10 FAR bonusable to 12 FAR.

Within the area between West 68th and West 64th Streets, while some development is built to a 10 FAR density, any use of the existing bonus to go to 12 FAR would yield very out-of-context developments; similarly, the C4-7 mapped across from the low density Lincoln Center complex could generate some massively out-of-scale developments.

- In the area below West 64th Street and east of Columbus Avenue the as-built context typically exceeds 10 FAR. In addition to the actual increment in built density in this area, its more commercial character tends to exaggerate the feeling of its dense character.[1]

That said, it remains the case that the proposals now pending do not deal with density. Hence, the Borough President has been informed that the Department of City Planning is unlikely to find the question of underlying density to fall within the scope of what can be accomplished in the near-term. The Borough President urges that this question of scope be carefully considered, but does not believe that formal consideration of the current proposals should be delayed pending a "return to the drawing boards" for such study. **In the event that density is deemed to fall**

[1] Density translates into a rough measure of how development may interfere with or oppress the people who live in or experience an area before new buildings change it. Generally, residential development is perceived as less "dense" than more commercial development, even where the square footage or size of the buildings is the same. But even residential development contributes substantially to the perception of density. While population is up slightly as of the 1990 census, the overall population of Community Board No. 7 has *declined* from 212,400 in 1970 to 210,993 in 1990, according to U.S. Census data. Nevertheless, perhaps because of the (often accurate) perception that many services have declined also, area residents do not perceive a lessening of density, but rather, increased demand for scarce resources.

outside the scope of the current actions, the Borough President recommends 1) that the matters found to be within scope be evaluated within *this* public review process and adopted or modified as detailed in this report, and 2) that the Department of City Planning be directed to undertake a more comprehensive review of mapped vs. built vs. "livable" density within this district, and ultimately, to propose appropriate zoning actions.

The issue of the treatment of the bonuses in the district -- inclusionary housing, subway, arcade -- warrants separate attention in this context. In 1989, the Community Board's *West Side Futures* study argued for an R10A zoning designation along Broadway, i.e., at a 10 FAR, and recommended that inclusionary housing be made mandatory. For the arcade and plaza bonuses, *West Side Futures* argued for elimination; for the subway bonus, it specifically supported retention of the bonus for this special district. The study recommended lower mid-block density only in the areas north of West 64th Street. As noted above, there has been substantial development in the intervening years, and more to come in the pipeline, all of which calls into question the continuing capacity of this area to absorb development in excess of 10 FAR.

Given the changed circumstances in Lincoln Square, the Borough President recommends: 1) the elimination of the arcade bonus; 2) the restriction of the inclusionary housing bonus to development on-site or entirely within the boundaries of the special district; and 3) the reevaluation of the economics of the subway bonus to relate the amount of floor area granted more clearly and directly to the effectiveness of the subway improvements in mitigating the impacts of high density development.

The Manhattan Borough President agrees with the Community Board that 10 FAR is more appropriate in the Lincoln Square area than 12 FAR. What should really happen, over the long-term, as the Borough President has stated since the release of her 1990 Strategic Policy Statement, is for inclusionary housing programs to be expanded in lower density districts, so that developments and communities could benefit from economic integration. Alternatively, the City should develop and implement an economically viable mandatory inclusionary housing program.

However, both of these are long-range approaches that cannot be accomplished within the foreseeable time frame. Given the existence of inclusionary housing, as a citywide *as-of-right* available bonus for all 10 FAR districts, the Borough President is concerned about the precedent of allowing areas to pick and choose where low-income housing would be welcomed. While the West Side has a long-standing tradition of welcoming economically integrated housing, the Borough President believes strongly that this kind of program works best when it is as-of-right and based on tough criteria.

Some aspects of this area are unique in the City, if not the world; density is already enormous and the chief defining "neighborhood character" is as a cultural hub. It is therefore unfair to allow the low-income units to go in a more economically depressed area (which requires more middle-income investment) far away from the District; this approach fails to create economic integration in the Special District, while continuing to overburden the area with additional density.

Since there is a special district in place, there are many precedents for modifications to citywide rules within the framework of special districts **including what was once a special inclusionary housing type bonus only for this district that pre-dated the citywide program.**

The Borough President proposes limiting any use of the inclusionary housing bonus to within this district: to units on-site; or within the district boundaries. While this could still add some density to the neighborhood -- and does not alter the mapped density in a way that would be inconsistent with the study and environmental work done by DCP on this proposal -- it would, at a minimum, ensure that the neighborhood saw both the burden and the benefit of such a development.

As for the subway bonus, the current formula bears no sound relationship of amount of FAR granted to the value of the improvement to the public. A classic example was the first Coliseum project proposal, overturned by courts as sale of zoning bonus, where the entire process was driven by the amount of FAR the developer wanted. The Borough President supports a complete reevaluation of this bonus, to bring the value of added floor area and the value of public benefit into line.

BUILDING HEIGHT LIMIT

The Borough President agrees with both DCP and the community that special treatment should be paid to the bow-tie sites. Because of their unique location, they serve as a gateway to the Upper West Side, and thus this distinct quality must be maintained and preserved. DCP's current proposal to have a 300 foot overall height limit is certainly an improvement to having no height limit; however, this proposal does not go far enough in achieving the goal of safeguarding these special sites.

It is therefore rather noteworthy that DCP has expressed a willingness to consider a 275 foot height limit on these sites and has also indicated that this modification to the proposed text could occur in a timely fashion, since the only legal requirement for such a change would involve the re-publishing of this proposed modification and a continuation on December 1, 1993, of the CPC public hearing on this modification in order to give all affected parties proper notice.
This receptivity on the part of DCP is very welcomed.

There still remains the larger issue of a building height limit throughout the district. The Borough President agrees with the community's recommendation that a 275 foot building height limit be adopted by the Commission for the entire district. The decision to support this modification is based on DCP's Special Lincoln Square District zoning report which clearly studied building heights throughout the district, as indicated in the chart on page 6 of the report and in the text on page 14. In fact the report argued for "packing the bulk" in terms of this tool's ability to control height. The report stated that "to avoid excessive height, as in the Lincoln Square project (Millennium I), the Department proposes the following: 'Establish envelope controls to govern the massing and height of new buildings throughout the district. The proposed regulation would require a minimum of 60 percent of a development's total floor area to be located below an elevation of 150 feet. This regulation results in a better relationship

between the base and tower portions of buildings, producing building heights ranging from the mid-20 to 30 stories.' "

In addition, DCP participated in the analysis of the six development sites, within the Special District, undertaken by the New School's Environmental Simulation Center and funded by Landmark West!. This work involved the development of physical models for the six sites, and showed the cumulative impacts of the buildouts of these sites, under existing zoning, under DCP's proposed zoning, and under the 275 foot building height limit.

Hence the Commission needs to agree to hear this modification at its December 1, 1993 public hearing. The planning rationale, however, presently exists in the DCP study as well as in the Environmental Simulation Center's analysis. The only change is the tool to achieve this goal. Because the argument for a building height limit is very strong, it is essential to continue discussions with DCP during the review process so that a more suitable recommendation evolves that takes into account the context of the entire District as well as each of its sub-districts.

SPECIAL PERMIT REQUIREMENT

As-of-right design controls cannot address such unique sites as are created by the Broadway diagonal and the world-famous Lincoln Center complex. In acknowledgment of the singular character of this area, the City created the Special Lincoln Square District approximately 25 years ago. Previously in the district, loading docks triggered special permit requirements. It is also clear that a special permit requirement would result in better building design for what is really a unique area. The Borough President therefore urges the Commission to optimize such design controls in order to ensure that the area's distinctiveness continues.

URBAN DESIGN ISSUES

With regard to streetwall heights, setbacks and other building design controls, the Borough President supports the community's solution and thinks that either Community Board 7's recommendations or those of Landmark West! are preferable to the specifics of the DCP proposal. (See attached drawings.) CPC is urged to resolve these conflicts with the community in the same consultative process that it has used all along. In addition, any design controls that are ultimately adopted need to respect the adjacent Central Park West Historic District, whose southern portion falls within the Special District.

The Borough President has no strong opinions on the issue of arcades because experience has shown that sometimes arcades work well and sometimes they deaden the space. If properly designed, subject to some design review process, the Board would support arcades, without any bonus provision, along the east side of Broadway between 61st Street and 65th Street and along Columbus Avenue between 65th Street and 66th Street. The Board's position provides an appropriate middle-ground approach as opposed to DCP's proposals which would mandate arcades at a reduced bonus (amendment #1) or would entirely eliminate them (amendment #2). For these unusual streetscapes, experience has shown that a special permit process works better than an as-of-right solution.

ZONING LOT MERGERS

While the idea of restricting zoning lot mergers is generally a good one, and the Board's recommendation of 20 percent seems to be appropriate, the Borough President is concerned about specific conditions on the Bank Leumi site (bow-tie site) and supports the full preservation of the occupied tenements. Therefore, DCP is urged to come up with a mechanism that addresses both issues: restricting mergers that create unduly tall buildings on small portions of sites and preserving occupied housing.

COMMERCIAL DENSITY AND USE

The Borough President agrees with the Board's assessment that the area is overly congested and has major air quality problems (according to the Riverside South Final Environmental Impact Statement (FEIS), the northern bow-tie site exceeds the National Ambient Air Quality Standard for an 8-hour Carbon Monoxide Concentrations). This continuing overload is obviously not good for economic development. This excessive traffic impact also negatively affects Lincoln Center, a major cultural and economic resource.

As the Board's resolution indicates, there is substantial development planned for this area. Therefore, DCP's proposal to reduce the amount of commercial floor area from 10 FAR to 3.4 FAR in sub-district A of the Special District is strongly endorsed. This restriction is designed to prevent any more debacles like Lincoln Square (Millennium I) which will contain 4.9 FAR of commercial use including: 10 movie theaters (4,000 seats); high traffic generating ground floor retail; and the world's largest health club (10,000 members and 126,000 square feet, which is bigger than most regional mall department stores); there is also an additional 110,000 square feet of cellar retail space. The Millennium I project, because of the amount of commercial space permitted, will add significantly to the pedestrian and vehicular congestion that already exists in this area. This project will generate approximately 41,500 person trips per day, 144 percent more than a residential scenario. The intensity of activity generated by this concentration of commercial uses greatly exceeds that of more typical District buildings which average about 1 FAR of commercial use. Therefore, a reduction in allowable commercial floor area is one small way to reduce the impacts on this overly congested area.

The Borough President supports the Board's position opposing the limitation on Use Group 8 uses (theaters and other entertainment uses) and urges DCP to devise a mechanism to require transparency from the curb level to the ceiling of the theater.

The Borough President acknowledges ABC's importance in the entertainment industry and the enormous commitment of resources ABC has made not only to this neighborhood but also to this City's economy by developing its corporate headquarters and television production facilities in the Lincoln Square area. Therefore, continued dialogue between DCP/CPC and ABC is encouraged so that solutions to existing conflicts may be found.

SPECIAL DISTRICT SUB-AREA C

Sub-area C, located in the southern portion of the district, between West 60th Street and West 64th Street, is a center of commercial activity due to its proximity to midtown, Columbus Circle and the Paramount Building. The more commercial character of Sub-area C, specifically the area including and around the Mayflower Hotel site, means somewhat different building forms, especially those which allow larger floorplates. With regard to the Mayflower Hotel site, its visible location at the gateway to the Central Park West Historic District and its internationally recognized skyline requires any building on this site to respect these unique site conditions.

PEDESTRIAN CONDITIONS

DCP's proposal to mandate retail continuity at the ground level along Broadway, Columbus Avenue and Amsterdam Avenue to ensure the continuation of the area's pedestrian-oriented character, clearly deserves support. In addition, DCP's proposal to mandate transparency regulations which would require glazing on the ground floor of new developments to encourage active street life and give pedestrians visual access to the interior of retail shops also warrants the Borough President's endorsement.

Given the level of density and congestion in this neighborhood, Community Board 7's desire for area-wide landscape and streetscape improvements to enhance the District, including the need to refurbish the "bow-tie" parks and malls, would not only provide some minimal relief from these impacts, but would also act as a unifying element for the District. DCP is urged to work with the community and other appropriate city agencies to help achieve these improvements.

TEXT ENACTMENT AND FOLLOW-UP

The DCP proposal to make the new zoning effective with the date of approval by the Commission is strongly endorsed by the Borough President. Further, the Commission is strongly encouraged to enact the most comprehensive zoning package possible for this review cycle.

As to follow-up after enactment, the Borough President urges DCP to move to expedite a full traffic/pedestrian circulation study of this area so that the issues of traffic and congestion are addressed. DCP should also move quickly to complete the necessary supporting documentation on any proposals that are deemed outside scope at this point.

CONCLUSION

The Manhattan Borough President applauds DCP for its collaborative work with the Community Board, community groups, other elected officials as well as with the Manhattan Borough President's Office in identifying problems and proposing solutions to the many issues facing the Lincoln Square District. Chairman Schaffer, Manhattan Planning Director Robert Flahive and Regina Myer should be complimented for prioritizing the Special Lincoln Square District zoning Text Amendments and the extra effort expended to prepare and refer the amendments out for public review so expeditiously.

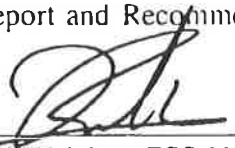
The Lincoln Square Task Force has played an invaluable role in this process. Besides the contribution of the Community Board, DCP, Manhattan Borough President's Office staff and other elected officials and their staffs, many other people contributed greatly to this planning effort, such as: Arlene Simon of Landmark West!; Doug Cogan of The Municipal Art Society; Paul Buckhurst of Buckhurst, Fish and Jacquemart; Marilyn Taylor of SOM; Michael Kwartler of the Environmental Simulation Center at the New School.

In addition to the cooperative work concerning the rezoning of the Lincoln Square area, the community also organized a Millennium Construction Safety Task Force shortly after the collapse of the Ansonia Post Office. This Task Force, jointly chaired by Community Board 7 and the Manhattan Borough President's Office, has worked to assure site safety for the area and has addressed specific problems raised by local residents. Recently, the Task Force has expanded its scope of work to include two other sites: the Bank Leumi site (bow-tie site); and the ABC assemblage on West 66th Street between Central Park West and Columbus Avenue.

The Borough President supports proactive planning in regard to changes to the Zoning Resolution. However, no one realized how flawed the zoning was for the Special Lincoln Square District until the Millennium I project was proposed as an as-of-right development. Sometimes it takes a project that is so out of scale with the surrounding community, so inappropriate in terms of a mix of land uses, and so visually offensive, to galvanize the local community, elected officials and city staff to respond quickly and cooperatively to correct a glaring failure in the Zoning Resolution.

In order to avoid the recurrence of such excessive out of scale development and to enhance the uniqueness of the Special District, the Borough President urges the Commission and then the City Council to move expeditiously to enact the most comprehensive zoning package possible for this review cycle. In order to allow the Commission to hear the Community Board's modifications concerning the proposed zoning amendement, the Borough President requests the Commission to faciliate the airing of these modifications at its December 1st, 1993 pulbic hearing. By allowing the inclusion of the Board's modifications, the Commission expands its own ability to approve the most comprehensive set of zoning amendments possible.

Report and Recommendation Accepted:



RUTH W. MESSINGER
Manhattan Borough President

THE COUNCIL

STATED MEETING

Wednesday, January 26, 1994, 1:30 noon.
Public Advocate (Mr. Green)

Peter F. Vallone	Kenneth K. Fisher	Antonio Pagan
Speaker	Wendell Foster	Mary Pinkett
Michael Abel	Kathryn E. Freed	Morton Povman
Sal F. Albanese	John A. Fusco	Adam Clayton Powell IV
Herbert E. Berman	Julia Harrison	Jose Rivera
Alfred C. Cerullo III	Lloyd Henry	Annette M. Robinson
Una Clarke	Karen Koslowitz	Victor L. Robles
Lucy Cruz	Howard L. Lasher	David Rosado
Noach Dear	Sheldon S. Leffler	Israel Ruiz, Jr.
Michael DeMarco	Guillermo Linares	John D. Sabini
Stephen DiBrienza	Helen M. Marshall	Archie Spigner
Martin Malave-Dilan	Joan Griffin McCabe	Alfonso C. Stabile
Thomas K. Duane	Walter L. McCaffrey	Lawrence Warden
June M. Eisland	Stanley E. Michels	Anthony D. Weiner
Ronnie Eldridge	Charles Millard	Thomas White, Jr.
Andrew S. Eristoff	Jerome X. O'Donovan	Priscilla A. Wooten
C. Virginia Fields	Thomas Ognibene	

Excused: Council Members Watkins and Williams.

The presence of a quorum was announced by the Public Advocate (Mr. Green).

The Invocation was delivered by Reverend Joseph A. O'Hare, S.J., Fordham University, Bronx, New York 10458.

All mighty and all loving God,

In whose image and likeness, we have been created, send your spirit among us today, as we assemble to celebrate the memory of your son, Robert F. Wagner, Jr. In his life and aspirations your presence could be traced, Your spirit was for him a summons to service for others.

We meet in this chamber where the future of our city and the hopes of its people are debated and defined. It is a place dedicated to politics in the highest sense, that is, the common good of your people living together in the *polis*, the city.

It was in this sense that Bobby Wagner's life was a political life, committed to and fascinated by the challenge of building the city, making it a place where men and women of different colors and creeds and countries could build a life together worthy of their personal and collective human dignity.

It was of this kind of politics that Bobby Wagner was both student and servant.

His was not the politics of public posturing that masks private pettiness, nor of divisive demagoguery that exploits differences among group to promote individual ambition.

L.U. No. 54

By Council Member Eisland

Uniform land use review procedure application no. 940127A ZMM, pursuant to Sections 197-c and 197-d of the New York City Charter, concerning changes to the zoning map regarding the Special Lincoln Square District, in Council District no. 6.

Referred to the Committee on Land Use and Subcommittee on Zoning and Franchises.

L.U. No. 55

By Council Member Eisland

An Urban Development Action Area Project, located at 156 St. Marks Avenue, Council District No. 35, Borough of Brooklyn. This matter is subject to Council review and action pursuant to Article 16 of the New York General Municipal Law, at the request of the New York City Department of Housing Preservation and Development; and pursuant to Section 577 of the Private Housing Finance Law, an application for a partial tax exemption for said real property. (036094 HAK).

Referred to the Committee on Land Use and Subcommittee on Permits, Dispositions and Concessions.

L.U. No. 56

By Council Member Eisland

An Urban Development Action Area Project, located at 61-45 78th Street, Council District No. 30, Borough of Queens. This matter is subject to Council review and action pursuant to Article 16 of the New York General Municipal Law, at the request of the New York City Department of Housing Preservation and Development; and pursuant to Section 696 of the General Municipal Law a real property tax exemption (No. 164094A HAQ).

Referred to the Committee on Land Use and Subcommittee on Permits, Dispositions and Concessions.

L.U. No. 57

By Council Member Eisland

Landmarks Preservation Commission designation no. DL-254, LP-1831, pursuant to Section 3020 of the City Charter, of the Jackson Heights Historic District, Borough of Queens, in Council District Nos. 21 and 25. (Non-ULURP No. 179094HKQ) (N940195 HKQ).

Referred to the Committee on Land Use and Subcommittee on Landmarks, Public Siting and Maritime Uses.

L.U. No. 58

By Council Member Eisland

An Urban Development Action Area Project, located at 1883-85,-87,-89, -91, 93 and-95 Madison Avenue; 51,61,63,65,67 and 69 East 122nd Street; 1760-66, 1776 Park Avenue, 74 East 123rd Street, Council District No. 9, Borough of Manhattan. This matter is subject to Council review and action pursuant to Article 16 of the New York General Municipal Law, at the request of the New York City Department of Housing Preservation and Development. (No. 232094 HAM).

Adopted.

L.U. No. 59

By Council Member Eisland

An application for a revocable consent to occupy and use sidewalk space for the construction, maintenance and operation of an unenclosed sidewalk cafe, to be located at 184 Bleecker Street, Manhattan, Council District No. 3. (Non-ULURP No. 4740951 CM).

Referred to the Committee on Land Use and Subcommittee on Zoning and Franchises.

L.U. No. 60

By Council Member Eisland

Uniform land use review procedure application no. 940054 GFY, pursuant to Sections 197-c and 197-d of the New York City Charter, concerning a request for proposals by the New York City Department of Transportation, for automatic public pay toilets. This application is subject to review and action by the Land Use Committee only if appealed to the Council pursuant to Section 197-d(b)(2) of the Charter or called up by vote of the Council pursuant to Section 197-d(b)(3) of the Charter.

Referred to the Committee on Land Use and Subcommittee on Zoning and Franchises.

At this point the Speaker (Council Member Vallone) made the following announcements.

Thursday, January 27, 1994

Committee on **TRANSPORTATION** **1:00 P.M.**

Re: Organizational Meeting and
Oversight - Metropolitan Transit Authority Advertising Policies.

Council Chambers - City Hall Noach Dear, Chairperson

THE COUNCIL

STATED MEETING

Wednesday, February 9, 1994, 1:30 noon.
Public Advocate (Mr. Green)

Peter F. Vallone	C. Virginia Fields	Antonio Pagan
Speaker	Kenneth K. Fisher	Mary Pinkett
Michael Abel	Wendell Foster	Morton Povman
Sal F. Albanese	Julia Harrison	Adam Clayton Powell IV
Herbert E. Berman	Lloyd Henry	Jose Rivera
Alfred C. Cerullo III	Karen Koslowitz	Annette M. Robinson
Una Clarke	Howard L. Lasher	Victor L. Robles
Lucy Cruz	Sheldon S. Leffler	David Rosado
Noach Dear	Guillermo Linares	John D. Sabini
Michael DeMarco	Helen M. Marshall	Archie Spigner
Stephen DiBrienza	Joan Griffin McCabe	Alfonso C. Stabile
Martin Malave-Dilan	Walter L. McCaffrey	Lawrence Warden
Thomas K. Duane	Stanley E. Michels	Anthony D. Weiner
June M. Eisland	Charles Millard	Thomas White, Jr.
Ronnie Eldridge	Jerome X. O'Donovan	Enoch H. Williams
Andrew S. Eristoff	Thomas Ognibene	Priscilla A. Wooten

Excused: Council Members Freed, Fusco, Ruiz and Watkins.

The presence of a quorum was announced by the Public Advocate (Mr. Green).

The Invocation was delivered by Rabbi Jonathon Glass, Civic Center Synagogue, 49 White Street, New York, New York 10013.

INVOCATION

Men and Women of the City Council,

This weekend is Lincoln's Birthday and we should call attention to its special significance for those of us in government. His life serves as an eternal reminder of a time when legislators legislated out of moral convection and not solely from political expediency.

Some here today are new and the City itself has experienced a rebirth of sorts in its transition. We have the chance to eschew the modern style of politics and take our cue from an older but purer era. I therefore extend my blessing to this meeting that it may embody the principles of the man whose life we will commemorate this weekend.

Amen.

Council Member Henry Moved that the invocation be spread in full upon the Minutes and adopted.

(GENERAL PURPOSES) shall not apply to any #development# or #enlargement# with more than 25 percent of its total floor area in #residential use# after the effective date of this amendment).

In R9, R10, C1-8, C1-9, C2-7 or C2-8 Districts, or in C1 or C2 Districts mapped within R9 or R10 Districts, no existing #plaza#, plaza-connected open area, #residential plaza#, #arcade# or other public amenity, open or enclosed, for which an #floor area# bonus has been received pursuant to regulations antedating (the effective date of this amendment), shall be eliminated or reduced in size without a corresponding reduction in the #floor area# of the #building# or the substitution of equivalent complying area for such amenity elsewhere on the #zoning lot#.

JUNE M. EISLAND, Chairperson, ARCHIE SPIGNER, HERBERT E. BERMAN, SHELDON S. LEFFLER, ENOCH H. WILLIAMS, NOACH DEAR, JEROME X. O'DONOVAN, PRISCILLA WOOTEN, WALTER L. McCAFFREY, C. VIRGINIA FIELDS, KENNETH K. FISHER, THOMAS K. DUANE, ADAM C. POWELL IV, LAWRENCE A. WARDEN, MICHAEL J. ABEL. Committee on Land Use, February 9, 1994.

On motion of the Speaker (Council Member Vallone), and adopted, the foregoing matter was coupled made as a General Order for the day. (See ROLL CALL ON GENERAL ORDERS FOR THE DAY.)

L.U. No. 54

Report of the Committee on Land Use in favor of approving a Uniform Land Use review procedure application no 940127 (A) ZMM, pursuant to Sections 197-c and 197-d of the New York City Charter, concerning changes to the zoning map regarding the Special Lincoln Square District, in Council District No. 6

The Committee on Land Use to which was referred on January 26, 1994 (Minutes, page 328) the annexed Land Use resolution respectfully

REPORTS:

This zoning text change would amend the Special Lincoln Square Special District, located between Central Park West, Amsterdam Avenue and West 60th and 68th Streets. It would change the district's regulations with regard to design controls, commercial uses and parking. The City Planning Commission considered six versions of this rezoning, the differences among them relating to penthouses and the height limitations for blocks 1 and 2 (located between Columbus Avenue and Broadway, between 62nd and 63rd Streets (Block 1), and between 66th and 67th Streets (Block 2). The Commission approved an alternative that sets a height limitation on blocks 1 and 2 at 275 feet with the penthouse provision.

Members of the City Planning Commission, along with the Community Board, Council Member Eldridge and others, criticized this action for not being broad enough in scope to consider significant planning issues such as: density controls, height limits, inclusionary housing requirements, limits on zoning lot mergers, pedestrian and vehicular circulation.

Accordingly, Your Committee recommends its adoption

In connection herewith, Council Members Eisland and McCaffrey offered the following resolution:

Res. No. 130

Resolution approving the decision of the City Planning Commission on ULURP No. N 940127 (A) ZRM, regarding amendments to the text of the Zoning Resolution relating to Article VIII, Chapter 2, Section 82-00 regarding the Special Lincoln Square District (L.U. No. 54).

By Council Members Eisland and McCaffrey

WHEREAS, the City Planning Commission filed with the Council on December 28, 1993, its decision dated December 20, 1993 ("the Decision"), on the application submitted by the Department of City Planning, pursuant to Sections 197-c, 200 and 201 of the New York City Charter, for an amendment to the text of the Zoning Resolution (ULURP No. N 940127 (A) ZRM) the "Application");

WHEREAS, the Decision is subject to review and action by the Council pursuant to Section 197-d(b)(l) of the City Charter;

WHEREAS, the Council held a public hearing on the Decision and Application on January 24, 1994;

WHEREAS, the Council has considered the land use implications and other policy issues relating to the Decision and Application; and

WHEREAS, the Council has considered the relevant environmental issues and the negative declaration, dated October 4, 1993 (CEQR No. 94-DCP 007M);

WHEREAS, the Land Use Committee of the City Council intends to study the land use needs of this Special Lincoln Square District and propose a further zoning changes for the District to address the many necessary land use controls identified during the ULURP review of this action, but which were outside the scope of the review process;

The Council hereby resolves that:

The Council finds that the action described herein will have no significant effect on the environment.

Matter in Graytone is new, to be added:
Matter in ~~Strike out~~ is old, to be deleted
Matter within # # is defined in Section 12-10;
Matter in *italics* indicates City Council modification
* * * indicates where unchanged text appears in the Zoning Resolution.

Article VIII
Chapter 2 - Special Lincoln Square District

82-00 GENERAL PURPOSES

* * *

82-01 Definitions

* * *

Development

For purposes of this Chapter a "development" includes both #development# and #enlargement# as defined in Section 12-10 (DEFINITIONS).

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 the Chapter, certain specified ~~#bulk#~~ regulations of the districts on which the #Special Lincoln Square District# is superimposed are made inapplicable, ~~and Special regulations are substituted in the Center. 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. And the City Planning Commission, by special permit after public notice and hearing and subject to Board of Estimate action, may grant special permits authorizing modifications of specified applicable district #bulk# regulations for any #development# in the #Special Lincoln Square District#. In addition to meeting the requirements, conditions, and safeguards prescribed by the Commission as set forth in this Chapter, each such #development# shall conform to and comply with all of the applicable district regulations on #use#, #bulk#, supplementary #use# regulations, regulations applying along district boundaries, #accessory signs#, #accessory# off street parking and off street loading, and all other applicable provisions of this resolution, except as otherwise specifically provided in this Chapter.~~

~~82-03~~
~~Action by the Board of Estimate~~
Delete entire section

~~82-04~~
~~82-05~~
Requirements for Applications

An application to the City Planning Commission for the grant of a special permit or an authorization respecting and #developing# under the provisions of this Chapter shall include a site plan showing the location and the proposed #use# of all #buildings or other structures# on the site; the location of all vehicular entrances and exits and proposed off-street parking spaces, and such other information as may be required by the City Planning Commission for its determination as to whether or not a special permit or an authorization is warranted. Such information shall include, but not be limited to, justification of the proposed #development# in relation to the general purposes of the #Special Lincoln Square District# ~~(Section 82-00), its relation to public improvements (82-05), its proposed #uses# (Section 82-06), its parking facilities (Section 82-07), and its bulk and height (Section 82-08), as well, in applicable locations, as the inclusion of Mandatory Arcades (Section 82-09), public amenities (Section 82-10) and location of #building# walls in relation to certain #street lines# (Section 82-11).~~

~~82-05~~
~~Relationship to Public Improvement Projects~~
Delete Entire Section

82-04
District Plan
The District Plan for the #Special Lincoln Square District# included as Appendix A identifies specific subdistricts in which special zoning regulations carry out the general

purposes of the #Special Lincoln Square District#. These areas are: Subdistrict A, Subdistrict B and Subdistrict C.
The District Plan also identifies #blocks# with mandatory #front lot line street walls#. The District Plan is hereby incorporated as an integral part of the #Special Lincoln Square District#.

82-05
Right to Construct

For the purposes of this Chapter, the right to continue to construct shall terminate if the provisions of Section 11-30 (BUILDING PERMITS ISSUED BEFORE EFFECTIVE DATE OF AMENDMENT) are not met by the date of approval of this amendment by the City Planning Commission.
Notwithstanding the provisions of this subchapter, and #development# approved by special permit of the City Planning Commission pursuant to this chapter prior to (the effective date of this amendment) may be started ore continued pursuant to such special permit.

82-10
MANDATORY DISTRICT IMPROVEMENTS
The provisions of this Section specify mandatory or optional physical improvements to be provided in connection with #developments# on certain #zoning lots# located within the Special District.

~~82-09~~
82-11
Special Provisions for Optional ~~Mandatory~~ Arcades

Any #development# located on a #zoning lot# within a #lot line# which coincides with ~~any~~ either of the following #street lines#: ~~the north side of 61st Street between Canal Park West and Broadway,~~ the east side of Broadway between West 61st and West 65th Street or the East side of Columbus Avenue between West 65th and West 66th streets, ~~may shall~~ contain an #arcade# as defined in Section 12-10, except that:

(a) The #arcade# shall extend the full length of the #zoning lot# along the #street lines# described above. However, the required #arcade# along the east side of Columbus Avenue may be terminated at a point 40 feet south of west 66th Street;

(b) The exterior face of #building# columns shall lie along the #street lines# described above;

(c) The minimum depth of the #arcade# shall be 15 feet (measured perpendicular to the exterior face of the #building# columns located on the #street line#) and the ~~average~~ minimum height of the #arcade# along the center line of its longitudinal axis shall not be less than 20 feet;

(d) The #arcade# shall contain no permanent obstruction within the area delineated by the minimum width and height requirements of this Section except for the following:

(1) Unenclosed cafes, provided that there is at least a ~~6~~ six-foot feet wide unobstructed pedestrian way adjacent to the #building# #street wall#. In no event may such cafes be enclosed at any time.

(2) Structural columns not exceeding 2 feet by 3 feet provided that the longer dimension of such columns is parallel to the #street line#, that such columns are spaced at a minimum of 17 feet on center, and that the space between such columns and the face of the ~~building~~ #street wall# is at least 13 feet wide. No other columns shall project beyond the face of the ~~building~~ #street wall#.

(e) No #signs# may be affixed to any part of the #arcade# or #building# columns except on a parallel to the #building# #street wall# projecting no more than 18 inches therefrom parallel to the #street line# along which the #arcade# lies.

(f) The #arcade# shall be illuminated only by incandescent lighting to a standard of average ~~8~~ eight foot-candle intensity with a minimum ~~5~~ five foot-candle intensity at any point within the #arcade#.

82-12
Mandatory Off-Street Relocation of a Subway Stair

Where a #development# is constructed on a #zoning lot# that fronts on a sidewalk containing a stairway entrance into the West 59th Street (Columbus Circle) or the West 66th Street subway station and such zoning lot# contains 5,000 square feet or more of #lot area#, the existing entrance hall be relocated from the #Street# onto the #zoning lot# in accordance with the provisions of Section 37-032 (Standards for relocation, design and hours of public accessibility) and 37-033 (Administrative procedure for a subway stair relocation).

82-13
Special Provisions for a transit Easement

Any #development# located on the east side of Broadway between West 66th Street and West 67th Street shall provide an easement on the #zoning lot# for public access to the subway mezzanine or station when require by the New York State Transit Authority (TA) in accordance with the procedure set forth in Section 95-04 (Certification of transit Easement Volume) and hereby made applicable.

~~82-06~~
~~82-20~~
SPECIAL USE ~~AND SIGN~~ REGULATIONS

~~In order to insure that a wide variety of consumer and service needs of local residence are met, a special limitation is imposed in the amount of street frontage that can be elected to any one type of commercial use, and a special incentive is provided to encourage uses compatible with the General Purposes of Section 82-00.~~

In order to provide for the special cultural needs, convenience, enjoyment, education and recreation of the residents of the area and of the many visitors who are attracted to the Lincoln Center for the Performing Arts, a limitation is imposed on the ground for #uses# within the Special District.

The provisions of this Section shall apply to all #development# or change of #uses# within the Special District

~~82-061~~
~~82-21~~
Restrictions on Street Level Use

~~#Uses# on the ground floor level along Broadway, Amsterdam or Columbus Avenues except lobby space shall be limited to Use Group L uses or #commercial uses# permitted by the underlying district regulations. On any #zoning lot# which abuts Columbus, Amsterdam Avenue or Broadway, the maximum length of street frontage along Broadway or Columbus or Amsterdam Avenue which may be devoted to any permitted #use# shall be 40 feet unless the use also is included in Use Group L (Section 82-062) #Uses# under Use Group L are permitted without #street# frontage limitation.~~

Within 30 feet of Broadway, Columbus Avenue or Amsterdam Avenue #street lines#, #uses# located on the ground floor level or within five feet of #curb level# shall be limited to those listed in Use Groups 3A, 3B, 6A, 6C, 8A, 10A, eating or drinking establishments listed in 12A, or 12B. Within Use Groups 3A or 3B #uses# shall be limited to colleges, universities including professional schools, museums, libraries or non-commercial art galleries. Within such area, lobby space, required accessory loading berths, or access to subway stations are permitted.

82-22
Location of Floors Occupied by Commercial Uses

The provisions of Section 32-422 (Location of Floors Occupied by Non-Residential Uses) shall not apply to any #commercial use# located in a portion of a #mixed building# that has separate direct access to the #street# and has no access within the #building# to the #residential# portion of the #building# at any #story#. In no event shall such #commercial use# be located directly over any #dwelling units#.

82-23
Street Wall transparency

When the front building wall or #street wall# of any #development# is located on Broadway, Columbus Avenue or Amsterdam Avenue, at least 50 percent of the total

surface area of the #street wall# between #curb level# and 12 feet above #curb level# or to the ceiling of the first #story#, whichever is higher, shall be transparent. Such transparency shall begin not higher than two feet six inches above #curb level#.

~~82-063~~
~~82-24~~
Supplementary Sign Regulations

No permitted #business sign# shall extend above #curb level# at a height greater than 20 feet or obstruct an #arcade#.

~~82-07~~
~~Modification of Parking and off street Loading Requirements~~
Delete entire section

~~82-08~~
~~Modification of Bulk and Height and Setback Requirements~~
Delete entire section

~~82-10~~
~~PUBLIC AMENITIES~~
Delete entire section

82-30
SPECIAL BULK REGULATIONS

82-31
Floor Area Ratio Regulations for Commercial Uses

Within Subdistrict A, for any #development# in a C4-7 District the maximum permitted #commercial floor area# on a #zoning lot# shall be 100,000 square feet.

82-311
Floor area increase by special permit

The City Planning commission may by special permit allow the #commercial floor area ratio# permitted on a #zoning lot# pursuant to Section 82-31 (Floor Area Ration Regulations for Commercial Uses) within Subdistrict A to be increased to 10.0 for #commercial uses#. As a condition for such special permit, the Commission shall find that:

(a) the #uses# are appropriate for the location and shall not unduly affect the #residential uses# in the nearby area or impair the future land use and development of the adjacent areas;

(b) the #uses# shall not require any significant addition to the supporting services of the neighborhood or that provision of adequate supporting services has been made;

(c) the additional #bulk# devoted to #commercial uses# shall not create or contribute to serious traffic congestion and will not unduly inhibit vehicular and pedestrian flow; and

(d) the #streets# providing access to such #use# are adequate to handle the traffic generated thereby or provision has been made to handle such traffic.

The Commission may prescribe appropriate conditions and safeguards to minimize adverse effects of any such #uses# on the character of the surrounding area.

82-32
Special Provisions for Increases in Floor Area

The provisions of Sections 23-16, 24-14 or 33-13 (Floor Area Bonus for a Plaza), Section 23-17, 24-15 or 33-14 (Floor Area Bonus for a Plaza-Connected Open Area), Section 23-18, 24-16, or 33-15 (Floor Area Bonus for Arcades), or Section 23-23 (Density Bonus for a Plaza-Connected Open Area or Arcade) shall not apply. In lieu thereof the following provisions shall apply, which may be used separately or in combination, provided that the total #floor area ratio# permitted on a #zoning lot# does not exceed 12.0.

(a) Floor Area Increase for Inclusionary Housing

For any #development# to which the provisions of Section 23-90 (INCLUSIONARY HOUSING) are applicable, the maximum permitted #residential floor area ratio# may be increased by a maximum of 20 percent under the terms and conditions set forth in Section 23-90 (INCLUSIONARY HOUSING).

(b) Floor Area Bonus for Public Amenities

When a #development# is located on a #zoning lot# that is adjacent to the West 59th Street (Columbus Circle) or the West 66th Street subway station mezzanine, platform, concourse or connecting passageway, with no tracks intervening to separate the #zoning lot# from these elements, and such #zoning lot# contains 5,000 square feet or more of #lot area#, the City Planning Commission may be special permit pursuant to Section 74-634 (Subway station improvements in commercial zones of 10 FAR and above in Manhattan) grant a maximum of 20 percent #floor area# bonus.

For a subway station improvement or for a subsurface concourse connection to a subway, the amount of #floor area# bonus that may be granted shall be at the discretion of the Commission. In determining the precise amount of #floor area# bonus the Commission shall consider:

(i) the direct construction cost of the public amenity;

(ii) the cost of maintain the public amenity; and

(m) the degree to which the station's general accessibility and security will be improved by the provision of new connections, additions to or reconfigurations of circulation space, including provision of escalators or elevators.

82-33
Modification of Bulk Regulations

The Commission may, by special permit, modify the height and setback regulations, #yard# regulations, regulations governing minimum distance between #buildings# on a single #zoning lot# and regulations governing #courts# and minimum distance between #legally required windows# and walls or #lot lines# for any #development# provided the City Planning Commission finds that such modifications are necessary to:

(a) facilitate good design; or

(b) allow design flexibility for any #development# to which the mandatory provisions of Section 82-10 are applicable; or

(c) incorporate a #floor area# allowance pursuant to Section 82-32 (Special Provisions for Increases in Floor Area) where inclusion of the proposed public amenity will significantly further the specific purposes for which the #Special Lincoln Square District# is established.

The #lot area# requirements for the non-#residential# portion of a #building# which is eligible for a #floor area# allowance under the provisions of paragraph (b) of Section 82-32 may be reduced or waived by the Commission provided that the Commission makes the additional finding that such modification will adversely affect the #uses# within the #building# or the surrounding area.

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.

82-35
Height and Setback Regulations

Within the Special District, all #developments# 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) Paragraph (b), (c) and (d) of Section 82-37 (Street Walls along Certain Street Lines) where the #street wall# of a #building# is located at the #street line# and to penetrate the #sky exposure plane# above a height of 85 feet from #curb level#.

82-36
Special Tower Coverage and Setback Regulations

The requirements set forth in Sections 33-45 (Tower Regulations) or 35-63 (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:

(i) not more that 40 per cent of the #lot area# of a #zoning lot#, or, for a #zoning lot# of less than 20,000 square feet, the per cent set forth in Section 23-651 (Tower on small lots); and

(ii) not less than 30 per cent 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# 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 set back 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 35-63, as modified by paragraphs (a) and (b) above, shall apply to any #mixed building#.

For the purposes of determining the permitted tower coverage in Block 3 as indicated on the District Plan, 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 apply to such portion.

~~82-11~~
~~Building Walls Along Certain Street Lines~~

Delete the entire section

82-37
Street Walls along Certain Lines

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

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

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

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

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

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

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

(b) For any #development# on a #zoning lot# in Block 1 with a #front lot line# coincident with any of the following #street lines#, a #street wall# shall be located on such #street lines# for the entire frontage of the #zoning lot# on that #street#:

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

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

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

The #street wall# located on the South side of West 63rd Street shall rise vertically without setback to the full height of the #building# except for the top floors or 40 feet, whichever is less, and extended along Broadway and/or Columbus Avenue for one half of the length of the total #block# front. The #street wall# located on the remaining #block# front on Broadway shall rise to a height of 85 feet above #curb level# and then set back 20 feet as required in Section 33-432 (In other Commercial Districts).

(c) For any #development# on a #zoning lot# in Block 2 with a #front lot line# coincident with any of the following #street lines#, a #street wall# shall be located on such #street line# for the entire frontage of the #zoning lot# on that #street#:

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

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

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

The #street wall# located on the north side of West 66th Street shall rise vertically without setback to the full height of the #building# except for the top four floors or 40 feet, whichever is less, and extend on Broadway and/or Columbus Avenue for one-half of the length of the total #block# front. The #street wall# located on the remaining #block# front on Broadway shall rise to a height of 85 feet above #curb level# and then setback 20 feet as required in Section 33-432 (In other Commercial Districts).

(d) For any #development# on a #zoning lot# in Block 3 with a #front lot line# coincident with the #street line# of Central Park West, the #street wall# shall be located on such #street line# for the entire frontage of the #zoning lot# on that #street#.

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

82-38
Recesses in the Street Wall of a Building

Recessed fenestration and special architectural expression lines in the #building# facade of a #development# are required as follows:

(a) Except as set forth in paragraph (b) below, the aggregate length of all recesses in the #street wall# along Broadway of a #development# shall be between 15 per cent and 30 per cent of the entire length of such #street wall# at any #story# between the ground floor and 85 feet above #curb level#.

(b) In block 1, for any #development# that fronts on the #street line# of the South side of West 63rd Street and extends along the #street line# of Broadway and/or Columbus Avenue to a distance of not less than 50 percent of the #block# front, the aggregate length of all recesses in the #street walls# along each such #street# frontage shall be between 15 percent and 30 percent of the entire length of each #street wall# at any #story# between the ground floor and 85 feet above #curb level# and shall be between 30 percent and 50 percent of the entire length of each #street wall# at any #story# above 85 feet above #curb level#.

(c) In block 2 the requirement of #street wall# recesses in paragraph (b) above shall also apply to a #development# that fronts on the #street line# of the north side of West 66th Street and extends along the #street line# of Broadway and/or Columbus Avenue to a distance of not less than 50 per cent of the #block# front.

Such recesses shall be a minimum of one foot in depth and shall not exceed a depth of 10 feet. Below a height of 85 feet above #curb level#, not recesses deeper than one foot shall be permitted in the #street wall# of a #building# within a distance of 10 feet from the intersection of any two #street lines#.

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

82-39
Permitted Obstructions within Required Setback Areas.

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

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

On any #street# frontage the aggregate width of all dormers at the required initial setback level shall not exceed 60 per cent of the width of the #street wall# of the #story# immediately below the initial setback level. For each foot of height above the required initial setback level, the aggregate width of all dormers at the height shall

be decreased by one per cent of the width of the #street wall# of the #story# immediately below the initial set back level. Such dormers shall count as #floor area# but not as tower #lot coverage#.

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

82-40
SPECIAL HEIGHT LIMITATION

For #developments# located in Block 1 or Block 2, the maximum height of a #building or other structure# or portion thereof shall not exceed 275 feet above #curb level#, except that a penthouse may be located above such height, provided that such penthouse:

(1) contains not more than four #stories# or 40 feet, whichever is less, and
(2) the gross area of each #story# does not exceed 80 percent of the gross area of that #story# directly below it.

~~82-121~~

82-50
OFF-STREET PARKING AND OFF-STREET LOADING REGULATIONS

The regulations of Article I, Chapter 3 (COMPREHENSIVE OFF-STREET PARKING REGULATIONS IN COMMUNITY DISTRICT 1,2,3,4,5,6,7, AND 8 IN THE BOROUGH OF MANHATTAN) and the applicable underlying district regulations of Article III, Chapter 6, relating to Off-Street Loading Regulations, shall apply in the #Special Lincoln Square District# except as otherwise provided in this Section.

(a) Accessory Off-Street Parking Spaces

#Accessory# off-street parking spaces are permitted only by special permit of the City Planning Commission pursuant to Section 13-461 (Accessory off-street parking spaces).

(b) Curb Cuts

The City Planning Commission may authorize curb cuts within 50 feet of the intersection of any two #street lines#, or on #wide streets#, where such curb cuts are needed exclusively for required off-street loading berths, provided the location of such curb cuts meets the finding in Section 13-453 (Curb Cuts) and the loading berths are arranged so as to permit head-in and head-out truck movements to and from the #zoning lot#.

(c) Waiver of Loading Berth Requirements

The City Planning Commission may authorize a waiver of the required off-street loading berths where the location of the required curb cuts would:

(i) be hazardous to traffic safety, or

(ii) create or contribute to serious traffic congestion or unduly inhibit vehicular and pedestrian movement, or
(iii) interfere with the efficient functioning of bus lanes, specially designated streets or public transit facilities.

The Commission shall refer these applications to the Department of transportation for its comments.

~~82-122~~
~~Public parking garages~~
Delete entire section

82-60
PUBLIC PARKING GARAGES

In that portion of the Special Lincoln Square District located within a C4-7 District, the Commission may permit #public parking garages# with any capacity pursuant to Section 74-52 (Parking Garages or Public Parking Lots in High Density Central Areas).

~~82-13~~
~~Special regulations for Zoning Lots Divided by District Boundaries~~
Delete entire section

~~82-14~~
~~82-10~~
EXISTING PLAZAS OR OTHER PUBLIC AMENITIES

No existing #plaza# or other public amenity, open enclosed, for which a #floor area# bonus has been received, pursuant to regulations antedating May 24, 1984 shall be eliminated or reduced in size anywhere within the #Special Lincoln Square District#, without a corresponding reduction in the #floor area of the building# or the substitution of equivalent complying areas for such amenity elsewhere on the #zoning lot#.

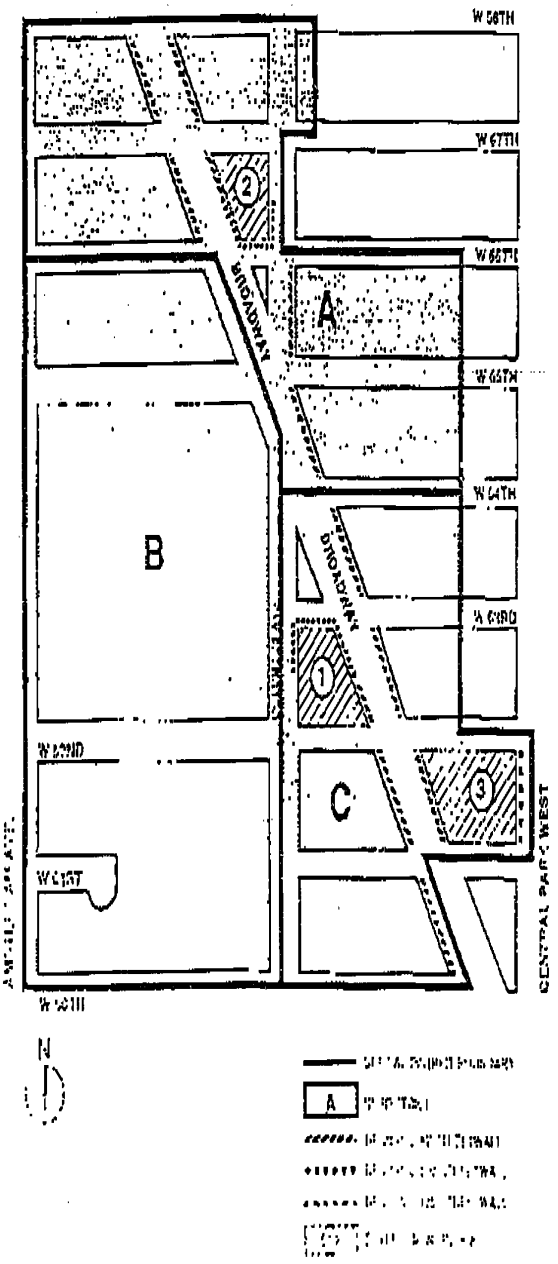
Any elimination or reduction in size or volume of such an existing public amenity in #developments# which include prior approved #bulk modifications#, shall be permitted in the #Special Lincoln Square District# only by special permit of~~, an authorization, after public notice and hearing, by~~ the City Planning Commission ~~and by the Board of Estimate~~. As a condition for such permit ~~authorization,~~ the Commission shall find that the proposed change will provide a greater benefit in light of the public amenity's purposes of the #Special Lincoln Square District#.

An application for such special permit ~~authorization~~ shall contain exact and detailed plans, drawings, and other description as to fully explain the use and quality of all features of the proposed public amenity revisions and any other information and documentation as may be required by the Commission.

~~The Chairman of the City Planning Commission shall furnish a copy of the application for such authorization to Community Board No. 7, Manhattan for 30 days and will give due consideration to their opinion as to the appropriateness of such a facility to the area.~~

~~The Commission shall act within 45 days from the date of receipt of the Community Board recommendations or within 45 days of the date on which the Community Board review period expires, whichever is earlier. The Board of Estimate shall act on the application within 45 days of receipt of the Commission recommendations.~~

APPENDIX A - DISTRICT PLAN
SPECIAL LINCOLN SQUARE DISTRICT



Other Related Amendments

1. The following definitions are hereby deleted in their entirety in Section 12-10:
   #Covered Plaza#
   #Pedestrian Mall#

2. All references to Section 82-08 (Modification of Bulk and Height and Setback Requirements) are hereby deleted in the following sections:

Section 23-15	(Maximum Floor Area Ratio in R10 Districts)
Section 33-131	(Commercial buildings in certain specified Commercial Districts)
Section 33-133	(Community facility buildings in certain other specified Commercial Districts)
Section 33-141	(Commercial buildings in certain specified Commercial Districts)
Section 33-151	(Commercial buildings in certain specified Commercial Districts)
Section 33-153	(Commercial facility buildings in certain other specified Commercial Districts)
Section 35-35	(Floor Area Bonus for Plaza, Plaza-Connected Open Area, or Arcade in connection with Mixed Buildings)
Section 33-43	(Maximum Height of Front Wall and Required Front Setbacks)
Section 33-44	(Alternate Front Setbacks)
Section 33-455	(Alternate regulations for towers on lots bounded by two or more streets)
Section 33-456	(Alternate setback regulations on lots bounded by two or more streets)
Section 35-41	(Lot Area Requirements for Non-residential Portions of Mixed Buildings)
Section 35-62	(Maximum Height of Front Wall in Initial Setback Distance)
Section 74-87	(Covered Pedestrian Space)

3. All reference to Section 82-11 (Building Walls Along Certain Street Lines) is hereby deleted in Section 33-43 (Maximum Height of Front Wall and Required Front Setbacks).

4. All references to Section 82-07 (Modification of Parking and Off-street Loading Requirements) are hereby deleted in the following sections:

Section 36-11	(General Provisions)
Section 36-21	(General Provisions)
Section 36-31	(General Provisions)
Section 36-33	(Requirements Where Group Parking Facilities Are Provided)
Section 36-34	(Modification of Requirements for Small Zoning Lots)
Section 36-61	(Permitted Accessory Off-street Loading Berths)

The above resolution, duly adopted by the City Planning Commission on December 20, 1993 (Calendar No. 3), is filed with the Office of the Speaker, City Council and the Borough President, together with a copy of the plans of the development, in accordance with the requirements of Section 197-d and 200 of the New York City Charter.

Pursuant to Sections 197-d and 200 of the City Charter and on the basis of the Decision and Application, the Council approves the Decision.

The Zoning Resolution of the City of New York, effective as of December 15, 1961, and as subsequently amended, is further amended by modification of Article VIII, Chapter 2 as follows:

JUNE M. EISLAND, Chairperson, ARCHIE SPIGNER, HERBERT E. BERMAN, SHELDON S. LEFFLER, ENOCH H. WILLIAMS, NOACH DEAR, JEROME X. O'DONOVAN, PRISCILLA WOOTEN, WALTER L. McCAFFREY, C. VIRGINIA FIELDS, KENNETH K. FISHER, THOMAS K. DUANE, ADAM C. POWELL IV, LAWRENCE A. WARDEN, MICHAEL J. ABEL. Committee on Land Use, February 8, 1994.

On motion of the Speaker (Council Member Vallone), and adopted, the foregoing matter was coupled made as a General Order for the day. (See ROLL CALL ON GENERAL ORDERS FOR THE DAY.)

L.U. No. 59

Report of the Committee on Land Use in favor of approving an application for a revocable consent to occupy and use sidewalk space for the construction, maintenance and operation of an unenclosed sidewalk cafe, to be located at 184 Bleecker Street, Manhattan, Council District No. 3 (474093 TCM)

The Committee on Land Use to which was referred on January 26, 1994, Minutes, page 329) the annexed Land Use resolution respectfully

REPORTS:

At the request of the sponsor, this item is filed.

JUNE M. EISLAND, Chairperson, ARCHIE SPIGNER, HERBERT E. BERMAN, SHELDON S. LEFFLER, ENOCH H. WILLIAMS, NOACH DEAR, JEROME X. O'DONOVAN, PRISCILLA WOOTEN, WALTER L. McCAFFREY, C. VIRGINIA FIELDS, KENNETH K. FISHER, THOMAS K. DUANE, ADAM C. POWELL IV, LAWRENCE A. WARDEN, MICHAEL J. ABEL. Committee on Land Use, February 8, 1994.

Filed.

Report of the Committee on Transportation

Int. No. 28-A

Report of the Committee on transportation in favor of approving and adopting, as amended, a local law to amend the administrative code of the City of New York, in relation to the operation of horse drawn cabs.

The Committee on transportation to which was referred on January 26, 1994 (Minutes, page 131) the annexed amended local law respectfully

REPORTS:

With the expiration of Local Law 89 of 1989 (hereafter Local Law 89) on December 31, 1993, restrictions that limited the hours and areas of horse drawn carriage operation in Manhattan, assigned temperature conditions, increased the rate that drivers must charge passengers, and set insurance, training and licensing standards lapsed. Proposed Int. No. 28-A would amend the Administrative Code by re-establishing these restrictions, by adding new restrictions and by amending current restrictions in the operation of horse drawn cabs.

Proposed Int. No. 28-A would frame area and time restrictions limiting the operation of horse carriages , allow horse drawn cabs to pick up passengers at hotels and restaurants on a pre-arranged basis, establish a variance from the area and time restrictions for special occasions, set the horses work day at nine hours, vary the number of permissible passengers, re-establish the temperature thresholds that govern whether or not the horse

Monroig, Blanca R.	69 Reeve Pl.	Brooklyn, NY 11218
Mose, Dail N.	400 East Mosholu Pkwy. So.	Bronx, NY 10458
Munnerlyn, Jr., Daniel K.	112-04 167 Street Apt.2-S	Queens, NY 114333955
Munoz, Ada N.	390 Nostrand Ave. Apt.5-N	Brooklyn, NY 11216
Neilson, George J.	485 Armstrong Ave., #B-3	Staten Island, NY 10308
O'Shea, Janet	1953 E. 37 St.	Brooklyn, NY 11234
Ores, Diana E.	1003 E. 55 St.,	Brooklyn, NY 11234
Ortiz, Pedro R.	118-17 Union Tpk.	Queens, NY 11375
Perretti, Denise	25 Woodvale Loop	Staten Island, NY 10309
Price, Edward V.	1689 First Ave., #4	New York, NY 10128
Quigley, Jean M.	307 Oldfield Street	Staten Island, NY 10306
Racks, Cyvella	2095 Union St.	Brooklyn, NY 11212
Rausch, Vicki Alayne	110 West End Ave. Apt. 6-F	Manhattan, NY 10023
Remmes, Joseph A.	55 W. 82nd. St. #2b	New York, NY 10024
Romano, Robert J.	2460 Ocean Ave.	Brooklyn, NY 11229
Santaella, Cesareo	2352 Lyon Avenue	Bronx, NY 10462
Savino, Brenda	1959 Colden Avenue	Bronx, NY 10462
Seda, Alice M.	697 Caulwell Ave.	Bronx, NY 10455
Selegean, Georgette	81-26 Margaret Place,	Queens, NY 11385
Slade, Emmanuel	456 Dekalb Ave. 16g,	Brooklyn, NY 11205
Speranza, Linda Marie	25-47 81st.	Queens, NY 11370
Stancil, Irene30 West	141 St.	New York, NY 10037
Stevenson, Jamie	527 Pelton Avenue.	Staten Island, NY 10301
Susskind, Adele C.	105-35 Otis Ave.	Queens, NY 11368
Taubenblatt, Leonard	150 East 69th St.	New York, NY 10021
Thompson, Persis	3415 Neptune Ave. #1710	Brooklyn, NY 11224
Tosi, Victor B.	3309 Hone Avenue	Bronx, NY 10469
Valerio, Suzanne	1461 Shore Dr.	Bronx, NY 10465
Vargas, Carmen	288 W. 238 St. #7h	Bronx, NY 10463
Vasquez, Hector	30 Magaw Place Apt 5 F	Manhattan, NY 10033
Welch, Dale	2111 Southern Blvd.	Bronx, NY 10460
White, Mary C.	219-10 133 Ave.	Queens, NY 11413
Wilson, Doris M.	365 Clinton Ave.,	Brooklyn, NY 11238
Wright, Mary E.	1590 E N.Y. Ave.	Brooklyn, NY 11212

On motion of the Speaker (Council Member Vallone), and adopted, the foregoing matter was coupled as a General Order for the day. (See ROLL CALL ON GENERAL ORDERS FOR THE DAY.)

ROLL CALL ON GENERAL ORDERS FOR THE DAY

(1) **L.U. 23 and Res. 122** - Ellis Island, Main Building (Interior), Manhattan, as a landmark, in Council District 1. (201094 HKM)

(2) **L.U. 24 and Res. 123** - Ellis Island Historic District, Manhattan, Council District 1. (202094 HKM)

(3) **L.U. 27 and Res. 124** - Exchange of parcels in the area of the New Croton Aqueduct, Shaft 16, Westchester County, with the city of Yonkers. (235094 PEQ)

(4) **L.U. 31 and Res. 115** - UDAAP the former Delmonico St. between Flushing Ave & Hopkins St., Council District 34, Brooklyn. (212094 HAK)

(5) **L.U. 33 and Res. 116** - UDAAP 925 Greene Ave, 685 Quincy St., 332 Decatur St., 211 Chauncey St., 883 & 885 Myrtle Ave, 28 Vernon Ave, 194 Kosciusko St., 231 Lexington Ave, 309A & 311 Monroe St. & 366 Madison St., Council District 36, Brooklyn. (214094 HAK)

(6) **L.U. 36 and Res. 117** - UDAAP 95 S 10th St., Council District 34, Brooklyn. (217094 HAK)

(7) **L.U. 37 and Res. 118** - UDAAP 184 Monroe St., Council District 36, Brooklyn. (218094 HAK)

(8) **L.U. 38 and Res. 119** - UDAAP 486 Gates Ave, Council District 36, Brooklyn. (219094 HAK)

(9) **L.U. 39 and Res. 120** - UDAAP 2017 Grand Concourse, CD 14, The Bronx. (220094 HAX)

(10) **L.U. 41 and Res. 125** - UDAAP, 973 Dumont Ave, Council District 42, Brooklyn. (229094 HAK)

(11) **L.U. 42 and Res. 121** - UDAAP various sites, Council District 41, Brooklyn. (233094 HAK)

(12) **L.U. 43 and Res. 126** - UDAAP, 518 Pennsylvania Ave, CD 42, Brooklyn. (234094 HAK)

(13) **L.U. 44 and Res. 131** - Zoning resolution amendment N 910515 ZRM, concerning changes in the text of the zoning resolution in the Special Midtown District, Council Districts 3, 4, 5 & 6.

(14) **L.U. 45 and Res. 132** - ULURP C 920457 PQK, acquisition of real property 771 Crown St., Brooklyn, Council District 41, for continued use as a day care center.

(15) **L.U. 46 and Res. 133** - ULURP C 920459 PQM, acquisition of real property 151/157 W 136th St., Manhattan, Council District 9, for continued use as a day care center.

(16) **L.U. 47 and Res. 134** - ULURP C 920569 PQX, acquisition of real property 417/421 E 161st St., The Bronx, Council District 17, for continued use as a day care center.

(17) **L.U. 48 and Res. 135** - ULURP C 920677 PQQ, acquisition of real property 116-36 207th St., Queens, Council District 27, for continued use as an Agency Operated Boarding Home.

(18) **L.U. 49 and Res. 127** - ULURP C 930136 ZMM, changes to the zoning map changing the depth of Upper East Side avenue zoning districts from 125' to 100', Council District 4 & 5.

(19) **L.U. 51 and Res. 128** - ULURP C 930430 ZMK, changes to the zoning map regarding the Prospect Heights Rezoning, in Council District nos. 33 and 35.

(20) **L.U. 52 and Res. 129** - Zoning resolution amendment C 940013 ZRM, changes in the text.

(21) **L.U. 54 and Res. 130** - ULURP 940127 (A) ZMM, changes to the zoning map regarding the Special Lincoln Square District, in Council District 6

(22) L.U. 59 - FILED - Revocable consent to occupy-& use an unenclosed sidewalk cafe, 184 Bleecker St., Manhattan, Council District 3. (474093 TCM)

(23) Resolution approving various persons Commissioners of Deeds.

The President Pro Tem (Council Member Spigner) put the question whether the Council would agree with and adopt such reports which were decided in the **affirmative** by the following vote:

Affirmative -- Abel, Albanese, Berman, Cerullo III, Clarke, Cruz, Dear, DeMarco, DiBrienza, Malave-Dilan, Duane, Eisland, Eldridge, Eristoff, Fields, Fisher, Foster, Harrison, Henry, Koslowitz, Lasher, Leffler, Linares, Marshall, McCabe, McCaffrey, Michels, Millard, O'Donovan, Ognibene, Pagan, Pinkett, Povman, Powell IV, Rivera, Robinson, Robles, Sabini, Stabile, Warden, Weiner, White, Williams, Wooten, the Speaker (Council Member Vallone) and the President Pro Tem (Council Member Spigner) – 46.

The following vote was recorded on **L.U. 31, L.U. 33, L.U. 36, L.U. 39, L.U. 42, Res. 114, Res. 115, Res. 116, Res. 119 and Res. 120:**

Affirmative -- Abel, Albanese, Berman, Cerullo III, Clarke, Cruz, Dear, DeMarco, DiBrienza, Malave-Dilan, Duane, Eisland, Eldridge, Eristoff, Fields, Fisher, Foster, Harrison, Henry, Koslowitz, Lasher, Leffler, Linares, Marshall, McCabe, McCaffrey, Michels, Millard, O'Donovan, Pagan, Pinkett, Povman, Powell IV, Rivera, Robinson, Robles, Sabini, Stabile, Warden, Weiner, White, Williams, Wooten, the Speaker (Council Member Vallone) and the President Pro Tem (Council Member Spigner) -- **45.**

Negative – Ognibene -- 1. The following vote was recorded on L.U. 51 and Res. 128:

Affirmative – Abel, Albanese, Berman, Cerullo III, Clarke, Cruz, Dear, DeMarco, DiBrienza, Malave-Dilan, Duane, Eisland, Eldridge, Eristoff, Fields, Fisher, Foster, Harrison, Henry, Koslowitz, Lasher, Leffler, Linares, Marshall, McCabe, McCaffrey, Michels, Millard, O'Donovan, Ognibene, Pagan, Povman, Powell IV, Rivera, Robinson, Robles, Sabini, Stabile, Warden, Weiner, White, Williams, Wooten, the Speaker (Council Member Vallone) and the President Pro Tem (Council Member Spigner) -- **45.**

Negative – Pinkett -- 1. The following vote was recorded on L.U. 54 and Res. 130:

Affirmative -- Abel, Albanese, Berman, Cerullo III, Clarke, Cruz, Dear, DeMarco, DiBrienza, Malave-Dilan, Eisland, Eldridge, Eristoff, Fields, Fisher, Foster, Harrison, Henry, Koslowitz, Lasher, Leffler, Linares, Marshall, McCabe, McCaffrey, Michels, Millard, O'Donovan, Ognibene, Pagan, Pinkett, Povman, Powell IV, Rivera, Robinson, Robles, Sabini, Stabile, Warden, Weiner, White, Williams, Wooten, the Speaker (Council Member Vallone) and the President Pro Tem (Council Member Spigner) -- **45.**

Negative -- Duane – 1.

INTRODUCTION AND READING OF BILLS

Res. No. 82

Resolution to amend Rule 7.00 of the Rules of the Council of the City of New York

By the Speaker (Council Member Vallone); also Council Members Cruz, Eldridge, Harrison, Williams.

The paragraph relating to the General Welfare Committee of Rule 7.00 of the Rules of the Council of the City of New York is amended to read as follows:

General Welfare - Human Resources, Department of Social Services, Department of Employment, *Department of the Homeless Services,* Mayors Office for the Handicapped, charitable institutions, human rights.

Referred to the Committee on Rules, Privileges and Elections

State Leg. No. 18

State Legislation Resolution requesting the New York State Legislature to pass bills, introduced by Senator Onorato, 56414A, and Assemblyman Butler, A9073A, "AN ACT to amend the general city law, in relation to authorizing certain cities to restrict the location of retail "adult materials" businesses"

By (the Speaker) Council Member Vallone and Council Members DeMarco, Berman, Cruz, Dear, DeMarco, Malave-Dilan, Eisland, Fields, Fisher, Harrison, Henry, Koslowitz, Lasher, Leffler, Marshall, McCaffrey, O'Donovan, Pagan, Pinkett, Povman, Rivera, Robles, Rosado, Ruiz, Sabini, Spigner, Warden, Watkins, White, Williams, Wooten and Abel; also Council Members Foster, Weiner, Eristoff and Stabile.

Whereas, A bill has been introduced in the New York State Legislature by Senator Onorato, AN ACT to amend the general city law, in relation to authorizing certain cities to restrict the location of retail "adult materials" businesses; and

Whereas, The enactment of the above State Legislation requires the concurrence of the Council of The City of New York as the local legislative body; now, therefore, be it

Resolved, That the Council of The City of New York, in accordance with the provisions of Section 2 of Article 9 of the Constitution of the State of New York, does hereby request the New York State Legislature to enact into law the aforesaid pending bills.

Referred to the Committee on State and Federal Legislation.

Int. No. 8

By Council Members Abel, Albanese, DeMarco, Foster, Rivera, Sabini, Warden and Weiner; also Council Members Clarke, Cruz, Dear, Duane, Eisland, Fisher, Harrison, Leffler, McCaffrey, Pinkett, Povman and Stabile

A local law to amend the administrative code of the city of New York in relation to providing recourse for property owners whose sidewalk is damaged by trees under the exclusive care of the city of New York.

Be it enacted by the Council as follows:

Section 1. Section 19-152 of the administrative code of the city of New York is amended by the addition of a new subdivision t to read as follows:

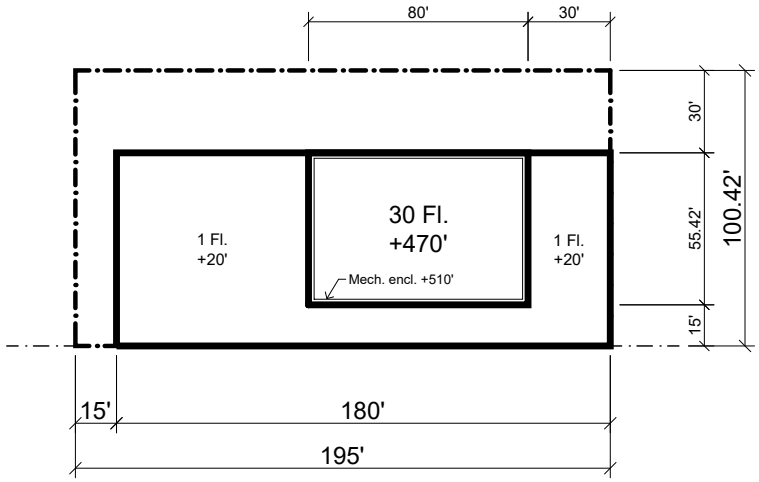
t. Notwithstanding any inconsistent provision of subdivision e of this section, an owner of real property shall not be required to pay for the cost of reinstalling, reconstructing or repaving existing sidewalk flags at legal grade if:

19 West 65th Street

The Jewish Guild for the Blind
Block 1118, Lot 14
Community Facility Tower
Scheme 1

Assumes Lincoln Sq. bulk distribution requirements, ZR 82-34, do not apply.

Zone:
R8
Special Lincoln Square District



West 65th Street (60')

Lot Area:

R8, Lincoln Sq.	19,582 SF

Permitted Floor Area:

CF @ 6.5 FAR	127,282 SF

Proposed Floor Area:

Below 150'	59,953 ZSF	39.25%
Above 150'	77,329 ZSF	60.75%
Total	127,282 ZSF	100.00%

Notes:

1. Assumes Lincoln Sq. bulk distribution requirements do not apply in R8 zones. ZR 82-34
2. CF tower no min., max. 41% or 8,028 SF (19,582 x 0.4), min. 15' tower setback. ZR 23-652, 24-54(a)(2)(i) & 82-35.
3. Lincoln Sq. tower coverage and setback regulations do not apply in R8 zones. ZR 82-36.
4. Maximum CF lot coverage 65% (12,728 SF). Sec. 24-11.
5. ZSF refers to zoning square feet. GSF (Gross Square Feet) refers to above-grade floor area, including mechanical and other deductions that are not zoning floor area.

2641 - CF Towers.dwg

Note: Lot areas and floor areas are estimates subject to survey verification.

Date: 7/23/19 Scale: 1" = 70'

SK-1

Drawing No:

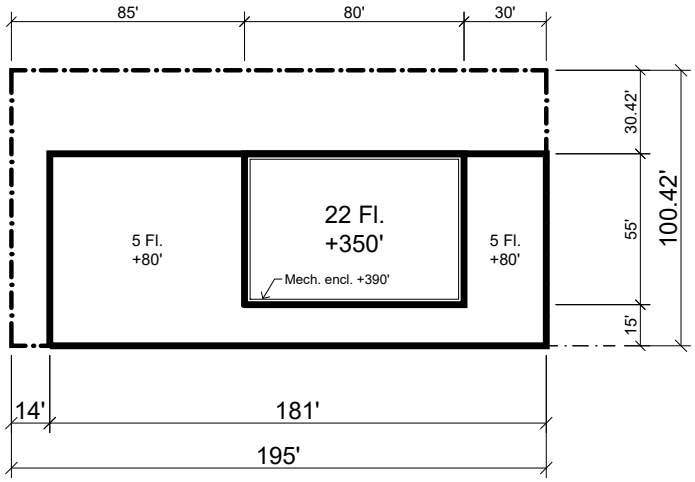
Development Consulting Services, Inc.
330 West 42nd Street
16th Floor
New York, NY 10036
212 714-0280

19 West 65th Street

The Jewish Guild for the Blind
Block 1118, Lot 14
Community Facility Tower
Scheme 2

Assumes Lincoln Sq. bulk distribution requirements, ZR 82-34, apply.

Zone:
R8
Special Lincoln Square District



West 65th Street (60')

Lot Area:

R8, Lincoln Sq.	19,582 SF

Permitted Floor Area:

CF @ 6.5 FAR	127,282 SF

Proposed Floor Area:

Below 150'	81,273 ZSF	63.85%
Above 150'	46,009 ZSF	36.15%
Total	127,282 ZSF	100.00%

Notes:

1. Assumes Lincoln Sq. bulk distribution requirements apply in R8 zones. ZR 82-34
2. CF tower no min., max. 41% or 8,028 SF (19,582 x 0.4), min. 15' tower setback. ZR 23-652, 24-54(a)(2)(i) & 82-35.
3. Lincoln Sq. tower coverage and setback regulations do not apply in R8 zones. ZR 82-36.
4. Maximum CF lot coverage 65% (12,728 SF). Sec. 24-11.
5. ZSF refers to zoning square feet. GSF (Gross Square Feet) refers to above-grade floor area, including mechanical and other deductions that are not zoning floor area.

2641 - CF Towers.dwg

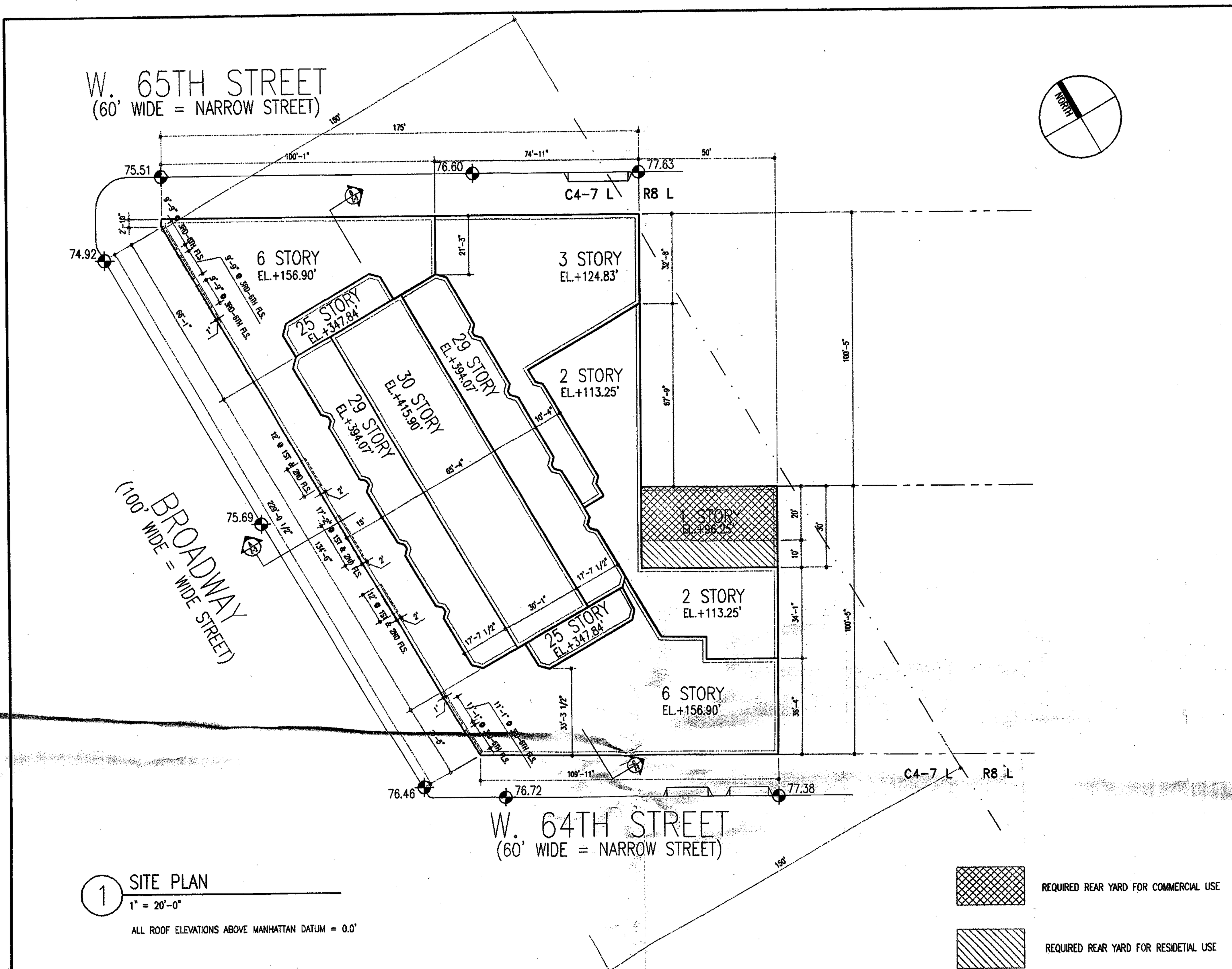
Note: Lot areas and floor areas are estimates subject to survey verification.

Date: 7/23/19 Scale: 1" = 70'

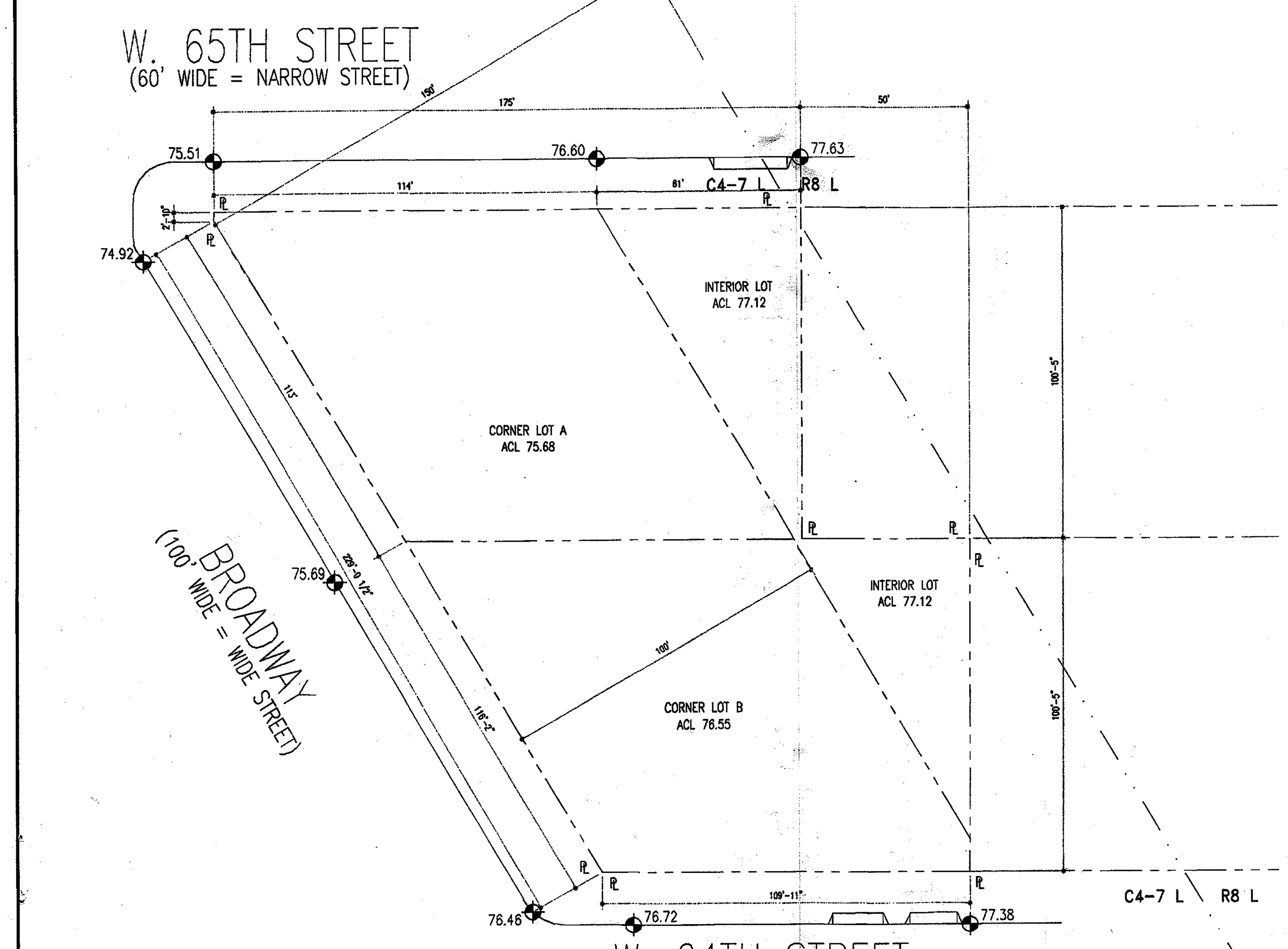
SK-2

Drawing No:

Development Consulting Services, Inc.
330 West 42nd Street
16th Floor
New York, NY 10036
212 714-0280



1 SITE PLAN
1" = 20'-0"
ALL ROOF ELEVATIONS ABOVE MANHATTAN DATUM = 0.0'



2 ACL DIAGRAM
1" = 20'-0"
ALL ROOF ELEVATIONS ABOVE MANHATTAN DATUM = 0.0'

AVERAGE CURB LEVEL

CORNER LOT A
$$\frac{\frac{75.69 + 74.92}{2} + \frac{75.51 + 76.60}{2}}{2} = 75.68$$

CORNER LOT B
$$\frac{\frac{75.69 + 76.46}{2} + \frac{76.72 + 77.38}{2}}{2} = 76.56$$

INTERIOR LOT 1
$$\frac{76.60 + 77.63}{2} = 77.12$$

AVERAGE CURB LEVEL
FOR SECTION 82-34

$$\frac{\frac{77.63 + 75.51}{2} + \frac{74.92 + 76.46}{2} + \frac{76.72 + 77.38}{2}}{3} = 76.436$$

AVERAGE CURB LEVEL
FOR SECTIONS 82-23 & 82-37

$$\frac{74.92 + 76.46}{2} = 75.69$$

BULK DISTRIBUTION SCHEDULE

1920-36 BROADWAY
(See Height & Setback Diagrams)

FLOOR AREA BELOW 150 FEET

FLOOR	FLOOR AREA (SF)
1	27,582
2	24,854
3	22,897
4	18,831
5	19,127
6	18,870
7	9,517
8	9,356
9	9,356
10	9,330
11	9,356
12	9,356
13	9,330
14	9,356
Total	207,118

RECESSES

1920-36 BROADWAY
82-38(a) Recesses Required / Provided In Broadway Streetwall

		RECESSES REQUIRED		RECESSES PROVIDED	
FLOOR	STREETWALL LENGTH	15% MINIMUM	30% MAXIMUM	TOTAL RECESS PROVIDED	RECESS% PROVIDED
1	229.02'	34.35'	68.71'	41.16'	17.9%
2	229.02'	34.35'	68.71'	41.16'	17.9%
3	229.02'	34.35'	68.71'	51.41'	22.4%
4	229.02'	34.35'	68.71'	51.41'	22.4%
5	229.02'	34.35'	68.71'	51.41'	22.4%
6	229.02'	34.35'	68.71'	51.41'	22.4%

FLOOR AREA SCHEDULE FOR NEW BUILDING

1920-36 BROADWAY

		C4-7			R8			TOTAL		
FLOOR	USE	GROSS FA (SF)	DEDUCTIONS (SF)	ZONING FA (SF)	GROSS FA (SF)	DEDUCTIONS (SF)	ZONING FA (SF)	GROSS FA (SF)	DEDUCTIONS (SF)	ZONING FA (SF)
Sub-Cellor 2	Commercial #2: *	23,358	23,358	0	0	0	0	23,358	23,358	0
	Commercial #1:	990	990	0	0	0	0	990	990	0
	Residential	4,383	4,383	0	8	8	0	4,391	4,391	0
	Total	28,731	28,731	0	8	8	0	28,739	28,739	0
Sub-Cellor 1	Commercial #2: *	1,029	1,029	0	0	0	0	1,029	1,029	0
	Commercial #1:	21,896	21,896	0	0	0	0	21,896	21,896	0
	Residential	5,806	5,806	0	8	8	0	5,814	5,814	0
	Total	28,731	28,731	0	8	8	0	28,739	28,739	0
Cellar	Commercial #2: *	1,029	1,029	0	0	0	0	1,029	1,029	0
	Commercial #1:	21,120	21,120	0	0	0	0	21,120	21,120	0
	Residential	6,582	6,582	0	8	8	0	6,590	6,590	0
	Total	28,731	28,731	0	8	8	0	28,739	28,739	0
1	Commercial #2:	5,033	10	5,023	0	0	0	5,033	10	5,023
	Commercial #1:	15,782	998	14,784	0	0	0	15,782	998	14,784
	Residential	7,949	181	7,768	9	2	7	7,958	183	7,775
	Total	28,764	1,189	27,575	9	2	7	28,773	1,191	27,582
2	Commercial #1:	17,493	304	17,189	0	0	0	17,493	304	17,189
	Residential	9,423	1,758	7,665	7	7	0	9,430	1,765	7,665
	Total	26,916	2,054	24,854	7	7	0	26,923	2,069	24,854
3	Residential	23,541	653	22,888	9	0	9	23,550	653	22,897
4	Residential	19,474	643	18,831	0	0	0	19,474	643	18,831
5	Residential	19,733	606	19,127	0	0	0	19,733	606	19,127
6	Residential	19,474	604	18,870	0	0	0	19,474	604	18,870
7	Residential	9,916	399	9,517	0	0	0	9,916	399	9,517
8	Residential	9,729	373	9,356	0	0	0	9,729	373	9,356
9	Residential	9,729	373	9,356	0	0	0	9,729	373	9,356
10	Residential	9,729	399	9,330	0	0	0	9,729	399	9,330
11	Residential	9,729	373	9,356	0	0	0	9,729	373	9,356
12	Residential	9,729	373	9,356	0	0	0	9,729	373	9,356
13	Residential	9,729	399	9,330	0	0	0	9,729	399	9,330
14	Residential	9,729	373	9,356	0	0	0	9,729	373	9,356
15	Residential	9,729	373	9,356	0	0	0	9,729	373	9,356
16	Residential	9,729	399	9,330	0	0	0	9,729	399	9,330
17	Residential	9,729	373	9,356	0	0	0	9,729	373	9,356
18	Residential	9,729	373	9,356	0	0	0	9,729	373	9,356
19	Residential	9,729	399	9,330	0	0	0	9,729	399	9,330
20	Residential	9,729	373	9,356	0	0	0	9,729	373	9,356
21	Residential	9,729	373	9,356	0	0	0	9,729	373	9,356
22	Residential	9,729	399	9,330	0	0	0	9,729	399	9,330
23	Residential	9,729	373	9,356	0	0	0	9,729	373	9,356
24	Residential	9,729	373	9,356	0	0	0	9,729	373	9,356
25	Residential	9,729	399	9,330	0	0	0	9,729	399	9,330
26	Residential	8,711	344	8,367	0	0	0	8,711	344	8,367
27	Residential	8,711	344	8,367	0	0	0	8,711	344	8,367
28	Residential	8,711	318	8,393	0	0	0	8,711	318	8,393
29	Residential	8,711	334	8,377	0	0	0	8,711	334	8,377
30	Residential	3,649	1,878	1,762	0	0	0	3,649	1,878	1,762
Totals	Commercial #2:	30,449	25,426	5,023	0	0	0	30,449	25,426	5,023
	Commercial #1:	77,281	45,308	31,973	0	0	0	77,281	45,317	31,973
	Residential	339,887	31,703	308,184	49	33	16	339,936	31,736	308,200
	Total	447,617	102,437	345,180	49	33	16	447,666	102,470	345,198

* Use Group 6F – Retail – Storage

DWELLING UNIT SCHEDULES

NEW BUILDING

1920-36 BROADWAY

FLOOR	R8 Zone	C4-7 Zone	Total # of DU's
2	0	1	1
3	0	13	13
4	0	13	13
5	0	16	16
6	0	13	13
7	0	8	8
8	0	8	8
9	0	8	8
10	0	8	8
11	0	8	8
12	0	8	8
13	0	8	8
14	0	8	8
15	0	8	8
16	0	8	8
17	0	8	8
18	0	8	8
19	0	8	8
20	0	8	8
21	0	8	8
22	0	8	8
23	0	8	8
24	0	8	8
25	0	8	8
26	0	6	6
27	0	6	6
28	0	6	6
29	0	6	6
30	0	0	0
Total	0	232	232

ZONING CALCULATIONS

Applicable Section

Map 8c — 1 Zoning Districts
C4-7 & R8
Special Lincoln Square District

2 Lot Area
C4-7 — 28,765 SF
R8 — 9 SF
Total — 28,774 SF

32-00, 82-21 — 3 Uses Permitted or Required:
a) Permitted:
C4-7: Use Groups 1-6, 8-10 & 12
R8: Use Groups 1-4
b) Required:
Within 30 feet of Broadway streetline on the ground floor:
Use Groups 3A, 3B, 6A, 8A, 10A, or eating and drinking establishments in 12A, or 12B.

4 Uses Provided:
a) Use Group 2 – Residential
Use Group 6A – Retail
Use Group 6F – Retail – Storage
b) Uses along Broadway, Ground Floor:
Use Group 6A, 6B – Retail

23-15, 35-23, 35-32, 33-12 — 5 Floor Area Permitted
A. FAR Permitted
C4-7 Zone:
1) Basic FAR
Community Facility: 10 FAR
Residential: 10 FAR

82-31 — 2) Commercial:
Floor area permitted; 100,000 SF

23-15, 23-90, 23-93, 82-32 — 3) Bonus FAR
Maximum bonus for Inclusionary Housing: 2 FAR
Actual FAR bonus generated: 2 FAR
(See 4, below)

4) Inclusionary Housing Bonus:
Lower Income Housing Provided: 14,382 SF
Bonus rate off-site new construction: 4 SF
14,382 X 4 = 57,528 SF
Bonus Floor Area Permitted:
57,528/28,765 = 2.0

5) Maximum FAR Permitted
C4-7:
Residential: 12 FAR
Maximum: 12 FAR

6) Maximum FAR Permitted
R8:
Community Facility: 6.5 FAR
Residential: 6.02 FAR

B. Floor Area Permitted
C4-7 Zone:
1) Commercial: 100,000 SF
2) Community Facility:
28,765 X 12 = 345,180 SF
3) Residential:
28,765 X 12 = 345,180 SF
4) Total Maximum floor area: 345,180 SF

R8 Zone:
1) Community Facility:
9 X 6.5 = 58.5 SF
2) Residential:
9 X 6.02 = 54 SF

C. Total both zones
Maximum (all uses): 345,239 SF

6 Floor Area Provided:
A. By Use and Zone
C4-7 Zone:
Commercial #2: 5,023 SF
Commercial #1: 31,973 SF
Residential: 308,184 SF
Total: 345,180 SF

R8 Zone:
Residential: 16 SF

B. Total both zones
Commercial #2: 5,023 SF
Commercial #1: 31,973 SF
Residential: 308,200 SF
Total: 345,196 SF

23-22, 35-40, 23-24 — 7 Density
C4-7
Dwelling unit factor — 790
Maximum residential floor area permitted — 345,180 SF
Non residential floor area provided — 36,996 SF
Difference floor area provided — 308,184 SF
Maximum dwelling units permitted
308,184/790= — 390 D.U.'S

R8
Dwelling unit factor — 740
Maximum residential floor area permitted — 54 SF
Maximum dwelling units permitted
54/740= — 0 D.U.'S
Total dwelling units permitted
390 + 0= — 390 D.U.'S

8 Dwelling units proposed
C4-7 — 232 D.U.'S
R8 — 0 D.U.'S
Total — 232 D.U.'S
Complies see dwelling unit schedule sheet Z-01

82-34 — 9 Bulk Distribution (entire Broadway streetwall is 85' high)
A. Required
60% of the floor area shall be located in stories, partially or entirely below 150' from curb level
345,196 x .6 = 207,118 SF
B. Provided below 150'
(See Bulk Distribution Schedule)
207,118 SF
Complies

23-47, 33-26 — 10 Yard Regulations
A. 20' Rear yard required for commercial use at interior lot.
B. 30' Rear yard required for residential use at interior lot.
Proposed building complies. See diagram # 1

35-60, 82-35, 82-36 — 11 Height and Setback Regulations
Complies: See sheet Z-2

36-62 — 12 Required Off-Street Loading
A. Loading Required
0 – 25,000 SF — 0 berth
25,001 – 40,000 SF — 1 berth
40,001 – 100,000 SF — 1 berth
Each additional 150,000 SF — 1 berth

Retail Area:
Sub-Cellar 2 — 0 SF
Sub-Cellar 1 — 21,896 SF
Cellar — 21,120 SF
1st Floor — 5,023 + 14,784= 19,807 SF
2nd Floor — 17,189 SF
Total: — 80,012 SF

80,012 SF requires 2 berths

B. Loading provided
2 berths Complies

82-11 — 14 No Arcade provided

82-22 — 15 Commercial and Residential use have no access within each other on the second floor.
Both uses have separate and direct access.

ADDRESS: 1920-36 BROADWAY
BLOCK: 1117
LOTS: 1, 61
ZONING DISTRICT: C4-7, R8
MAP: 8c
USE GROUPS: 2, 6A, 6F
OCC. CLASSIFICATIONS: J-2 & C
CONSTRUCTION CLASS: 1B

No.	Date	Revision
4	05-03-02	T.R.U. REVISION
3	03-15-02	D.O.B. REVISION
2	03-05-02	D.O.B. REVISION
1	02-27-02	T.R.U. REVISION

Project
1930 BROADWAY
RESIDENTIAL TOWER
BLOCKFRONT
EAST SIDE OF BROADWAY
between
WEST 64th AND WEST 65th STREETS
New York, N.Y.

COSTAS KONDYLIS & PARTNERS, LLP
ARCHITECTS
31 West 27th Street, New York, N.Y. 10011
Tel (212) 725-4655 Fax (212) 725-3441

Rosenwasser & Grossman
Structural Engineer
132 West 36th Street, New York N.Y. 10018
Tel (212) 564-2424 FAX (212) 564-6678

I. M. Robbins
Mechanical & Electrical Engineers
15 West 44th Street, New York, N.Y. 10036
Tel (212) 944-5566 Fax (212) 944-5597

Title
SITE PLAN,
FLOOR AREA SCHEDULE
CALCULATIONS &
DEDUCTION SCHEDULE

Scale: AS NOTED
Date: 01/20/02
Project No.: 00A03
Drawing No.: Z-01
File P:\00A03\ARCH\XREF\ZONING\Z-01
54" x 36"

ADDRESS: 1920-36 BROADWAY
BLOCK: 1117
LOTS: 1, 61
ZONING DISTRICT: C4-7, R8
MAP: 8c
USE GROUPS: 2, 6A, 6F
OCC. CLASSIFICATIONS: J-2 & C
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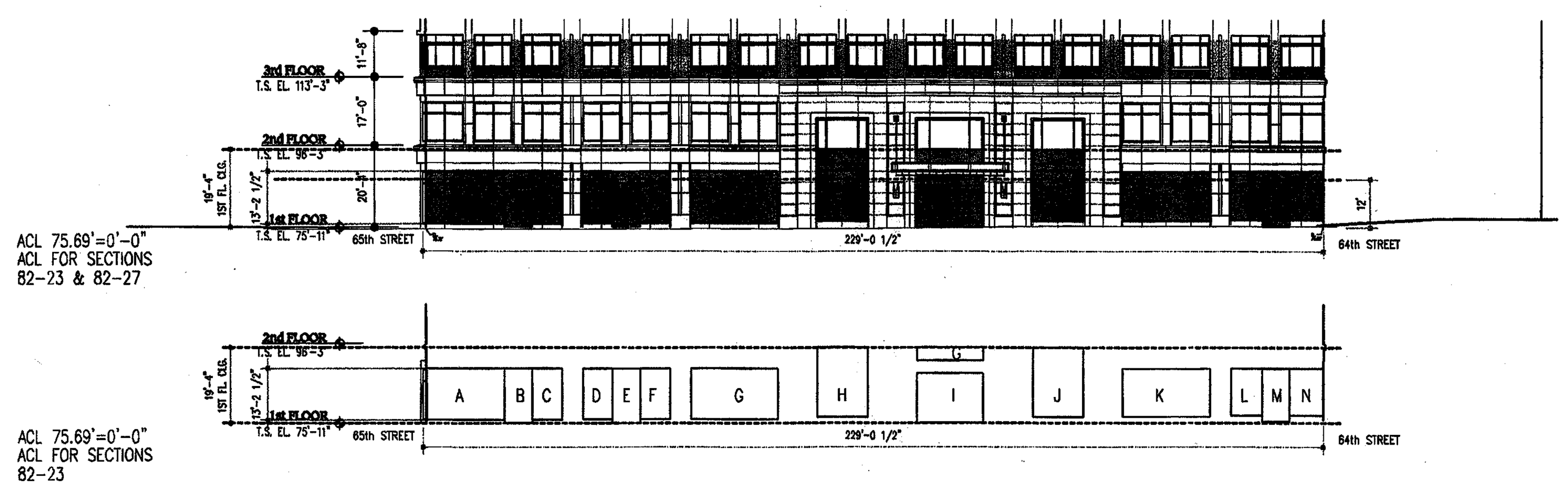


③ STREET WALL TRANSPARENCY DIAGRAM
1" = 20'-0"

82-23 Street Wall Transparency

When the front of the development fronts on Broadway, at least 50% of the surface area between curb level and 12' or the ceiling of the first story shall be transparent.

Complies: See this Sheet

Surface Area of Street Wall:

229.02' X 19'-4" = 4,427.64 SF

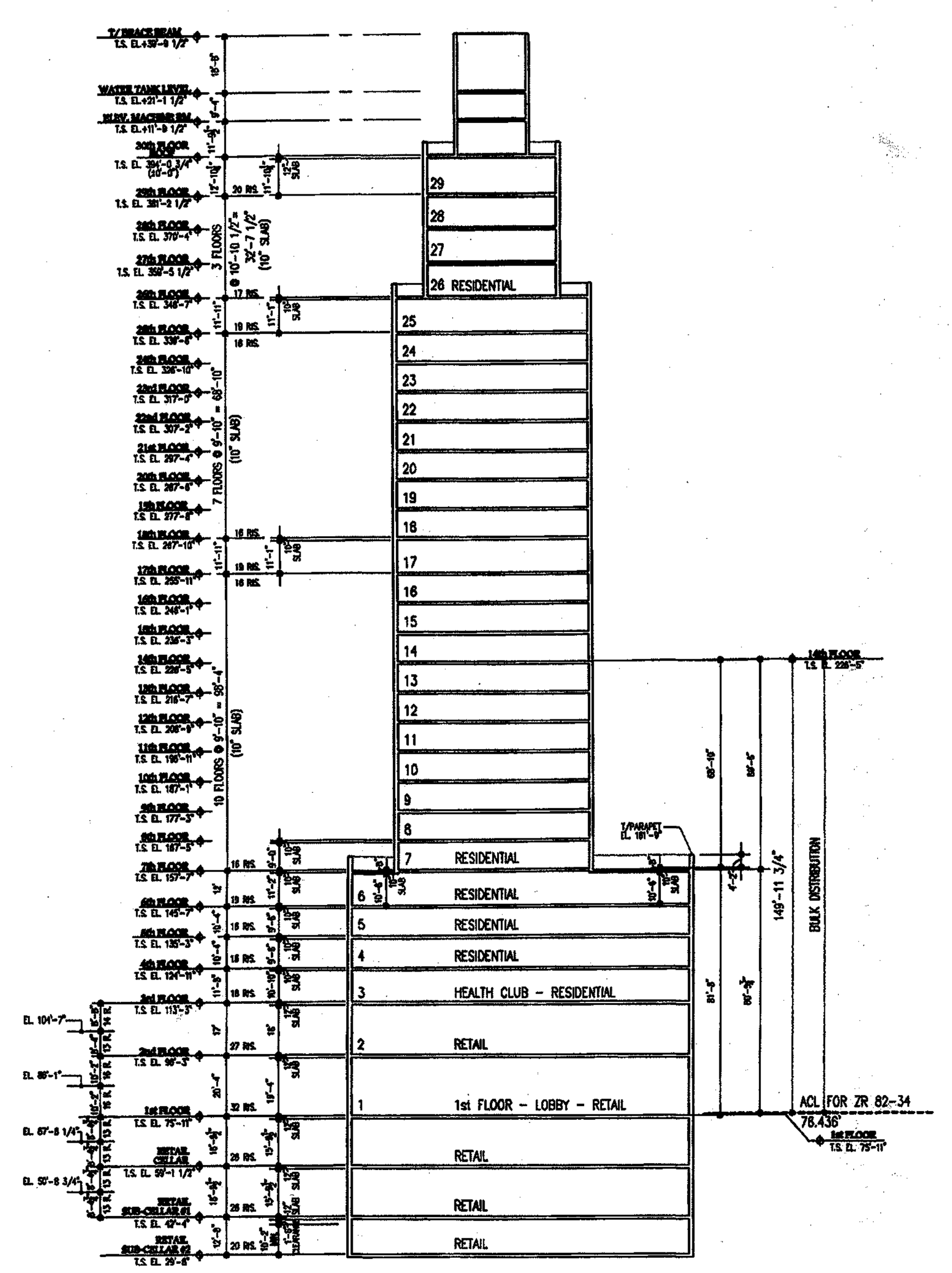
Required Transparency:

50% of the surface area of the streetwall.

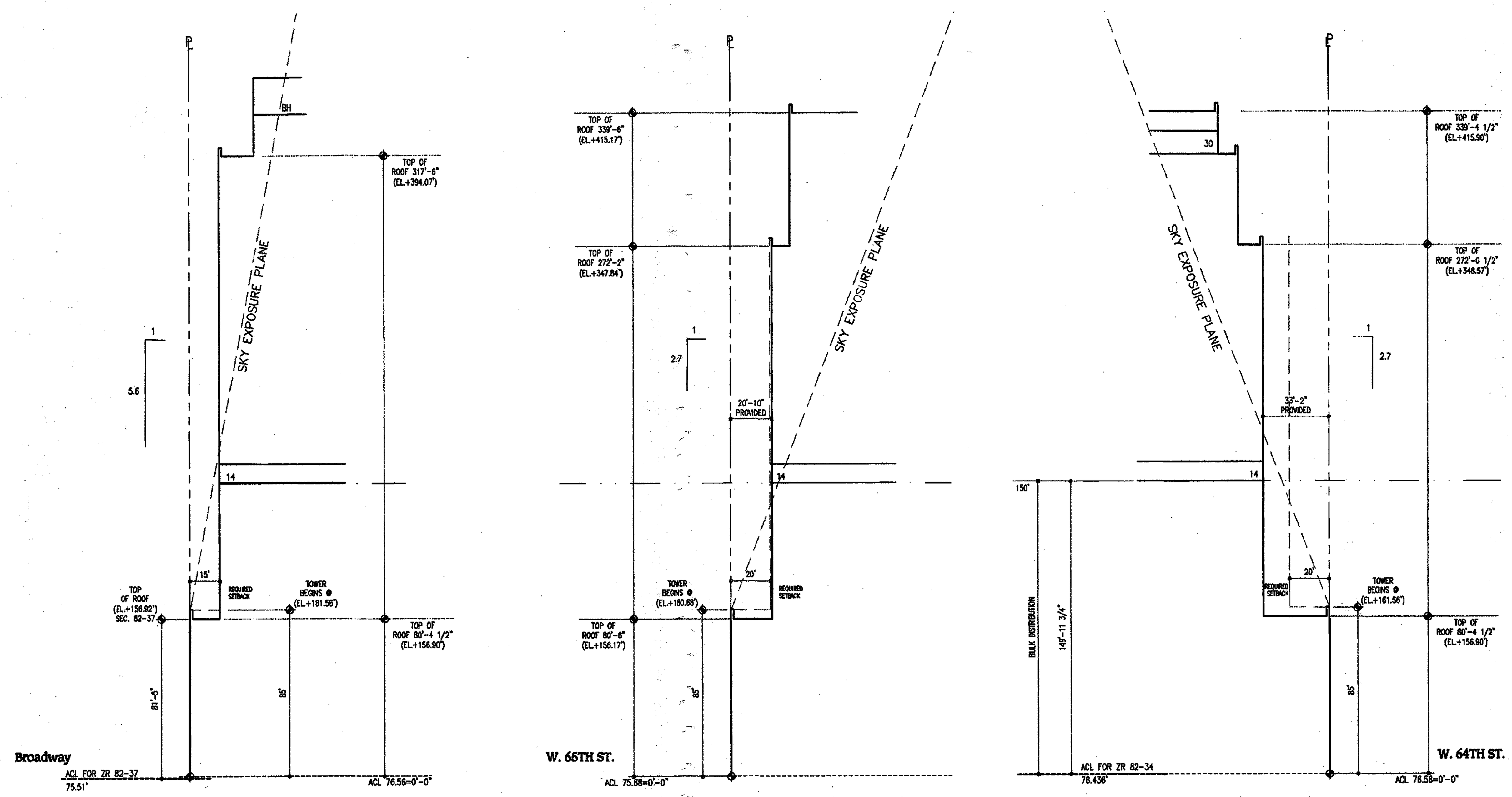
.5 X 4,427.64 = 2,213.82 SF

Transparency Provided: 2,351.03 SF

A+B+C+D+E+F+G+H+I+J+K+L+M+N= 2,351.03 SF



① TYPICAL BUILDING SECTION
1" = 40'-0"
ALL ROOF ELEVATIONS ABOVE MANHATTAN DATUM = 0.0'



SECTION A (partial) SECTION B (partial) SECTION C (partial)

② HEIGHT & SETBACK REGULATIONS
1" = 40'-0"
ALL ROOF ELEVATIONS ABOVE MANHATTAN DATUM = 0.0'

HEIGHT AND SETBACK: Street Wall Requirements

82-37 Building Walls Along Certain Street Lines

Building along Broadway, Columbus Avenue and 50' along narrow Streets shall have exterior walls coincident with the street lines and rising without setback to 85'.

Required setback along narrow streets 20'

Complies: See this Sheet and sheet Z-1

33-432 In Other Commercial Districts

Sky Exposure Plane 2.7:1 @ 85'
Initial Setback Distance 20'

Complies: See this Sheet

TOWER REGULATIONS

82-36 Tower Coverage Permitted

35-63 Minimum 30% (28,765 X .30) = 8,629 SF
Minimum 40% (28,765 X .40) = 11,506 SF

Tower Coverage Provided

9,729 SF at elevation 161.32'
Floor # 7

8,711 SF at elevation 348'-7"
Floor # 26

Complies: See this Sheet

No.	Date	Revision
3	05-03-02	T.R.U. REVISION
2	03-05-02	D.O.B. REVISION
1	02-27-02	T.R.U. REVISION

Project
1930 BROADWAY
RESIDENTIAL TOWER
BLOCK FRONT
EAST SIDE OF BROADWAY
between
WEST 64th AND WEST 65th STREETS
New York, N.Y.

COSTAS KONDYLIS & PARTNERS, LLP
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Tel (212) 944-5566 Fax (212) 944-5597

Title
SECTIONS,
STREET WALL
TRANSPARENCY DIAGRAM

Scale	AS NOTED
Date	01/20/02
Project No.	00A03
Drawing No.	Z-02
File	P:\00A03\ARCH\XREF\ZONING\Z-02

54" x 36"

R. 001307

Key Differences between Tower on Base Requirements and SLSD Sec. 82-34 and 82-36

	Tower on-a-base, Sec. 23-651	SLSD, Sec. 82-34 and 82-36
1.Zones applicable for tower coverage regulations	R9 and R10, and commercial equivalents: C1 or C2 overlays and C1-8, C1-9, C2-7 or C2-8. [Sec. 23-65 and Sec. 35-64]	Zones permitting towers in Lincoln Square; C4-7 is only one.
2. Zones applicable for floor area below 150', other than R9 and R10, and equivalents	No; only as above.	Yes; C4-7 and R8 [Sec. 82-34]
3. Zoning lots subject to min. tower coverage and 150' floor area regulations	Zoning lot must front on wide street	No wide street frontage required
4. Minimum required floor area below 150' in height	55%-60%, down to 54% [Sec. 23-651 (a) and (c)]	60% [Sec. 82-34]
5. Minimum tower coverage	30% down to 28% [Sec. 23-651 (a) and (c)]	30% [Sec. 82-36]
6. Tower location requirement	Within 100' of a wide street	Anywhere
7. Street Wall heights	60' min; 85' maximum	no minimum; 85' maximum
8. Minimum setback at 85' in ht.	15' on narrow street 10' on wide street	20'on narrow street 15' on wide street
9. Mandatory base along street frontages	Yes	No
10. Matching requirements of street walls with adjoining buildings.	Yes	No

COMMUNITY BOARD SEVEN/Manhattan

RESOLUTION

DATE: NOVEMBER 3, 1993

COMMITTEE OF ORIGIN: LAND USE

FULL BOARD VOTE: 39 IN FAVOR 1 AGAINST 0 ABSTENTION 0 PRESENT

RE: ULURP APPLICATION #N940127ZRM BY DEPARTMENT OF CITY PLANNING FOR A ZONING TEXT AMENDMENT TO THE SPECIAL LINCOLN SQUARE DISTRICT.

WHEREAS, Community Board 7/Manhattan enthusiastically supports zoning revisions to the Special Lincoln Square District and has been meeting repeatedly since November, 1992 with the Department of City Planning, community groups and private consultants to review necessary revisions; and

WHEREAS, zoning revisions should foster the original 1969 goals of the Special District: "To preserve, protect and promote the character of the Special Lincoln Square District area as the location of a unique cultural and architectural complex"; and

WHEREAS, an extraordinary level of intense development in the Special District has resulted in extremely overcrowded and dangerous pedestrian and vehicular traffic conditions, particularly at the intersections of West 65 and 66 Streets, Broadway and Columbus Avenue, which are operating above capacity with extensive congestion and traffic delays, causing each to have been identified by recent environmental impact statements (EIS's) as exceeding the 1990 Clean Air Act carbon monoxide concentration standards; and

WHEREAS, the traffic conditions are to become further exacerbated by the 41,500 person trips per day, as projected by the Department of City Planning, generated by the now under construction "Lincoln Square" mixed use development at 1992 Broadway; and

250 West 87 Street, New York, NY 10024 (212) 362-4008
FAX (212) 595-9317

WHEREAS, the completion of the following City-approved developments to be located in and adjacent to the Special District will further add to the congestion: 9.7 million square feet at the Penn Yards site (Riverside South, Manhattan West and ABC); 700,000 square feet at the Alfred II and YMCA sites; and 2.5 million square feet at the New York Coliseum site; and

WHEREAS, the congestion already threatens to destroy both the quality of life of the surrounding residential community and the ability of the general public to gain access to Lincoln Center for the Performing Arts, one of the world's most treasured cultural institutions; and

WHEREAS, the allowable density, available bonuses, zoning lot mergers, and current design regulations have enabled the construction of oversized, out-of-context buildings and towers; and

WHEREAS, urban design controls in the Special District should respect the contiguous Central Park West Historic District; and

WHEREAS, the "bow tie" parks and Broadway Malls are unique features of the Special Lincoln Square District and special attention should be paid to their improvement; and

WHEREAS, the "Mayflower" site, the full square block bounded by West 61 and 62 Streets, Central Park West and Broadway, by its size and prominent location requires a mechanism that will encourage superlative urban design and excellent architecture consistent with its visible location at the gateway to the Central Park Historic District and its internationally recognized skyline; and

WHEREAS, the prominent location of the "bow tie" development sites, especially the Bank Leumi site, the gateway to the Upper West Side, also merits special consideration;

BE IT RESOLVED THAT Community Board 7/Manhattan **approves the text amendment subject to the following conditions**:

(1) **A maximum FAR of 10.0.** Community Board 7/Manhattan believes this is an appropriate allowable density given the crowded conditions in the Special District. 10.0 FAR could be achieved by either reducing the density to 8.0 FAR and allowing a 2.0 FAR bonus for affordable housing, or eliminating FAR bonuses and mandating affordable housing within 10 FAR.

(2) **Require a straightforward height limit of 275 feet throughout the Special District.** City Planning's proposal to limit building height with "packing the bulk" (requiring 60% of the bulk below 150 feet) has not been tested on actual buildings, and is therefore unpredictable. Community Board 7/Manhattan applauds the Department's proposals for height limits on the bow tie sites, and believes it is only logical to mandate a height limit throughout the Special District. Height limits have worked successfully in the Limited Height Districts on the Upper East Side, and are a major component of City Planning's soon to be certified application for text amendments to the Quality Housing Program. A straightforward height limit of 275 feet would achieve the height goal of "packing" (see page 14 in the May, 1993 Lincoln Square Zoning report) with a predictability which would be beneficial to both private developers and the general public.

(3) **Require special permit for new development throughout the Special District.** Community Board 7/Manhattan believes requiring a special permit provides the best means to achieve the original Special District goal to "preserve, protect and promote" Lincoln Center. The majority of buildings which have been constructed under the existing regulations bear little relationship to the Special District's focus - Lincoln Center - and underscore the inability of legislation to mandate appropriate design.

The device of a special permit would allow the developer's architect freedom to design an appropriate building for this world famous Special District. The special permit review process would ensure a design agreeable to the surrounding community. The precedent for design review exists in the current review requirements for alterations to landmarked buildings and new construction within landmark districts. As a prerequisite, any development within the Special District must abide by the following regulations:

Throughout the District: Maximum 10.0 FAR; 275 foot height limit;

Sites facing Broadway (excluding bow tie sites): 85 foot street wall, 15 foot setback;

East side of Broadway (61-65 Streets) and east side of Columbus (65-66 Streets): Arcade requirement without bonus;

Mayflower site: 125 foot street wall, 15 foot setback on Central Park West;

Northern bow tie site: Specific regulations to be determined during ULURP, though Community Board 7/Manhattan notes preference for the following proposal over City Planning's proposal for the northern bow tie site: No setback for 60% of linear frontage on 66 Street, Columbus and Broadway; 85 foot street wall on remaining 30% of linear frontage on Broadway; 55-60 foot street wall on remaining 30% of linear frontage on Columbus;

Sewage and sanitation facilities must be adequate to meet the needs of the new construction.

(4) **Theaters should not be restricted to 1 FAR.** Controlling the height of buildings could be achieved more directly by requiring a straightforward building height limit of 275 feet rather than restricting the FAR of theaters. One of the goals of the Special District is to attract uses which will enhance the cultural character of the area. By restricting the FAR for theaters, cultural and entertainment uses other than film may be inadvertently and regrettably restricted. To avoid facades without transparency, City Planning should devise a mechanism to require transparency from the curb level to the ceiling of the theater.

(5) **Restrict zoning lot mergers to 20% of floor area.** As proposed in "West Side Futures", the comprehensive planning report for the Upper West Side completed by Community Board 7/Manhattan and The Municipal Art Society, a maximum zoning lot merger of 20% of the floor area on the original lot would control the potential for overly bulky buildings. A 20% restriction already applies to development rights transfers from landmark sites; and

BE IT FURTHER RESOLVED THAT Community Board 7/Manhattan calls on the Department of City Planning to work with Community Board 7/Manhattan and the appropriate City agencies to restore the open space and improve pedestrian and vehicular traffic in the Special District; and

BE IT FURTHER RESOLVED THAT if the Department of City Planning determines that the Community Board's recommendations are not in the scope of the ULURP application, Community Board 7/Manhattan urges the Department to complete the necessary analysis for a major modification as expeditiously as possible.

Committee vote: 10-0-0-0; Board members vote: 2-0-0-0.

JERROLD NADLER
8TH DISTRICT, NEW YORK

REPLY TO:

- WASHINGTON OFFICE:
  424 CANNON BUILDING
  WASHINGTON, DC 20515
  (202) 225-5635
- DISTRICT OFFICE:
  1841 BROADWAY
  SUITE 800
  NEW YORK, NY 10023
  (212) 489-3530

Congress of the United States
House of Representatives
Washington, DC 20515

PUBLIC WORKS AND TRANSPORTATION COMMITTEE
SUBCOMMITTEES:
ECONOMIC DEVELOPMENT
SURFACE TRANSPORTATION
WATER RESOURCES AND ENVIRONMENT
JUDICIARY COMMITTEE
SUBCOMMITTEES:
CIVIL AND CONSTITUTIONAL RIGHTS
INTERNATIONAL LAW, IMMIGRATION AND REFUGEES

MEMBER, CONGRESSIONAL ARTS CAUCUS
MEMBER, CONGRESSIONAL CAUCUS FOR WOMEN'S ISSUES

TESTIMONY OF REPRESENTATIVE JERROLD NADLER BEFORE THE CITY PLANNING COMMISSION HEARING ON THE SPECIAL LINCOLN SQUARE DISTRICT, NOVEMBER 17, 1993

Since the creation of the Special Lincoln Square District in 1969, many development changed have occurred on the West Side. As stated in the Department of City Planning's "Special Lincoln Square District Zoning Review," 18 buildings have been constructed since the district guidelines were enacted. Mixed-use projects were built with FARs of 13 to 16.7, and as-of-right residential buildings had FARs of 8.64 to 12. Many developments were granted special permits. We find that numerous projects that have been constructed or approved do not square with the original intent of the Special District. We are all witness to some of the deleterious effects -- more air pollution, less light, more traffic and overcrowding of our streets and sidewalks. Traffic circulation has not improved -- it has deteriorated, and the subway stations are still in dire need of improvement. "A desirable urban relationship of each building to its neighbors and to Broadway" has also been obstructed by certain projects in this special part of New York City. All of these conditions are due to worsen with the completion of the Millenium projects and its added residents, movie theaters and shoppers, and of course by Riverside South.

In order to avoid many of the problems within this cultural enclave, it is high time to revisit the zoing text and to make appropriate changes. Community Board 7, the Department of City Planning and community groups have been poring over the details and effects of this zoning change.

There are plenty of oversized buildings in this community, and the area does not need more of them. The six specific soft sites mentioned in the review should not be allowed to exceed 10 FAR. There should be no provisions for bonuses that would increase the FAR to 12. The granting of a 2 FAR in exhange for inclusionary housing and subway improvements should not be allowed; they should be included as part of the development. Movie theaters should be located below grade to discourage windowless facades.

The notion of "packing the bulk" in order to limit building height is an idea that has not seen practicle application. Downsizing is the proper approach to ensuring architectural integrity and design controls. The West Side, in existing and planned developments, is rapidly losing control of its skyline. The Community Board proposal of a height limit of 275 feet is certainly the most encouraging figure presented, although it would be even better it it were lower still. The bowtie sites must be given special regard, for the nature of development on those sites could well impact the nature of the gateway to the Upper West Side. The Bank Leumi site, in particular, is already slated for development, and plans have been submitted to the Department of Buildings. This points up the urgency of putting new zoning into place as expeditiously as possible. West Siders are waiting for a time when they do not have

to worry about their neighborhood pollution, overcrowding and deprivation of light and open space.

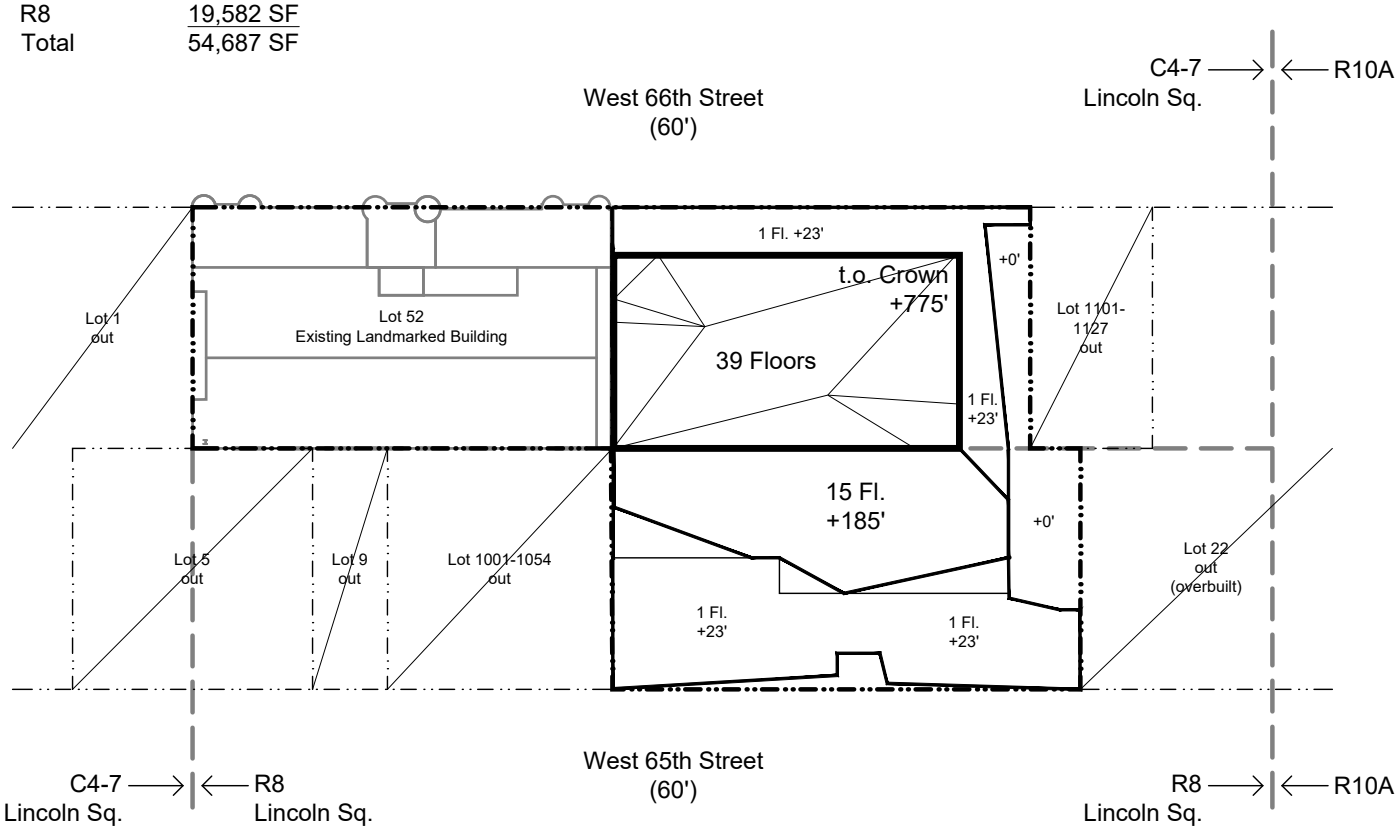
44 West 66th Street

Block 1118, Lots 14, 45, 46, 47 7 48
With Air Rights from Lot 52
Residential Tower
As Approved

Assumes Lincoln Sq. bulk distribution requirements, ZR 82-34, apply in both zones, current status.

Lot Area):

C4-7	35,105 SF
R8	19,582 SF
Total	54,687 SF



Existing Building (Lot 52):

C4-7, below 150'	43,053 ZSF

New Building:

R8, below 150' (Fl. 1-14)	127,282 ZSF
C4-7, below 150' (Fl. 1-14)	158,794 ZSF
C4-7, above 150' (Fl. 15-39)	219,413 ZSF
Total	505,489 ZSF

Total Provided: 548,542 ZSF

Floor Area Below 150' in Both Zones:

Below 150':		
Existing building	43,053 ZSF	
New building in R8	127,282 ZSF	
New building in C4-7	158,794 ZSF	
Total below 150'	329,129 ZSF	60.00%
Above 150'	219,413 ZSF	40.00%
Total	548,542 ZSF	100.00%

2641 - CF Towers.dwg

Note: Lot areas and floor areas are estimates subject to survey verification.

Date: 7/23/19 Scale: 1" = 80'

A.1

Drawing No:

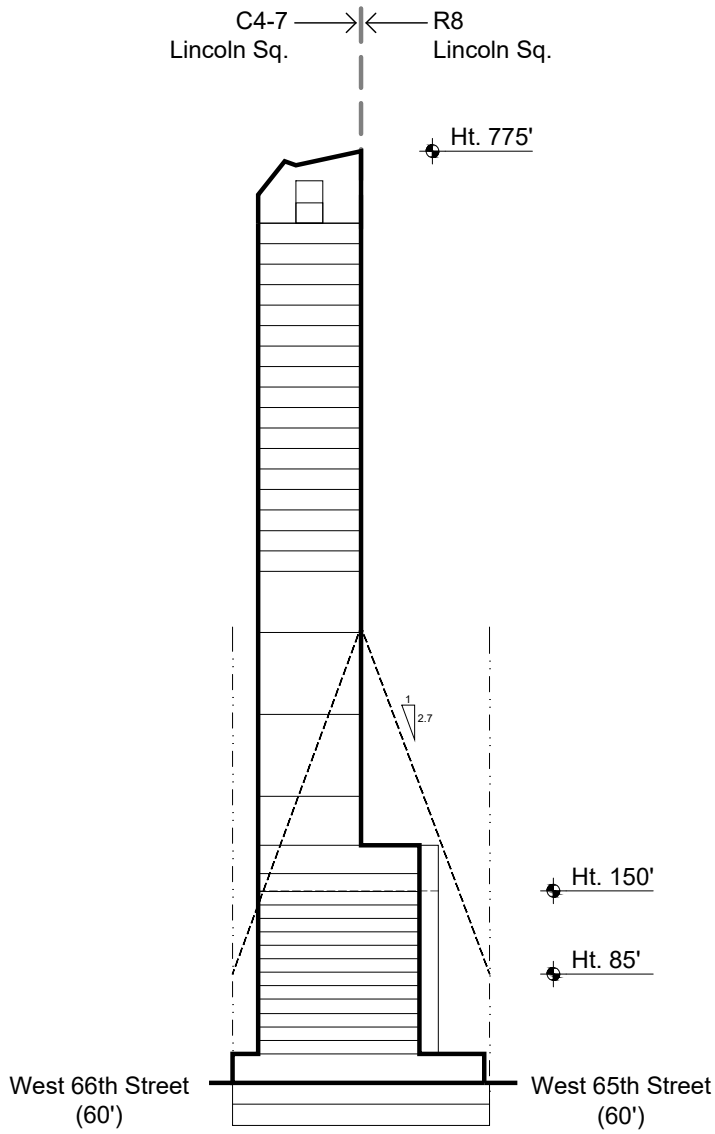
Development Consulting Services, Inc.
330 West 42nd Street
16th Floor
New York, NY 10036
212 714-0280

R. 001316

44 West 66th Street

Block 1118, Lots 14, 45, 46, 47 7 48
With Air Rights from Lot 52
Residential Tower
As Approved

Assumes Lincoln Sq. bulk distribution requirements, ZR 82-34, apply in both zones, current status.



2641 - CF Towers.dwg

Note: Lot areas and floor areas are estimates subject to survey verification.

Date: 7/23/19 Scale: 1" = 150'

A.2

Drawing No:

Development
Consulting
Services, Inc.

330 West 42nd Street
16th Floor
New York, NY 10036
212 714-0280

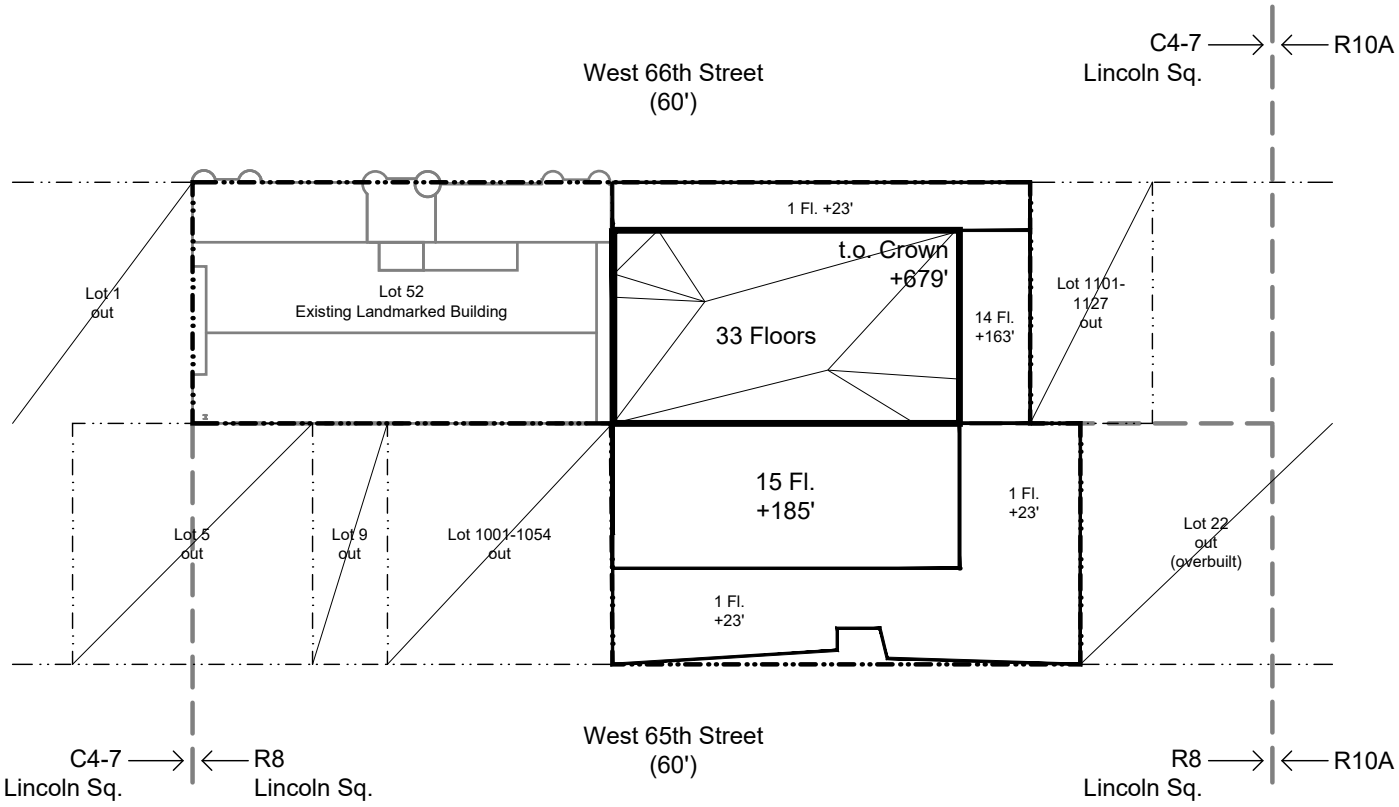
44 West 66th Street

Block 1118, Lots 14, 45, 46, 47 7 48
With Air Rights from Lot 52
Modified Residential Tower

Assumes Lincoln Sq. bulk distribution requirements, ZR 82-34, apply in C4-7 Zone only.

Lot Area):

C4-7	35,105 SF
R8	19,582 SF
Total	54,687 SF



Existing Building (Lot 52):

C4-7, below 150'	43,053 ZSF

New Building:

R8	127,271 ZSF
C4-7, below 150' (Fl. 1-14)	189,791 ZSF
C4-7, above 150' (Fl. 15-33)	155,229 ZSF
Total	472,291 ZSF

Total Provided: 515,344 ZSF

Floor Area Below 150' in C4-7 Zone Only:

Below 150':		
Existing Building	43,053 ZSF	
New building	189,791 ZSF	
Total below 150'	232,844 ZSF	60.00%
New building, above 150'	155,229 ZSF	40.00%
Total in C4-7	388,073 ZSF	100.00%

2641 - CF Towers.dwg

Note: Lot areas and floor areas are estimates subject to survey verification.

Date: 7/23/19 Scale: 1" = 80'

B.1
Drawing No:

Development
Consulting
Services, Inc.

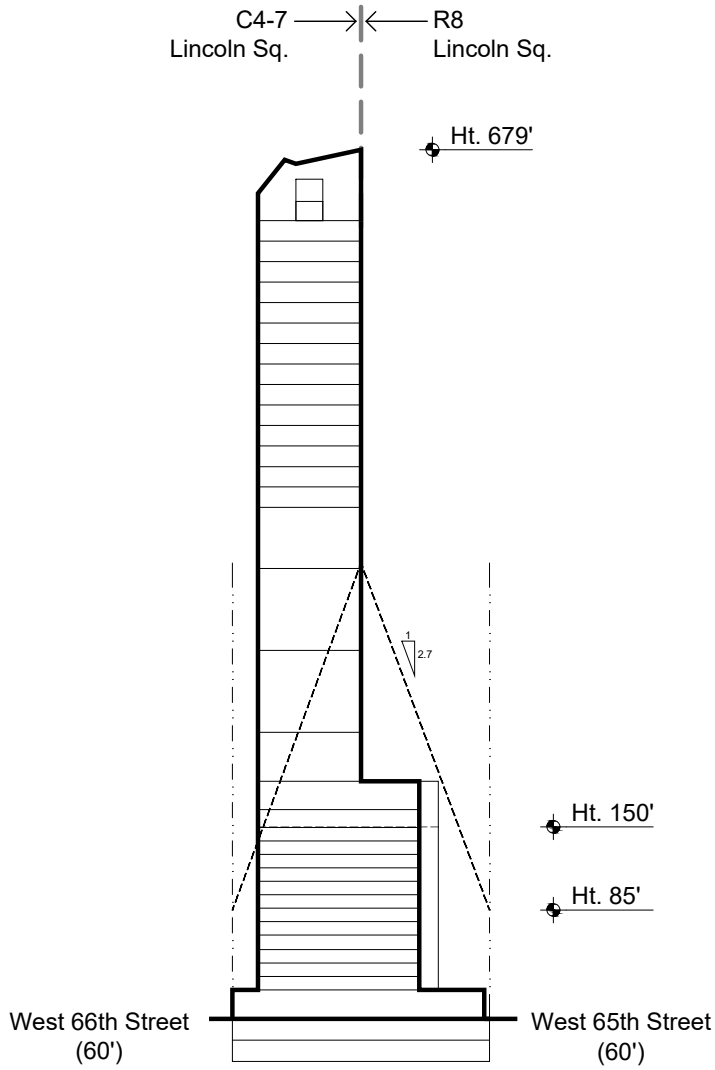
330 West 42nd Street
16th Floor
New York, NY 10036
212 714-0280

R. 001318

44 West 66th Street

Block 1118, Lots 14, 45, 46, 47 7 48
With Air Rights from Lot 52
Modified Residential Tower

Assumes Lincoln Sq. bulk distribution requirements, ZR 82-34, apply in C4-7 Zone only.



2641 - CF Towers.dwg

Note: Lot areas and floor areas are estimates subject to survey verification.

Date: 7/23/19 Scale: 1" = 150'

B.2
Drawing No:

Development
Consulting
Services, Inc.

330 West 42nd Street
16th Floor
New York, NY 10036
212 714-0280

R. 001319

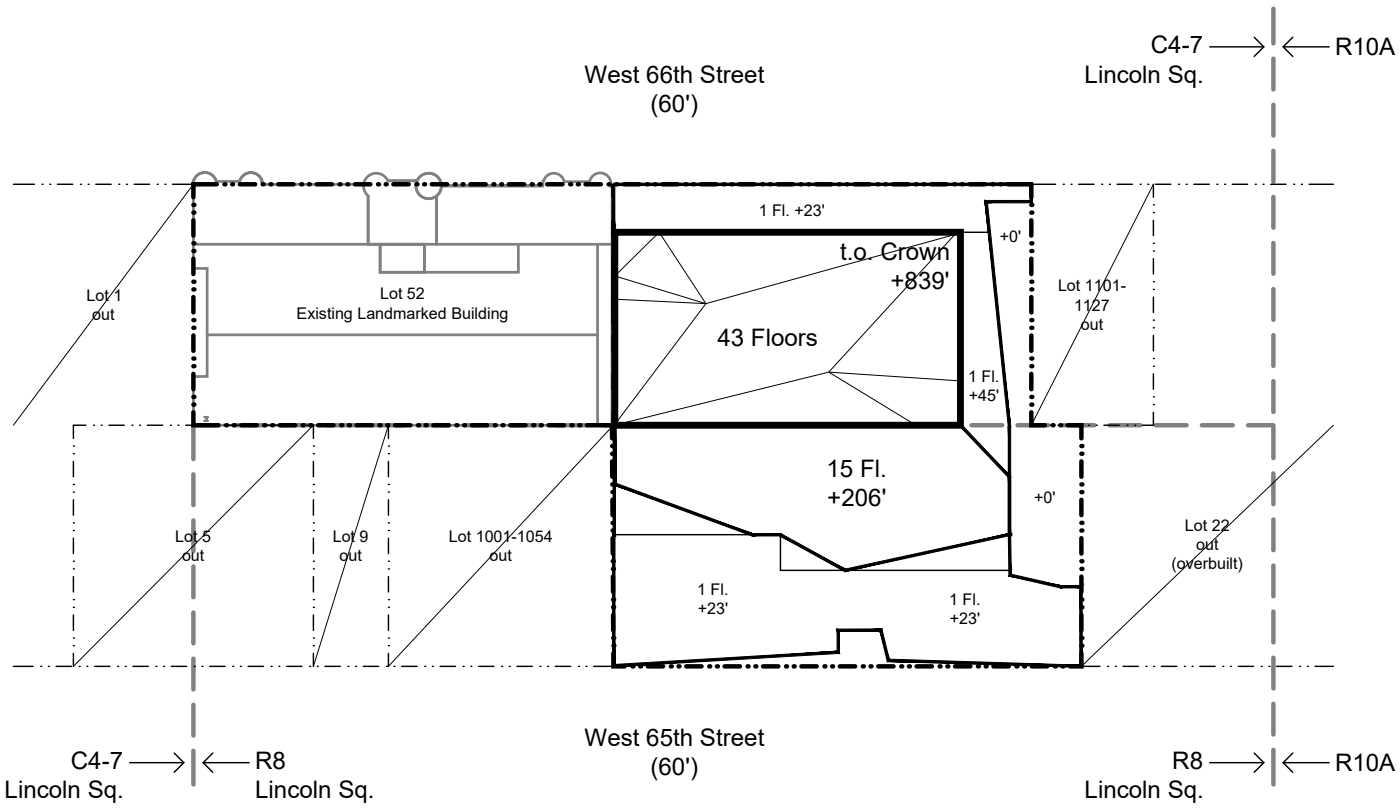
44 West 66th Street

Block 1118, Lots 14, 45, 46, 47 7 48
With Air Rights from Lot 52
Residential Tower

Assumes Lincoln Sq. bulk distribution requirements, ZR 82-34, do not apply in either zone.

Lot Area):

C4-7	35,105 SF
R8	19,582 SF
Total	54,687 SF



Existing Building (Lot 52):

C4-7	43,053 ZSF

New Building:

R8	127,268 ZSF
C4-7	377,975 ZSF
Total	505,243 ZSF

Total Provided: 548,296 ZSF

2641 - CF Towers.dwg

Note: Lot areas and floor areas are estimates subject to survey verification.

Date: 7/23/19 Scale: 1" = 80'

C.1

Drawing No:

Development
Consulting
Services, Inc.

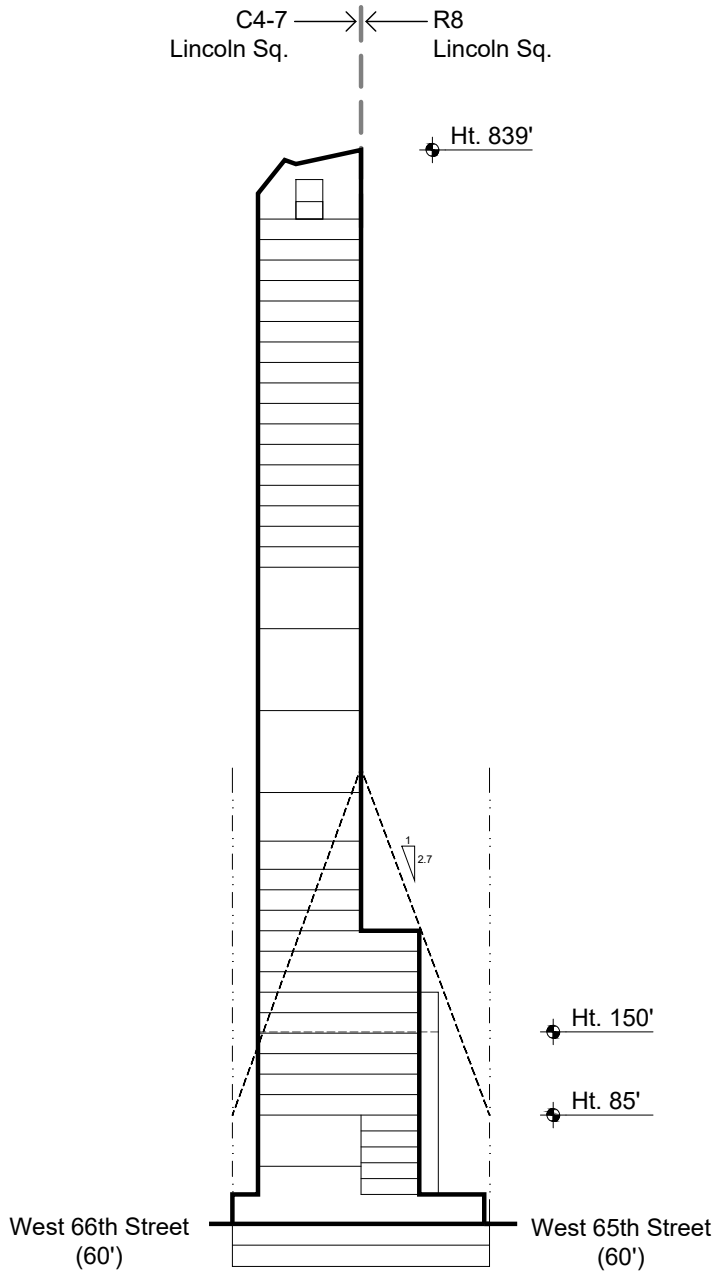
330 West 42nd Street
16th Floor
New York, NY 10036
212 714-0280

R. 001320

44 West 66th Street

Block 1118, Lots 14, 45, 46, 47 7 48
With Air Rights from Lot 52
Residential Tower

Assumes Lincoln Sq. bulk distribution requirements, ZR 82-34, do not apply in either zone.



2641 - CF Towers.dwg

Note: Lot areas and floor areas are estimates subject to survey verification.

Date: 7/23/19

Scale: 1" = 150'

C.2

Drawing No:

Development Consulting Services, Inc.

330 West 42nd Street
16th Floor
New York, NY 10036
212 714-0280

R. 001321

[689 NE2d 1373, 667 NYS2d 327]

In the Matter of Raritan Development Corp. et al., Appellants, v Gaston Silva et al., Respondents.

Argued September 10, 1997; decided October 28, 1997

POINTS OF COUNSEL

Tenzer Greenblatt, L. L. P., New York City *(James G. Greilsheimer* and *Lawrence S. Feld* of counsel), for appellants. The Board of Standards and Appeals contravened the plain meaning of the Zoning Resolution when it ruled that the exemption of "cellar space" from the definition of "floor area" is limited to "cellar space" that is not used for dwelling purposes. *(Matter of Trump-Equitable Fifth Ave. Co. v Gliedman,* 57 NY2d 588, 98 AD2d 487, 62 NY2d 539; *Finger Lakes Racing Assn. v New York State Racing & Wagering Bd.,* 45 NY2d 471; *Matter of Harbolic v Berger,* 43 NY2d 102; *Matter of Jones v Berman,* 37 NY2d 42; *Matter of Allen v Adami,* 39 NY2d 275; *Thomson Indus. v Incorporated Vil. of Port Wash. N.,* 27 NY2d 537; *Matter of 440 E. 102nd St. Corp. v Murdock,* 285 NY 298; *Matter of Exxon Corp. v Board of Stds. & Appeals,* 128 AD2d 289, 70 NY2d 614, 151 AD2d 438, 75 NY2d 703; *Matter of Toys "R" Us v Silva,* 89 NY2d 411; *Appelbaum v Deutsch,* 66 NY2d 975.)

Paul A. Crotty, Corporation Counsel of New York City *(Virginia Waters, Leonard Koerner* and *Ellen B. Fishman* of counsel), for respondents. I. Petitioners have failed to preserve any argument regarding the correct standard of agency and judicial review. In any event, the courts below properly reviewed the Board of Standards and Appeals' determination in accordance with controlling precedent. *(Matter of Wiegan v Board of Stds. & Appeals,* 229 App Div 320, 254 NY 599; *Matter of Friedman-Kien v City of New York,* 92 AD2d 827, 61 NY2d 923; *Matter of Toys "R" Us v Silva,* 89 NY2d 411; *People ex rel. Fordham Manor Refm. Church v Walsh,* 244 NY 280; *Matter of Cowan v Kern,* 41 NY2d 591; *Matter of Fiore v Zoning Bd. of Appeals,* 21 NY2d 393; *Matter of Doyle v Amster,* 79

NY2d 592; *Conley v Town of Brookhaven Zoning Bd. of Appeals,* 40 NY2d 309; *Matter of Fuhst v Foley,* 45 NY2d 441; *Matter of Khan v Zoning Bd. of Appeals,* 87 NY2d 344.) II. The courts below correctly sustained the Board of Standards and Appeals' determination that a dwelling unit at the zoning cellar level should be included in the calculation of floor area under Zoning Resolution § 12-10. *(Doctors Council v New York City Employees' Retirement Sys.,* 71 NY2d 669; *Matter of Chatlos v McGoldrick,* 302 NY 380; *Matter of Carr v New York State Bd. of Elections,* 40 NY2d 556; *New York State Bankers Assn. v Albright,* 38 NY2d 430; *Bragg v Genesee County Agric. Socy.,* 84 NY2d 544; *Matter of New York City Asbestos Litig. [Brooklyn Nav. Shipyard Cases],* 82 NY2d 342; *Matter of DeTroia v Schweitzer,* 87 NY2d 338; *Matter of Frishman v Schmidt,* 61 NY2d 823; *Matter of Town of New Castle v Kaufmann,* 72 NY2d 684; *Matter of Parkview Assocs. v City of New York,* 71 NY2d 274, 488 US 801.)

Sean M. Walsh, Douglaston, for Federation of Civic Councils of the Borough of Queens, Inc., *amicus curiae.* The courts below properly sustained the Board of Standards and Appeals' determination that a dwelling unit at the cellar level should be included in the calculation of the Floor Area Ratio under Zoning Resolution § 12-10. *(Appelbaum v Deutsch,* 66 NY2d 975; *Matter of Perotta v City of New York,* 107 AD2d 320, 66 NY2d 859; *Doctors Council v New York City Employees' Retirement Sys.,* 71 NY2d 669; *New York State Bankers Assn. v Albright,* 38 NY2d 430.)

OPINION OF THE COURT

SMITH, J.

Respondents, the Commissioners of the Board of Standards and Appeals of the City of New York (BSA), argue that this Court should defer to the agency's interpretation of section 12-10 of New York City's Zoning Resolution. However, when an interpretation is contrary to the plain meaning of the statutory language, we have typically declined to enforce an agency's conflicting application thereof. We see no compelling reason to depart from that long-established rule in this case.

[redacted] In calculating the Floor Area Ratio (FAR) for zoning purposes, floor area includes the total amount of "floor space used for dwelling purposes, no matter where located within a building, when not specifically excluded; * * * However, the floor area of a building shall not include * * * cellar space."

Contrary to respondents' argument, we find that this language clearly provides that "cellar space" is excluded from "floor area" without further qualification. We further conclude that such an interpretation is not "absurd." The Appellate Division's order should be reversed.

BACKGROUND

A development of two-family residences on Staten Island was planned in a R3-2 zoning district. That zoning district permits a "floor area ratio" of 0.50 for each building. That ratio means that the total floor area of each building may not exceed 50% of the area of the lot on which the residence is situated. One particular residence was designed to be a trilevel residential building with one dwelling unit comprised of the top two floors and another single dwelling unit on the ground floor. The architect calculated the FAR without including the floor space of the ground floor.

The relevant zoning provision, Zoning Resolution § 12-10, provides in relevant part:

> " '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. In particular, floor area includes: * * *
>
> "(g) any other floor space used for dwelling purposes, no matter where located within a building, when not specifically excluded; * * *
>
> "However, the floor area of a building shall not include:
>
> "(a) cellar space".

The Zoning Resolution defines "cellar" in R3 zoning districts as: "a space wholly or partly below the base plane with more than one-half its height (measured from floor to ceiling) below the base plane." It is conceded by both parties that the ground floor of the subject residence fits within this definition of a "cellar."

On October 14, 1993, the New York City's Department of Buildings (DOB) objected to the architect's FAR calculations because the ground level was a "dwelling unit" and should have been included in the FAR calculations notwithstanding the fact that the ground floor was a "cellar" as that term is defined in the Zoning Resolution. The DOB found that the cel-

lar space exclusion only applied to "true cellar space, space used for nonhabitable purposes, such as for furnace rooms, utility rooms, auxiliary recreation rooms, etc." The DOB further claimed that this interpretation was consistent with the "Zoning Resolution's treatment of basement space and the Multiple Dwelling Law's treatment of cellar space."

The DOB also claimed that the "past practice and policy in interpreting the 1916 Zoning Resolution and the current Zoning Resolution has consistently been to require a habitable room at the zoning cellar level to be included as floor area." Previous approvals that did not conform to this interpretation were allegedly "given in error."

The DOB revoked petitioners' building permit and denied the architect's request for reconsideration. The development corporation of the residential community appealed to the BSA. The BSA noted that the Department of City Planning, "the drafters of the Zoning Resolution, strongly supports the determination of the Department of Buildings based upon the language of the Zoning Resolution, the legislative history of the definition of 'floor area' and the interpretation of the Zoning Resolution in conjunction with the Multiple Dwelling Law." The BSA denied the appeal and found that DOB's ruling had been "reasonable and rational."

Petitioners filed this CPLR article 78 proceeding to annul the BSA's decision. Supreme Court examined the legislative history of the provision and determined that cellar space to be used as dwelling space should be included in the FAR calculation. The court also found that DOB had consistently adhered to that interpretation which reflected standard industry practice. The Appellate Division affirmed and found BSA's interpretation rational and supported by legislative history. This Court granted leave to appeal.

ANALYSIS

[redacted] Contrary to the parties' assertions, this Court has consistently applied the same standard of review for agency determinations. Where "the question is one of pure legal interpretation of statutory terms, deference to the BSA is not required" (*Matter of Toys "R" Us v Silva*, 89 NY2d 411, 419). On the other hand, when applying its special expertise in a particular field to interpret statutory language, an agency's rational construction is entitled to deference (*see, Matter of Jennings v New York State Off. of Mental Health*, 90 NY2d 227, 239; *Kurc-*

sics v Merchants Mut. Ins. Co., 49 NY2d 451, 459). Even in those situations, however, a determination by the agency that "runs counter to the clear wording of a statutory provision" is given little weight (*Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d, at 459; *see also, Matter of Toys "R" Us v Silva*, 89 NY2d, at 418-419).

[redacted] The statutory language could not be clearer. As noted above, a cellar is defined within the Zoning Resolution in terms of its physical location in a building. "Floor area" includes dwelling spaces when not specifically excluded and "cellar space," without further qualification, is expressly excluded from FAR calculations.[1] Thus, FAR calculations should not include cellars regardless of the intended use of the space. BSA's interpretation conflicts with the plain statutory language and may not be sustained.

BSA urges this Court to ignore the obvious interpretation of the Zoning Resolution and, instead, to look beyond the pages of statutory text. BSA attempts to justify its reading by first referring this Court to the language of a former version of the regulation. In 1916, the Zoning Resolution defined "floor area" as "the sum of the gross horizontal areas of the several floors * * * but excluding * * * basement and cellar floor areas not devoted to residence use." BSA is correct that the 1916 Zoning Resolution supports its contention that cellar space is only excluded from FAR calculations when not used for residential purposes.

However, the provision was changed in 1961 to its present text. In the amended text, cellar spaces were excluded from floor area without qualification. There is no evidence that the changed meaning was accidental or superfluous (*see, Mabie v Fuller*, 255 NY 194, 201 ["We must assume that the Legislature in enacting the section intended that it should effect some change in the existing law and accomplish some useful purpose"]). Still, BSA insists that the amendment did not change the law.

For example, BSA argues that it has always interpreted the resolution a particular way so, presumably, it should be allowed to continue to do so. Such evidence might be more com-

1. The dissent interprets the exclusionary language to apply to dwelling space "which is specifically excluded *as such*" (dissenting opn, at 110 [emphasis in original]). The provision, of course, is not so limited. Where, as here, the language is unambiguous, and the result not absurd, we see no reason to depart from the legislative text.

pelling if the present text of the Zoning Resolution offered any support. It should also be noted that BSA concedes that it has not consistently interpreted the statute in the same manner as it did here.

Perhaps most telling is BSA's contention to Supreme Court that its interpretation of the Zoning Resolution is consistent with the Multiple Dwelling Law which applies to residential buildings for three or more families. As BSA notes in its answer, which was verified by its Commissioner:

> "Section 26 of Title I in Article 3 of the Multiple Dwelling Law reads (under paragraph 2 Definitions):
>
> "b. 'Floor area': the sum of the gross horizontal areas of all of the several floors of a dwelling or dwellings and accessory structures on a lot measured from the exterior faces of exterior walls or from the center line of party walls, except:
>
> "1. cellar not used for residential purposes."

Unfortunately, BSA relies upon a version of the law which was amended over a decade ago. In 1985, the definition of the exclusion was modified from "cellar not used for residential purposes" to the unqualified "cellar space" (*see*, L 1985, ch 857, § 1). According to the legislative memorandum which accompanied the text of the new law, the "amendment resolves [a] conflict by correlating the bulk of yard regulation requirements of the Multiple Dwelling Law with those of the Local Zoning Resolution, thus providing one clear set of guidelines for professionals and administrators" (1985 McKinney's Session Laws of NY, at 3171). The memorandum concludes that "the Mayor urges upon the Legislature the earliest possible favorable consideration of this proposal" (*id.*). Thus, it was thought in 1985 that the unqualified exclusion of cellar space from floor area calculations would be in conformity with the Zoning Resolution. BSA's reliance on outdated laws to justify its reading of the Zoning Resolution would be yet another reason to annul its determination.

Essentially, BSA has (sometimes) grafted onto the language of the current Zoning Resolution an addendum of its own whereby only certain cellars are excluded from floor area calculations. Typically, we have declined to uphold such an interpretation (*see, Matter of Chemical Specialties Mfrs. Assn. v Jorling*, 85 NY2d 382, 394 [" '(N)ew language cannot be

imported into a statute to give it a meaning not otherwise found therein' "], quoting McKinney's Cons Laws of NY, Book 1, Statutes § 94, at 190). Moreover, the conclusion reached herein is not "absurd" as the BSA contends.

FAR is related to the density of land use and such regulations have been upheld as reasonable (*see*, *Pondfield Rd. Co. v Village of Bronxville*, 1 AD2d 897, *affd without opn* 1 NY2d 841; 1 Anderson, New York Zoning Law and Practice § 9.46 [3d ed]). BSA contends that its interpretation of the Zoning Resolution would prevent "the additional burden" of increased neighborhood population upon schools and parking. However, FAR calculations were not designed to control population.

As noted above, FAR is comprised of total floor area within the building divided by the total area of the lot containing the building. Since residential areas have lower FAR, more lot is required to build larger buildings. Such concerns restrict *physical* development within a neighborhood (*see*, 7 Rohan, Zoning and Land Use Controls § 42.06 [2] [c] [1997] ["Through this device, zoning ordinances restrict the amount of development on a lot by specifying the ratio that the floor area of a building may bear to the lot area"]; *see also* 3 Rathkopf, Zoning and Planning § 34C.02 [1] [4th ed] [the " 'floor area ratio' or F.A.R. technique is widely used today to establish the gross maximum size of a building in terms of the amount of floor area permitted therein"]).

It has also been stated that "[o]ne way to control the size of a building is to limit its overall volume" through FAR limits (7 Rohan, Zoning and Land Use Controls, at App 42-10; *see also*, 3 Rathkopf, Zoning and Planning § 34C.02 [1] [4th ed] ["A more flexible method of regulating bulk is establishing a ratio between the size of the lot and the gross floor area of the principal building to be erected thereon"]). Indeed, the area regulations of New York City were originally enacted to regulate bulk in building development (*see*, Bassett, Zoning: The Laws, Administration, and Court Decisions During the First Twenty Years, at 62 ["Many ordinances have followed that of New York City in limiting building area to a fraction of the lot area. * * * The regulation must not be so drastic that it compels an absurdly small house on a normal lot or an unreasonably large lot for a normal house"]).

It seems clear that such zoning restrictions were never designed to combat the erection of primarily underground housing levels which do not contribute to bulky, high-rise

development.[2] It is eminently logical that cellars, housing levels that are more than halfway below the ground, would be excluded from FAR calculations notwithstanding the actual or intended use of the space. Consistent with the purpose of FAR restrictions to control building density, it should be noted that basement space, also defined in the Zoning Resolution in terms of its physical location within a building as being more than halfway above ground, is included in FAR calculations to the same extent as similarly situated space. Contrary to the views expressed in the dissenting opinion, we find nothing in zoning treatises, California case citations or the legislative history of the 1990 amendment to the Zoning Resolution that would indicate a contrary legislative intent regarding the 1961 amendments to the Zoning Resolution which excluded cellars, in unqualified language as to the intended use, from FAR calculations.

In sum, BSA urges this Court to disregard the plain meaning of the Zoning Resolution because (1) the former version of the Zoning Resolution should be binding upon any interpretation of the amended language thereof; (2) BSA's interpretation is consistent with an outdated version of the Multiple Dwelling Law; (3) the Zoning Resolution was amended to require cellars to be measured from the surrounding ground level rather than curb level to prevent overexcavation of lots; (4) BSA has inconsistently interpreted the Zoning Resolution in a particular manner; and (5) BSA seeks to prevent overcrowding through provisions designed to control physical bulk of buildings. We find such arguments to be unpersuasive.

This Court has long applied the well-respected plain meaning doctrine in fulfillment of its judicial role in deciding statutory construction appeals. We agree that "[i]t is fundamental that a court, in interpreting a statute, should attempt to ef-

---

2. In a 1990 Planning Report prepared by the Department of City Planning, it is stated that under current regulations, a "cellar does not count as floor area" and "cellars are exempt from floor area calculations" (*see,* New York Dept of City Planning, Lower Density Zoning, Proposed Follow-up Text Amendment: A Planning Report, at 35, 37 [June 1990]). Previously, the resolution defined a cellar as more than halfway below "curb" level which caused developers to "level" lots so that a ground floor could still qualify as a "cellar." The Zoning Resolution was amended to provide that "the base plane [ground], and not curb level, be the benchmark for determining whether floor space is a basement or cellar." Thus, a basement, "with more than half its height" above the ground would count as floor area but cellars on sloping sites, even if situated above "curb level" would be excluded in such calculations.

fectuate the intent of the Legislature," but we have correspondingly and consistently emphasized that "where the statutory language is clear and unambiguous, *the court should construe it so as to give effect to the plain meaning of the words used*" (*Patrolmen's Benevolent Assn. v City of New York*, 41 NY2d 205, 208 [emphasis added] [citations omitted]; *see*, *Doctors Council v New York City Employees' Retirement Sys.*, 71 NY2d 669, 674-675).

We have provided further clear teaching and guidance that "[a]bsent ambiguity the courts may not resort to rules of construction to broaden the scope and application of a statute," because "no rule of construction gives the court discretion to declare the intent of the law *when the words are unequivocal*" (*Bender v Jamaica Hosp.*, 40 NY2d 560, 562 [emphasis added] [citations omitted]). Lastly, "[t]he courts are not free to legislate and if any unsought consequences result, *the Legislature is best suited to evaluate and resolve them*" (*id.* [emphasis added]). Based on this Court's adherence to these respectable principles and precedents as primary sources of authority for the legitimacy of the plain-meaning doctrine, we reject the dissent's characterization of the statutory construction tool generally and as applied in this case.

BSA's interpretation is not only against the plain meaning of the resolution's text and contrary to the Multiple Dwelling Law, but also contrary to the purpose behind FAR restrictions in general. There is no statutory or practical support for BSA's strained construction of the Zoning Resolution for FAR calculations. The solution here is for the City to legislate a different definition if that is its intent, to be manifested by the ordinance itself.

The Appellate Division order should be reversed, with costs, the petition granted and the determination of respondent Board of Standards and Appeals revoking petitioners' building permit annulled.

LEVINE, J. (dissenting). We respectfully dissent. This case presents an unfortunate yet graphic example of the plain-meaning doctrine in operation, eschewing as it does other sources and evidence of legislative intent, such as context, legislative history and the purpose of the enactment. The majority appears to elevate the plain-meaning rule to a point of interpretive primacy not supported by our precedents. Although, to be sure, our Court has employed plain-meaning arguments in the past (*see, e.g.*, *Patrolmen's Benevolent Assn. v*

City of New York, 41 NY2d 205, 208; *Bender v Jamaica Hosp.*, 40 NY2d 560, 561-562), our prevailing view has been, wisely, that the overarching duty of the courts in statutory interpretation is always to ascertain the legislative intent through examination of all available legitimate sources. "The legislative intent is the great and controlling principle. Literal meanings of words are not to be adhered to or suffered to 'defeat the general purpose and manifest policy intended to be promoted' " (*People v Ryan*, 274 NY 149, 152; *see, Matter of Sutka v Conners*, 73 NY2d 395, 403; *Matter of Albano v Kirby*, 36 NY2d 526, 529-531; *Matter of Petterson v Daystrom Corp.*, 17 NY2d 32, 38).

Chief Judge Breitel articulated well the predominant view of this Court in *New York State Bankers Assn. v Albright* (38 NY2d 430): "Absence of facial ambiguity is * * * rarely, if ever, conclusive. The words men use are never absolutely certain in meaning; the limitations of finite man and the even greater limitations of his language see to that. Inquiry into the meaning of statutes is never foreclosed at the threshold" (*id.*, at 436). The Court went on to quote, with approval, the Supreme Court's opinion in *United States v American Trucking Assns.* (310 US 534, 544):

> " 'Frequently, however, even when the plain meaning did not produce absurd results but merely an *unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words.* When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination" ' " (*New York State Bankers Assn. v Albright*, 38 NY2d, at 437, *supra* [emphasis supplied]).

Criticism of the plain-meaning doctrine has long been expressed by legal scholars as frustrating legislative objectives and placing unrealistic demands upon the legislative process (*see,* Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation In The "Modern" Federal Courts,* 75 Colum L Rev 1299 [1975]). More recently, in the current debate over the "new textualism" (*see, e.g.*, Eskridge, *The New Textualism*, 37 UCLA L Rev 621 [1990]; Shapiro, *Continuity and Change in Statutory Interpretation*, 67 NYU L Rev 921

[1992]), legal and linguistic scholars have criticized the plain-meaning doctrine for oversimplifying the task of interpretation and for, itself, creating new interpretative problems (*see*, Cunningham, Levi, Green and Kaplan, *Plain Meaning and Hard Cases*, 103 Yale LJ 1561 [1994], reviewing Solan, The Language of Judges [1993]).

Simply put, even if a court might encounter that rare case where the words of a statute are so utterly and indisputably clear (notwithstanding the litigants' dispute over their meaning) that the court could correctly interpret the statute's meaning merely by reading its words, this is *not* that case.

The issue here is whether space to be used as actual living quarters, located partly below ground at the lowest level of a house in a residential zoning district, is to be excluded from the calculation of the floor area ratio (FAR) under New York City Zoning Resolution § 12-10. The applicable FAR, as the majority points out (majority opn, at 101), would limit the total floor area of petitioners' residential building to 50% of the square footage of the lot on which it is situated.

Petitioners claim that the space, irrespective of its use as a dwelling unit, falls literally within the definition of "cellar" space introduced in a 1990 amendment to Zoning Resolution § 12-10, as "space wholly or partly below the base plane, with more than one half its height (measured from floor to ceiling) below the *base plane*" (NY City Zoning Resolution § 12-10, "cellar" [emphasis in original]). Section 12-10 excludes cellar space as such from the floor area numerator of the FAR (*see*, *id.*, § 12-10, "Floor area"—exclusions [a]).

Respondents, constituting the Board of Standards and Appeals of the City of New York (BSA) and the New York City Department of Buildings, however, determined that the cellar space exclusion was inapplicable here because the space in question is not used as a cellar but, rather, as a subsurface apartment. Supreme Court and the Appellate Division agreed (231 AD2d 725). The BSA relied upon, among other things, subdivision (g) of the floor area component of section 12-10, which directly applies to the space at issue, mandating that floor area includes:

> "any *other floor space used for dwelling purposes, no matter where located* within a building, when not specifically excluded" (NY City Zoning Resolution § 12-10 ["Floor area" (g); emphasis supplied]).

The majority holds that subdivision (g) does not require

petitioners' partly below ground living quarters to be included in floor area because cellar floor space is "specifically excluded." Therefore, the majority reasons, a cellar always falls within the exception to subdivision (g), which otherwise includes all space used for dwelling purposes irrespective of its location in the building (*id.*).

To be sure, the "specifically excluded" exception to the inclusion of all space devoted to dwelling purposes under subdivision (g) can be read, as interpreted by the majority, to refer to any space excluded elsewhere in the Zoning Resolution. Nevertheless, the provision can be read with at least equal plausibility not to apply to cellar *living* quarters. Thus, the "specifically excluded" exception can easily be interpreted as applying only to "floor space *used for dwelling purposes*" (*id.*) which is specifically excluded *as such* elsewhere in the statute. Reading the exception in this fashion, since cellar space *used for dwelling purposes* is not "specifically excluded" from floor area anywhere in the Zoning Resolution, the BSA correctly determined that the floor space of petitioners' subsurface apartment had to be counted in the FAR calculation.

The foregoing contrasting interpretations of the treatment of dwelling space/floor area in Zoning Resolution § 12-10 present a paradigm of what linguists refer to as "*structural ambiguity* [in which] interpretive difficulties arise not from indeterminacy as to the meaning of individual words but from *ambiguity as to the relationship of the words in a sentence structure*" (Cunningham, Levi, Green and Kaplan, *Plain Meaning and Hard Cases*, 103 Yale LJ, at 1570 [emphasis supplied]). Here, the text of subdivision (g) alone does not resolve the issue as to whether the "specifically excluded" phrase in that provision refers to *any* space otherwise expressly excluded from floor area, or solely to any "other floor space *used for dwelling purposes*" specifically excluded as such (*see*, NY City Zoning Resolution § 12-10 "Floor area" [g] [emphasis supplied]). For us, the irrefutable existence of that ambiguity is sufficient to resolve this appeal in the Board's favor. We would defer to the BSA's interpretation, the agency we have recognized as having responsibility for implementing the statutory purposes of New York City Zoning Resolution § 12-10, which not even petitioners dispute is consistent with the general policy of this FAR legislation. Moreover, as the BSA points out, the statute explicitly directs that in the event of an internal conflict between provisions in the regulations over the bulk of buildings, the "more restrictive" provision controls (NY City Zoning Resolution § 11-22).

Even without according deference to the BSA's interpretation, inclusion in floor area of cellar space used for dwelling purposes, because space used that way is not otherwise "specifically excluded," represents a sounder reading of the "dwelling purpose" inclusory language of subdivision (g), and is more consistent both with section 12-10 as a whole, and with the legislative history and transcendent purpose of the Zoning Resolution.

First, consistent with the BSA's interpretation, Zoning Resolution § 12-10 actually contains a defined floor space *used for dwelling purposes* which is "specifically excluded" as such from floor area. Under subdivision (i) of the exclusionary portion of section 12-10, the lowest stories of qualifying houses in specific residential zoning districts are excluded from floor area if used as a "furnace room, *utility room*, *auxiliary recreation room*" (NY City Zoning Resolution § 12-10, "Floor area"—exclusions [i] [3] [emphasis supplied]). Thus, it is readily apparent that what was contemplated in the "specifically excluded" exception to the catchall provision (otherwise including in floor area all space used for dwelling purposes) was those particular spaces devoted to some dwelling uses, which the legislative body determined were not to be counted as floor area in the FAR calculation. This conclusion is reinforced by the fact that both subdivision (g) of the floor area definitional portion of section 12-10, in its present form, and the specific exclusion of certain lower story space utilized for dwelling purposes such as a utility or recreation room, were added simultaneously to the Zoning Resolution in 1961. Thus, the most plausible explanation for the insertion of the "specifically excluded" exception was to avoid conflict between the foregoing provisions.

The majority's interpretation relies heavily upon the fact that, whereas the 1916 Zoning Resolution expressly excluded from floor area basements and cellars only when " 'not devoted to residence use,' " the 1961 recodification flatly excluded cellars without the nonresidential use qualification (*see*, majority opn, at 103, 106). However, the 1961 resolution substituted the floor area catchall provision contained in subdivision (g) for the 1916 specific exclusion of nonresidential cellar and basement space (*see*, NY City Zoning Resolution § 12-10, "Floor area" [g] [including in floor area *any* space used for dwelling purposes "*no matter where located*"] [emphasis supplied]). It was, therefore, unnecessary to retain the 1916 nonresidential use qualification in the 1961 Zoning Resolution cellar space exclusion. Thus, the absence of that nonresidential use qualification

in the cellar exclusion is of no significance whatsoever in interpreting the all-inclusory dwelling space language in subdivision (g) of the 1961 resolution (still in effect), which is the dispositive issue in this case.

It is also highly unlikely that in the 1961 FAR recodification, the legislative body had the intent ascribed to it by the majority, i.e., to permit exclusion from floor area of cellar space used for residential purposes. In the general purpose clause of the 1961 Zoning Resolution, subdivision (d) recites that a specific purpose of the resolution was "[t]o protect residential areas against congestion, as far as possible, by *regulating the density of population*" (NY City Zoning Resolution § 21-00 [d], Statement of Legislative Intent [emphasis supplied]). Permitting cellar area devoted to residential use to be excluded from the numerator of the FAR formula hardly comports with that purpose.

Moreover, the legislative history of the present "base plane" definition of excluded cellar space in Zoning Resolution § 12-10, upon which petitioners concededly must rely in order to exclude, from the FAR, the lowest level living quarters of its building, makes it absolutely clear that the "base plane" definition was never intended to change the settled construction of the prior law which limited the exclusion to "true" cellar space (as commonly understood) and not space, as urged by petitioners, used as a cellar apartment. The present "base plane" definition was added in a 1990 amendment to Zoning Resolution § 12-10. Prior to 1990, and at least as early as 1961, section 12-10 differentiated between basement space and cellar space, and the difference in treatment was maintained in the current statutory scheme. Basement space, *even when not used for dwelling purposes*, was previously and still is included in floor area for determining the FAR. The definitions of basement space and cellar space were (and are) complementary and employed essentially to differentiate one from the other.

As explained in the legislative memorandum in support of the 1990 amendment, the differences between basement and true cellar spaces were originally defined in terms of their location in relation to the curb level of the building lot (*see*, New York Dept of City Planning, Lower Density Zoning, Proposed Follow-up Text Amendment: A Planning Report, at 35 [1990]). Under the 1961 Zoning Resolution, basement space was defined as space partly below curb level, with at least one half of its height *above* curb level (*id.*). Cellar space, although similar, was space whose height was more than one half *below* curb level (*id.*).

The 1990 amendments only changed the benchmark differentiation between basement and cellar space from curb level to base plane (*id.*, at 35-36). Significantly, this change was enacted to address the unintended result of the prior definition, which encouraged needless excavation of upwardly sloping lots in order to avoid having true cellar space counted as basement space, and thereby included in floor area (*see*, *id.*, at 35). Thus, there is not even the hint of any indication that the decisive amendment of the definition of cellar space, upon which petitioners must rely, was intended to expand the cellar exclusion to space used for subsurface living quarters. Indeed, the manifestation of intent regarding the amendment was completely to the contrary. The 1990 amendment also contained a proviso for reverting the benchmark of the basement and cellar space differentiation back to curb level under certain circumstances "to *reduce the potential abuse* of this [base plane] provision by excavation of yards, *turning cellars into floor space suitable for additional bedrooms and accessory units*" (*id.*, at 36 [emphasis supplied]).

Furthermore, as already pointed out, the function of the definition of cellar has nothing whatsoever to do with determining whether any cellar space actually used for dwelling purposes is to be excluded from floor area. Rather, in context, the definition is designed solely to differentiate cellar space from basement space, the latter space always being included in floor area irrespective of its nonuse for dwelling purposes.

Finally, the majority's application of the plain-meaning doctrine here, to permit the exclusion from floor area of cellar space converted to an actual dwelling unit, directly conflicts with the underlying purpose of the FAR concept embodied in New York City Zoning Resolution § 12-10. Contrary to the suggestion in the majority writing that the purpose of the FAR is an apparently aesthetic one, merely to restrict the bulk of buildings within the zoning district and therefore was "never designed to control population" (majority opn, at 105), and was "never designed to combat the erection of primarily underground housing levels which do not contribute to bulky, high-rise development" (majority opn, at 105-106), the well-recognized purpose of FAR residential zoning regulation is to control population density with its resultant adverse impact on quality of life and overtaxing of governmental services within the zoning district.

It should be self-evident and beyond dispute that the primary effect of restricting the amount of buildable floor space

for each building lot in a *residential* district, through a FAR, will be to limit the aggregate habitable space occupied by people within the zoning district, i.e., its *population density*.

As explained by Rohan, among the various height, bulk and density controls and "measurement restrictions imposed through the use of zoning power [are] * * * *devices for limiting population density*, i.e., minimum lot areas, frontage requirements and *floor area ratio*" (7 Rohan, Zoning and Land Use Controls § 42.01 [5], at 42-10—42-11 [1997] [emphasis supplied]; *see generally*, *id.*, ch 42, at 42-1 ["Measurement Controls: Height, Bulk and Density"]). The Rathkopf treatise discusses zoning controls on building area, bulk and floor size, "including *floor-area-ratio* restrictions that are tied to overall lot size" (3 Rathkopf, Zoning and Planning § 34C.01, at 34C-1 [Ziegler 4th ed] [emphasis supplied]). The author characterizes the function of these controls as including "protection of public health and safety, [and] *prevention of overcrowding* and traffic congestion" (*id.*, § 34C.02 [2], at 34C-6 [emphasis supplied]). Additionally, in *Broadway, Laguna, Vallejo Assn. v Board of Permit Appeals*, a leading early case on the validity of zoning regulation through FARs, the court stated that: "*the consensus among zoning authorities is that, in terms of controlling population density* and structural congestion, the technique of restricting the *ratio of a building's* rentable *floor space* to the size of the lot on which it is constructed possesses numerous advantages" (66 Cal 2d 767, 771, 427 P2d 810, 813 [emphasis supplied]). Indeed, ironically, the legislative report in support of the very amendment to Zoning Resolution § 12-10 relied upon by petitioners here is entitled "*Lower Density* Zoning, Proposed Follow-up Text Amendment" (New York Dept of City Planning [1990] [emphasis supplied]). Moreover, as previously noted, the general purpose clause of the 1961 Zoning Resolution militates strongly against the majority's interpretation of that law's modification of the cellar exclusion as permitting cellar residences to be omitted from the FAR equation.

Thus, petitioners' interpretation of section 12-10 (adopted by the majority here), permitting a developer to set up a cellar dwelling unit not subject to FAR restrictions, is diametrically opposed to the basic purposes of the Zoning Resolution. This alone should be enough to reject petitioners' interpretation, even if the "plain meaning" of the words supported that interpretation (*see*, *New York State Bankers Assn. v Albright*, *supra*, quoting *United States v American Trucking Assns.*, *supra*; *see also*, *Cabell v Markham*, 148 F2d 737, 739 [Hand, J.] ["The

defendants have no answer except to say that we are not free to depart from the literal meaning of the words, however transparent may be the resulting stultification of the scheme or plan as a whole. Courts have not stood helpless in such situations; the decisions are legion in which they have refused to be bound by the letter, when it frustrates the patent purpose of the whole statute"], *affd* 326 US 404).

Because the pertinent provisions of New York City Zoning Resolution § 12-10 are at the least ambiguous, and because the BSA's interpretation of subdivision (g) is consistent with section 12-10 as a whole, its legislative history and patent statutory purpose, we would uphold the Board's determination and affirm the dismissal of the petition by the courts below.

Chief Judge KAYE and Judges TITONE, BELLACOSA and CIPARICK concur with Judge SMITH; Judge LEVINE dissents and votes to affirm in a separate opinion in which Judge WESLEY concurs.

Order reversed, etc.

[redacted]

[694 NE2d 424, 671 NYS2d 423]

In the Matter of New York Botanical Garden, Appellant, v Board of Standards and Appeals of the City of New York, Respondent, and Fordham University, Intervenor-Respondent.

Argued February 18, 1998; decided April 2, 1998

[redacted]

[redacted]

POINTS OF COUNSEL

Rosenman & Colin, L. L. P., New York City *(Jeffrey L. Braun, Kenneth Lowenstein* and *Rosemary Halligan* of counsel), for appellant. The Board of Standards and Appeals' determination that Fordham's radio tower is an "accessory" use is irrational and erroneous. *(300 Gramatan Ave. Assocs. v State Div. of Human Rights,* 45 NY2d 176; *Matter of Pell v Board of Educ.,* 34 NY2d 222; *Matter of Moran Towing & Transp. Co. v New York State Tax Commn.,* 72 NY2d 166; *Chinese Staff & Workers Assn. v City of New York,* 68 NY2d 359; *Matter of Trump-Equitable Fifth Ave. Co. v Gliedman,* 62 NY2d 539; *Matter of Toys*

"R" Us v Silva, 89 NY2d 411; *Matter of Raritan Dev. Corp. v Silva,* 91 NY2d 98; *Kurcsics v Merchants Mut. Ins. Co.,* 49 NY2d 451; *Matter of Teachers Ins. & Annuity Assn. v City of New York,* 82 NY2d 35; *Matter of 7-11 Tours v Board of Zoning Appeals,* 90 NY2d 486.)

Jeffrey D. Friedlander, Acting Corporation Counsel of New York City *(Deborah R. Douglas* and *Kristin M. Helmers* of counsel), for respondent. The determination by the Board of Standards and Appeals that Fordham University's proposed radio tower qualifies as an "accessory use" under the Zoning Resolution, thereby permitting construction of the tower as of right, has a rational basis and is supported by substantial evidence. *(Matter of Toys "R" Us v Silva,* 89 NY2d 411; *Appelbaum v Deutsch,* 66 NY2d 975; *Matter of Cowan v Kern,* 41 NY2d 591; *Matter of Teachers Ins. & Annuity Assn. v City of New York,* 82 NY2d 35; *Irwin v Kayser,* 112 AD2d 192; *Matter of Khan v Zoning Bd. of Appeals,* 87 NY2d 344; *Matter of Fuhst v Foley,* 45 NY2d 441; *Matter of Collins v Lonergan,* 198 AD2d 349; *Conley v Town of Brookhaven Zoning Bd. of Appeals,* 40 NY2d 309; *Matter of Raritan Dev. Corp. v Silva,* 91 NY2d 98.)

Kurzman Karelsen & Frank, L. L. P., New York City *(Deirdre A. Carson* and *Joanne Seminara Lehu* of counsel), for intervenor-respondent. I. The New York Botanical Garden failed to articulate to the Board of Standards and Appeals, or present evidence on, its theory that the tower alone is the accessory use; because the new theory was not preserved, the appeal must be dismissed. *(Cooper v City of New York,* 81 NY2d 584; *Merrill v Albany Med. Ctr. Hosp.,* 71 NY2d 990; *Matter of Levine v New York State Liq. Auth.,* 23 NY2d 863; *Matter of Fanelli v New York City Conciliation & Appeals Bd.,* 90 AD2d 756, 58 NY2d 952; *Matter of Mengoni v Division of Hous. & Community Renewal,* 186 AD2d 385; *Matter of Schodack Concerned Citizens v Town Bd.,* 148 AD2d 130; *Matter of Celestial Food Corp. v New York State Liq. Auth.,* 99 AD2d 25.) II. The Board of Standards and Appeals' determination that, whether viewed as a use by itself, or together with WFUV's studio as an element of a single use, the WFUV tower is accessory to Fordham University, is rational, text-based and supported by substantial evidence. *(Matter of Exxon Corp. v Board of Stds. & Appeals,* 128 AD2d 289, 70 NY2d 614; *Aim Rent A Car v Zoning Bd. of Appeals,* 156 AD2d 323; *Matter of Poriandа v Amelkin,* 115 AD2d 650; *Matter of Presnell v Leslie,* 3 NY2d 384; *Matter of Toys "R" Us v Silva,* 89 NY2d 411; *Matter*

of Fuhst v Foley, 45 NY2d 441; *Matter of Collins v Lonergan,* 198 AD2d 349; *Matter of Raritan Dev. Corp. v Silva,* 91 NY2d 98.)

Edward N. Costikyan, New York City, for Municipal Art Society of New York, Inc., *amicus curiae.* The decision of the Board of Standards and Appeals finding that a 480-foot radio tower qualifies as an accessory use is arbitrary and capricious because there is no evidence in the record that a tower of such size is "customarily found in connection with" a university campus in a residential district. *(Matter of Teachers Ins. & Annuity Assn. v City of New York,* 82 NY2d 35; *Matter of Presnell v Leslie,* 3 NY2d 384; *Gray v Ward,* 74 Misc 2d 50, 44 AD2d 597; *Aim Rent A Car v Zoning Bd. of Appeals,* 156 AD2d 323; *Matter of 7-11 Tours v Board of Zoning Appeals,* 90 AD2d 486; *Matter of Porianda v Amelkin,* 115 AD2d 650; *Matter of Baker v Polsinelli,* 177 AD2d 844, 80 NY2d 752; *Matter of Exxon Corp. v Board of Stds. & Appeals,* 151 AD2d 438, 75 NY2d 703.)

OPINION OF THE COURT

WESLEY, J.

In 1993, Fordham University applied to the New York City Department of Buildings (DOB) for a permit to build a new broadcasting facility and attendant tower as an accessory use on its Rose Hill campus. The DOB issued Fordham a building permit. After construction began, the New York Botanical Garden objected to the issuance of the permit. The DOB Commissioner determined that the radio station and accompanying tower together were an accessory use within the meaning of section 12-10 of the New York City Zoning Resolution. The Botanical Garden appealed to the Board of Standards and Appeals (BSA) which, after reviewing numerous submissions from both parties and holding two public hearings, unanimously confirmed the Commissioner's determination. The issue before this Court is whether that determination was arbitrary or capricious; we agree with both lower courts that it was not.

Fordham University was founded in 1841, at the site of the current main campus, as St. John's College. Shortly thereafter, the Jesuits assumed administration of the institution; it took its current name in 1907. The main campus is situated on approximately 80 acres in the Rose Hill section of the North Bronx, directly adjacent along its eastern border to the Botanical Garden. The campus falls within an R6 zoning district (medium density residential). The University offers a wide va-

riety of graduate and undergraduate studies, including degree programs in communications and media studies. As part of these programs, the University offers courses such as "Introduction to Radio," "Radio News Techniques," "Broadcast News Operations" and an internship at the University's radio station, WFUV.

Fordham has operated WFUV as an on-campus, noncommercial, educational radio station since 1947. WFUV is affiliated with National Public Radio and has operated at its current signal strength of 50,000 watts since 1969. The station's current antenna extends 190 feet above ground level and is situated atop the University's Keating Hall, which also houses WFUV's broadcast studio. In 1983, Fordham explored new sites for the antenna. On February 17, 1993, it filed an application with the DOB to construct a new one-story radio transmitting building and an accessory 480-foot (approximately 45-story) radio tower midway along the eastern border of the campus. The application correctly identified the University as a Use Group 3 facility, a permitted use within R6 zoning districts (*see,* NY City Zoning Resolution § 22-13), and described the tower and radio station as an accessory use to the principal use of the property as an educational institution. DOB approved the project and issued a building permit on March 1, 1994; construction began shortly after the permit was renewed on May 13, 1994.

By letter to the DOB Commissioner dated June 30, 1994, the Botanical Garden, which is located across a four-lane thoroughfare from the tower site, objected to the construction and its classification as an "accessory use" under the Zoning Resolution. By that time, construction of the tower was partially complete, at a cost to Fordham of $800,000. On July 1, 1994, the DOB Commissioner issued a stop work order pending resolution of the objection.

By letter of September 12, 1994, the Commissioner informed Fordham that the DOB had determined that the tower did in fact constitute an accessory use within the meaning of Zoning Resolution § 12-10. In response to the Botanical Garden's request, the Commissioner issued a final determination confirming the decision on November 7, 1994. The Botanical Garden filed an administrative appeal with the BSA on December 6, 1994. After reviewing substantial submissions, and holding two public hearings, the BSA affirmed the Commissioner's determination. The BSA found that Fordham's operation of a radio station of this size and power was "clearly

incidental to the educational mission of the University," and that it was "commonplace" for universities to operate stations "at or near the same power level." The BSA expressly ruled that "the sole issue * * * is whether the proposed tower is 'incidental to' and 'customarily found' in connection with the University and not whether the tower could be smaller or relocated to another site."

The Botanical Garden then commenced this CPLR article 78 proceeding to annul the BSA's determination that the radio station and tower constituted an accessory use of Fordham's property. The trial court dismissed the petition, holding that the BSA's determination was rational and supported by substantial evidence. The court noted that aesthetics appeared to be at the heart of petitioner's concerns, and implicitly rejected this as a valid basis for labeling the BSA's determination arbitrary and capricious. The court further noted that the record was devoid of any proof that the Botanical Garden would suffer any economic harm, that the tower presented any sort of danger or that the tower would prompt an undesirable change in the character of the neighborhood. The court found it significant that Federal policy and Federal Communications Commission (FCC) regulations encourage local authorities to accommodate radio communications, and that FCC guidelines on radiation exposure levels made a new tower a practical necessity. The court noted that it would be "an arrogant abuse of judicial power" to annul the BSA's determination after its expert members had considered all the relevant factors and decided that the tower was a proper accessory use. Finally, the court noted that petitioner's application suffered from "a taint of laches," in that it had waited until the tower was half complete before taking action. The Botanical Garden appealed.

The Appellate Division unanimously affirmed. The Court held that:

> "Respondent's determination is supported by substantial evidence that it is commonplace for universities to own and operate radio stations many of which operate at or near the same power level of the proposed radio station, and is rationally based on a statute that specifically lists radio towers as an accessory use." (238 AD2d 200.)

We granted petitioner leave to appeal, and now affirm.

This Court has frequently recognized that the BSA is comprised of experts in land use and planning, and that its in-

terpretation of the Zoning Resolution is entitled to deference. So long as its interpretation is neither "irrational, unreasonable nor inconsistent with the governing statute," it will be upheld (*Matter of Trump-Equitable Fifth Ave. Co. v Gliedman*, 62 NY2d 539, 545). Of course, this principle does not apply to purely legal determinations; where "the question is one of pure legal interpretation of statutory terms, deference to the BSA is not required" (*Matter of Toys "R" Us v Silva*, 89 NY2d 411, 419). However, "when applying its special expertise in a particular field to interpret statutory language, an agency's rational construction is entitled to deference" (*Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98, 102).

Here, the BSA determined that Fordham's radio station and tower constituted an "accessory use" within the meaning of Zoning Resolution § 12-10. That section provides that an accessory use:

> "(a) Is a *use* conducted on the same *zoning lot* as the principal *use* to which it is related (whether located within the same or an *accessory building or other structure,* or as an *accessory use* of land) * * * and
>
> "(b) Is a *use* which is clearly incidental to, and customarily found in connection with, such principal *use*; and
>
> "(c) Is either in the same ownership as such principal *use*, or is operated and maintained on the same *zoning lot* substantially for the benefit or convenience of the owners, occupants, employees, customers, or visitors of the principal *use*."

[redacted] Thus, Zoning Resolution § 12-10 sets forth a three-prong test for determining whether a use qualifies as an accessory one: first, it must be conducted on the same zoning lot as the principal use; second, it must be "clearly incidental to, and customarily found in connection with" the principal use; and third, there must be unity of ownership, either legal or beneficial, between the principal and accessory uses. Petitioner acknowledges that the first and third prongs are satisfied here. It takes issue, however, with the BSA's determination that a tower of this size is clearly incidental to, and customarily found in connection with, the principal use of this land as a university campus. Petitioner also maintains that this question, particularly the "customarily found" inquiry, presents an issue of pure

statutory construction and therefore this Court should not give any deference to the BSA determination. We disagree.

Whether a proposed accessory use is clearly incidental to and customarily found in connection with the principal use depends on an analysis of the nature and character of the principal use of the land in question in relation to the accessory use, taking into consideration the over-all character of the particular area in question (*see, Matter of Hassett v Horn*, 23 NY2d 745, *revg* 29 AD2d 945 *on the dissent below*). This analysis is, to a great extent, fact-based (*Matter of Exxon Corp. v Board of Stds. & Appeals*, 128 AD2d 289, 298 ["the requirement that the proposed use be one customarily found in connection with, and incidental to, (the principal use) poses a factual issue for Board resolution"]). Moreover, such an analysis is one that will clearly benefit from the expertise of specialists in land use planning. Pursuant to section 659 (b) of the New York City Charter, the BSA includes a city planner, an engineer and an architect. These professionals unanimously determined that the radio station and the proposed tower are incidental to, and customarily found in connection with, an educational institution. This Court may not lightly disregard that determination.

The Botanical Garden nonetheless argues that the "customarily found" element of the definition of accessory use itself poses a purely legal question, relying on *Matter of Teachers Ins. & Annuity Assn. v City of New York* (82 NY2d 35). We did hold in *Teachers* that, in an appropriate case, this Court will parse various sections of a statute or regulation, and identify certain sections as requiring deference to agency experts, while other sections present questions of pure legal interpretation. In *Teachers* we noted that whether a restaurant was of "special historical or aesthetic interest" (Administrative Code of City of NY § 25-301 [b]) to justify its designation as a landmark was an interpretation and application of the Landmarks Law better left to the expertise of the Landmarks Preservation Commission. However, the "jurisdictional predicate" that the restaurant would only be given landmark status if it was " 'customarily open or accessible to the public' " was a matter of pure legal interpretation (*id.*, at 41-42). The Court in *Teachers* was not called upon to examine whether there was record support for deciding the "jurisdictional predicate." The issue was a straightforward legal one: does a restaurant fall within the coverage of the statute—i.e., areas that are customarily open or accessible to the public.

In this case, there is no dispute that radio stations and their attendant towers are clearly incidental to and customarily found on college campuses in New York and all over the United States. The issue before the BSA was: is a station of this particular size and power, with a 480-foot tower, customarily found on a college campus or is there something inherently different in this radio station and tower that would justify treating it differently. This is clearly a fact-based determination substantially different from the law issue presented in *Teachers (supra)*.

[redacted] Granting the BSA's determination its appropriate weight, we cannot say that its classification of the tower as an accessory use is arbitrary or capricious, or not supported by substantial evidence. It must be noted that the Botanical Garden's initial objection was to the over-all size of Fordham's radio operations. Petitioner argued before the DOB Commissioner and the BSA that it was not customary, but rather highly unusual, for a university to operate a station which is affiliated with National Public Radio and which broadcasts at a signal strength of 50,000 watts. It argued that the "sheer extent of the operations," which reached "far beyond the immediate college community" showed that the station was not being operated as an adjunct to University programs, but that it was essentially a commercial enterprise.

In response, Fordham established that it is commonplace for stations affiliated with educational institutions to operate on the scale of WFUV. The University submitted evidence showing that 180 college or university radio stations are affiliated with National Public Radio. (This represents 58% of all NPR affiliates.) Of these, slightly more than half operate at a signal strength of 50,000 watts. Fordham also presented proof that the station was an integral part of the University's communications curriculum. Finally, Fordham introduced evidence that building this tower was a practical necessity, in order for the station to comply with FCC regulations. This evidence provides a substantial basis for the BSA's determination that Fordham's radio operations are of a type and character customarily found in connection with an educational institution.

The Botanical Garden nonetheless maintains that it is not customary for universities to build radio towers of this height in connection with their radio operations. This argument ignores the fact that the Zoning Resolution classification of accessory uses is based upon functional rather than structural specifics. The use found to be accessory here is the operation of

a 50,000-watt university radio station. As set forth above, there was more than adequate evidence to support the conclusion that such a use is customarily found in connection with a college or university. In order to operate such a station, it is necessary to maintain an antenna at a sufficient height to properly radiate that signal. The FCC has determined that broadcasting WFUV's signal from its current antenna atop Keating Hall has resulted in ground radiation levels which "substantially exceed[ ] the Commission's Radio Frequency Protection Guidelines" (*In re: WFUV [FM]*, 12 FCCR 6774, 6777; *see*, 47 CFR 1.1307 [b]; 1.1310). WFUV therefore cannot receive a license renewal unless and until it moves its antenna to a new location (*id*).*

The specifics of the proper placement of the station's antenna, particularly the height at which it must be placed, are dependent on site-specific factors such as the surrounding geography, building density and signal strength. This necessarily means that the placement of antennas will vary widely from one radio station to another. Thus, the fact that this specific tower may be somewhat different does not render the Board's determination unsupported as a matter of law, since the use itself (i.e., radio operations of this particular size and scope) is one customarily found in connection with an educational institution. Moreover, Fordham did introduce evidence that a significant number of other radio stations affiliated with educational institutions in this country utilize broadcast towers similar in size to the one it proposes.

Separation of powers concerns also support the decision we reach today. Accepting the Botanical Garden's argument would result in the judicial enactment of a new restriction on accessory uses not found in the Zoning Resolution. Zoning Resolution § 12-10 (accessory use) (q) specifically lists "*[a]ccessory* radio or television towers" as examples of permissible accessory uses (provided, of course, that they comply with the requirements of Zoning Resolution § 12-10 [accessory use] [a], [b] and [c]). Notably, no height restriction is included in this example of a permissible accessory use. By contrast, other examples of accessory uses contain specific size restrictions. For instance, Zoning Resolution § 12-10 defines a "home occupation" as an accessory use which "[o]ccupies not more than

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* FCC compliance concerns, as well as concerns with respect to the structural integrity of the current Keating Hall site, were apparently the primary impetus for Fordham's decision to build a new tower.

25 percent of the total *floor area* * * * and in no event more than 500 square feet of *floor area*" (§ 12-10 [home occupation] [c]) and the accessory use of "[l]iving or sleeping accommodations for caretakers" is limited to "1200 square feet of *floor area*" (§ 12-10 [accessory use] [b] [2]). The fact that the definition of accessory radio towers contains no such size restrictions supports the conclusion that the size and scope of these structures must be based upon an individualized assessment of need. The BSA is the body designated to make this determination, and courts may intervene only if its determination is arbitrary or capricious.

The Botanical Garden continues to press the argument that the BSA abrogated its obligation to consider the environmental impact of the tower on an adjoining property by designating the tower an accessory use. The statute has no reference to environmental considerations in defining an accessory use, although it does list radio antennas as one type of an accessory use. The Botanical Garden's real complaint is the impact of the tower on the unique nature of its buildings and grounds. The Botanical Garden has raised these same concerns with the FCC in the context of the National Historic Preservation Act (16 USC § 470 *et seq.*) and that matter is still pending (*see*, *In re: WFUV [FM]*, 12 FCCR 6774, *supra*). While we are not unmindful of those concerns, they are simply not part of the legal equation before us.

Matter of Presnell v Leslie (3 NY2d 384), relied upon heavily by petitioner, does not dictate a contrary result. The petitioner in *Presnell*, an amateur radio operator, applied for a building permit to construct a 44-foot radio tower. He claimed that he was entitled to a permit as of right, because the tower was an accessory use to the principal use of the lot as his residence. The Village Board of Trustees denied the application, finding that the tower was neither an accessory building nor use customary to a residential dwelling. Presnell challenged this determination. The trial court dismissed the petition and the Appellate Division affirmed. This Court affirmed, holding that "it cannot be said as a matter of law that the erection of a 44-foot steel tower in a compact residential area of a suburban community, where dwellings are restricted in height to 35 feet * * * is a customarily incidental use of residential property, or one which might commonly be expected by neighboring property owners" (*id.*, at 388).

Presnell (supra) is both factually and legally distinguishable from the case at bar. The homeowner in *Presnell* claimed the

right to build his radio tower in the pursuit of a hobby. This Court ruled that the municipality could legitimately conclude that the scope of the proposed operation took it outside the realm of a simple pastime. As we stated in *Presnell*, "[i]t is clear that, in the conduct of a hobby, the scale of its operation may well carry it beyond what is customary or permissible" (3 NY2d, at 387-388). Here, we are concerned not with a personal hobby carried on as an incident to a residential premises, but with a legally recognized institutional use that is integral to the educational mission of this University. As noted at the outset, Fordham offers both bachelor's and master's degrees in communications and media studies, and WFUV is a key part of that curriculum. Fordham submitted ample evidence showing that the scope of its radio operations is not outside the norm for an educational institution and that the station has operated at its current power levels for almost 30 years.

In addition, *Presnell (supra)* is distinguishable because there, the municipality had denied the permit. Thus, we specifically limited our scope of review to whether that determination was unsupported "as a matter of law" (3 NY2d, at 388). We did not hold that the municipality could not have determined that the tower was a permissible accessory use. We afforded its determination the proper level of respect, reviewable only for clear legal error. While we did not articulate this as an arbitrary and capricious or substantial evidence question, this was the standard effectively employed. Here, the BSA determined that the station and tower did constitute an accessory use. Thus, rather than mandating reversal, *Presnell* actually lends support to Fordham's position that the BSA's determination should be upheld as an appropriate and well-supported exercise of its power to decide what does or does not constitute an accessory use under the pertinent zoning ordinance.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge KAYE and Judges TITONE, BELLACOSA and CIPARICK concur; Judges SMITH and LEVINE taking no part.

Order affirmed, with costs.

[redacted]

Positive
As of: July 24, 2019 1:08 AM Z

New York City Educ. Constr. Fund v Verizon NY Inc.

Supreme Court of New York, New York County

June 11, 2012, Decided

650193/09

Reporter
36 Misc. 3d 1201(A) *; 957 N.Y.S.2d 265 **; 2012 N.Y. Misc. LEXIS 2949 ***; 2012 NY Slip Op 51142(U) ****; 2012 WL 2368984

[**1]** New York City Educational Construction Fund, Plaintiff, against Verizon New York Inc. f/k/a NEW YORK TELEPHONE CO., TACONIC INVESTMENT PARTNERS LCC, TIP ACQUISITIONS LLP, SQUARE MILE CAPITAL, 375 PEARL ASSOCIATES LLC, MANUFACTURERS AND TRADERS TRUST COMPANY, AREFIN US INVESTMENT LENDERS 1 LLC, PAUL PARISER, as Manager of BOARD OF MANAGERS OF 375 PEARL STREET CONDOMINIUM, and DOES 1-100, Defendants.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

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Subsequent History: Affirmed by, Appeal dismissed by, in part New York City Educ. Constr. Fund v. Verizon N.Y. Inc., 114 A.D.3d 529, 981 N.Y.S.2d 11, 2014 N.Y. App. Div. LEXIS 1104 (N.Y. App. Div. 1st Dep't, Feb. 18, 2014)

Core Terms

zoning, floor area, space, telephone, mechanical equipment, argues, square foot, calculation, justifiable reliance, floor space, building's, cause of action, parties, sophisticated, mechanical, exemption, development rights, misrepresentation, floor-area, Map, third amendment, Occupancy, diligence, cellar, plans, deed, alleged misrepresentation, fraud claim, make use, representations

Headnotes/Summary

Headnotes

[*1201A] **[**265]** Fraud--Reliance.

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Judges: BARBARA R. KAPNICK, J.S.C.

Opinion by: BARBARA R. KAPNICK

Opinion

Barbara R. Kapnick, J.

This action arises out of plaintiff's sale, almost 40 years ago, to New York Telephone Company ("Telco"), the predecessor of defendant Verizon New York Inc. f/k/a New York Telephone Co. ("Verizon"), of a plot of land designated as Block 113, Lot 150 on the Tax Map of New York County, together with certain specified development rights. Plaintiff ("ECF" or the "Fund") is a New York public benefit corporation that was created in 1966 "to facilitate the timely construction of [elementary and secondary] school buildings in combination with other compatible and lawful uses ... of available land." Education Law 451. The Fund develops combined-occupancy structures on land that is conveyed to it by the City of New York (the "City") (*see* Education Law 452), and finances the construction of schools with the revenue of bonds that, in turn, are financed by its sale of land **[***2]** and development rights to commercial entities.

Directly adjacent to Lot 150 is Lot 100 which ECF owns; this is the site of the Murry Bergtraum High School for Business Careers (the "School Building"). Together, the

lots comprise a single zoning lot (the "Combined Zoning Lot"). Under New York City zoning laws, the Combined Zoning Lot is considered a single zoning lot "for zoning calculation and limits", such as the amount of zoning floor area available for development in a particular lot.

[*2]*** *Background*

By Agreement made as of July 22, 1971 (the "City-Fund Agreement"), the City agreed to transfer to the Fund the Combined Zoning Lot consisting of real property located at 375 Pearl Street and 411 Pearl Street, for the purpose of building the School Building, and a Telco "multistory office building and wire equipment center." Prior to this transfer, the City Planning Commission ("CPC") had approved certain zoning variances needed because the proposed Telco building would exceed height and setback limitations set forth in the New York City Zoning Resolution ("Zoning Resolution"), and had issued a Special Permit providing that the building was to be "a million square foot telephone equipment and **[***3]** office building." CPC Approval, at 2863. The Board of Estimate had approved the transfer of this City-owned property, on condition that the Telco building not exceed a height of 544 feet above grade.

By contract of sale dated July 13, 1972 (the "1972 Contract") the Fund agreed to convey to Telco real property located at 375 Pearl Street, certain development rights above that land, and certain development rights above the School Building that would be built at 411 Pearl Street. AC, ¶ 28. In return, Telco was required to pay the Fund $4,278,000 plus 8.25% interest per year on the unpaid balance, payable in quarterly installments over 35 years, to build the telephone building as described in the 1972 Contract and to build the school. AC, ¶ 35. The Contract also provided that after 35 years, the Fund would transfer to Telco title to the land and the appurtenant rights for which Telco had paid (the "Closing").

By Development Agreement, also made as of July 13, 1972, the Fund, Telco, the Chancellor of the City School District, and Pearl Street Development Corporation agreed that the latter would oversee the construction of both the Telco building and the School Building. That agreement provided, **[***4]** among other things, that all parties would have the right to enter upon the construction site at any time to "examine the same for the purpose of inspection to determine whether or not Developer [was] complying with the terms and conditions of this Agreement." Development Agreement, Sec 215.

Construction of the Telco building was completed in 1976. On September 14, 1976, December 7, 1976, and March 8, 1977, the New York City Department of Buildings (the "DOB") issued temporary certificates of occupancy for the building. DOB issued a final Certificate of Occupancy on May 12, 1977, certifying that the building "conforms substantially to the approved plans and specifications and to the requirements of all applicable laws, rules and regulations for the uses and occupancies specified herein." The Certificate of Occupancy specifically notes that at least eight floors of the building were to be used for "Mechanical equipment", "Telephone equipment", or "Office telephone equipment".

In 2007, shortly before the contemplated Closing, Verizon notified the Fund that an architect's survey, which Verizon had commissioned, showed that the building actually occupied 759,200 square feet of Floor Area, **[***5]** rather than the 744,000 square feet which the Contract set as the limit on the Telco building. At that time, Verizon provided the Fund with, at least, the title sheet of a document entitled "Floor Area at Verizon 375 Pearl St. New York, NY," prepared by William Collins, AIA Architects, LLP, and dated November 2005.[1] AC, ¶ 68. The title sheet states that the Verizon building occupies a total of 759,200 square feet of Floor Area, "BASED ON NEW YORK ZONING RESOLUTION ARTICLE 1, CHAPTER 2, SECTION 12-10," and that "TELEPHONE EQUIPMENT AREAS HAVE BEEN ASSUMED AS ALLOWABLE EXCLUSIONS TO FLOOR AREA.'". The title sheet also noted that the "FLOOR PLANS SHOULD NOT BE RELIED UPON AS ACCURATE OR REFLECTING CURRENT **[****3]** CONDITIONS."

On or about July 31, 2007, the Fund and Verizon entered into a third amendment to the 1972 Contract (the "Third Amendment"), which described the real property sold as "including 771,003 square feet of Floor Area, as defined in the Zoning Resolution." Third Amendment, Recital B.2. (which replaced Sec. 101 of the 1972 Contract).[2] At the same time, the parties also entered into a Zoning Lot and Easement Agreement **[***6]** (the "ZLDA") and a Bargain and Sale Deed,

[1] Verizon contends that it provided the Fund with the entire survey.

[2] The first two amendments to the Contract have no bearing on the claims in this action.

which transferred to Verizon title to the real property described in the 1972 Contract, as modified by the Third Amendment, and which provided for reciprocal easements. The ZLDA recites that the Verizon building and the school contain, respectively, 759,200 and 219,403 square feet of Floor Area and that there remain 38,807 square feet of unused Floor Area. The ZLDA further recites that the Parties desire to allocate the Excess Development Rights as follows: 27,004 square feet to the Fund Premises and 11,803 square feet to the [Verizon] Building Premises, so that the Fund Premises shall have a total of 246,407 square feet Floor Area (the "*Fund Development Rights*"), and the [Verizon] Building Premises shall have a total of 771,003 square feet of Floor Area (the "*Office Building Development Rights*"), for use and enjoyment by the Fund and the [Verizon] Building Owner, respectively.

In November 2007, Verizon converted its property to condominium ownership, and then sold a condominium unit comprising most of the building to defendant TIP Acquisitions LLP, one of **[***7]** the "Taconic" defendants.[3]

After apparently examining "more closely" the floor-area calculations for the building as set forth in the Collins Drawings, ECF "inquired of the Department of Buildings as to whether telephone switching equipment was properly deductible" from the calculation of zoning floor area. It submitted a letter to DOB on March 10, 2008, more than six months after closing and delivering the Deed to Verizon.

A responsive letter dated March 27, 2008 was sent to the Executive Director of ECF from Manher Shah, P.E., Executive Engineer at DOB, which provided in relevant part as follows:

Please be advised that floor space occupied by equipment which supports the building's mechanical system is considered a mechanical space and can be excluded from zoning floor area. As you mentioned in your letter that the referenced telephone building is occupying floor space for housing telephone switching equipment for business operation and not for the building's mechanical system, such space will not qualify for mechanical space and therefore should not be exempt from zoning floor **[***8]** area.

ECF then initiated this action by Summons and Complaint filed on April 9, 2009, and filed its First Amended Complaint ("Amended Complaint" or "AC") on July 1, 2009.

The Amended Complaint alleges the following causes of action against Verizon: (1) fraud **[****4]** in relation to the 1972 Contract; (2) fraud in relation to the Third Amendment; (3) fraud in relation to the ZLDA; (4) negligent misrepresentation; (5) unjust enrichment for use of the overbuilt space; (6) unjust enrichment for the compensation that it received for the overbuilt space; (8) breach of the 1972 Contract; (9) breach of the ZLDA; (11) a request for a declaratory judgment; (12) a request for injunctive relief; (13) determination of interests under RPAPL Article 15 and (14) fraudulent concealment.[4]

Verizon now moves to dismiss the Amended Complaint, pursuant to CPLR 203 (g), 213 (1), (2), and (8), 214 (4), 3016 (b), and 3211 (a) (1) (5), and (7).

Discussion

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction . . . We accept the facts as alleged in the complaint **[***9]** as true, accord plaintiffs the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.

Leon v Martinez, 84 NY2d 83, 87-88, 638 N.E.2d 511, 614 N.Y.S.2d 972 (1994) (internal citations omitted). Allegations consisting of bare legal conclusions, with no factual specificity, however, "are insufficient to survive a motion to dismiss." *Godfrey v Spano*, 13 NY3d 358, 373, 920 N.E.2d 328, 892 N.Y.S.2d 272 (2009); *see also Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 233-34, 612 N.Y.S.2d 146 (1st Dep't 1994).

Verizon argues that the central premise of this case is that Verizon misrepresented the total amount of "zoning floor area" utilized in the Verizon Building by misstating the amount of "gross floor area" it deducted, pursuant to a "mechanical space" exemption, from the calculation of "zoning floor area". Specifically, ECF alleges that Telco obtained a reduced price by offering to reduce the size of the building that it would construct, but that instead of doing so, it simply "misclassif[ied] certain space . . . as mechanical space' under the Zoning Resolution in order

[3] By Stipulation dated April 25, 2011, plaintiff discontinued this action as to the non-Verizon defendants.

[4] The causes of action which related solely to the non-Verizon defendants who settled are not included in this list.

to exclude such space from the calculation of Floor Area utilized by the Verizon Building." AC, ¶ 52.

According to Verizon, **[***10]** the Zoning Resolution controls and limits the amount of "zoning floor area" that may be developed on any given zoning lot. Section 12-10 of the Resolution defines "floor area" to include "the sum of the gross areas of the several floors of a building or buildings," but it also excludes several categories of floor space from the scope of floor area; of significance here, section 12-10 states that "the floor area of a building shall not include . . . floor space used for mechanical equipment." This "mechanical equipment" exemption has been part of the Zoning Resolution at all times relevant to this action.

ECF's claim that Verizon improperly excluded its telephone switching equipment under the "mechanical equipment" exemption relies on the informal opinion letter ECF obtained from Mr. Shah in March 2008.

Verizon argues that the opinion in the DOB letter runs afoul of squarely applicable precedent, which precludes DOB or ECF from imposing such non-textual, purpose-based limitations on the Zoning Resolutions's floor-area provisions, and that the Court of Appeals decision in *Matter of Raritan Dev. Corp v Silva*, 91 N.Y.2d 98, 102-103, 689 N.E.2d 1373, 667 N.Y.S.2d 327 (1997), requires that the entire Complaint be dismissed. **[****5]**

In **[***11]** *Matter of Raritan*, the issue was whether cellar space in a building, that was used as dwelling space, should be included in the floor space used to calculate the Floor Area Ratio ("FAR") for zoning purposes. The Zoning Resolution provides that floor area includes the total amount of "floor space used for dwelling purposes, no matter where located within a building, when not specifically excluded; ... However, the floor area of a building shall not include ... cellar space." *Id.* at 100, quoting Zoning Resolution 12-10. "Cellar space" is defined in terms of its physical location in a building ("a space wholly or partly below the base plane with more than one-half of its height ... below the base plane"). Zoning Resolution 12-10. The Court of Appeals held that because the Zoning Resolution defines cellar space, "FAR calculations should not include cellars regardless of the intended use of the space." 91 NY2d at 103.

Verizon argues that the Court of Appeals' reasoning in *Matter of Raritan* compels the same conclusion here, because Section 12-10's "mechanical equipment" exemption unequivocally provides that zoning floor area "shall not include . . . floor space used for mechanical equipment."

However, **[***12]** ECF claims that there is a distinction here because unlike the phrase "cellar space", which is unambiguously defined in the Zoning Resolution, the phrase "mechanical equipment" is not defined therein.

Relying on the DOB opinion letter, ECF argues that the only "mechanical equipment" that is exempt from the zoning floor area is the equipment which services the building itself, not the telephone switching equipment that routes communications throughout lower Manhattan. Otherwise, plaintiff argues, a building housing only such equipment would occupy no zoning floor area at all, and could be built to an infinite size. Therefore, according to ECF, the only reasonable definition of "mechanical equipment" as used in the Zoning Resolution is the interpretation offered by Mr. Shah, on behalf of the DOB, i.e., equipment which supports the building's mechanical system. As the Court held in *Matter of Raritan*, "when applying its special expertise in a particular field rational construction is entitled to deference." 91 NY2d at 102.

Defendant, however, argues that no deference is owed to mere informal opinions expressed by agency personnel, as opposed to a definitive final agency determination. *See* ***[***13]*** *State Farm Mut. Auto. Ins. Co. v Mallela*, 372 F3d 500, 506 (2d Cir 2004); *Marigliano v New York Cent. Mut. Fire Ins. Co.*, 15 Misc 3d 766, 774, 831 N.Y.S.2d 697 (Civ Ct, NY Co 2007) aff'd 22 Misc. 3d 131A, 880 N.Y.S.2d 225 [A], 2009 NY Slip Op 50137 [U] (App. Term, 1st Dep't 2009); *Matter of Park Radiology v Allstate Ins. Co.*, 2 Misc 3d 621, 625 n.2 (Civ. Ct., 769 N.Y.S.2d 870, Richmond Co., 2003).

Where the question is one of "pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency" (*Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459, 403 N.E.2d 159, 426 N.Y.S.2d 454 [1980]), and no deference is required. However where the statutory language suffers from some "fundamental ambiguity" (*Matter of Golf v New York State Dep't. of Social Servs.*, 91 NY2d 656, 667, 697 N.E.2d 555, 674 N.Y.S.2d 600 [1998]; *Matter of Beekman Hill Assn. v Chin*, 274 A.D.2d 161, 167, 712 N.Y.S.2d 471 [2000]; *lv denied* 95 N.Y.2d 767, 742 N.E.2d 123, 719 N.Y.S.2d 647 [2000]), or "the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices" (*Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459, 403 N.E.2d 159, 426

N.Y.S.2d 454 [1980], courts routinely defer to the agency's construction of a statute it administers.

New York City Council v City of New York, 4 AD3d 85, 97, 770 N.Y.S.2d 346 (1st Dep't 2004), **[***14]** lv den 4 N.Y.3d 701, 824 N.E.2d 48, 790 N.Y.S.2d 647 (2004).

It that case, which was an Article 78 proceeding, referred to by both counsel during oral **[****6]** argument as the *Highline* case, the petitioner City Council sought to compel the respondent City to submit a pending agreement to demolish the Highline on Manhattan's West Side to the Uniform Land Use Review Procedure ("ULURP") set forth in the New York City Charter, because it was part of the "City Map". The City and the adjoining landowners contended that despite the appearance of the Highline on various engineering maps maintained by the City over the years, the Highline was privately owned, and the private easements which were to be abandoned to the adjacent landowners were not part of the "City Map".

The respondents relied heavily on the affidavit of their expert, Robert Gochfeld, a supervisor in the Technical Review Division of the New York City Department of City Planning, whose responsibilities for 15 years had included "supervising the review and processing of applications for modifications of the City Map" submitted to the City Planning Department. *Highline*, 4 AD3d at 95. The Court found that Mr. Gochfeld's experiences, "his intimate knowledge of the operational **[***15]** practices of that Department and the nature of his duties" made him "uniquely qualified to render an opinion on the proper subjects of the City Map" (*id*. at 96), and found that his opinion was deserving of some degree of judicial deference because the language of the mapping provision was fundamentally ambiguous and susceptible to conflicting interpretations. *Id*. at 97.

ECF argues that since, as in the *Highline* case, there has been no formal adjudication by the relevant agency (i.e., DOB) of the issue before the Court - namely, what constitutes "floor area used for mechanical equipment" - the agency's view is binding, unless it is inherently arbitrary and capricious.

In reply, Verizon asserts that there is no valid basis for disregarding the plain language of the Zoning Resolution. Verizon argues that the arbitrary distinction between supposedly qualifying and non-qualifying "floor space used for mechanical equipment" which ECF urges the Court to adopt, is not supported in the statutory text, nor does it serve to address any legitimate textual ambiguity.

Since there is no specific definition of "mechanical equipment" in the Zoning Resolution or any definitive finding by DOB on this issue, **[***16]** it demands administrative determination in the first instance, and this Court declines to dismiss the action on this preliminary basis.

Fraud and Negligent Misrepresentation Claims

The Court turns now to the specific causes of action alleged in the Complaint. The first to fourth, and the fourteenth causes of action alleging fraud, negligent misrepresentation, and fraudulent concealment, respectively, are all predicated on the large discrepancy between Telco's, and later Verizon's, representations of the amount of floor space that the telephone building would contain, and the actual amount of floor space that the building ultimately did contain.

Verizon argues that even if there were any legal basis for ECF's claim that Verizon improperly excluded its telephone switching space from the calculation of floor area used in the Verizon Building, all of ECF's fraud and misrepresentation claims would, nonetheless, fail as a matter of law, for lack of justifiable reliance, as well as being time-barred to the extent that fraud is claimed in connection with the original 1972 Contract. For inherent in the principle of justifiable reliance, Verizon contends, is the requirement that a party to a commercial **[***17]** contract must conduct reasonable, independent due diligence before purporting to rely on the representations of its counterparty. *See UST Private Equity Invs Fund v Salomon Smith Barney*, 288 AD2d 87, 88, 733 N.Y.S.2d 385 (1st Dep't 2001) ("a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff **[****7]** failed to make use of the means of verification that were available to it"). Further, where the circumstances call into question the reliability of the representations at issue, or direct the plaintiff's attention to the source of information that would reveal the truth, the plaintiff bears a heightened burden of investigation. *Global Minerals & Metals Corp. v Holme*, 35 AD3d 93, 100, 824 N.Y.S.2d 210 (1st Dep't 2006) *lv den* 8 N.Y.3d 804, 863 N.E.2d 111, 831 N.Y.S.2d 106 (2007); *UST Private Equity Invs Fund, supra*.

Verizon argues that ECF cannot possibly meet its burden of establishing justifiable reliance on any alleged misrepresentation here, because its own pleading, as well as the governing transactional documents and

relevant public records, demonstrate that ECF failed to make any independent efforts to investigate the relevant facts and discover the alleged **[***18]** fraud.

Moreover, Verizon asserts that ECF is a sophisticated party, well-versed in matters of real estate development, was represented by counsel and was certainly capable of conducting its own diligence. Thus, according to Verizon, ECF bore a heightened duty to exercise reasonable diligence, which it failed to uphold.

It is Verizon's position that ECF knew all along that Verizon planned to construct a "telephone equipment and office building" which was to be built "in size and arrangement as proposed and as indicated on the plans" filed publicly with the CPC and Board of Estimate in connection with their review of the proposed project. *Journal of Proceedings of the Board of Estimate of the City of New York*, from May 28, 1971 to July 28, 1971, at 2755, 2757 and 2930-3.

In fact, ECF's own agreement with the City acknowledged that the proposed Verizon Building would contain a "wire equipment center," and required that the building be constructed "in accordance with plans and specifications" that had been prepared by Verizon's architects and "approved" by ECF. City Fund Agreement, Sec. 201. The Development Agreement also provided that the building would be "constructed in accordance with" **[***19]** plans made available to ECF, and it afforded ECF an express right to inspect the building at any time during construction, "day or night." Development Agreement, Sections 215, 301.2. Likewise, the 1972 Contract acknowledged that Verizon was purchasing the property for the purpose of constructing an "office/telephone facilities building" that was to contain a "telephone plant and equipment." Sections 201.2, 202.2. Despite all of these provisions, ECF does not allege that it took any steps to confirm Verizon's zoning floor-area analysis - including its calculation of "mechanical equipment" exemptions - at any time before or during the construction of the building.

Even after the building was completed, Verizon submits that ECF failed to take any steps to confirm whether Verizon correctly assessed the amount of the floor-are exemptions it claimed for "mechanical equipment" in the building. ECF failed to do so even though public documents, including the Certificate of Occupancy, clearly revealed that Verizon had characterized substantial portions of the building as dedicated to mechanical equipment.

Verizon further contends that ECF failed to conduct any independent diligence to confirm **[***20]** the amount of zoning floor area contained in the Verizon Building prior to the 2007 transactions culminating in the transfer of title to Verizon under the 1972 Contract. ECF's duty to close under the 1972 Contract was expressly conditioned on Verizon having "substantially performed" all of its obligations under the 1972 Contract. *See*, Sec. 1002. Yet, according to Verizon, ECF failed to perform any diligence even after Verizon put it on notice that its initial floor-area calculations might not have been accurate. How, Verizon asks, with all this, could a sophisticated party justifiably rely on its counterparty's representation, without conducting any independent analysis? Yet, ECF proceeded to negotiate the Third Amendment to address the discrepancy identified by Verizon, and then proceeded to close the deal. **[****8]**

ECF admits it undertook no independent analysis here, but nonetheless claims it was wronged because it relied on the floor-area calculations contained in the Collins Title Sheet which Verizon provided prior to the Closing, notwithstanding the express disclaimers contained therein, as discussed, supra.

Verizon argues that ECF cannot now be heard to claim that it *justifiably* relied **[***21]** on a document that expressly disclaims reliance, and that expressly put ECF on notice that it should seek DOB's input to "provide interpretation" regarding Verizon's claimed floor-area exclusion.

Moreover, ECF's allegations demonstrate not only that it "failed to make use of the means of verification that were available to it," *UST Private Equity Invs. Fund*, 288 AD2d at 88, but also that ECF clearly *could have* discovered the alleged fraud had it undertaken any such efforts at the time the alleged misrepresentations were made. When it finally took the time to examine the facts "more closely," ECF apparently discovered that Verizon had claimed a higher-than-average amount of "mechanical deductions" in calculating the zoning floor area contained in the building. Specifically, ECF's counsel complained in a letter dated April 23, 2008, that Verizon had deducted about 30% of the gross floor area in the building, even though, according to ECF, "mechanical deductions for this type of building are typically under five percent." That "discovery" by ECF ultimately led to the commencement of this action. But ECF certainly knew, or should have known from the outset, that the gross floor space in **[***22]** the building would be approximately one million square feet. The Development Agreement, Sec. 30.12 makes reference

to the plans and specifications and indicates that Telco agreed to provide the plaintiff with a conformed copy of them. The Fund also knew from the 1972 Contract that the building was supposed to contain only 744,000 square feet of zoning floor area. *See*, Sec. 201.2. The difference between those two figures alone should have alerted ECF to the possibility that "the amount of zoning floor area which Verizon[] . . . contracted to purchase" differed from "what was actually built in the Building." *See*, April 17, 2008 letter from plaintiff's counsel to Verizon in connection with the Closing.

Thus, Verizon argues that ECF's failures are fatal to its fraud and misrepresentation claims and that they must be dismissed. *See, e.g. Permasteelisa, S.p.A. v Lincolnshire Mgt., Inc.*, 16 AD3d 352, 793 N.Y.S.2d 16 (1st Dep't 2005); *UST Private Equity Invs. Fund, supra*.

ECF attempts to distinguish the holding in *UST*, arguing that it is not applicable to the facts here. Moreover, ECF argues that the facts misrepresented here - namely, the size of the actual building space in the Verizon Building - were previously **[***23]** within Verizon's own knowledge. ECF asserts that Verizon was obligated to build to specific specifications and thus asks "[w]hy on earth would ECF even think it needed [to] check" or to "independently measure each of the internal spaces Verizon built to be sure that Verizon was not committing fraud" since "[t]here was simply no reason for ECF to think that fraud was afoot."

ECF also refers to the 2010 Court of Appeals decision in *DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 155, 931 N.E.2d 87, 905 N.Y.S.2d 118 where the Court of Appeals declined to dismiss a fraud claim on a CPLR 3211 motion, based on justifiable reliance, recognizing that "[t]he question of what constitutes reasonable reliance is always nettlesome because it is so fact-intensive" (quoting *Schlaifer Nance & Co. v Estate of Warhol*, 119 F3d 91, 98 [2d Cir 1997]).

The *DDJ* Court further stated that where

> a plaintiff has taken reasonable steps to protect itself against deception, it should not be denied recovery merely because hindsight suggests that it might have been possible to detect the fraud when it occurred. In particular, where a plaintiff has **[****9]** gone to the trouble to insist on a written representation that certain facts are true, it will often **[***24]** be justified in accepting that representation rather than making its own inquiry.

15 NY3d at 154.

ECF asserts that as in *DDJ*, it sought and received from Verizon representations about the building's space dimensions that were offered as truthful, namely the Collins Architectural Drawings, and thus the Court should deny defendant's motion to dismiss the fraud claims based on plaintiff's failure to demonstrate reasonable or justifiable reliance on any alleged misrepresentation by Verizon as to the zoning floor area of the Verizon Building.

Of course, on March 27, 2012, after this motion was briefed and argued, the Appellate Division, First Department issued its decision in *HSH Nordbank AG v UBS AG*, 95 AD3d 185, 941 NYS2d 59, in which it dismissed plaintiff's fraud claim as legally insufficient pursuant to CPLR 3211(a)(1) and (7), finding that plaintiff, - "a sophisticated commercial entity" (i.e., a German commercial bank)-could not satisfy the element of justifiable reliance. While the facts in that case were based on a complex financial transaction between the parties, and not a real estate transaction, the Appellate Division made clear that despite the Court of Appeals holding in *DDJ*, **[***25]** which it distinguished, the Appellate Division continues to adhere to its previous holdings that

> " [a]s a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it'"
>
> (*Ventur Group, LLC v Finnerty*, 68 AD3d 638, 639, 892 N.Y.S.2d 69 [2009], quoting *UST Private Equity Invs. Fund v Salomon Smith Barney*. 288 AD2d 87,88, 733 N.Y.S.2d 385 [2001]; *see also Global Mins & Metals Corp. v Holme*, 35 AD3d 93, 100, 824 N.Y.S.2d 210 [2006], *lv denied* 8 N.Y.3d 804, 863 N.E.2d 111, 831 N.Y.S.2d 106 [2007] ["New York law imposes an affirmative duty on sophisticated investors to protect themselves from misrepresentations . . . by investigating the details of the transactions"]; *Stuart Silver Assoc. v Baco Dev. Corp.*, 245 AD2d 96, 98-99, 665 N.Y.S.2d 415 [1997] [justifiable reliance cannot be shown "(w)here a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means"]; *Lampert v Mahoney, Cohen & Co.*, 218 AD2d 580, 582-583, 630 N.Y.S.2d 733 [1995] [dismissing fraud claim where "plaintiff failed to undertake an independent appraisal of the risk he was **[***26]** assuming," and thereby "assumed the

> risk of loss that a proper investigation would have been likely to disclose"]).
>
> The principle that sophisticated parties have "a duty to exercise ordinary diligence and conduct an independent appraisal of the risk they [are] assuming" (*Abrahami v UPC Constr. Co.*, 224 AD2d 231, 234, 638 N.Y.S.2d 11 [1996]; *see also Granite Partners, L.P. v Bear, Stearns & Co.*, 58 F. Supp. 2d 228, 259 [SDNY 1999]) has particular application where, as here, the true nature of the risk being assumed could have been ascertained from reviewing market data or other publicly available information (*see Havell Capital Enhanced Mun. Income Fund, L.P. v Citibank, N.A.*, 84 AD3d 588, 589, 923 N.Y.S.2d 479 [2011].

HSH Nordbank AG v UBS AG, 941 NYS2d at 66.

Verizon has made reference to the contracts between the parties, the Certificate of Occupancy and the Collins Architectural Drawings which all should have put a sophisticated **[****10]** commercial entity such as ECF on notice of the discrepancy with the zoning floor area in the building. The applicable rule, as stated by the Court of Appeals and referenced by the Appellate Division in HSH, is as follows:

> "If the facts represented are not matters peculiarly within the party's knowledge, **[***27]** and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentation" (*Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 N.Y.3d 269, 278-279, 952 N.E.2d 995, 929 N.Y.S.2d 3, [2011] [internal quotations marks and brackets omitted]; *see also Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 322, 157 N.E.2d 597, 184 N.Y.S.2d 599 [1959] [same]; *Schumaker v Mather*, 133 NY 590, 596, 30 N.E. 755, 4 Silv. A. 224 [1892] [same].

HSH, 941 NYS2d at 65-66.

The Appellate Division distinguished its holding from the *DDJ* case, at least in part "on the ground that the matters misrepresented therein . . . were matters of existing fact peculiarly within the knowledge of the defendants,"[5] and also because the plaintiffs there made a significant effort to protect themselves against the possibility of false statements by obtaining written representations and warranties to the effect that nothing in the statements was materially misleading. *HSH*, 941 NYS2d at 68, FN 9 (citing *DDJ, supra*).

Based on the transactional documents and the relevant public records, and the fact that ECF failed to make any independent efforts to investigate the relevant facts and discover the alleged fraud, or at least the discrepancy in the zoning floor-area analysis, this Court finds that as a matter of law, plaintiff cannot establish the element of justifiable reliance necessary to sustain its causes of action based on fraud, and thus the first, second, third, fourth and fourteenth causes of action are dismissed.

Contract Claims

The eighth and ninth causes of action, alleging breach of the 1972 Contract and the ZLDA, respectively, must also be dismissed because the provisions of those contracts were merged into the deed upon closing of title. *See Stollsteimer v Kohler*, 77 AD3d 1259, 910 N.Y.S.2d 581 (3d Dep't 2010); *Marcantonio v Picozzi*, 70 AD3d 655, 893 N.Y.S.2d 623 (2d Dep't 2010). Plaintiff argues, however, that this rule does not apply "where there is a clear intent evidenced **[***29]** by the parties that a particular provision will survive delivery of the deed or where there is a collateral undertaking." *Goldsmith v Knapp*, 223 AD2d 671, 673, 637 N.Y.S.2d 434 (2d Dep't 1996). Still, ECF has failed to identify any contract provision or other "surrounding circumstances" which reflect any intent on the part of the parties to have the relevant contract provision survive the issuance of the deed.

Further, while ECF argues that the 1972 Contract required construction of the telephone building, and that such a "collateral undertaking" may show an intent that it not be merged in the deed, collateral matters are those that "cannot be performed until after conveyance." *See White v* **[****11]** *Long*, 204 AD2d 892, 612 N.Y.S.2d 482 (3d Dep't 1994), *mod on other grnds* 85

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[5] This is also the reason, in part, that this Court recently denied **[***28]** a motion to dismiss a fraud claim for failing to satisfy the element of justifiable reliance, notwithstanding that the plaintiff was a sophisticated entity. See ACA Fin. Guar. Corp. v Goldman, Sachs & Co., 35 Misc. 3d 1217 [A], 951 N.Y.S.2d 84, 2012 NY Slip Op 50723 [U] (Sup Ct, NY Co April 23, 2012).

NY2d 564, 650 N.E.2d 836, 626 N.Y.S.2d 989 (1995). The Verizon Building herein was completed decades before the Fund conveyed title to Verizon.

Unjust Enrichment Claims

The Court will also dismiss the fifth and sixth causes of action alleging unjust enrichment, because quasi contract claims generally do not lie where, as here, there is a valid and enforceable written contract which covers the scope of the dispute between the parties. *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142, 907 N.E.2d 268, 879 N.Y.S.2d 355 (2009); **[***30]** *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388-389, 516 N.E.2d 190, 521 N.Y.S.2d 653 (1987).

Claims for Declaratory and Injunctive Relief

The eleventh and twelfth causes of action allege that Verizon (and Taconic) are planning certain unspecified alterations to the Verizon Building that would violate both the ZLDA and unspecified provisions of the Zoning Resolution. Similarly, the thirteenth cause of action seeks a determination of interests pursuant to Article 15 of the Real Property Actions and Proceedings Law, and alleges that Verizon claims "or might claim" (AC, ¶ 257) an ownership interest adverse to that of the Fund. The Court questions plaintiff's standing to bring these claims since it no longer owns the Building, nor does Verizon or Taconic for that matter. In any event, counsel for ECF stated on the record during oral argument on June 2, 2011 that they "have withdrawn that aspect of the case. We are no longer claiming that what's inside [the Verizon Building] didn't belong to Verizon and doesn't now belong to whoever bought it from Taconic." Tr. June 2, 2011, 28:19-22.

Thus, the eleventh to thirteenth causes of action are dismissed.

Accordingly, Verizon's motion is granted in its entirety and the **[***31]** action is dismissed with prejudice and without costs or disbursements.

The Clerk shall enter judgment accordingly.

This constitutes the decision and order of this Court.

Dated: June 11, 2012

BARBARA R. KAPNICK

J.S.C.

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to order the children removed from the parents. The children had been temporarily removed prior to the first hearing on April 10, 1968 and accordingly, it is clear that the letter constituted a judicial determination on its part. We know of no situation in which due process will permit a judicial determination of a case prior to the close of the evidence and whether or not the letter was actually intended as a *final* determination, such procedure is not condoned by this court. The due process clause of the Fourteenth Amendment of the United States Constitution requires that juvenile court hearings measure up to essentials of due process and fair treatment. (Cf. *Matter of Gault,* 387 U. S. 1.) While the present case is not on the juvenile delinquency side of the Family Court, the *Gault* case evidences the concern of the Supreme Court that due process generally be accorded to infants.

The order should be reversed, on the law and the facts, and the petition dismissed.

REYNOLDS, AULISI, STALEY, JR., and GABRIELLI, JJ., concur.

Order reversed, on the law and the facts, and petition dismissed.

[redacted]

In the Matter of OCEAN HILL-BROWNSVILLE GOVERNING BOARD et al., Appellants, *v.* BOARD OF EDUCATION OF THE CITY OF NEW YORK, Respondent.

Second Department, October 24, 1968.

[redacted]

[redacted]

[redacted]

Robert L. Carter and *Lewis M. Steel* for appellants.

J. Lee Rankin, Corporation Counsel (*John J. Loflin* and *Bernard Friedlander* of counsel), for respondent.

Per Curiam. This is an appeal from the dismissal of the petition and the denial of the requested relief in a proceeding under article 78 of the CPLR to (a) compel the Board of Education of the City of New York to reinstate immediately the Ocean Hill-Brownsville Governing Board and the 18 members thereof, which Governing Board had been suspended by the Board of Education on October 6, 1968, effective immediately, for 30 days; and (b) require the Board of Education of the City of New York to refrain from interfering with the normal functioning of the Governing Board and to refrain from interfering with its decisions.

On April 19, 1967 the Board of Education declared itself committed to a policy of decentralization of its operations into 30 districts and expressed a desire to experiment with various forms of decentralization and community involvement in several experimental districts. On April 24, 1967 chapter 484 of the Laws of 1967 was enacted, directing the Mayor of the City of New York to prepare a study, report, and plan for decentralization. Pursuant to the aforesaid statement of policy and the newly enacted statute, the Board of Education created three demonstration districts, of which the Ocean Hill-Brownsville District was one.

The statute (Education Law, § 2564, subd. 2) did not at that time give the power to the Board of Education to provide for an election of a local school board. Nevertheless, and despite the fact that it does not appear that the Board of Education directed an election, the Ford Foundation supplied funds to assist in the conduct of an election on August 3, 1967 to select members of the experimental decentralized governing school board in the Ocean Hill-Brownsville area. This election was not held pursuant to any of the provisions of the Election Law. It was conceded on the argument that the election was not supervised by the Board of Education and was not conducted under guidelines laid down by the Board of Education. Of the present 18 members of the Governing Board only seven were " elected ". These seven in turn chose five other members. The teaching staff in the eight schools of the district chose four teacher members. The local administrative staff chose two supervisory members. The members of the board chose another member. (One of the

original 19 is not now a petitioner in this proceeding.) The project was developed by the Board of Education beginning on or about August 21, 1967. Although the members of the Governing Board were not chosen pursuant to the authority contained in any statute, the Board of Education has apparently acquiesced in their selection.

At no time up to June 5, 1968 (the effective date of chapter 568 of the Laws of 1968) did the Board of Education have any power or authority to delegate to any local school board, including the Ocean Hill-Brownsville Governing Board, any or all of its functions, powers, obligations, or duties in connection with the operation of the schools and programs under its jurisdiction, nor did the Board of Education in fact so delegate any of its powers to the Ocean Hill-Brownsville Governing Board. The powers of the local school boards were at that time advisory only.

On May 9, 1968 the Administrator of the demonstration school project (appointed by the Board of Education on September 27, 1967 on the recommendation of the local Governing Board) removed a number of teachers in the district from their teaching assignments. On May 27 he preferred charges of misconduct against some of them and suspended them immediately. On May 31 he changed the "discharges" or "suspensions" into requests for transfers out of the demonstration school project. After six days of hearings before a Special Trial Examiner (former Judge FRANCIS E. RIVERS), a report was made on August 26, 1968 denying the requests for the transfers because the evidence was insufficient to sustain the charges. These findings were confirmed by the Superintendent of Schools and the Board of Education.

During the pendency of the proceedings just mentioned, chapter 568 of the Laws of 1968 was enacted on June 5, 1968, effective immediately, which, among other things, (a) directed the Board of Education to formulate a detailed program for decentralization for presentation to the Legislature after review by the State Board of Regents; (b) directed the Board of Education to divide the city school district into such number of local school board districts as it may in its discretion determine; (c) provided that a school decentralization demonstration project in existence on April 1, 1968 shall be deemed to be a local school board district; (d) provided that the Board of Education have the power to appoint or provide for the election of a local school board for each such local school board district; (e) continued the power of the Board of Education to remove at its pleasure a local school board in any such district; (f) gave the Board of Education power to delegate to such local school boards, with

the approval of the Board of Regents, any or all of its functions, powers, obligations and duties in connection with the operation of the schools and programs under its jurisdiction. On September 4 and 11, 1968 the Board of Education delegated, subject to the approval of the Board of Regents, certain of its functions to the 33 local school districts created by it. On October 17, 1968 the Board of Regents gave its approval to this delegation of powers and the creation of the 33 districts.

It is conceded that on various occasions during September, 1968 and up to October 6, 1968 the Board of Education and the Superintendent of Schools directed the Governing Board and the Administrator of the Ocean Hill-Brownsville School District to assign the teachers involved in the hearings before the Special Trial Examiner and a number of others to their teaching positions in the local school district. It is alleged in the answer of the Board of Education, and petitioners' brief states that it is undisputed, that the Governing Board and its Administrator have continued to oppose these directions. On September 15, 1968 the Board of Education suspended the Governing Board, but this suspension was removed on September 20, 1968. On October 6, 1968 the Board of Education suspended the Governing Board for 30 days, effective immediately. It is this suspension which is the subject of the present article 78 proceeding.

In our opinion, the suspension complained of was legal. Subdivision 2 of section 2564 of the Education Law (as last amd. by L. 1968, ch. 568) provides that the Board of Education may " remove at its pleasure, a local school board ". On the argument, counsel for petitioners conceded that the power to remove includes the power to suspend. The legislative intent is framed in language which is plain and clear. Courts are not at liberty to hold that the Legislature had an intention other than that which the language of the statute imports. Where a statute provides that a person holding a particular position may be removed at pleasure, such person may be removed without notice, without charges, and without hearing (*Matter of Byrnes* v. *Windels,* 265 N. Y. 403). The statute in question does not provide that there be cause for removal or that there be an opportunity to be heard. Where the statute contains no such conditions, neither notice, nor charges, nor opportunity to be heard are necessary (*Eckloff* v. *District of Columbia,* 135 U. S. 240; *People ex rel. Gere* v. *Whitlock,* 92 N. Y. 191, 199).

Petitioners argue that the statute should not be construed to give the Board of Education the power to remove at pleasure an " elected " body. Whether, in view of the facts stated *supra* with respect to the lack of statutory authority for their election

or the manner of their " election ", this Governing Board may be deemed to be a duly elected body is subject to serious doubt. In any event, the statute does not contain an exception that an appointed local school board may be removed at pleasure and that an elected local school board may not be removed at pleasure (as counsel for petitioners argued). The statute provides that all local school boards, whether elected or appointed, may be removed at pleasure. Courts may not interpolate exceptions in a statute and thus avoid and nullify the express declaration of the Legislature (*Johnson* v. *Hudson Riv. R. R. Co.*, 49 N. Y. 455). It is not to be supposed that the Legislature will deliberately place words in a statute which are intended to serve no purpose (*People* v. *Dethloff*, 283 N. Y. 309). The public policy of the State has been determined and recorded by the Legislature in the express language of the statute, namely, that the Board of Education has the power to remove at pleasure any local school board of any local school board district, having in mind that the members of a local school board have no fixed term of office and have no tenure.

It is our further opinion that the Board of Education had ample basis for the suspension of the local governing board. There is sufficient allegation here, not disputed, that the local board and its administrator failed and refused to obey the lawful directives of the Board of Education.

It is the clear intent of the statute (L. 1968, ch. 568, § 1, subd. 4, par. a, subpar. [5]; § 1, subd. 4, par. a, subpars. [1], [3]; Education Law, § 2564, subd. 2) and of the decentralization plan with its delegation of certain functions to local school boards, which has been approved by the Board of Regents, that all local school boards and their administrators, including the Ocean Hill-Brownsville Board and its Administrator, even with respect to the delegated functions and the exercise thereof, are subject to the control, supervision, and directives of the Board of Education and its Superintendent of Schools. The Board of Education and its Superintendent are, and were intended to be, paramount and superior. No local school board, or its administrator, is, or was intended to be, autonomous. Any other result would lead to chaos in the administration of a unified system of education.

The judgment should be affirmed, without costs.

BELDOCK, P. J., CHRIST, BRENNAN, RABIN and HOPKINS, JJ., concur.

Judgment affirmed, without costs.

[redacted] 105

[877 NE2d 281, 846 NYS2d 64]

BRUCE FRIEDMAN, on Behalf of Himself and All Others Similarly Situated, Appellant, v CONNECTICUT GENERAL LIFE INSURANCE COMPANY, Respondent.

Argued September 5, 2007; decided October 18, 2007

[redacted]

[redacted]

[redacted]

[redacted]

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2019-89 A and 2019-94 A Friedman v Connecticut General Life, 33 N.Y.3d 105 07/29/2019

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POINTS OF COUNSEL

Quadrino & Schwartz, P.C., Garden City (*Richard J. Quadrino* of counsel), for appellant. I. Insurance Law § 3216 (c) (7) must be liberally construed because it was enacted for the public's benefit to suppress the evil of unfair surprise to members of the public at large. II. Expressions of public policy by the Legislature and the Insurance Commissioner mandating fair disclosure and the avoidance of surprise require that the statute be liberally construed in favor of the beneficiaries. III. The Appellate Division ignored the rule of construction regarding the use of provisos and disregarded the Legislature's intent. IV. Plaintiff's construction of the statute is in harmony with the statutory scheme and thus the Appellate Division erred in finding that

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plaintiff's construction rendered the provision superfluous. V. The only remedy for the statutory violation is to bar enforcement of the Relation of Earnings to Insurance clause. (*Bersani v General Acc. Fire & Life Assur. Corp.,* 36 NY2d 457; *G.E. Capital Mtge. Servs. v Daskal,* 211 AD2d 613.) VI. Even if this Court agrees with the Appellate Division as to the construction of the statute, plaintiff's other causes of action must be reinstated since they were never adjudicated and only dismissed as moot.

Rivkin Radler LLP, Uniondale (*Cheryl F. Korman, Evan H. Krinick* and *Norman L. Tolle* of counsel), and *McCarter & English, LLP,* New York City (*Andrew O. Bunn* and *Raphael M. Rosenblatt* of counsel), for respondent. I. The Relation of Earnings to Insurance provision was worded, captioned and placed in the policy in accordance with the applicable provisions of the Insurance Law. (*Ivey v State of New York,* 80 NY2d 474; *People v Santorelli,* 80 NY2d 875.) II. Plaintiff's additional arguments on appeal are without merit. (*Gillman v Chase Manhattan Bank,* 73 NY2d 1; *Bersani v General Acc. Fire & Life Assur. Corp.,* 36 NY2d 457; *G.E. Capital Mtge. Servs. v Daskal,* 211 AD2d 613, 89 NY2d 861; *Carrier v Salvation Army,* 88 NY2d 298; *Hammer v American Kennel Club,* 1 NY3d 294; *Sheehy v Big Flats Community Day,* 73 NY2d 629; *Burns Jackson Miller Summit & Spitzer v Lindner,* 59 NY2d 314; *Hudes v Vytra Health Plans Long Is.,* 295 AD2d 788, 99 NY2d 505; *Sparkes v Morrison & Foerster Long-Term Disability Ins. Plan,* 129 F Supp 2d 182; *Matter of State of New York v Avco Fin. Serv. of N.Y.,* 50 NY2d 383.)

OPINION OF THE COURT

READ, J.

We are called upon to decide whether the placement of a "Relation of Earnings to Insurance" (REI) clause within the "General Provisions" of a disability insurance policy complies with Insurance Law § 3216. For the reasons that follow, we conclude that it does.

I.

Defendant Connecticut General Life Insurance Company issued a 10-page form disability income insurance policy to plaintiff Bruce Friedman, a citizen and resident of New York, on July 19, 1983. The first section of the policy, entitled "Policy Specifications," sets forth a "Monthly Indemnity for Total Dis-

ability" in a "Benefit Amount" of $2,500, and an "Annual Premium" of $952.50. Sections entitled "Definitions," "Benefit Provisions," "Exclusions and Limitations," "Premium and Reinstatement Provisions" and "General Provisions" immediately follow.

In its "Benefit Provisions," the policy declares plaintiff eligible for a "Monthly Indemnity for Total Disability" of $2,500 upon proof of his total disability while the policy is in force. The REI clause, included within the "General Provisions," specifies, however, that

> "[i]f the total amount of loss of time benefits promised for the same disability under all valid loss of time coverage upon the Insured exceeds the greater of (a) the Insured's monthly earnings at the time disability commenced or (b) the Insured's average monthly earnings for the 2-year period immediately preceding a disability for which claim is made, the Company will be liable only for a reduced amount of the benefits under the policy. Such reduced amount will be (a) such proportion of the benefits otherwise provided under the policy as the amount of such monthly earnings or average monthly earnings bear to the total amount of monthly benefits for the same disability under all valid loss of time coverage upon the Insured at the time such disability commences, plus (b) a pro rata refund of the premiums paid during such 2-year period for benefits not paid. This provision, however, will not operate to reduce the total monthly amount of benefits payable under all valid loss of time coverage upon the Insured below the lesser of: (a) the sum of $300 or (b) the sum of the monthly benefits specified in such coverages. This provision will not be effective with respect to any renewal of the policy after Age 65. 'Valid loss of time coverage' means all loss of time coverage provided by any government, or agency thereof, or any Insurance company, organization or fund."

In June 1998, plaintiff became totally disabled within the meaning of the policy.[1] He had paid all the premiums due since the policy's issuance and had otherwise complied with its terms

1. Plaintiff's premiums for the policy were waived on June 8, 1998.

and conditions. Initially, Connecticut General tendered plaintiff a monthly benefit check in the amount of $2,500. Later, however, the company applied the policy's REI clause and reduced his monthly benefits to $543.33 (plus a pro rata refund of premiums already paid, as provided by the REI clause).[2]

In a summons and complaint dated June 18, 2001, plaintiff sued Connecticut General in Supreme Court on behalf of himself and a putative class. He alleged eight causes of action arising out of the company's use of REI clauses in its insurance policies in New York and elsewhere.

Plaintiff's first and third causes of action asserted class claims under other states' statutes proscribing deceptive acts or practices in business or trade and other states' statutes and regulations governing insurance respectively. A second cause of action alleged that Connecticut General's "conduct in the marketing and sale of" the policies was "materially unfair, misleading, and constituted a deceptive act or practice in the conduct of [its] business or trade" under General Business Law § 349. As a fourth cause of action, plaintiff alleged that Connecticut General was "in violation of New York insurance statutes and regulations." Plaintiff's fifth cause of action alleged breach of contract; his sixth cause of action alleged that the policy was unconscionable because of its REI clause. As remedies for the above causes of action, plaintiff principally sought damages amounting to the difference between the amount paid and the benefit amount of $2,500, and a declaration that the REI clause was void or unenforceable.

A seventh cause of action sought the statutory penalty under Insurance Law § 4226 for alleged violation of insurance regulations: a refund of premiums paid. In his eighth and final cause of action, plaintiff alleged that even if the REI clause was enforceable, Connecticut General had still underpaid him. Plaintiff therefore sought to be awarded a sum equal to the difference between the amount he considered to be due and payable and the lesser amount that he had, in fact, received.

The thrust of the complaint was that the REI clause's location in the policy was "unfair, deceptive, and misleading" to plaintiff and purported class members. Specifically, plaintiff

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2. According to plaintiff's counsel, at some point Connecticut General increased his monthly benefit from $543.33 to an amount over $1,900. According to Connecticut General's counsel, plaintiff paid about $14,000 over a 15-year period in premiums and, as of November 2003, had collected roughly $98,000 in benefits.

contended that section 3216 (c) (7) of the Insurance Law mandated putting the REI clause together with the total disability benefit to which it applied, whereas Connecticut General had instead buried the REI clause in the policy's "General Provisions."

On August 3, 2001, Connecticut General moved to dismiss the complaint on grounds that plaintiff's claims were either time-barred or failed to state a cause of action. Supreme Court denied the motion in its entirety, agreeing with plaintiff that section 3216 (c) (7) mandated placing the REI clause with the benefit provision to which it applied,

> "to wit, the Total Disability Benefit. Instead, [Connecticut General] placed it in the 'General Provisions' section of the policy along with 'general' terms such as claim forms, proof of loss, payment of claims, etc. . . . [T]he Specification Page, which is the first substantive page of the policy, describes the benefit provided by the policy as $2500 without making any mention of the prior earnings 'cap.' "

Supreme Court went on to address plaintiff's eighth cause of action, although he did not need to reach it. Relying on an out-of-state case where the REI language was written by an insurance company rather than a legislature, the court opined that "it would appear that even if the clause were enforceable, plaintiff would still be entitled to the full benefit amount of the policy, in the absence of a showing that he has another disability policy providing loss of time benefits."

On May 30, 2003, plaintiff moved by order to show cause to certify a class consisting of "[a]ll insureds, owners, and beneficiaries under disability policies of insurance underwritten and sold by [Connecticut General] that contain a Relation of Earnings to Insurance Provision." On July 29, 2003, Connecticut General moved for summary judgment to dismiss the complaint. In support of its motion, the company supplied documentation to establish that the form policy issued to plaintiff had been reviewed and approved by the New York State Insurance Department for use in New York. Further, Connecticut General emphasized that

> "[t]he purpose of the REI provision is to reduce or restrict loss of time benefits if the insured was over-insured at the time of claim. Application of the provision does not deprive the insured of benefits to

> which he was entitled. To the extent premiums were paid for a greater benefit than actually received, such premiums are returned to the policyholder."

On behalf of himself and the putative class, plaintiff on October 6, 2003 cross-moved for partial summary judgment on certain of his causes of action.

As an initial matter, Supreme Court determined that Connecticut General's "motion for summary judgment [was], in essence, a motion to reargue the prior motion to dismiss" and treated the prior order as law of the case (2004 NY Slip Op 30089[U], *4).[3] Ultimately, Supreme Court dismissed plaintiff's first and second causes of action on the company's motion; granted plaintiff summary judgment on his fifth cause of action for breach of contract; declared the REI clause void from the beginning, entitling plaintiff to full disability benefits going forward and reimbursement of any amounts deducted from past payments on account of the REI clause; entered judgment for plaintiff on the seventh cause of action for payment of a statutory penalty equal to the amount of premiums paid; dismissed plaintiff's third, fourth, sixth, and eighth causes of action as duplicative and/or moot; and denied class certification.

Connecticut General appealed; plaintiff cross-appealed the denial of class certification. In addition, plaintiff contended that in the event the Appellate Division reversed the order granting him summary judgment on his fifth and seventh causes of action, it should reinstate the other claims dismissed by Supreme Court.

First, the Appellate Division faulted Supreme Court for regarding Connecticut General's motion for summary judgment as a motion to reargue the motion to dismiss, and for "treating the prior [order] as law of the case . . . since the scope of review on the two motions differs" (30 AD3d 349, 349 [1st Dept 2006]). The court then explained that

> "[t]his error was compounded by the prior motion court's erroneous construction of the policy language. The breach of contract claim was based upon the insurer's enforcement of its [REI] clause, which was alleged to be unenforceable under the contract due to failure to comply with statutory requirements. Specifically, the policy allegedly failed to

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3. The prior motion was decided by a different Justice, who had retired by the time Connecticut General moved for summary judgment.

> notify the insured that his monthly benefit would be less than the policy's stated monthly benefit, because the location in the policy of its REI clause did not accord with the statutory requirements" (30 AD3d at 350).

The Appellate Division rejected Supreme Court's interpretation of section 3216, holding that "the location of the REI clause in the policy did not violate the statute, as a matter of law" (*id.* at 351). The court denied plaintiff's cross motion in its entirety and dismissed plaintiff's fifth and seventh causes of action, ultimately directing the clerk to enter judgment in favor of defendant and dismiss the complaint. The Appellate Division did not discuss the four causes of action dismissed by Supreme Court as duplicative and/or moot based on that court's contrary interpretation of section 3216, but instead simply affirmed this part of Supreme Court's order.

Plaintiff then moved for leave to appeal to us. We granted his motion except insofar as he sought to appeal from the portion of the Appellate Division's order denying class certification, which we dismissed on the ground of finality (*see* 8 NY3d 875 [2007]).[4] We begin our analysis by considering the causes of action dismissed for the first time by the Appellate Division—the fifth cause of action for breach of contract and the seventh cause of action for a statutory penalty under Insurance Law § 4226.

II.

Plaintiff's breach-of-contract claim is premised upon a clause in the policy entitled "Conformity with State Statutes." This clause, which comes directly after the REI clause in the section captioned "General Provisions," states that "[a]ny provision of the Policy . . . in conflict with the statutes of the state in which the Insured resides . . . is hereby amended to conform to the minimum requirements of such statutes" (*see also* Insurance Law § 3103 [a] ["in all respects in which (an insurance policy's) provisions are in violation of the requirements or prohibitions of (the Insurance Law) it shall be enforceable as if it conformed with such requirements or prohibitions"]). Consequently, if Connecticut General's REI clause does not comply with the requirements of New York's Insurance Law, the reduction of

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4. An order denying class certification is not reviewable on appeal from a final order because it does not necessarily affect the final determination (*see* Karger, The Powers of the New York Court of Appeals § 4:6, at 61 [rev 3d ed 2005]).

plaintiff's benefits in accordance with the REI clause would constitute a breach of contract.

[redacted] Insurance Law § 3216 (c) (7) provides that

> "[n]o policy of accident and health insurance shall be delivered or issued for delivery to any person in this state unless: . . .
>
> "[t]he exceptions and reductions of indemnity are set forth in the policy and, *except those which are set forth in subsection (d) of this section*, are printed, at the insurer's option, either included with the benefit provision to which they apply, or under an appropriate caption such as 'EXCEPTIONS', or 'EXCEPTIONS AND REDUCTIONS', provided that if an exception or reduction specifically applies only to a particular benefit of the policy, a statement of such exception or reduction shall be included with the benefit provision to which it applies" (emphasis added).

Plaintiff argues that section 3216 (c) (7)'s closing proviso—i.e., "provided that if an exception or reduction specifically applies only to a particular benefit of the policy, a statement of such exception or reduction shall be included with the benefit provision to which it applies"—should control the placement of the REI clause, which concededly applies solely to the "particular benefit" of "Total Disability Benefit." Governing principles of statutory construction, as applied to the language of subsections (c) (7), (d) (2), and (d) (4), however, counsel otherwise.

First, section 3216 (c) (7) begins by explicitly "except[ing] those [exceptions and reductions of indemnity] which are set forth in subsection (d) of this section" from its further requirements as to location of exceptions and reductions of indemnity. Subsection (d) (2), in turn, states as follows:

> "Other provisions. No such policy delivered or issued for delivery to any person in this state shall contain provisions respecting the matters set forth below unless such provisions are in the words (not including the designation by number or letter) in which the same appear in this paragraph except that the insurer may, at its option, use in lieu of any such provision a corresponding provision of different wording approved by the superintendent [of Insurance] which is not less favorable in any respect

> to the insured or the beneficiary. Any such provision contained in the policy shall be preceded individually by the appropriate caption appearing herein or, at the option of the insurer, by such appropriate individual or group captions or subcaptions as the superintendent may approve."

Subparagraph (F) in subsection (d) (2), captioned "RELATION OF EARNINGS TO INSURANCE," recites the precise wording used by Connecticut General in the REI clause that is the subject of this litigation. Thus, Connecticut General's REI clause, as an exception or reduction in indemnity "set forth in subsection (d)" of section 3216, is explicitly excepted from the requirements of section 3216 (c) (7) by the plain language of that statutory provision.

Plaintiff nonetheless argues that the "subsection (d)" exception within subsection (c) (7) modifies only the phrase "either included with the benefit provision to which they apply, or under an appropriate caption such as 'EXCEPTIONS', or 'EXCEPTIONS AND REDUCTIONS'." Thus, he contends that subsection (c) (7)'s further proviso (i.e., "provided that if an exception or reduction specifically applies only to a particular benefit of the policy, a statement of such exception or reduction shall be included with the benefit provision to which it applies") modifies subsection (d) exceptions or reductions in indemnity. In short, plaintiff maintains that subsection (c) (7)'s final proviso is unqualified by that subsection's earlier, explicit limitation relating to subsection (d) enumeration.

"The purpose of a proviso is to restrain the enacting clause, to except something which would otherwise have been within it, or in some measure to modify it" (McKinney's Cons Laws of NY, Book 1, Statutes § 212). "The operation of a proviso is usually and properly confined to *the clause or distinct portion of the enactment which immediately precedes it* and does not, in the absence of a manifestly shown intent, extend to or qualify other sections or portions of the statute" (*id.*, Comment [emphasis added]). Thus, under traditional principles of statutory construction, the proviso so heavily relied upon by plaintiff modifies only "the clause or distinct portion of the enactment which immediately precedes it." The end result is that subsection (c) (7) commands that, *where no subsection (d) exception or reduction in indemnity applies*, any other exception or reduction in indemnity that pertains only to a particular policy benefit must be included with the benefit provision to which it applies.

Thus, the statutory proviso is wholly inapplicable to the REI clause.

Further, subsection (d) sets forth its own requirements for placement and captioning of the exceptions or reductions in indemnity that it enumerates. This lends additional support to our reading of section 3216 (c) (7). Specifically, section 3216 (d) (4) provides that

> "[t]he provisions which are the subject of paragraphs one and two of this subsection, or any corresponding provisions which are used in lieu thereof in accordance with such paragraphs, shall be printed in the consecutive order of the provisions in such paragraphs or, *at the option of the insurer, any such provision may appear as a unit in any part of the policy*, with other provisions to which it may be logically related, provided the resulting policy shall not be in whole or in part unintelligible, uncertain, ambiguous, abstruse, or likely to mislead a person to whom the policy is offered, delivered or issued" (emphasis added).

Because of this explicit direction relating to placement of subsection (d) exceptions and reductions, interpreting subsection (c) (7)'s ending proviso to govern the REI clause would inevitably create superfluity if not a downright conflict within section 3216. A court must consider a statute as a whole, reading and construing all parts of an act together to determine legislative intent (*see* McKinney's Cons Laws of NY, Book 1, Statutes § 97), and, where possible, should "harmonize[ ] [all parts of a statute] with each other . . . and [give] effect and meaning . . . to the entire statute and every part and word thereof" (*id.* § 98; *see also People v Mobil Oil Corp.*, 48 NY2d 192, 199 [1979] ["It is a well-settled principle of statutory construction that a statute or ordinance must be construed as a whole and that its various sections must be considered together and with reference to each other"]). The existence of a specific placement scheme within subsection (d) reinforces our conclusion that the final proviso of subsection (c) (7) applies only to those exceptions and reductions in indemnity that are *not* enumerated in subsection (d), while subsection (d) (4)—the independent provision on placement contained within subsection (d)—applies to those exceptions and reductions in indemnity that *are* specifically enumerated in subsection (d). Only this interpretation permits subsections (c) and (d) to fit together in complete concinnity.

Because the REI clause's placement in the policy complies with section 3216, the Appellate Division correctly dismissed plaintiff's fifth cause of action for breach of contract, as that claim hinges upon the policy provision demanding conformity with state statutes. For the same reason, the Appellate Division also properly dismissed plaintiff's seventh cause of action, a claim for statutory penalties under Insurance Law § 4226 (d). We next address plaintiff's eighth cause of action.

III.

Plaintiff alleges in his eighth cause of action that even if the REI clause is enforceable, Connecticut General has not calculated his benefits correctly. He contends that once this cause of action is no longer moot, it must be reinstated because it has never been considered on its merits by any court.

[redacted] The record makes clear that between Supreme Court's initial order, which was addressed solely to the pleadings, and its subsequent order, which disposed of Connecticut General's and plaintiff's motions for summary judgment and partial summary judgment respectively, neither party submitted additional facts on the subject of the eighth cause of action. Connecticut General's motion for summary judgment and its supporting memoranda, exhibits, and affirmations merely reassert the argument made in its earlier motion to dismiss; that is, that plaintiff insufficiently alleged a mistake. For his part, plaintiff did not cross-move for summary judgment on this particular cause of action. Instead, he simply took the position that there were material issues of fact regarding Connecticut General's misapplication of the REI clause, assuming it to be enforceable. As a result, plaintiff's eighth cause of action requires further adjudication. Plaintiff's arguments to support revival of his other causes of action are without merit.

Accordingly, the order of the Appellate Division, insofar as appealed from, should be modified, without costs, by reinstating the eighth cause of action and remitting to Supreme Court for further proceedings on that cause of action, and, as so modified, should be affirmed.

Chief Judge Kaye and Judges Ciparick, Graffeo, Smith, Pigott and Jones concur.

Order, insofar as appealed from, modified, etc.

[redacted]

[redacted] 161

[712 NYS2d 471]

In the Matter of BEEKMAN HILL ASSOCIATION, INC., et al., Appellants, v JAMES CHIN et al., Respondents, and TRUMP 845 UN GP, L. L. C., Intervenor-Respondent.

First Department, August 3, 2000

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[redacted]

[redacted]

[redacted]

[redacted]

APPEARANCES OF COUNSEL

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Paul A. Straus of counsel (*Battle Fowler, L. L. P.,* attorneys), for Associated Builders & Owners of Greater New York, *amicus curiae.*

OPINION OF THE COURT

SULLIVAN, P. J.

In this CPLR article 78 proceeding, petitioners appeal from the Supreme Court's denial of their application to annul a determination by the New York City Board of Standards and Appeals (BSA) sustaining the refusal of the Department of Buildings (DOB) to revoke a building permit for a building presently under construction at 845 First Avenue in Manhattan. Petitioners include several community organizations that oppose construction of the building. Respondents are the municipal officials and agencies responsible for the determinations being challenged, as well as the limited partnership, including the general and limited partners, that owns the zoning lot upon which the building is being constructed.[1]

Additionally, this Court granted permission to the Associated Builders & Owners of Greater New York, a real estate industry association, to file an *amicus curiae* brief in opposition to petitioners' appeal.

This appeal requires us, *inter alia*, to determine whether the Supreme Court applied the proper standard of review under CPLR article 78 in evaluating petitioners' challenge to the BSA's determination. Assuming the correct standard was applied, we must then determine whether the Supreme Court properly found that the BSA's interpretation of the relevant provisions of the New York City Zoning Resolution (Zoning Resolution) had a rational basis. We answer both questions af-

1. The limited partnership, 845 UN Limited Partnership, and the limited partner, Daewoo 845 UN, L. L. C., were named as respondents in this proceeding. The general partner, Trump 845 UN GP, L. L. C., was permitted by stipulation to intervene as a respondent. Collectively, they will be referred to as "Owners."

firmatively and affirm the Supreme Court's order dismissing the proceeding.

On October 22, 1998, DOB issued a building permit authorizing the construction of a 70-story, primarily residential building on a zoning lot located on the west side of First Avenue, between 47th and 48th Streets (Building). The subject zoning lot (zoning lot) was created through a zoning lot merger pursuant to Zoning Resolution (ZR) § 12-10 ([Zoning Lot] [d]), which permits the sale or transfer of development rights between contiguous lots in order to create additional development rights on one portion of the merged zoning lot. The zoning lot is located in two different commercial zoning districts, a C5-2 district and a C1-9 district, and has a combined area of 89,772 square feet. The building permit authorizes the development of the C5-2 portion of the zoning lot with a mixed building,[2] and allows the transfer of 526,105 square feet of floor area from the C1-9 portion to the C5-2 portion.

On February 4, 1999, the attorney for petitioner Beekman Hill Association (Beekman Hill) wrote to DOB requesting that it revoke the building permit and issue a stop work order on the ground that the proposed Building violated the Zoning Resolution in two ways. First, Beekman Hill argued that the Building cannot be built pursuant to the residential tower regulations set forth in ZR § 23-65, but must instead be built in accordance with the Tower-on-a-base regulations of ZR § 23-652.[3] Second, Beekman Hill contended that under the "split-lot" provisions of the Zoning Resolution, floor area rights from C1-9 portion of the zoning lot could not be transferred to the C5-2 portion.

By letter dated April 21, 1999, the DOB Commissioner (Commissioner) denied Beekman Hill's request for revocation of the building permit. The Commissioner's ruling rejected both of Beekman Hill's key contentions. He found that the Tower-on-a-base provisions of ZR § 23-652 did not apply in C5-2 zoning districts, and that the Building may utilize floor area gener-

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2. A "mixed building" is a building in a commercial district used partly for residential use and partly for community facility or commercial use. (ZR § 12-10.)

3. The Tower-on-a-base form generally requires that a building have a base with a minimum height of 60 feet extending along the entire length of the street frontage of the zoning lot, with the tower rising above the base (ZR § 23-652 [b] [1], [2]). This form also indirectly limits tower height by requiring that 55% (or more) of the building's total floor area be located below a height of 150 feet (ZR § 23-652 [a] [3]). This is sometimes referred to as the "wedding cake" design.

ated in the C1-9 portion of the zoning lot since the floor area regulations applicable to C5-2 and C1-9 portions of the zoning lot were the same.

On April 28, 1999, Beekman Hill and other petitioners filed an appeal with the BSA. The BSA, a five-member body that includes at least one planner, a licensed professional engineer and a registered architect, is vested with exclusive jurisdiction to determine appeals from DOB decisions (NY City Charter § 659 [a], [b]; § 666 [6] [a]). In support of their appeal, petitioners submitted a statement of facts and legal memorandum reiterating their two primary contentions. DOB and the Owners made written submissions urging affirmance of the Commissioner's determination. On June 23, 1999, the BSA conducted a lengthy public hearing at which representatives of all parties, as well as public officials and interested members of the public, gave testimony. The BSA also accepted posthearing submissions.

On September 28, 1999, the BSA voted unanimously to confirm the Commissioner's determination and denied the appeal. In its resolution, the BSA explicitly stated that the statutory structure of ZR § 35-63, as well as the legislative history of the Tower-on-a-base amendments, supported the Commissioner's determination that the Tower-on-a-base regulations did not apply to C5-2 zoning districts. The BSA's resolution further stated that consistent with DOB's longstanding interpretation of the split-lot provisions of the Zoning Resolution, where a zoning lot is divided by a district boundary but the two districts have identical regulations for a particular aspect, such as maximum floor area, then the divided zoning lot would not be considered a split-lot for purposes of that particular aspect. The BSA also concluded that petitioners' interpretation of the Zoning Resolution's split-lot provisions was overbroad and would render superfluous many other split-lot provisions in the Zoning Resolution.

Petitioners thereafter commenced the instant article 78 proceeding seeking vacatur of the BSA's determination and an order directing DOB to revoke the building permit and issue a stop work order. Petitioners' legal arguments were the same as those made before the DOB and BSA: that the Tower-on-a-base regulations were applicable and prohibited construction of the tower portion of the Building, and that the transfer of development rights from the C1-9 portion to the C5-2 portion of the zoning lot violated the Zoning Resolution's split-lot provisions.

The Supreme Court denied and dismissed the article 78 proceeding. With respect to petitioners' argument that the Tower-on-a-base regulations were applicable to C5-2 districts, the court stated that C5-2 districts were "conspicuously missing" from the list of districts in ZR § 35-63 (a) that have been specifically designated as requiring the Tower-on-a-base design. The court also found that notwithstanding the Owners' election to be governed by the residential tower regulations of ZR § 23-65, which incorporates a "Tower-on-a-base carve-out" allegedly making the Tower-on-a-base regulations applicable here, "this [wa]s plainly an example of inadvertent draftmanship."

In the court's view, the drafter's failure to make reference to the Tower-on-a-base regulations in subdivision (c) of ZR § 35-63, which governs C5-2 districts, as had been done in subdivision (a) of the same section, was persuasive evidence that C5-2 districts were not subject to the Tower-on-a-base regulations. The court also found that the legislative history of the Tower-on-a-base regulations and the planning rationale underlying them further supported the BSA's determination. In contrast, the court found "nothing in the legislative history to support [p]etitioners' interpretation."

The Supreme Court also confirmed the BSA's interpretation of the split-lot provisions of the Zoning Resolution. It concluded that the enumeration of individual bulk regulations in ZR § 23-17 suggests that the split-lot provisions become applicable only on a category-by-category basis, and that petitioners' interpretation would render other, more specific split-lot provisions in the Zoning Resolution superfluous. Lastly, the Supreme Court confirmed that it had applied a rational basis standard in reviewing the BSA determination.

[redacted] Petitioners' first argument on appeal is that the Supreme Court applied the wrong standard of review in this article 78 proceeding and erroneously deferred to an administrative agency on questions of law. They claim that this case presented issues of pure statutory construction for the court's de novo review, and that the Supreme Court's deference to the DOB and BSA "government functionaries" was inappropriate. Petitioners argue that any inquiry into the legislative history of the Zoning Resolution is unwarranted because the provisions are unambiguous on their face. We disagree.

" 'It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature, and where the statutory language is clear and unambiguous, the

court should construe it so as to give effect to the plain meaning of the words used.' " (*Doctors Council v New York City Employees' Retirement Sys.*, 71 NY2d 669, 674-675, quoting *Patrolmen's Benevolent Assn. v City of New York*, 41 NY2d 205, 208.) Questions of pure legal interpretation of statutory language do not warrant judicial deference to administrative expertise (*Matter of Toys "R" Us v Silva*, 89 NY2d 411, 419), unless such language "is not altogether clear and unambiguous" (*Matter of Bockis v Kayser*, 112 AD2d 222, 223). Thus, courts will defer to an agency's construction where statutory language is "special or technical and does not consist of common words of clear import" (*Matter of New York State Assn. of Life Underwriters v New York State Banking Dept.*, 83 NY2d 353, 360 ["the 'incidental powers' clause in Banking Law § 96 (1) does not consist of common words of clear import, and that clause is susceptible to differing interpretation"]), or where it suffers from some "fundamental ambiguity" (*Matter of Golf v New York State Dept. of Social Servs.*, 91 NY2d 656, 667).

Contrary to petitioners' contention, the provisions of the Zoning Resolution at issue here are not clear and unambiguous. As detailed below, petitioners' claim that the Tower-on-a-base regulations apply to mixed buildings in C5-2 districts is based on a strained reading of ZR § 35-63, and that section's cross reference to ZR § 23-65. Similarly, the language used in the split-lot provisions is also susceptible of conflicting interpretations. Accordingly, deference to the BSA's construction of these provisions of the Zoning Resolution was clearly authorized.

Matter of Raritan Dev. Corp. v Silva (91 NY2d 98), cited by petitioners, is clearly distinguishable. There, the DOB and BSA interpreted the language of ZR § 12-10 (Floor area) stating that the "*floor area* of a *building* shall not include * * * *cellar* space" to mean only *habitable* cellar space. Rejecting this administrative construction, the Court of Appeals held that such limitation conflicted with the "plain statutory language," which "could not be clearer" (*supra*, at 103). The language used in the cross-referenced provisions of the Zoning Resolution in this case falls well short of the level of clarity in *Matter of Raritan*.

[redacted] Petitioners next contend that the Building may not be constructed in accordance with the residential tower regulations of ZR § 23-65, but instead is governed by the Tower-on-a-base regulations of ZR § 23-652. All parties agree that the controlling provision is ZR § 35-63, titled "Special Tower Regulations for Mixed Buildings." ZR § 35-63 sets forth the

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four types of tower regulations—the residential tower regulations (ZR § 23-65), the commercial tower regulations (ZR § 33-45), the Towers on small lots regulations (ZR § 23-651) or the Tower-on-a-base regulations (ZR § 23-652)—that are applicable to mixed buildings in certain sets of zoning districts.

ZR § 35-63 contains three subdivisions, each of which pertains to a separate grouping of commercial zoning districts. ZR § 35-63 (a) covers C1 or C2 districts mapped within R9 or R10 districts as well as C1-8, C1-9, C2-7 and C2-8 districts. Subdivision (a) provides that in these aforementioned districts "a *mixed building* that meets the requirements of a tower-on-a-base set forth in Section 23-65 (Tower Regulations) shall be governed by the provisions of Section 23-652 (Tower-on-a-base)."

ZR § 35-63 (b) covers C4-6, C5-1 and C6-3 districts, and provides that the residential portion of mixed buildings which meet certain requirements "may be constructed in conformance with the provisions of Section 23-65 [Tower Regulations]."

ZR § 35-63 (c) covers C4-7, C5-2, C5-3, C5-4, C5-5, C6-4, C6-5, C6-6, C6-7, C6-8 and C6-9 districts, and provides that the applicable Tower regulations for mixed buildings in these districts are the commercial tower regulations (ZR § 33-45). Subdivision (c), however, further provides that in some of the districts enumerated, including C5-2 districts, when no more than two stories of a mixed building are occupied by nonresidential uses, the applicable tower regulations may also be either the residential tower regulations (ZR § 23-65) or the Towers on small lots regulations (ZR § 23-651).[4]

Thus, as can be seen from the structure of the three subdivisions of ZR § 35-63, only subdivision (a) makes any reference to the Tower-on-a-base regulations in ZR § 23-652. More significantly, the list of districts in subdivision (a) that "shall be governed by the provisions of Section 23-652 (Tower-on-a-base)" does not include C5-2 districts. Thus, it is clear from the structure of ZR § 35-63 that C5-2 districts are governed by subdivision (c), not subdivision (a). Petitioners concede that subdivision (c) governs C5-2 districts, but contend that its cross-reference to ZR § 23-65 (residential tower regulations) makes the Tower-on-a-base regulations of ZR § 23-652 applicable.

ZR § 23-65, titled "Tower Regulations," applies by its terms to R9 and R10 residential districts. Although not separated by

4. The Towers on small lots regulations do not apply to this Building because the merged zoning lot exceeds 20,000 square feet (ZR § 23-651).

subdivisions, the section has three distinct parts. The first part, consisting of the first three paragraphs, describes the requirements for the residential tower regulations, which, *inter alia*, permit the construction of a tower in residential buildings that occupy not more than 40 percent of the zoning lot.

The fourth paragraph of ZR § 23-65 provides an exception, making the residential tower regulations inapplicable where the building is within 100 feet of a public park (park exception).

The fifth paragraph of ZR § 23-65, upon which petitioners rely, provides an additional exception to the residential tower regulations. It provides that such regulations "shall not apply" to any development which: (i) is located on a wide street; (ii) is within 125 feet from such wide street frontage along the short dimension of the block or within 100 feet from such wide street frontage along the long dimension; and (iii) contains more than 25 percent of its total floor area in residential use. If the building meets the three criteria in this exception, ZR § 23-65 states that the building "shall be subject to the provisions of Section 23-652 (Tower-on-a-base)." This is the so-called "Tower-on-a-base exception."

Petitioners argue that the Building in this case meets the criteria of the Tower-on-a-base exception of ZR § 23-65, since it is located on a wide street (First Avenue), is within 125 feet of the First Avenue frontage along the short dimension of the block, and devotes more than 25 percent of its floor area to residential use. Therefore, they assert, the Building is subject to the Tower-on-a-base regulations of ZR § 23-652. Several factors persuade us that the BSA's contrary interpretation of these complex, interlocking provisions is on sounder footing than petitioners'.

A comparison of the language used in subdivisions (a) and (c) of ZR § 35-63 strongly suggests that mixed buildings in C5-2 districts were not intended to be subject to the Tower-on-a-base regulations. ZR § 35-63 (a), which does not apply to C5-2 districts, states in relevant part: "In C1 or C2 Districts mapped within R9 or R10 Districts, or in C1-8, C1-9, C2-7 or C2-8 Districts, a *mixed building* that meets the requirements of a tower-on-a-base set forth in Section 23-65 (Tower Regulations) shall be governed by the provisions of Section 23-652 (Tower-on-a-base)" (emphasis in original).

As is readily apparent, subdivision (a) of ZR § 35-63 makes explicit reference to the Tower-on-a-base regulations of ZR § 23-652, and specifically provides that such regulations will

apply if the building meets the criteria in the Tower-on-a-base exception of ZR § 23-65. Thus, the potential applicability of the Tower-on-a-base regulations in the districts listed in subdivision (a) is stated in clear and unequivocal terms.

Subdivision (c) of ZR § 35-63 stands in stark contrast. It makes no reference at all to the Tower-on-a-base regulations in ZR § 23-652, or the criteria for the Tower-on-a-base exception of ZR § 23-65. Rather, by its express terms, it provides that mixed buildings in C5-2 districts are governed by the commercial tower regulations (ZR § 33-45). Or, if the building has no more than two stories of nonresidential use, it also may be governed by the residential tower regulations (ZR § 23-65) or the Towers on small lots regulations (ZR § 23-651).

We reject petitioners' assertion that this glaring textual inconsistency should be accorded no legal significance. The argument ignores the "fundamental rule of statutory construction that a statute or legislative act is to be construed as a whole, and that all parts of an act are to be read and construed together to determine the legislative intent." (McKinney's Cons Law of NY, Book 1, Statutes § 97.)

Reading subdivisions (a) and (c) together, as we must, the only conclusion to be drawn is that the drafters did not intend that mixed buildings in C5-2 districts would be subject to the Tower-on-a-base regulations. Had the Legislature so intended, it could easily have added C5-2 districts to those enumerated in subdivision (a) of ZR § 35-63. Given that these two subdivisions are contained within a single section, and relate to the same issue of which tower regulations apply to mixed buildings in particular districts, the omission of a direct reference to the Tower-on-a-base regulations in subdivision (c) may reasonably be construed as evidencing a legislative intent that such regulations do not apply to C5-2 districts (*see*, *Matter of Schultz Mgt. v Board of Stds. & Appeals*, 103 AD2d 687, 689, *affd* 64 NY2d 1057 [if a statute describes the particular situation in which it is to apply, an irrefutable conclusion must be drawn that what is omitted or not included was intended to be omitted or excluded]; McKinney's Cons Laws of NY, Book 1, Statutes § 240).[5]

We further agree with the Supreme Court's conclusion that the cross-reference in subdivision (c) of ZR § 35-63 to "Sec-

5. We also note that petitioners have not cited a single instance in the Zoning Resolution where it is stated that the Tower-on-a-base regulations apply to C5-2 districts.

tion[ ] 23-65 [Tower Regulations]" refers only to the substantive residential tower regulations of ZR § 23-65, and not to the two exceptions also present in the statute. A comparison between subdivisions (a) and (c) of ZR § 35-63 is again helpful. In subdivision (a) of ZR § 35-63, when referring to the Tower-on-a-base exception, the drafters made explicit reference to "the requirements of a tower-on-a-base set forth in Section 23-65 (Tower Regulations)." However, in subdivisions (b) and (c) of ZR § 35-63 reference is made only to "Sections 23-65 [Tower Regulations] or 23-651 [Towers on small lots]," without any reference to the Tower-on-a-base exception or the criteria for its applicability. A reasonable construction of this statutory inconsistency, adopted by the BSA, is that the reference in subdivision (c) of ZR § 35-63 to "Section [ ] 23-65 [Tower Regulations]" pertains solely to the actual, substantive residential tower regulations, and not to the park and Tower-on-a-base exceptions (*see, Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 458 [reference in former Insurance Law § 671 (2) (a) to " 'lost earnings pursuant to paragraph (b) of subdivision one of this section' " refers only to so much of paragraph (b) of subdivision (1) which defines lost earnings, and not to the $1,000 limitation, which "is not part and parcel of the definition of lost earnings"]).

Petitioners' interpretation is far more strained. In order to conclude that the drafters of ZR § 35-63 intended that mixed buildings in C5-2 districts were to be governed by the Tower-on-a-base regulations, this Court would have to overlook several statutory quirks, including: (1) the drafters' omission of C5-2 districts from subdivision (a) of ZR § 35-63, which contains the only reference in the entire section to the Tower-on-a-base regulations; (2) that subdivision (c) of ZR § 35-63, which expressly governs C5-2 districts, makes no reference at all to the Tower-on-a-base regulations; (3) that subdivisions (a) and (c) of ZR § 35-63 allegedly make the Tower-on-a-base regulations of ZR § 23-652 applicable by two completely different methods, one by direct reference thereto and another by cross-reference to a separate section, ZR § 23-65; (4) that the cross-reference to ZR § 23-65 is made not only to the substantive portions of that section, but also to an exception which, in turn, makes those substantive provisions inapplicable; and (5) that the cross-reference to ZR § 23-65 makes the Tower-on-a-base regulations applicable to C5-2 districts, even though ZR § 23-65, by its terms, applies only in R9 and R10 districts. The determination to reject such a tortured reading of these interlocking statutes clearly had a rational basis.

The BSA's interpretation of ZR § 35-63 is also supported by the legislative history and rationale underlying the adoption of the 1994 amendments to the Zoning Resolution, which added the Tower-on-a-base regulations. As this Court recently stated, "the fundamental rule in construing any statute, or in this case an amendment to the City's Zoning Resolution, is to ascertain and give effect to the intention of the legislative body" (*City of New York v Stringfellow's of N. Y.*, 253 AD2d 110, 115-116, *lv dismissed* 93 NY2d 916; *see also, Matter of Sutka v Conners,* 73 NY2d 395, 403 [in matters of statutory interpretation, legislative intent is the "'great and controlling principle'"]; McKinney's Cons Laws of NY, Book 1, Statutes § 92).

The New York City Charter requires that amendments to the Zoning Resolution be reviewed and approved by the City Planning Commission (CPC) (NY City Charter § 200 [a] [1]), and then forwarded to the City Council for approval, disapproval or modification (City Charter § 200 [a] [2]; § 197-d [b] [1]). When the CPC approves the text of a prospective zoning amendment, it issues a report that is filed with the City Council (City Charter § 197-d [a]).

The CPC Report filed in connection with the 1994 Tower-on-a-base amendments states in unequivocal terms: "The proposed changes would be applicable to buildings that are entirely or partially residential in R9, R10, C1-8, C2-7, and C2-8 zoning district [*sic*] or in C1 or C2 districts mapped within R9 and R10 districts." Significantly, in this report prepared by the body responsible for drafting the Tower-on-a-base amendments, C5-2 districts are not included among the districts to which the proposed amendments were to apply. In fact, nowhere in the narrative text of the CPC Report or the proposed amendments is there a single reference or suggestion that the Tower-on-a-base amendments were applicable to C5-2 zoning districts. Thus, this important piece of legislative history (*see*, *Stringfellow's of N. Y. v City of New York*, 91 NY2d 382, 401) supports the BSA's conclusion that the Tower-on-a-base regulations were inapplicable in this case.

Additionally, a Land Use Review Application (Application), filed by the Department of City Planning (DCP) in connection with the zoning amendment proposal for the Tower-on-a-base regulations, stated "Applicable districts: R9, R10, C1-8, C1-9, C2-7 or C2-8 Districts; and C1 or C2 overlay districts." Similarly, the Environmental Assessment Statement (EAS) filed with the proposed zoning text amendments stated that the amendment applied to these same districts. Moreover, the

EAS incorporated several maps of the Manhattan zoning districts identifying the areas which would be affected by the proposed Tower-on-a-base regulations. Neither the Application, the EAS narrative statement nor the EAS maps indicated that C5-2 districts were to be covered by the Tower-on-a-base amendments.

While petitioners downplay the failure to identify C5-2 districts in the shaded maps as merely reflective of the fact that C5-2 districts are not "automatically" subject to the Tower-on-a-base regulations, such argument ignores the fact that even the districts listed in subdivision (a) of ZR § 35-63 are not automatically subject to the Tower-on-a-base regulations; rather, they must also meet the criteria in ZR § 23-65. Additionally, since the purpose of an EAS is to determine the environmental significance or nonsignificance of the proposed zoning text changes (*see*, *Matter of Merson v McNally*, 90 NY2d 742, 751; 6 NYCRR 617.2 [m]), it would be imperative to identify all of the potentially affected areas in the shaded maps, not simply those automatically covered by the new amendments. Moreover, these maps are entirely consistent with the CPC report and the statutory language in ZR § 35-63 (a) in their exclusion of C5-2 districts from those subject to the Tower-on-a-base regulations.[6]

We also find persuasive respondents' contention that exclusion of C5-2 districts from the Tower-on-a-base regulations is consistent with the underlying planning rationale of the proposed amendments. As the CPC Report clearly demonstrates, the Tower-on-a-base amendments were clearly aimed at reducing the numbers of excessively tall towers by prohibiting use of the "plaza bonus" in "high-density residential districts" and "reinforcing the traditional streetwall character of the districts." It is equally clear the "high-density residential districts" referred to throughout the CPC Report are R9, R10, C1-8, C1-9, C2-7, C2-8 districts and C1 or C2 districts mapped within R9 and R10 districts.

The Owners and City respondents posit that because streetwall continuity is an important and desired feature for these largely residential neighborhoods, it makes good sense to apply the Tower-on-a-base regulations in these districts to effectuate the goals of the Tower-on-a-base amendments. However, in high-density commercial zoning districts, such as the C5-2

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6. Also supportive of this conclusion is a 1995 memorandum from the DCP stating that the Tower-on-a-base regulations "do not apply in C4, C5, and C6 districts."

district here, the Tower-on-a-base regulations would contribute far less to these goals because streetwall continuity is far from the norm in such districts and many tall towers already exist. While petitioners take issue with this rationale, they do not, and cannot, dispute that high-density commercial districts, such as C5-2 districts, were not the focus of the Tower-on-a-base amendments.

Additionally, it is undeniable that had respondent Owners elected to be governed by the commercial tower regulations of ZR § 33-45 instead of the residential tower regulations of ZR § 23-65, a choice they were entitled to make pursuant to ZR § 35-63 (c), they would have been authorized to build a tower that did not have to comply with the Tower-on-a-base format. Accordingly, it would be illogical to permit the construction of a tower pursuant to the commercial tower regulations while prohibiting the construction of a tower on the same zoning lot under the residential tower regulations.

In sum, the BSA's conclusion that the language, structure and legislative history of ZR § 35-63 and the 1994 Tower-on-a-base amendments demonstrate that the amendments do not apply to C5-2 districts has a rational basis and we will not disturb it (*see*, *Matter of Dudyshyn Contr. Co. v Zoning Bd. of Appeals*, 255 AD2d 445 [a zoning board's determination should not be cast aside unless there is a showing of illegality, arbitrariness or an abuse of discretion]).

[redacted] Petitioners next contend that the "split-lot" provisions of article VII (ch 7) of the Zoning Resolution prohibit a transfer of floor area across zoning district boundary lines whenever the two districts are subject to any different use, bulk, off-street parking, loading or other regulations. However, as the Supreme Court held, petitioners' interpretation of the relevant provisions of the Zoning Resolution is overbroad and would render other, more specific split-lot provisions superfluous. Additionally, it is contrary to the BSA's long-standing, rational application of these provisions.

Petitioners rely primarily on ZR § 77-01, which provides that the split-lot provisions of article VII (ch 7) of the Zoning Resolution are applicable "[w]henever any *zoning lot* is located in two or more districts in which different *uses* are permitted, or in which different *use*, *bulk*, *accessory* off-street parking and loading, or other regulations apply." Once the split-lot provisions are found to be applicable, ZR § 77-02 mandates that "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."

Petitioners argue that the plain language of ZR § 77-02 "means that all floor areas must be used only in the district in which the floor area is generated and that floor area may not be transferred from one zoning district to another." In our view, the actual language of ZR § 77-02 states something different from what petitioners say it means. Concededly, however, the language does not unambiguously refute petitioners' interpretation. Accordingly, as with the issue of the appropriate tower regulations, resort to the rules of statutory construction and deference to the agency's interpretation of the statute it administers become appropriate (*see*, *Matter of Golf v New York State Dept of Social Servs.*, 91 NY2d, *supra*, at 667).

The flaws in petitioners' overexpansive interpretation of ZR § 77-01 are apparent. Initially, petitioners' reading of ZR § 77-01 would necessarily mean that in a zoning lot that is divided by a district boundary, even a single difference among the various use and bulk regulations applicable to each district would render the split-lot provisions applicable for all purposes. If this reading were correct, however, all divided zoning lots would be subject to the split-lot provisions since no two zoning districts contain identical use, bulk and other zoning regulations. Thus, the language in ZR § 77-01 listing different types of regulations would itself be superfluous since any zoning lot which straddled a district boundary would automatically be subject to the split-lot provisions.

It is a basic principle of statutory construction that "all parts of an enactment shall be harmonized with each other as well as with the general intent of the whole enactment, and meaning and effect given to all provisions of the statute." (McKinney's Cons Laws of NY, Book 1, Statutes § 98, at 220.) The BSA's interpretation of the split-lot provisions avoids any conflict with this principle by giving meaning to the language in ZR § 77-01, as well to the more specific split-lot provisions in the Zoning Resolution. The DOB's longstanding interpretation of ZR § 77-01 requires that a zoning lot be treated as a split-lot only with respect to the application of individual use or bulk regulations that do not apply to both portions of the zoning lot. By applying the split-lot provisions on a regulation-by-regulation basis, a zoning lot may be viewed as a split-lot for purposes of applying one set of zoning regulations and as an individual lot for purposes of applying another set of regulations.

The correctness of the BSA's interpretation is illustrated by reference to two more specific split-lot provisions relevant to

this case. ZR § 23-68 is the split-lot provision that specifically addresses height, setback and tower regulations. ZR § 23-68 provides that the split-lot provisions of article VII (ch 7) apply where "a *zoning lot* is divided by a boundary between districts, or is subject to other regulations resulting in different height and setback regulations, or whenever a *zoning lot* is divided by a boundary between a district to which the provisions of Section 23-65 (Tower Regulations) apply and a district to which such provisions do not apply" (emphasis in original). It is clear that this provision would be entirely redundant if petitioners' interpretation of ZR § 77-01 were to prevail. There would be no need for a provision to mandate the applicability of the split-lot requirements in these specific areas if any difference in regulations was sufficient to invoke the split-lot provisions, as petitioners contend.

More important, ZR § 23-68 refutes petitioners' argument that the split-lot provisions are applicable here because of the allegedly different tower regulations for C1-9 and C5-2 districts. As we have already upheld the BSA's determination that the residential tower regulations in ZR § 23-65 apply to this mixed building in a C5-2 district, and it is undisputed that they apply in a C1-9 district,[7] the same tower regulations apply to both districts. Thus, under ZR § 23-68, the split-lot provisions do not apply with respect to the tower regulations governing this building.

Petitioners' interpretation also runs counter to ZR § 23-17, another provision mandating the application of the split-lot provisions in divided zoning districts where certain, individual bulk regulations are different. ZR § 23-17 states that the split-lot provisions of article VII (ch 7) shall apply "whenever a *zoning lot* is divided by a boundary between districts or is subject to *bulk* regulations resulting in different minimum required *open space ratios*, different maximum *floor area ratios*, different *lot coverages*, or *open space ratios* and *lot coverages*, on portions of the *zoning lot*" (emphasis in original). Again, the particularity of this provision would be entirely unnecessary if, as petitioners contend, any difference in the use or bulk regulations for the two districts divided by a boundary was sufficient to trigger the split-lot provisions.

Moreover, ZR § 23-17 clearly demonstrates that the split-lot provisions do not apply with respect to floor area in the man-

7. The C1-9 portion of the zoning lot is subject to the residential tower regulations (ZR § 23-65) instead of the Tower-on-a-base regulations (ZR § 23-652) pursuant to ZR § 35-63 (a) since it does not meet the Tower-on-a-base criteria set forth in ZR § 23-65, to wit, the lot does not front on a wide street.

ner claimed by petitioners. Mixed buildings in C1-9 and C5-2 districts are both governed by the bulk requirements applicable to residential buildings in R10 districts (ZR § 35-23). As the maximum basic floor area ratio (FAR) for R10 districts is 10.0 (ZR § 23-15), then the maximum FAR of 10.0 applies to both C1-9 and C5-2 districts. Thus, since the maximum FAR is the same in the two districts, the split-lot provisions do not apply for purposes of maximum FAR. To interpret ZR § 77-01 to mean that the difference in other bulk regulations unrelated to FAR would render the zoning lot a split-lot for all purposes, including for purposes of maximum FAR, would be inconsistent with the basic thrust of ZR § 23-17.

In contrast, DOB has consistently interpreted the split-lot provisions of the Zoning Resolution to authorize the use of residential floor area from anywhere on a divided zoning lot where, as here, the basic maximum FAR is the same for each portion of the zoning lot.[8] Indeed, where the two portions of a zoning lot are subject to the same basic FAR, petitioners fail to cite any logical reason for treating the two portions of the zoning lot as a split-lot for purposes of maximum FAR.

Other provisions in the Zoning Resolution support the conclusion that the entire floor area of a zoning lot divided by a district boundary may be utilized, as long as the FAR for each portion (district) of the zoning lot is the same. ZR § 33-17, which is applicable to commercial buildings in commercial districts, provides that the split-lot requirements are applicable where "a *zoning lot* is divided by a boundary between districts or is subject to other regulations resulting in different maximum *floor area ratios* on portions of the *zoning lot*." Similarly, ZR § 43-16 provides that the split-lot requirements apply to manufacturing buildings "whenever a *zoning lot* is divided by a boundary between [manufacturing] districts with different maximum *floor area ratios*."

While these provisions explicitly state that the split-lot provisions will apply in divided lots where the maximum FAR is different, they presumably mandate the inverse, i.e., that where the maximum FAR is the same, the split-lot provisions will not apply. However, that conclusion could not be reached if we accepted petitioners' argument that any difference in use or bulk regulations between two portions of a divided zoning lot would trigger the split-lot provisions. Accordingly, we agree

8. Respondents produced six documents from high-level DOB personnel which confirmed its long-standing interpretation of the split-lot provisions.

with the BSA and the Supreme Court that the split-lot provisions apply on a regulation-by-regulation basis and, therefore, it is irrelevant that the C5-2 portion of the zoning lot is governed by different use regulations than the C1-9 portion.[9]

Accordingly, the order of the Supreme Court, New York County (Nicholas Figueroa, J.), entered December 9, 1999, which denied and dismissed the petition brought pursuant to CPLR article 78 seeking to annul a determination of the Board of Standards and Appeals that confirmed the Department of Buildings' refusal to revoke a building permit, should be affirmed, without costs or disbursements.

NARDELLI, MAZZARELLI and SAXE, JJ., concur.

Order, Supreme Court, New York County, entered December 9, 1999, affirmed, without costs or disbursements.

[redacted]

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9. Similarly unavailing is petitioners' contention that the split-lot provisions prohibit this tower because a residential tower bonus was generated in the C5-2 portion of the zoning lot while the Zoning Resolution prohibits such bonuses in C1-9 districts. Since the tower bonus was derived from floor area exclusively in the C5-2 portion, where the tower is being built, there was no transfer across district lines and ZR § 77-02 is not implicated.

[redacted]

In the Matter of SAM A. SCHMIDT, on Behalf of THOMAS McNELL, Appellant, v GEORGE F. ROBERTS, as Justice of the Supreme Court, New York County, et al., Respondents.

Argued October 11, 1989; decided November 28, 1989

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[redacted]

[redacted]

[redacted]

POINTS OF COUNSEL

Sam A. Schmidt for appellant. Further prosecution of appellant is barred by CPL 210.20 (1) (e) and 40.20 (2), since the State indictment encompasses the same criminal transaction for which appellant was convicted under a Federal indictment. *(People v Abbamonte,* 43 NY2d 74; *Matter of Abraham v Justices of N. Y. Supreme Ct.,* 37 NY2d 560; *Matter of Wiley v Altman,* 52 NY2d 410; *Matter of Kaplan v Ritter,* 71 NY2d 222; *People v Vera,* 47 NY2d 825; *People v Williams,* 123 Misc 2d 165; *United States v Sheridan,* 329 US 379; *Lyda v United States,* 279 F2d 461; *People v Lennon,* 80 AD2d 672; *People v Fletcher,* 113 Misc 2d 5.)

Robert M. Morgenthau, District Attorney (George M. Donahue and *Mark Dwyer* of counsel), for respondents. Petitioner's State larceny prosecution is not barred by his Federal convictions. *(People v Robinson,* 60 NY2d 982; *People v Day,* 73 NY2d 208; *People v Crean,* 115 Misc 2d 996; *People v Abbamonte,* 43 NY2d 74; *Matter of Abraham v Justices of N. Y. Supreme Ct.,* 37 NY2d 560; *Matter of Wiley v Altman,* 52 NY2d 410; *People v Lo Cicero,* 14 NY2d 374.)

OPINION OF THE COURT

ALEXANDER, J.

We are confronted in this case with the issue whether under the double jeopardy bar of CPL 40.20, a conspiracy prosecution in another jurisdiction bars a later New York prosecution for consummated result offenses arising out of the same criminal transaction. Although the Legislature addressed this

problem in 1984 by the enactment of CPL 40.20 (2) (g), which excepts from the double jeopardy bar cases in which the prior conspiracy prosecution occurred in "another state", petitioner argues that because Thomas McNell's prior conspiracy prosecution was pursued by the Federal Government and the Federal Government may not be considered "another state", the exception of CPL 40.20 (2) (g) does not apply. Additionally, petitioner contends that none of the other exceptions to the statutory bar to multiple prosecutions are applicable; thus the writ of prohibition should have been granted. For the reasons that follow, we conclude that petitioner's contentions have merit and therefore grant the writ of prohibition barring Thomas McNell's prosecution.

I.

The essential facts out of which this prosecution arises are not in dispute. In 1982, an indictment was filed in Supreme Court, New York County, charging Thomas McNell and his brother Samuel McNell,[1] presidents of Triad Energy Corp. (Triad) and Everest Petroleum Inc. (Everest) respectively, with stealing money from those two businesses. The indictment contained two counts charging the crime of grand larceny in the second degree (Penal Law former § 155.35 [now Penal Law § 155.40]); the first count accused the McNells of stealing property valued at more than $1,500 from Triad, and the second count charged that they stole property valued at more than $1,500 from Everest. Both the McNells became fugitives and were not apprehended until 1987.

In July 1986, an indictment was filed in the United States District Court for the Southern District of New York charging the McNells with one count of interstate transportation of stolen property (18 USC § 2314) and one count of conspiracy to commit that crime (18 USC § 371). The Federal indictment charged that "as part of said conspiracy," the McNells stole "the funds" of Triad and Everest and transported some of the stolen funds, "in excess of $284,000," from New York to Zurich, Switzerland. The overt acts of the conspiracy count charged, *inter alia,* that Thomas McNell drew checks totaling $174,000 payable to his brother Samuel McNell on the ac-

1. Although both Thomas and Samuel McNell were charged in both the Federal and State indictments, only the charges against Thomas McNell are involved in this appeal, Samuel McNell having pleaded guilty to the State indictment.

count of Everest and that the brother deposited checks totaling $284,000 into an account he had opened at the New York branch office of a Swiss bank. The substantive count charged the McNells with having transported stolen securities and money valued at more than $5,000 between New York and Zurich, Switzerland.

In June 1987, following his apprehension by the Federal authorities, Thomas McNell rejected the Federal prosecutor's offer to dismiss the conspiracy count and pleaded guilty to the entire indictment. The court accepted his plea.

On his subsequent arraignment on the State charges, McNell moved, under CPL 210.20 (1) (e), to dismiss the State larceny charges as violative of his statutory double jeopardy rights (CPL 40.20). Supreme Court denied the motion, concluding that although the State and Federal prosecutions were based on the same criminal transaction, the State larceny prosecution fell within the exception to the double jeopardy bar provided in CPL 40.20 (2) (g) which permits a defendant to be prosecuted again when the prior conviction for the same transaction was for conspiracy and was obtained in "another state." The court concluded that CPL 40.20 (2) (g) was intended to apply to prior Federal as well as State convictions for conspiracy and that the language apparently limiting the exception to prior State prosecutions was a result of "inaccurate drafting." The court held further that the exception in CPL 40.20 (2) (a) authorized the State larceny prosecution because the offenses of larceny and interstate transportation of stolen property contain different elements and the offenses charged involved "clearly distinguishable" acts.

After denial of the motion, the instant article 78 proceeding, seeking an order prohibiting Supreme Court and the District Attorney from prosecuting McNell on the State larceny charges, was instituted in the Appellate Division. That court unanimously denied the application for a writ of prohibition, without opinion, and dismissed the petition (145 AD2d 997). The case is before us by permission of this court.

II.

The Legislature has decreed that a person may not be twice prosecuted for the same offense (CPL 40.20 [1]) and, with certain exceptions, may not be separately prosecuted for two offenses based on the same act or criminal transaction (CPL 40.20 [2]). CPL 40.10 (2) defines a criminal transaction as

"conduct which establishes at least one offense, and which is comprised of two or more or a group of acts either (a) so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident or (b) so closely related in criminal purpose or objective as to constitute elements or integral parts of a single criminal venture" (CPL 40.10 [2]).

Petitioner argues that because the Federal and State prosecutions encompass a single criminal transaction within the contemplation of CPL 40.20 (2),[2] prosecution of the State indictment should be barred because the exceptions set forth in paragraphs (a), (b) and (g) of that statute, the only exceptions arguably relevant, do not apply. The People respond that the State and Federal prosecutions are not based on the same criminal transaction and that, in any event, CPL 40.20 (2) does not bar the State prosecution because that prosecution falls within one of the exceptions set forth in paragraphs (a), (b) and (g).

A

[redacted] We reject at the outset the People's threshold argument that the State and Federal prosecutions of McNell are not based on the same criminal transaction. The People contend that the State crime of larceny was completed when money was removed from the accounts of the victim businesses and that these thefts did not constitute an element of the Federal interstate transportation of stolen property charge because the Federal indictment only concerned the subsequent transportation of the stolen funds to Switzerland. This contention, however, overlooks the fact that the conspiracy count of the Federal indictment charges conduct which is at the very heart

2. CPL 40.20 (2) provides as follows:

"A person may not be separately prosecuted for two offenses based upon the same act or criminal transaction unless:

"(a) The offenses as defined have substantially different elements and the acts establishing one offense are in the main clearly distinguishable from those establishing the other; or

"(b) Each of the offenses as defined contains an element which is not an element of the other, and the statutory provisions defining such offenses are designed to prevent very different kinds of harm or evil; or

* * *

"(g) The present prosecution is for a consummated result offense, as defined in subdivision three of section 20.10, which occurred in this state and the offense was the result of a conspiracy, facilitation or solicitation prosecuted in another state."

of the State larceny charges—that as part of the conspiracy, McNell "did steal, convert and fraudulently take for [his] personal use, the funds of Triad and Everest". Thus, since that conspiracy count charges the very conduct that constitutes the crime of larceny, we conclude that the Federal and State prosecutions are based on the "same criminal transaction."

The People contend, however, that the reference in the conspiracy count to McNell's involvement in the actual theft should be disregarded as mere surplusage and that the conspiracy count should be read narrowly as embracing only those elements necessary to establish the substantive offense of transporting stolen property interstate. These contentions must also be rejected. A conspiracy embraces all of the overt acts and substantive crimes in the particular criminal enterprise *(People v Abbamonte,* 43 NY2d 74, 85). Here, the conspiracy charged in the Federal indictment encompassed the entire scheme by the McNell brothers to steal funds from Triad and Everest and convert them to their own use—precisely the crimes charged in the State indictment—and thus clearly relates to the same criminal transaction as does the State indictment. Thomas McNell's criminal enterprise consisted of stealing the funds of Triad and Everest. Each of these thefts was charged as part of the conspiracy, each was an "integral part[] of a single criminal venture" and thus together constitute a single "criminal transaction" under CPL 40.20 (2).

As we made clear in *People v Abbamonte* (43 NY2d 74, *supra),* the significant inquiry is not what overt acts were actually charged as part of the conspiracy but whether "the particular activity for which the State seeks to hold defendants responsible could have been alleged to support the [Federal] conspiracy charge" *(People v Abbamonte,* 43 NY2d 74, 84, *supra; see also People v Vera,* 47 NY2d 825, 826 [prior Federal conviction for conspiracy to distribute cocaine barred State prosecution for cocaine sale even though the Federal authorities were not aware of that sale]).

Thus, we conclude that the Federal and State prosecutions are based on the same criminal transaction and that prosecution of the State indictment is barred unless one or more of the exceptions specified in paragraphs (a) through (h) of CPL 40.20 (2) is applicable.

B

[redacted] The People assert that the exception of subdivision (2) (g)

permits the State larceny prosecution. We conclude, however, that that subdivision by its language is limited to prior prosecutions in another "state." Thus, it cannot be used here to permit McNell's State prosecution to proceed when his prior prosecution occurred in Federal court.

Subdivision (2) (g) permits a second prosecution for the same criminal transaction when "[t]he present prosecution is for a consummated result offense[3] * * * which occurred in this state and the offense was the result of a conspiracy, facilitation or solicitation prosecuted in another state." The People urge that the word "state" should be interpreted to mean "jurisdiction" and thereby embrace Federal prosecutions. They argue that this was the intent of the Legislature as evidenced by the fact that the title of the amendment as originally introduced indicated that the amendment was designed to "permit New York State to prosecute substantive offenses where another sovereign has brought a related prosecution for inchoate crimes" *(see,* Assembly Mem, Bill Jacket, L 1984, ch 624, at 31) and by the further fact that, in their view, this amendment was designed to overrule *People v Abbamonte* (43 NY2d 74, *supra)* and *Matter of Abraham v Justices of N. Y. Supreme Ct.* (37 NY2d 560), both of which involved prior Federal prosecutions for conspiracy.

These arguments are unavailing. A fundamental rule of statutory construction is that the Legislature is presumed to mean what it says and when the language of a statute is unambiguous, it is to be construed "according to its natural and most obvious sense, without resorting to an artificial or forced construction" (McKinney's Cons Laws of NY, Book 1, Statutes § 94). Indeed, when a statute is free of ambiguity, a court should construe it so as to give effect to its plain meaning unless that construction would lead to an "absurd or futile" result *(Doctors Council v New York City Employees' Retirement Sys.,* 71 NY2d 669, 674-675; *New York State Bankers Assn. v Albright,* 38 NY2d 430, 436-437). Differentiating between "state" and "jurisdiction" is not absurd or futile but is a distinction the Legislature has drawn in drafting other exceptions to the double jeopardy bar and is consistent with the legislative purpose of providing enhanced protection

3. CPL 20.10 (3) defines a result offense as follows: "[w]hen a specific consequence * * * is an element of an offense, the occurrence of such consequence constitutes the 'result' of such offense. An offense of which a result is an element is a 'result offense.' "

against repeat prosecutions. The initial draft of the bill adding subdivision (2) (g) referred to "[] previous prosecution occurr[ing] in another jurisdiction * * * for the offense of conspiracy * * * an offense defined in the federal Organized Crime Control Act of 1970, (18 U.S.C.§§ 1961 et seq.) or * * * a criminal enterprise offense similar to that defined in such act" (A 6308/S 5157, 1983-1984 Regular Sessions). This language was not included in the bill as passed, however; rather, references to the Federal "Organized Crime Control Act" and "criminal enterprise" were deleted and the phrase "other state" was substituted for the phrase "another jurisdiction."

It is abundantly clear that when the Legislature intends to broaden the scope of an exception to the double jeopardy bar of CPL 40.20 (2) it has no difficulty doing so. For example, in subdivision (2) (f), cases involving offenses constituting a violation of a statutory provision of "another jurisdiction" have been excepted, and in subdivision (2) (h), racketeering offenses in violation of Federal law and enterprise corruption or racketeering offenses in violation of the law of another State likewise have been expressly excepted.

The People assert, however, that subdivision (2) (g) was enacted to overrule our decisions in *People v Abbamonte* (43 NY2d 74, *supra)* and *Matter of Abraham v Justices of N. Y. Supreme Ct.* (37 NY2d 560, *supra)* to permit a successive prosecution in this State for a result offense, after a Federal prosecution for a conspiracy to commit that offense. These cases, both involving Federal narcotics prosecutions, were decided in 1977 and 1975 respectively without any legislative response. It was not until after we decided *Matter of Wiley v Altman* (52 NY2d 410) in 1981 that the Legislature addressed the issue. *Matter of Wiley* held that a prosecution in the State of Maryland for conspiracy to commit a murder was a bar to a subsequent New York prosecution for the actual murder. Although the legislative history of the amendment does not reveal reasons for doing so, the Legislature apparently chose to limit the (2) (g) exception to the specific problem illustrated by *Matter of Wiley,* a prosecution for conspiracy occurring in another State. We have only recently observed that "[e]ach of the statutory exceptions to the general rule proscribing successive prosecution for offenses arising from the same transaction was drafted to address a particular situation in which the statutory prohibition was deemed overly broad" *(Matter of Kaplan v Ritter,* 71 NY2d 222, 229). Since the Legislature itself has expressly restricted the exception of (2) (g) to con-

spiracy convictions obtained in "another state", we have no occasion to give that language a more expansive interpretation.

C

[redacted] The People's argument that the exceptions of CPL 40.20 (2) (a) and (b) permit the State prosecution is unpersuasive and also must be rejected. Separate prosecutions are permissible under subdivision (2) (a) when "[t]he offenses as defined have substantially different elements and the acts establishing one offense are in the main clearly distinguishable". Although it may be true, as the People assert, that the Federal Government had only to prove that McNell knew the money involved in the interstate transportation was stolen and not that he stole it, the fact remains that the Federal indictment charges, as one of the overt acts of the conspiracy, that McNell "did steal, convert and fraudulently take for [his] personal use, the funds of Triad and Everest". Thus the "acts" establishing the offenses are not "clearly distinguishable." Indeed it is the same theft " 'charged and proved and for which a conviction was had' " *(Matter of Abraham v Justices of N. Y. Supreme Ct.,* 37 NY2d 560, 567, *supra)* that constitutes the State larceny charges.

[redacted] Also inapplicable is the exception of CPL 40.20 (2) (b) which permits successive prosecutions when "[e]ach of the offenses * * * contains an element which is not an element of the other, and the statutory provisions defining such offenses are designed to prevent very different kinds of harm or evil". The Federal crime of interstate transportation of stolen property and the State crime of larceny are both designed to punish thieves and to protect property owners from thefts. In making the interstate transportation of stolen property unlawful, Congress intended to aid States in detecting and punishing criminals who used the channels of interstate commerce "to make a successful getaway and thus make the state's detecting and punitive processes impotent." *(United States v Sheridan,* 329 US 379, 384.) By making it more difficult for thieves and their fences to escape with or trade in stolen property, the Federal statute grants greater governmental protection to property owners than they would otherwise enjoy *(United States v McClain,* 545 F2d 988, 994). Similarly, the larceny statute is intended to punish thieves and to protect the interests of property owners *(see, People v Lennon,*

[redacted] 523

80 AD2d 672, 673). Because the Federal and State offenses at issue here are designed to prevent the same evils, the instant case falls outside the exception of CPL 40.20 (2) (b).

Accordingly, the judgment of the Appellate Division should be reversed, without costs, and the petition granted.

Chief Judge WACHTLER and Judges SIMONS, KAYE, TITONE, HANCOCK, JR., and BELLACOSA concur.

Judgment reversed, etc.

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[641 NYS2d 794]

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, v SIGFRIDO PENA, Defendant.

Supreme Court, Bronx County, February 16, 1996

[redacted]

APPEARANCES OF COUNSEL

David J. Goldstein for defendant. *Robert T. Johnson, District Attorney* of Bronx County *(Kenneth R. Bozza* of counsel), for plaintiff.

OPINION OF THE COURT

WILLIAM C. DONNINO, J.

The initial question presented is whether a civilian who uses

deadly physical force to effect the arrest of a person who has in fact just robbed that civilian and is in immediate flight from that robbery is liable for reckless homicide when the result of the use of that deadly force is to kill a person who was not the robber. The answer given by the law of New York is that there is no criminal liability for the homicide under those circumstances.

The secondary question is whether the Grand Jury in this case was properly charged on that applicable law as it may have related to the evidence before the Grand Jury. The answer to that question is no.

I. The Evidence before the Grand Jury

The evidence before the Grand Jury indicates that on February 18, 1995 at about 7:45 P.M., the defendant was operating the family bodega when two men entered. One of the two men appeared to position himself as a lookout while the other one pointed a shotgun at the defendant and robbed him. There were two other employees in the different parts of the store who observed portions of the robbery. The perpetrator with the shotgun was described as a dark skinned male, wearing a dark green ski jacket and a black hat or "hood" or an item "like a ski mask" though the face was not covered; the other perpetrator was described as a male, dressed in a black hat, and a black coat or jacket.

The perpetrators exited the store, which was located at 178th Street and Webster Ave., and headed west on 178th Street toward the next block, Valentine Ave., and Echo Park which was on the west side of Valentine Ave. The defendant testified that as the perpetrators left the store:

"I just thought about stopping them. It was the second time [in] less than a month that we had been robbed. I didn't think twice about it. I grabbed a weapon * * * [and] I went outside.

"As far as I was concerned they were the same ones, the same size, the same black hood. I yelled out to them, hey. The taller one, the one in the dark hood turned around towards me and he was like trying to get something out of his coat. I thought I had seen the shotgun again. I thought that it was going to be used against me. So, I shot first, I fired first."

The defendant's recollection was that he fired five or six uninterrupted bullets at the two people who were on the sidewalk on 178th Street heading toward Valentine Ave. Those two, he said, were the only two people he saw on the sidewalk. After firing the shots, he returned to the bodega.

The primary, disinterested, eyewitness to the event was a person who was riding his bike on 178th Street toward Echo Park. His first viewing is of the defendant standing outside the bodega with a gun in his hand. He then saw the defendant go to 178th Street, and on 178th Street facing in a westerly direction toward Valentine Avenue, "first" point the gun in the direction of the sidewalk and fire three or four shots. At some point, the witness saw people on 178th Street go between two cars into the middle of the street and run toward Echo Park. There is no detailed questioning of the witness as to the location of these two persons at the time of the initial shots though a permissible, reasonable and logical inference is that to get to the street from between two parked cars they had to have been on the sidewalk first. After discharging three or four shots, the defendant then fired four more shots in the direction of the two who had gone between the parked cars and into the middle of 178th Street. These two people were dressed in dark ski jackets and dark ski hats. The eyewitness saw two other people on the sidewalk of 178th Street who were ahead of the two who had gone into the street. The defendant's shot killed a person whom the eyewitness testified was one of the two on the sidewalk who was ahead of the two who went into the street.

The friend of the person who was killed and who was accompanying the deceased at the time testified that neither he nor his friend engaged in the robbery. They were walking west on 178th Street toward Valentine Ave., heard multiple shots, ran toward Valentine Ave. and Echo Park, and his friend fell mortally wounded in the middle of Valentine Ave. When the friend of the deceased first heard the shots, he saw two men running in back of him; one of them was wearing a black ski jacket. The friend of the deceased was wearing a black ski jacket and a black ski hat; the deceased was wearing a light colored coat. The eyewitness did not think the deceased and his friend were the ones in the street based on the relative size of the people, but, he could make no facial distinctions and identifications.

The defendant was not provided an opportunity to view the person who was shot and indicate whether that was the person he was shooting at and believed to be the robber. The defendant was asked to look at the deceased's friend as he sat in a patrol car parked at the scene of the shooting. The defendant seemingly identified the friend of the deceased as one of those involved in the robbery; however, the defendant testified in the

Grand Jury that when he had looked into the car he was not able to see the person's face and made the identification on the basis of the friend's clothing and physical appearance. One of the two employees did not see the robbers' faces and could make no identification; the other employee, in what only can be described as confusing testimony as to his capacity to identify either robber, appeared at best to indicate that the friend of the deceased did not seem like one of the robbers.

[redacted] In charging the Grand Jury on justification pursuant to Penal Law § 35.30 (4) (b), the District Attorney effectively took the position that a victim of a robbery who properly used deadly physical force to arrest a robber who was in immediate flight from the robbery but did so in such a manner as to kill an innocent passerby could be held criminally liable for the death of the passerby. So charged, the Grand Jury indicted the defendant for depraved indifference murder, reckless manslaughter, reckless endangerment, and several counts of criminal possession of a weapon.[1] The charge to the Grand Jury was in error. New York law provides that the citizen who properly uses deadly physical force to arrest a robber who is in immediate flight from the robbery and in so doing unintentionally injures or kills a passerby is not criminally liable for that tragic death.

II. Justification

The applicable statute, Penal Law § 35.30 (4) (b), reads as follows:

"4. A private person acting on his own account may use physical force, other than deadly physical force, upon another person when and to the extent that he reasonably believes such to be necessary to effect an arrest or to prevent the escape from custody of a person whom he reasonably believes to have committed an offense and who in fact has committed such offense; and he may use deadly physical force for such purpose when he reasonably believes such to be necessary to * * *

"(b) Effect the arrest of a person who has committed murder, manslaughter in the first degree, robbery, forcible rape or forcible sodomy and who is in immediate flight therefrom."

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1. The District Attorney took the position in the Grand Jury that the citizen was exposed equally to crimes with an intentional culpable mental state. The Grand Jury, however, decided not to indict defendant for intentional homicide. Of course, from the standpoint of sentence, there is no distinction between intentional murder and depraved indifference reckless murder; both require a sentence of imprisonment with a minimum between 15 and 25 years and a maximum of life.

[redacted] 79

To understand the full meaning of that statute, it is necessary to review its history. The current Penal Law went into effect on September 1, 1967. Shortly thereafter, the justification provisions engendered a serious public debate. In the words of the Executive Director of the Commission that drafted the then revised Penal Law: "Another difficult area was the justification provisions. We leaned a little too far to the left, to the civil libertarians' approach, and the roof fell in on us." (Drafting a New Penal Law for New York, 18 Buff L Rev 251, 256.) In response to a "public demand" for a reexamination of the justification provisions, the New York State Senate Committee on Codes held public hearings on the justification article, receiving the testimony of 90 people. (Legis mem, 1968 McKinney's Session Laws of NY, at 2245.) Those hearings led to legislation revising the justification article both in form and substance. (L 1968, ch 73, approved and eff Mar. 21, 1968.)

In that 1968 legislation, section 35.30 of the then revised Penal Law was repealed and a new section 35.30, containing a number of substantive changes, was enacted. Two of those changes bear on the issue presented.

First, the provisions authorizing the justifiable use of deadly force by a police or peace officer to make an arrest were considered too restrictive and they were expanded. For current purposes, the substance of those changes is not important. What is important is that the expanded authorization for the justifiable use of deadly physical force by a police or peace officer was qualified by a provision (Penal Law § 35.30 [2]) that made the officer who justifiably used deadly physical force to effect an arrest criminally responsible for the reckless assault or homicide of an innocent person from the exercise of such force.[2]

Second, the law governing the justifiable use of force by a citizen to make an arrest was expanded. That law was expanded by adding the above-quoted provision (Penal Law § 35.30 [4] [b]) that authorized under the specified circumstances the use of deadly physical force to effect an arrest where one of the specified crimes (including robbery) was com-

2. That then new provision (Penal Law § 35.30 [2]), which is currently in effect, reads as follows: "2. The fact that a police officer or a peace officer is justified in using deadly physical force under circumstances prescribed in paragraphs (a) and (b) of subdivision one [of section 35.30] does not constitute justification for reckless conduct by such police officer or peace officer amounting to an offense against or with respect to innocent persons whom he is not seeking to arrest or retain in custody."

mitted and the perpetrator was in immediate flight. The Legislature expressly recognized that this provision "represents a distinct innovation in New York law, both as it presently exists under the Revised Penal Law and as it existed under the former law." (Legis mem, 1968 McKinney's Session Laws of NY, at 2245, 2247.)[3]

Under the former Penal Law and initially in the revised Penal Law the citizen was not authorized to use deadly force to effect an arrest except upon reasonable belief that the person sought to be arrested was using or about to use deadly force against the citizen or another.

"That rule [explained the Penal Law commentators of that time] was grounded in an aversion to the picture of an ordinary citizen stalking an alleged criminal in bounty hunting style with the intention of capturing him dead or alive. Though logical and sound from that viewpoint, the doctrine has frequently been criticized in its application to arrests made or attempted immediately after the commission of particularly heinous crimes. The criticism may be illustrated by considering the case of a man who, immediately after a burglary of his home during which he was robbed and his wife raped, seizes a gun, looks out the window and sees the culprit fleeing down the street. Under the [former law], he would not be justified in using the gun for apprehension purposes. With cases of that nature in mind," the Legislature amended the law. (Denzer and McQuillan, Practice Commentary, McKinney's Cons Laws of NY, Book 39, Penal Law § 35.30, 1974 Pocket Part, at 76.)

Most importantly, the amended law contained no provision—similar to the one included for an officer—expressly making the citizen criminally responsible for reckless assault or homicide of an innocent person during the otherwise justified use of deadly force to effect the arrest of a rapist or robber.

Given the setting within which this legislation was drawn, it is plain, as we shall see, that the Legislature acted deliberately in including the qualified liability provision for an officer and not for the citizen.

Initially, the justification article was in substance and in structural format influenced by the Model Penal Code. *(People v Goetz,* 68 NY2d 96, 109 [1986]; Denzer and McQuillan,

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3. Other substantive changes also expanding the justifiable use of force by a citizen were made in the provisions dealing with the justifiable use of force in defense of premises and in defense of a person in the course of a burglary in Penal Law § 35.20.

Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law art 35 [1967].) The Model Penal Code justification sections were written to provide justification for certain uses of force irrespective of the result of that force, and any restrictions as to the result of that use were separately provided for in a different section. In fact, New York's provision (Penal Law § 35.30 [2]) qualifying the extent of an officer's authority to use justifiable force to effect an arrest of certain felons was drawn from Model Penal Code § 3.09 (3). As explained, that section was separate and apart from the sections of the Model Penal Code that set forth the justification rules, and the Model Code provision made that qualification applicable to all its justification provisions dealing with the use of force upon or toward the person of another. So, New York (albeit expanding its justification provisions beyond those of the Model Penal Code) followed the Model Penal Code structure (even in the 1968 revisions) of setting forth its justification provisions without qualification, and then, in the one instance where it decided to accept one of the Model Penal Code qualifications, New York plainly made a conscious decision not to extend the Model Penal Code's qualification on the use of force upon or toward the person of another beyond a police or peace officer effecting an arrest.

Next, remember the justification provisions came under intense public scrutiny soon after they were enacted; there were extensive legislative hearings; the Legislature was specially focused on the limited issue of justification. Various provisions deliberately expanding the justifiable use of force by police and citizens were enacted. In fact, the legislative memorandum in support of the revised justification provision dealing with a citizen's justifiable use of force to effect an arrest acknowledged that that statute was new to New York law. That bespoke the Legislature's knowledge and special attention to that provision. While focused on that new law, the Legislature in the same statute included the qualification on the use of force by police and peace officers but excluded it from applicability to the new statute dealing with the use of force by a civilian to effect an arrest. Further, the repealed statute of the revised Penal Law had a similar qualification on the use of force by a police or peace officer to effect an arrest, but, that former statute exposed the police or peace officer to criminal liability for criminally negligent conduct as well as reckless conduct. Thus, the Legislature plainly reconsidered carrying the repealed provision over into the new section and

in doing so was more restrictive in its scope than its ancestor. That careful attention to the details of this provision again illustrates the intense focus of the Legislature on this provision and makes it clear that it deliberately chose to apply the qualification exclusively to police and peace officers. Finally, as if to put the exclamation point on its decision to differentiate between a police or peace officer and a citizen, the Legislature added another provision in the 1968 legislation, specifying that "[w]henever a person is authorized by any [justification] provision to use deadly physical force in any given circumstance, nothing contained in any other [justification] provision may be deemed to negate or qualify such authorization." (Penal Law § 35.10 [6].)

With that history in mind, common sense and the normal rules of statutory construction dictate that the inclusion of a qualification on the justifiable use of such force by an officer and its exclusion in the justifiable use of such force by a citizen in the same statute be read as deliberate expression of the legislative will to qualify the justification provisions as applied to an officer but not as applied to a citizen.

It is of no significance that the statute or legislative memorandum did not expressly state that the citizen who properly uses deadly force to effect an arrest of a fleeing robber is not criminally liable for the unintentional injury or death of a passerby. In the absence of the express qualification to the contrary, the uniform rule that obtained from the language of the justification provisions applied. That rule, as we shall see, is that the justification statutes excuse certain uses of force from criminal liability without regard to the consequences of that use of force.

The applicable statute permits the "use" of deadly physical force when the user reasonably believes deadly physical force is necessary to effect the arrest of a person who has committed robbery and who is in immediate flight therefrom. All the justification statutes speak to the "use" of force; it is the use that is made lawful, irrespective of the result of that use unless there exists, as with the police and peace officer effecting an arrest, an express legislative direction to the contrary. As the Court of Appeals has recognized the Legislature has chosen "to use a single statutory section which would provide either a complete defense or no defense at all to a defendant charged with any crime involving the use of deadly force." *(People v Goetz, supra,* 68 NY2d, at 110.) "Justification does not make a criminal use of force lawful; if the use of force is justified, it

cannot be criminal at all." *(People v McManus,* 67 NY2d 541, 545 [1986].)

Factually in *McManus (supra),* one reasonable view of the evidence was that defendant's friend was being assaulted and robbed by a group of people some of whom were armed, and at his friend's desperate urging, the defendant fired a rifle into the group, killing someone in the group. It is not clear to what extent, if any, the person killed was involved in the assault of the defendant's friend. The jury, charged with justification as to intentional murder, found the defendant not guilty of that charge. But, told in effect that justification did not apply to reckless homicide, the jury found the defendant guilty of depraved indifference murder. The Court of Appeals reversed, holding that it is the "use" of force that is privileged regardless of the actor's mental state; accordingly, it is irrelevant that the user may have acted with a reckless culpable mental state. "[T]here is no basis for limiting the application of the defense of justification to any particular *mens rea* or to any particular crime involving the use of force. Indeed, the Legislature has clearly not done so." *(People v McManus,* 67 NY2d, at 547, *supra.)* That is equally true as to the statute in question which structurally parallels the statute in issue in *McManus.*

Both statutes speak to the "use" of force, not the result of the force used. The requirement that the citizen reasonably believe that the person against whom the force is being used be in fact the perpetrator is written as the predicate for the "use" of the force, not as a qualification on the applicability of the defense should a person, not the perpetrator, be the person injured or killed. That view is supported by the grammatical structure of the statutory sentence, and its parallel structure to the statute so construed in effect in *McManus (supra).* It is also supported by the language of the statute that anticipates that a person, other than the person sought to be arrested, may be the one against whom force is used. Thus, the statutory language justifies the use of force upon "another" person when necessary to effect the arrest of "a" person. That construction means that the person upon whom the use of force is directed need not be the person sought to be arrested. For example, in apprehending "a" person who in fact has committed the requisite felony, force may have to be used against "another" person who may be attempting to prevent the arrest. If the Legislature meant to limit the use of force to the robber, the statutory language would have been written to

reflect that the person against whom the force was being directed had to be the person sought to be arrested. *(See and compare, e.g.,* Penal Law § 35.15 [1].) Plainly, therefore, the requirement that the actor be seeking to arrest a person who in fact committed the requisite felony is a predicate to the use of the force and not a restriction on whom the force is used against.

In *People v Jacobs* (105 Misc 2d 616 [Sup Ct 1980]), the court held that it was "inconceivable" that the Legislature deliberately chose to excuse reckless conduct in the use of deadly physical force to effect the arrest of a robber who was in immediate flight from the crime because such a law could lead to "absurd" results in excusing those who recklessly injure or kill others under such circumstances. *(Supra,* at 624.) To reach its conclusion the *Jacobs* court posited an atypical, admittedly horrifying, hypothetical of a person robbed in Yankee Stadium who fired recklessly in the pursuit of the robber and killed a dozen people. Because that result was a theoretical possibility under the statute as written, the *Jacobs* court judged that the Legislature could not have intended that and held that the citizen was liable for reckless conduct in effecting the arrest of a robber in immediate flight from the crime. Incompatible with that conclusion, however, was the *Jacobs* court's further decision to dismiss the charges against Jacobs in the interest of justice, implicitly finding that excusing Jacobs from liability in that case was not absurd. Factually, *Jacobs* presented the typical scenario. Jacobs was accosted on a public street by a person with a gun and robbed. When the robber sought to leave, Jacobs pulled out a gun and ordered the robber to stop. The robber fled and Jacobs pursued him. Innocent people were in the area. Jacobs fired about five times, missed the robber, and hit an innocent passerby. By fortunate happenstance, that passerby received an injury that did not cost him his life.

When statutory meaning is unclear and legislative intent is wanting, a court may be informed of the legislative intent by determining that the interpretation being advanced by a party bespeaks an absurd result in the case, and thus could not have been the intended meaning. If the result proffered in the case being adjudged would be fair, concluding that the statute bespeaks absurd results based upon an atypical hypothetical is not an intellectually compelling claim. Indeed, if statutes were subject to that form of analysis to pass muster, many would fail. In *Jacobs (supra),* as noted, the court plainly did not find the result proffered in that case, the nonprosecution of Jacobs, or even in the typical case represented by *Jacobs,* absurd.

In any event, when the statutory meaning and legislative intent of a statute is clear, that "a" result may in a court's view be absurd is not by itself sufficient to permit a court not to follow the legislative direction.[4] In the end, therefore, the difficulty with the *Jacobs* conclusion is that the evidence is overwhelming that the Legislature did intend what *Jacobs (supra)* found unacceptable. To summarize that evidence, there is the legislative history of the statute which bespeaks a Legislature giving exceptionally careful attention to the drafting of the statute; there is the following of the Model Penal Code structure to extend justification to the use of force not the result of that use unless expressly stated to the contrary; there is the only express statement to the contrary being limited to the officer effecting an arrest; there is the exclusion of that express statement to the contrary in the provision dealing with a citizen effecting an arrest; and finally, there is the plain language of the justification provision, particularly as interpreted by *McManus (supra)* (which was decided subsequent to *Jacobs).*

In *People v Karp* (158 AD2d 378 [1st Dept 1990], *revd on other grounds* 76 NY2d 1006 [1990]), albeit not before them for decision, a majority of that Court found that the justification provisions applicable to a citizen effecting an arrest do apply to reckless conduct. In that case, a citizen was robbed in a public street and fired at the fleeing robber. Albeit no one was hit by the fire, Karp was prosecuted for reckless endangerment. In addressing the question of whether the prosecutor unfairly deprived Karp of testifying fully in the Grand Jury, the majority went on to indicate that notwithstanding *Jacobs (supra),* the defendant who testified that he sought to "stop" the robber by firing the two shots was entitled to have the jury charged on the law of justification as applied to a citizen effecting the arrest of a robber in immediate flight from the robbery.

It is, of course, not for the courts to determine the wisdom of legislation. The policy issue of whether and to what extent to permit prosecution of a citizen for the consequences of his/her conduct in attempting to arrest a felon in immediate flight from the commission of the felony often against that citizen is a difficult determination.

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4. "The lawmakers may enact an absurd statute; and hence an absurdity couched in unambiguous language must be enforced by the courts so far as possible. It is only in the case of ambiguous statutes that the rule for the avoidance of absurdity becomes applicable." (McKinney's Cons Laws of NY, Book 1, Statutes § 145, at 297.)

While the Legislature did not explain why it drew a distinction between a police and peace officer and a citizen, there is one explanation to be found in part in the statute itself. The officer need not be correct in his/her reasonable belief that the person the officer is seeking to arrest committed an enumerated felony; nor is the officer restricted to using the deadly physical force to effect the arrest of a person who is in immediate flight from the commission of the felony. Before using deadly physical force, the citizen must be correct in his/her reasonable belief that the person he/she is seeking to arrest committed an enumerated felony and that such person is in immediate flight from the commission of the enumerated felony. Given that the police and peace officer is specially trained, *inter alia,* in the responsible use of firearms under trying circumstances, and that he/she was being authorized to use that deadly physical force on a much broader scale than the citizen, the Legislature wanted some statutory incentive for the police to act responsibly in the use of their broad power to use deadly physical force by holding them responsible for reckless conduct. In fact, those who opposed the legislation did so on the grounds that the legislation accorded too much authority to the police to use force. *(See,* 1968 Bill Jacket, Senate Bill S 4104-A.) For the citizen who could not be presumed to have had training in the use of deadly physical force, and who would be acting often under stress, on the spur of the moment, in response to the commission of an enumerated felony and while the felon was in immediate flight from that felony, and who would often otherwise be a responsible member of the community, the Legislature chose not to hold that citizen accountable for an otherwise justifiable use of force that resulted in injury or death to the wrong person. Reasonable people may disagree with that decision, but the Legislature made its choice among the options presented and whether we agree or disagree with the law across the board or in its application to a particular situation, we are bound to accept the legislative direction. The question remains whether the Grand Jury was properly instructed on that law.

III. The Charge to the Grand Jury

In the Grand Jury, the District Attorney appreciated that a reasonable view of the evidence in a light, as dictated by the law, most favorable to the accused required that the instant defense of justification be charged. *(See, People v McManus,* 67 NY2d, at 549, *supra; People v Valles,* 62 NY2d 36 [1984].)

However, after reading the statutory language of Penal Law § 35.30 (4) (b) to the Grand Jury, the District Attorney gave the following qualifying instruction: "If you find that the person shot by the defendant, [the deceased], was not one of the robbers, then as a matter of law the defendant's conduct under that section, subdivision (b), is not justified for those charges * * * pertaining to [the deceased]." The District Attorney now argues that, assuming arguendo, that charge was in error, there was no reasonable view of the evidence before the Grand Jury to have warranted the justification charge in any event and thus any error in that charge is harmless. The District Attorney was correct in his initial judgment that there was a reasonable view of the evidence warranting a charge on the defense. The charge was in error because it assumed that the defense was inapplicable if the result of the use of the force was to kill a person other than the perpetrator of the robbery even though the citizen was using the force to effect the arrest of the persons whom he believed were, and were in fact, the robbers.

The District Attorney's view of the evidence before the Grand Jury is that the evidence unequivocally bespeaks two events. In the first event, the defendant is shooting in the direction of the sidewalk only at the two people, including the deceased, who were not involved in the robbery, and it is in that shooting that the deceased is killed. In the second event the defendant is shooting into the street where purportedly the real perpetrators of the robbery are.[5]

[redacted] However, a reasonable view of the evidence, premised primarily on the testimony of the eyewitness, is to the contrary. The reasonable inferences to be drawn from that testimony is that there were two sets of two people going west on 178th Street, the robbers, and in front of them the deceased and his friend. The robbers were the closest to the defendant. The defendant fired first at two people on the sidewalk. Here, the District Attorney assumed that the robbers had already left the sidewalk and were between the parked cars going into the middle of the street. But, the eyewitness was not examined closely as to the placement of those two at the time of the first shots and there thus remains a reasonable inference they were

5. The District Attorney tended to convey his view of the evidence to the Grand Jury particularly when he charged the Grand Jury that if they find that the two people in the street were the robbers then "defendant's conduct for shooting at those two people" was justified and the defendant was thus not criminally liable for attempted murder of them.

still on the sidewalk when the first shots were fired. That inference is bolstered by the eyewitness adding that there was then a second grouping of shots aimed at the two people who had gone into the street. It is also bolstered by the testimony of the deceased's friend who testified that he and the deceased were on the sidewalk and at the time of the shots he glanced back and saw a few people there who were also running away and one of those people was wearing a black, heavy ski-type jacket. The defendant testified that he fired at the two robbers because he wanted to "stop" them and only after he believed that the one with the shotgun was about to use it against him. Admittedly, he only recalled one grouping of shots, not two separate shootings, and claimed to have been firing only at the two he saw on the sidewalk. But, the eyewitness testimony would permit the inference that those two people were the robbers before they left the sidewalk to enter the street. Whether it is a reasonable inference on those facts that the defendant was seeking to effect the arrest of the two robbers who were in immediate flight from the robbery and in using deadly physical force to effect that stop, missed the robbers and hit an innocent bystander was for the Grand Jury to determine. Suffice it to say that the evidence permitted that inference and if the Grand Jury so found, then the defendant would have been justified in the use of that force and not liable for the reckless homicide of the innocent bystander.

The failure to have permitted the Grand Jury to consider this defense of justification even if the deceased was not one of robbers plainly prejudiced the defendant and impaired the integrity of the jury, and requires that the counts charging reckless homicide and reckless endangerment be dismissed, with permission granted to the District Attorney to represent the case to another Grand Jury. Since the defense of justification is not applicable to the counts charging the defendant with criminal possession of a weapon, those counts are sustained.

[redacted]

2016-4327-A

APPLICANT – Sky House Condominium, owner.

SUBJECT – Application November 10, 2016 – Appeal challenging NYC Department of Building's determination that the Tower complies with the New York City Zoning Resolution and the New York City Housing Maintenance Code. C5-2 zoning district.

PREMISES AFFECTED – 15 East 30th Street, Block 860, Lot (s) 12, 69, 63, Borough of Manhattan.

COMMUNITY BOARD #5M

ACTION OF THE BOARD – Appeal denied.

THE VOTE TO GRANT –

Affirmative: ……0

Negative: Chair Perlmutter, Vice-Chair Chanda and Commissioner Ottley-Brown ……3

THE RESOLUTION –

WHEREAS, the determination of the Department of Buildings ("DOB"), dated March 1, 2017, acting on a public challenge to New Building Application No. 122128679, reads in pertinent part:

> The challenger's second zoning challenge pertains to the classification of the Chandler Hotel's existing use as a residential use and not a commercial use (Point II). The Chandler Hotel at 12 East 31st Street is on tax lot No. 74, which is one of six adjoining tax lots, including the subject building's tax lot No. 12, which have been merged into a single zoning lot. Per the latest Certificate of Occupancy (CO) (No. 38263) in the Department's BIS website, dated March 8, 1951, the Chandler Hotel's lawful use is a "hotel." In addition, the CO states that "[t]his building complies with Section 67 of the Multiple Dwelling Law."
>
> [. . .]
>
> As per the Chandler Hotel's inspection I-cards, circa 1938, from the Housing Preservation and Development's (HPD) website . . . , the Chandler Hotel is classified as a "Heretofore Erected Existing Class B" (HEXB) multiple dwelling "originally erected as [an] apartment [and] transient hotel." Per the NYS Multiple Dwelling Law's (MDL) definition in MDL § 4(9), "[a] 'class B' multiple dwelling is a multiple dwelling which is occupied, as a rule transiently, as the more or less temporary abode of individuals or families who are lodged with or without meals. This class shall include hotels . . . ." MDL § 4(12) defines hotel as "an inn having thirty or more sleeping rooms." According to the I-card issued contemporaneously with the 1951 CO, none of the units in the Chandler Hotel were identified as residential apartments. Therefore, based on the above DOB and HPD records, this public challenge is hereby denied.
>
> [. . .]
>
> The challenger's third zoning challenge pertains to the subject building's mechanical floor spaces' use and "unnecessary height" (Point III). The challenger does not specify which of the subject building's mechanical floor spaces will be constructed with "unnecessary height."
>
> Per the Zoning Resolution's definition for "floor area" in Section ZR 12-10, "the floor area of a building shall not include . . . (8) floor space used for mechanical equipment . . . ." Per the mechanical plans approved by the Department for the building's second, third, fourth, fiftieth and fifty-first stories, those stories contain mechanical equipment throughout each story, which supports the building's mechanical systems. As such, these stories may be excluded from the building's floor area, as demonstrated on the approved zoning analysis . . . .
>
> In addition, the Zoning Resolution does not regulate the floor-to-ceiling height of a building's mechanical spaces. The building's bulk, including the building's height, is limited by the applicable height and setback regulations, including the tower regulations, in the Zoning Resolution. The approved zoning analysis . . . demonstrates that the subject building's bulk complies with the tower regulations in ZR 23-65 (Tower Regulations), including ZR 23-652 (Standard Tower). Therefore, this public challenge is hereby denied.
>
> [. . .]
>
> The [fifth] zoning challenge pertains to the minimum required distance between the subject building and the Chandler Hotel.
>
> In response, the challenger states that "I agree that the building space requirements of 23-71 are not applicable 'because the existing and proposed building are abutting on the same zoning lot and therefore considered to be one building.'"
>
> In addition, the challenger cites to subdivision 2 in MDL § 28 (Two or more buildings on same lot) in the NYS Multiple Dwelling Law . . . . Because the Chandler Hotel on tax lot No. 74 and the subject building on tax lot No. 12 are located on two separate tax lots, MDL 28(2) is not applicable. Therefore, this public challenge is hereby denied; and

WHEREAS, this is an appeal for interpretation under ZR § 72-11 and Charter § 666(6)(a), brought on behalf of Sky House Condominium ("Appellant"), owner in fee of land located in Manhattan known and designated as Block 859, Lot 7501 (11 East 29th Street), alleging errors of law pertaining to floor space

used for mechanical equipment within a building proposed at 15 East 30th Street (the "Proposed Building") and to the use classification of Hotel Chandler, an existing building located at 12 East 31st Street (the "Hotel"); and

WHEREAS, for the reasons that follow, the Board denies this appeal; and

WHEREAS, a public hearing was held on this appeal on July 25, 2017, after due notice by publication in *The City Record*, with a continued hearing on September 20, 2017, and then to decision on the same date; and

WHEREAS, Vice-Chair Chanda performed an inspection of the site and surrounding neighborhood; and

WHEREAS, the New York City Department of City Planning ("DCP") submitted testimony stating that there are no regulations in the Zoning Resolution controlling the height of stories with floor space used for mechanical equipment, that no inner court regulations apply to commercial hotel uses and that there are no provisions of the Zoning Resolution that would preclude the merger of two or more zoning lots in the event that such a merger would create any non-compliance with the bulk regulations of the Zoning Resolution; and

WHEREAS, New York City Councilmember Daniel R. Garodnick submitted testimony expressing concern that the idea of a "structural void," a shorthand term referring to the second, third and fourth stories of the Proposed Building and identified as mechanical floors, does not exist in the Zoning Resolution, that the DOB determination at issue in this appeal may set precedent for other developments in the City and that the proposed building may adversely affect legally mandated light and air available to Hotel Chandler; and

WHEREAS, Friends of the Upper East Side Historic Districts, The Municipal Art Society of New York and the Greenwich Village Society for Historic Preservation presented written and oral testimony in opposition to the proposed building and in support of this appeal; and

WHEREAS, DOB, Appellant, the owner of the Proposed Building (the "Owner") and the Hotel have been represented by counsel throughout this appeal; and

BACKGROUND

WHEREAS, the subject zoning lot is bounded by East 31st Street to the north, Madison Avenue to the east and East 30th Street to the south, in a C5-2 zoning district, in Manhattan; and

WHEREAS, the zoning lot has approximately 220 feet of frontage along East 31st Street, 143 total feet of non-continuous frontage along Madison Avenue, 118 square feet of frontage along East 30th Street and consists of Tax Lots 10, 12, 16, 63, 64, 67, 69, 71, 74, 1101–1107 and 90671; and

WHEREAS, the Proposed Building is under construction at 15 East 30th Street (Tax Lot 12); and

WHEREAS, 12 East 31st Street (Tax Lot 74) is occupied by the Hotel, a 13-story with cellar and sub-cellar building; and

PROCEDURAL HISTORY

WHEREAS, this appeal concerns the development of the Proposed Building, a 56-story, with cellar, mixed-use residential and commercial building; and

WHEREAS, a construction application for the Proposed Building was filed with DOB on September 11, 2014, and permits were issued in conjunction with New Building Application No. 122128679 (the "NB Application") on July 21, 2016, and subsequently renewed; and

WHEREAS, beginning February 11, 2015, numerous determinations regarding application of the Zoning Resolution to the Proposed Building were posted publicly on DOB's website in accordance with DOB's public-challenge rule, 1 RCNY § 101-15, which affords members of the public an opportunity to learn about proposed buildings early in the construction process; and

WHEREAS, by letter dated April 25, 2016, Appellant submitted a challenge to the Proposed Building, which DOB accepted in part and denied in part on June 29, 2016; and

WHEREAS, by letter dated July 14, 2016, Appellant internally appealed DOB's challenge denial to DOB's Technical Affairs Unit; and

WHEREAS, on June 29, 2016, and July 13, 2016, DOB audited the NB Application, finding open issues, which were resolved by August 4, 2016, when the NB Application passed its third audit; and

WHEREAS, post approval amendments to the NB Application were submitted and subsequently approved by DOB on August 11, 2016, and October 17, 2017; and

WHEREAS, on November 10, 2016, Appellant filed this appeal, contesting DOB's reissuance of Permit No. 122128679-01-NB for the Proposed Building on October 11, 2016; and

WHEREAS, on March 1, 2017, DOB issued the determination cited above (the "Final Determination") and Appellant filed an amendment to this appeal on March 31, 2017; and

WHEREAS, on May 5, 2017, the Board's staff instructed Appellant to notify the Hotel of this appeal because of Appellant's apparent challenge to the Hotel's CO; and

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1 ZR § 12-10 states that a "zoning lot" "may or may not coincide with a lot as shown on the official tax map of the City of New York." Here, pursuant to subdivision (d) of the "zoning lot" definition, multiple tax lots have been merged into one zoning lot pursuant to a restrictive declaration executed by each party in interest and recorded in the Conveyances Section of the New York City Department of Finance Office of the City Register (Document ID No. 2017041300245001), and the Board credits DOB's testimony that these tax lots constitute one merged zoning lot.

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ISSUES PRESENTED

WHEREAS, the two issues in this appeal are whether (1) DOB appropriately determined that floor space used for mechanical equipment within the Proposed Building could be deducted from floor area under ZR § 12-10 without limitation as to height and (2) DOB properly considered a certificate of occupancy for the Hotel in determining its legal use and occupancy and in applying bulk regulations to the Proposed Building2; and

DISCUSSION

(1) MECHANICAL SPACE

WHEREAS, Appellant, DOB and the Owner dispute whether floor space on the second, third and fourth stories of the Proposed Building may properly be deducted from floor area; and

WHEREAS, ZR § 12-10 reads in pertinent part that "the *floor area* of a *building* shall not include: . . . floor space used for mechanical equipment" and that an "*accessory use* . . . is a *use* which is clearly incidental to, and customarily found in connection with, such principal *use*"; and

WHEREAS, Appellant contends that the spaces on the second, third and fourth stories3 of the Proposed Building used for mechanical equipment are too tall to permit their exemption from floor area and that the height of those floors are too excessive and unrelated to the housing of mechanical equipment that they must be classified as their own use (a "Structural Void" 4) with the primary purpose of increasing the height of the building, which is not a permitted use in the Zoning Resolution; and

WHEREAS, the Board considers Appellant's contentions in turn but ultimately finds them unconvincing; and

(A) Height

WHEREAS, Appellant argues that the Proposed Building will contain Structural Voids rather than bona fide mechanical floor space used for mechanical equipment and that a Structural Void is not a listed—and thereby permitted—floor area deduction under the Zoning Resolution; and

WHEREAS, Appellant states that Structural Voids, masquerading as accessory building mechanicals, are designed to boost building heights, views and sales prices; and

WHEREAS, Appellant states, in a submission dated March 31, 2017, that approximately 172 feet of height, or 24 percent of the Proposed Building's volume, is devoted to accessory building mechanicals, but Appellant also states that the Structural Void proposed is 132 feet in height5; and

WHEREAS, the Owner replies that mechanical deductions constitute approximately five percent of the Proposed Building's above-grade square footage and that Appellant's figures are unsupported by calculations; and

WHEREAS, Appellant cites no provision in the Zoning Resolution restricting the height of floor space used for mechanical equipment as is at issue here,6 and Appellant states that it has found no case law or legal guidance on the topic but contends that, under *New York Botanical Garden v. Bd. of Standards & Appeals of City of New York*, 91 N.Y.2d 413, 423 (1998), the Zoning Resolution's silence as to the height permitted for accessory uses is not determinative; and

WHEREAS, Appellant also cites to *47 East 3rd Street*, BSA Cal. No. 128-14-A (May 12, 2015), where the Board stated that "DOB may take into consideration, with respect to a purported accessory use, the relative size of the purported accessory use where the size of the purported accessory use is indicative of its status as subordinate and minor in significance to said principal use"; and

WHEREAS, DOB replies that the Zoning Resolution does not contain any regulations pertaining to the floor-to-ceiling height of a building's mechanical spaces and, by letter dated July 20, 2017, DCP corroborates that there are no regulations in the Zoning Resolution controlling the height of stories with floor space used for mechanical equipment; and

WHEREAS, the Owner replies that, where the Zoning Resolution restricts floor-to-ceiling heights or overall building heights, it does so explicitly, though no such provision restricts the height of the Proposed Building under ZR § 23-65; and

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2 Appellant's revised statement of facts, dated March 31, 2017, indicates that these are the two issues on appeal. Subsequent submissions by Appellant attempt to muddy the issues by including, for instance, discussion of provisions of the Housing Maintenance Code without providing a final agency determination from DOB interpreting said provisions. Consistent with the Board's Rules of Practice and Procedure §§ 1-06.1(a) and 1-06.3(a), the Board declines to consider new arguments not presented to—and decided by—DOB in the first instance.

3 Appellant states in a letter dated August 8, 2017, that it does not address whether the fiftieth and fifty-first stories of the Proposed Building are primarily used for accessory building mechanicals in this appeal, but Appellant does not state what differentiates those stories from the second, third and fourth stories contested here.

4 The Board notes that "structural void" is a shorthand term, not one found or defined in the Zoning Resolution.

5 Presumably this discrepancy results from Appellant's inclusion or exclusion of the fiftieth and fifty-first stories from its calculations.

6 The Owner submits that the Zoning Resolution does regulate the height of mechanical equipment in the limited context of height restrictions for permitted obstructions under ZR §§ 23-62(g), 33-42(f) and 43-42(e), but those sections are inapplicable in this appeal.

WHEREAS, based upon its review of the record, the definition of "floor area" set forth in ZR § 12-10 and the Zoning Resolution as a whole, the Board finds that the Zoning Resolution does not control the floor-to-ceiling height of floor space used for mechanical equipment; and

(B) Accessory Use

WHEREAS, Appellant additionally argues that a Structural Void does not constitute a lawful accessory use and, thus, the excessive heights of the second, third and fourth floors are not permitted by the Zoning Resolution; and

WHEREAS, pursuant to ZR § 12-10, an "accessory use":

> (a) is a *use* conducted on the same *zoning lot* as the principal *use* to which it is related (whether located within the same or an *accessory building or other structure*, or as an *accessory use* of land), except that, where specifically provided in the applicable district regulations or elsewhere in this Resolution, *accessory* docks, off-street parking or off-street loading need not be located on the same *zoning lot*; and
>
> (b) is a *use* which is clearly incidental to, and customarily found in connection with, such principal *use*; and
>
> (c) is either on the same ownership as such principal *use*, or is operated and maintained on the same *zoning lot* substantially for the benefit or convenience of the owners, occupants, employees, customers, or visitors of the principal *use*; and

WHEREAS, Appellant posits that the Structural Void proposed on the second, third and fourth stories of the Proposed Building will hold only limited amounts of mechanical equipment that are not proportional to the size of the space or consistent with current standards for apartment buildings; and

WHEREAS, DOB and the Owner reply that the space at issue will be used for mechanical equipment, which is a lawful accessory use because the mechanical equipment proposed is "clearly incidental to" and "customarily found in connection with" the principal use of the Proposed Building under ZR § 12-10; and

WHEREAS, DCP states that, regardless of floor-to-ceiling height, any space devoted to accessory mechanical equipment is considered a lawful accessory use; and

WHEREAS, the Board notes that, under *New York Botanical Garden*, 91 N.Y.2d 413, 420 (1998):

> Whether a proposed accessory use is clearly incidental to and customarily found in connection with the principal use depends on an analysis of the nature and character of the principal use of the land in question in relation to the accessory use, taking into consideration the over-all character of the particular area in question . . . . This analysis is, to a great extent, fact-based . . . [and] one that will clearly benefit from the expertise of specialists in land use planning; and

WHEREAS, accordingly, the Board considers whether the proposed mechanical equipment is "clearly incidental to" and "customarily found in connection with" the principal use of the Proposed Building under ZR § 12-10; and

(i) Clearly Incidental

WHEREAS, despite the Board's request to do so, Appellant provided no testimony from a mechanical engineer evaluating whether the amount of floor space used for mechanical equipment in the Proposed Building is excessive or irregular, and, in its submission dated August 8, 2017, Appellant states that it "does not intend to hire an engineer or enter into a technical argument about what really constitutes mechanical space"; and

WHEREAS, at hearing, Appellant stated that, after searching, Appellant was unable to find someone willing and qualified to testify on the record evaluating the amount of floor space used for mechanical equipment in the Proposed Building; and

WHEREAS, instead, Appellant urges DOB to employ its discretion, as upheld in *9th & 10th St. L.L.C. v. Bd. of Standards & Appeals of City of New York*, 10 N.Y.3d 264 (2008), to require specific proof that floor space denoted on the approved plans as being used for mechanical equipment could be put to that use; and

WHEREAS, DOB states that, based upon its review, the architectural and mechanical plans for the Proposed Building show mechanical space sufficient to justify its exemption from floor are as follows: the second floor contains an emergency generator and switchboard, cooling towers, primary cold-water pumps, secondary condenser water-loop pumps, an expansion tank, heat exchangers and an air separator; the third floor has a cogeneration power plan, a precipitator, boilers, hot-water pumps, an air separator, an expansion tank, heat exchangers, part of the indoor-cooling towers from the second floor and other equipment; and the fourth floor includes domestic hot-water pumps, domestic-water heat-exchanger units, air-handler units, fan units and other equipment; and

WHEREAS, DOB and the Owner represent that, here, DOB has no reason to doubt that the mechanical space can be used as proposed, especially in light of composite mechanical plans for the Proposed Building illustrating the mechanical equipment proposed for the second, third and fourth stories; and

WHEREAS, the Board credits DOB's review of the proposed plans and finds that, unlike *9th & 10th St. L.L.C.*, there is no reason to suspect that floor spaces designated as being used for mechanical equipment on the approved plans will not be put to such use; and

WHEREAS, the Owner submits sworn affidavits from Fatma M. Amer, former First Deputy Commissioner for DOB with more than 25 years of experience in technical positions, stating that composite mechanical plans for the Proposed Building

demonstrate that the second, third and fourth stories will be used solely for mechanical equipment with no other uses; and

WHEREAS, the Owner additionally cites *246 Spring Street*, BSA Cal. No. 315-08-A (Oct. 5, 2010), where the Board upheld DOB's determination that the specific floor-area deductions taken for swimming pool service process equipment spaces and electric meter rooms were proper; and

WHEREAS, the Board credits DOB's review of the specific mechanical equipment proposed and, in the absence of contradicting testimony or evidence from a licensed and appropriately experienced engineer, the Board has no basis upon which to question the evidence in the record suggesting that the floor space on the second, third and fourth stories of the Proposed Building is "clearly incidental" to the principal use of the Proposed Building, in satisfaction of subdivision (b) of the "accessory use" definition in ZR § 12-10; and

(ii) Customary Connection

WHEREAS, at hearing, Appellant stated that large spaces used for mechanical equipment are not unique to this building and can be found in dozens of buildings currently planned, under construction and recently built in the City; and

WHEREAS, Appellant further stated that, on 57th Street in Manhattan, there is another building under construction with multiple stories devoted to mechanical equipment, totaling approximately 390 feet or 27 percent of that building's height, though Appellant did not specify how much floor space was used for such mechanical equipment; and

WHEREAS, the Owner states that other buildings within the City have been constructed using similar floor-area deductions for mechanical space, including 220 Central Park South, 520 Park Avenue, 111 West 57th Street, 217 West 57th Street and 432 Park Avenue in Manhattan; and

WHEREAS, at hearing, the Board noted that, on the same street as the Proposed Building, a similar building was completed within the past year that featured four interstitial mechanical floors and also discussed the similarity of the building located at 432 Park Avenue, Manhattan, to the Proposed Building; and

WHEREAS, Friends of the Upper East Side Historic Districts states that a building under construction at 180 East 88th Street, Manhattan, contains a three-story space used for mechanical equipment that is exempt from floor area, though no mention is made of the specific amount of floor space deducted; and

WHEREAS, The Municipal Art Society of New York states that several developments—including 217 West 57th Street, Manhattan, with 350 feet of its height devoted to mechanical space and an unspecified amount of floor space thereby exempted—contain tall mechanical spaces that extend heights, improve views and increase prices; and

WHEREAS, in response to concerns from Appellant and the community regarding the applicability of this appeal to other development within the City, the Board notes that, while it has the power, among other things, "to hear and decide appeals from and to review interpretations of this Resolution" under ZR § 72-01(a), the Board does not have the power to zone, *see* Charter § 666; and

WHEREAS, accordingly, insofar as Appellant or members of the community take issue with provisions of the Zoning Resolution—or absence thereof—as enacted, that grievance falls outside the scope of the Board's authority to review this appeal; and

WHEREAS, the Board notes that whether the amount of mechanical equipment proposed for the Proposed Building is customarily found in connection with mixed-use buildings similar to the Proposed Building is "a fact-based determination," *New York Botanical Garden v. Bd. of Standards & Appeals of City of New York*, 91 N.Y.2d 413, 421 (1998); and

WHEREAS, in response to an inquiry from the Board regarding whether a standard percentage of floor space dedicated to mechanical equipment has been interpreted as reasonable for similar developments and, thus, properly exempt from floor-area calculations, DOB states that mechanical floor space deductions are evaluated on a case-by-case basis and that the deduction of floor space on the second, third and fourth stories of the Proposed Building is consistent with its evaluation of mechanical floor space in comparable mixed-use developments in the City; and

WHEREAS, based upon the foregoing, the Board finds that, in accordance with the "floor area" and "accessory use" definitions of ZR § 12-10, DOB properly classified the floor space identified for the placement of mechanical equipment in the Proposed Building as a permissible accessory use and properly deducted that floor space from the calculation of floor area; and

(2) OCCUPANCY OF THE HOTEL

WHEREAS, Appellant, DOB and the Owner dispute the Hotel's legal occupancy under the Multiple Dwelling Law as of 1951 and today, the Hotel's legal use under the Zoning Resolution and the affect that the Hotel's legal occupancy and use have on the applicability of certain bulk regulations to construction of the Proposed Building, specifically with regards to distance between buildings; and

WHEREAS, the Board considers each contention in turn, but ultimately finds none of Appellant's arguments persuasive; and

(A) Legal Occupancy in 1951

WHEREAS, Appellant states that, according to the CO, the Hotel "is used for hotel rooms"7; and

7 Appellant also argues that the CO is "largely illegible and unconvincing of the [Hotel's] status in 1951." The Board does not find the CO illegible, especially in light of the fact that Appellant, DOB and the Owner have all concluded that the CO permits occupancy for a class B hotel.

WHEREAS, DOB and the Owner represent that the permissible occupancy of the Hotel is technically as a class B hotel,8 as defined in the Multiple Dwelling Law ("MDL"), and further emphasize that the definition of "class B" multiple dwelling in MDL § 4(9) indicates that such dwelling is occupied "as a rule transiently"; and

WHEREAS, the Board finds that, as authorized under the CO in 1951, the legal occupancy of the Hotel was as a class B hotel—a multiple dwelling designed to be occupied, as a rule transiently, as an inn having more than thirty sleeping rooms; and

(B) Current Legal Occupancy and Use

(i) Legal Occupancy under the Multiple Dwelling Law

WHEREAS, Appellant argues that the legal use of the Hotel in 1951 is irrelevant to this appeal, and that it is its current use, allegedly contrary to the CO, that dictates the applicability of certain bulk regulations to the Proposed Building; and

WHEREAS, in response, DOB directs the Board's attention to Charter § 645(e), which reads in relevant part:

> [E]very certificate of occupancy shall, unless and until set aside, vacated or modified by the board of standards and appeals or a court of competent jurisdiction, be and remain binding and conclusive upon all agencies and officers of the city . . . as to all matters therein set forth, and no order, direction or requirement affecting or at variance with any matter set forth in any certificate of occupancy shall be made or issued by any agency or officer of the city . . . unless and until the certificate is set aside, vacated or modified . . . upon the application of the agency, department, commission, officer or member thereof seeking to make or issue such order, direction or requirement; and

WHEREAS, accordingly, DOB argues that because the CO is binding as to matters set forth therein, it would be improper for DOB to look beyond the CO to determine the Hotel's legal occupancy; and

WHEREAS, the Board notes that DOB has not filed an appeal with the Board to set aside, vacate or modify the CO and that nothing in the record indicates that the CO was temporary, has otherwise expired as a matter of law or been superseded; and

WHEREAS, accordingly, the Board finds that the CO is currently in effect and that the Hotel's current legal occupancy remains class B hotel, as defined in the Multiple Dwelling Law and stated therein; and

(ii) Legal Use under the Zoning Resolution

(a) Apartment Hotel

WHEREAS, Appellant alleges that currently, the legal primary use of the Hotel is residential because the Hotel meets the definition of "apartment hotel" under ZR § 12-109; and

WHEREAS, ZR § 12-10 defines a "residence," in pertinent part, as "one or more *dwelling units* or *rooming units* . . . . A *residence* may, for example, consist of . . . multiple dwellings . . . or *apartment hotels*. However, *residences* do not include: (a) such transient accommodations as *transient hotels*"; and

WHEREAS, ZR § 12-10 defines an "apartment hotel," in pertinent part, as:

> [A] *building* or part of a *building* that is a Class A multiple dwelling as defined in the Multiple Dwelling Law, which:
> (a) has three or more *dwelling units* or *rooming units*;
> (b) has one or more common entrances serving all such units; and
> (c) provides one or more of the following services: housekeeping, telephone, desk, or bellhop service, or the furnishing or laundering of linens; and

WHEREAS, Appellant does not apply the Multiple Dwelling Law's definition of "Class A multiple dwelling"10 and instead presents records from the New York City Department of Finance ("DOF"), argues that they indicate that the Hotel contains rent-regulated residential units11 and cites *Nutter v. W&J Hotel Company*, 171 Misc. 2d 302 (N.Y.C. Civil Ct. 1997) for the proposition that rent-stabilized units in hotels are treated as permanent residences under the New York Rent Stabilization Law ("RSL"); and

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8 MDL § 4 states in relevant part: "9. A 'class B' multiple dwelling is a multiple dwelling which is occupied, as a rule transiently, as the more or less temporary abode of individuals or families who are lodged with or without meals. This class shall include hotels, lodging houses, rooming houses, boarding houses, boarding schools, furnished room houses, lodgings, club houses, college and school dormitories and dwellings designed as private dwellings but occupied by one or two families with five or more transient boarders, roomers or lodgers in one household. . . . 12. A 'hotel' is an inn having thirty or more sleeping rooms."

9 Contradictorily, Appellant states in its submission dated August 8, 2017, "The Hotel is a transient hotel and a multiple dwelling." The Board notes that apartment hotels and transient hotels are mutually exclusive primary uses but considers Appellant's argument to be that the Hotel is primarily used as an apartment hotel.

10 Nor does Appellant apply the Zoning Resolution's definitions of "dwelling unit" or "rooming unit" under subdivision (a) of the "apartment hotel" definition set forth in ZR § 12-10. However, Appellant does state that the Hotel has a common entrance on 30th Street in response to subdivision (b) of the definition of "apartment hotel" and submitted a printout from the Hotel's website and states that the Hotel provides services listed under subdivision (c).

11 However, under the heading "Annual Property Tax Detail," the DOF property tax statement indicates that the Hotel is "Tax class 4 – Commercial Property."

WHEREAS, in response, DOB points out that hotels subject to rent regulation include "[a]ny Class A or Class B multiple dwelling" under 9 NYCRR § 2520.6; thus, Appellant's reference to the RSL proves unpersuasive as determinative of the Hotel's proper use classification; and

WHEREAS, both DOB and the Owner submit that the presence of an incidental number of rent-regulated units within the Hotel would not convert the Hotel into a class A multiple dwelling and, thus, residential; and

WHEREAS, the Board notes that, in administering and enforcing the Zoning Resolution, neither DOB nor the Board is "required to blindly import a definition" from other statutes with varying purposes, *see Appelbaum v. Deutsch*, 66 N.Y.2d 975, 977 (1985); and

WHEREAS, the Board does not credit Appellant's suggestion that the Hotel's tax classification or the treatment of rent-stabilized units under the RSL as determinative of the Hotel's legal primary use; and

WHEREAS, rather, the Board looks to the definitions section of the Multiple Dwelling Law, which is directly referenced in the relevant text of the Zoning Resolution, and notes that MDL § 4(8)(a) states in pertinent part:

> A "class A" multiple dwelling is a multiple dwelling that is occupied for permanent residence purposes. This class shall include . . . all other multiple dwellings except class B multiple dwellings. A class A multiple dwelling shall only be used for permanent residence purposes. For the purposes of this definition, "permanent residence purposes" shall consist of occupancy of a dwelling unit by the same natural person or family for thirty consecutive days or more . . . ; and

WHEREAS, the Owner emphasizes that, under MDL § 4(8)(a), a class A multiple dwelling "shall only" be used for permanent residence purposes; and

WHEREAS, the Board notes that, because the Hotel's current legal occupancy is class B multiple dwelling while class A multiple dwellings include "all other multiple dwellings except class B multiple dwellings" under MDL § 4(8)(a), the Hotel cannot be a "Class A multiple dwelling as defined in the Multiple Dwelling Law" in accordance with the "apartment hotel" definition of ZR § 12-10; and

WHEREAS, accordingly, the Board finds that the Hotel is not an apartment hotel under ZR § 12-10; and

(b) Transient Hotel

WHEREAS, DOB and the Owner contend that the Hotel is instead a commercial12 building and classified as a transient hotel under ZR § 12-10; and

WHEREAS, ZR § 12-10 states in relevant part, "A 'transient hotel' is a *building* or part of a *building* in which: (a) living or sleeping accommodations are used primarily for transient occupancy, and may be rented on a daily basis"13; and

WHEREAS, Appellant states in its submission dated July 21, 2017, that the Hotel is primarily used "as a transient Class B multiple dwelling"14; and

WHEREAS, the Board notes that ZR § 12-01(f) states, "The phrase 'used for' includes 'arranged for', 'designed for', 'intended for', 'maintained for', 'or occupied for'"; and

WHEREAS, as stated above, the Board finds that the Hotel's current certificate of occupancy indicates that the Hotel is designed and arranged for occupancy, as a rule transiently, as an inn having more than thirty sleeping rooms; and

WHEREAS, the Board notes that nothing in the record indicates that the Hotel has been unlawfully altered from its legal occupancy as a class B hotel; and

WHEREAS, to the contrary, the Board notes that the Hotel's website indicates that the Hotel is actively being operated and advertising rooms for short-term, transient occupancy; and

WHEREAS, accordingly, the Board finds that the primary use of the Hotel is consistent with the "transient hotel" definition in ZR § 12-10 and that the Hotel is, therefore, a commercial building; and

(C) Applicability of Bulk Regulations

WHEREAS, Appellant argues that certain bulk regulations15 applicable to residential buildings apply to the Hotel and were not properly considered in DOB's evaluation of the NB Application and, thus, the Final Determination was in error; and

WHEREAS, in particular, Appellant argues that MDL § 28 precludes construction of the Proposed Building, and MDL § 28(2) reads in relevant part:

> Except as otherwise provided . . . for dwellings erected, enlarged, converted or altered pursuant to plans filed prior to December fifteenth, nineteen hundred sixty-one in accordance with the provisions of

12 ZR § 12-10 states, "A 'commercial' *use* is any *use* listed in Use Group[] 5." Transient hotels and accessory uses are listed in Use Group 5 under ZR § 32-14 and are, therefore, commercial uses.

13 None of the other elements of the "transient hotel" definition of ZR § 12-10 as they apply to the Hotel are disputed in this appeal.

14 The Board again notes that this statement contradicts Appellant's argument that the Hotel is an apartment hotel.

15 By letter from Appellant to DOB dated July 14, 2016, as referenced in the Final Determination, Appellant states, "I agree that the building space requirements of 23-71 are not applicable 'because the existing and proposed buildings are abutting on the same zoning lot and therefore considered to be one building.'" Accordingly, the Board declines to consider the applicability of ZR § 23-71 in this appeal since Appellant apparently conceded this point before DOB. Appellant has also not challenged any bulk regulations of the Zoning Resolution applied by DOB in the Final Determination, including ZR §§ 23-532 and 23-65.

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subdivision one of section twenty-six, if any building or dwelling is placed on the rear of the same lot with a multiple dwelling or a multiple dwelling is placed anywhere on the same lot with another building, there shall be left between the two buildings an open space unoccupied from the ground up and at least forty feet in depth, measured in the direction from one building to the other for the first one hundred twenty-five feet above the curb level, and eighty feet above that point; and

WHEREAS, both DOB and the Owner state that MDL § 28(2) does not apply because said provision relates to multiple buildings on a single tax lot, not zoning lot, and the Proposed Building and the Hotel are located on two separate tax lots; and

WHEREAS, additionally, the Owner notes that MDL § 4(31) states, "A 'lot' is a parcel or plot of ground which is or may be occupied wholly or in part by a dwelling, including the spaces occupied by accessory or other structures and any open or unoccupied spaces thereon, but not including any part of an abutting public street or thoroughfare"; and

WHEREAS, comparing the "lot" definition in MDL § 4(31) with the "zoning lot" definition in ZR § 12-10, the Board notes that the definitions differ in scope and purposes16; and

WHEREAS, the Board finds Appellant's conclusory conflation of the "lot" definition in MDL § 4(31) with the "zoning lot" definition in ZR § 12-10 unpersuasive; and

WHEREAS, the Board credits DOB's interpretations, especially in light of DOB's extensive experience administering complex zoning lot mergers; and

WHEREAS, based on the above, the Board finds MDL § 28(2) is inapplicable to the Proposed Building; and

CONCLUSION

WHEREAS, the Board has considered all of Appellant's arguments on appeal and finds them to be without merit; and

WHEREAS, for the foregoing reasons, the Board finds that DOB appropriately permitted floor space used for mechanical equipment within the Proposed Building to be deducted from floor area under ZR § 12-10 without limitation as to height and that DOB properly determined that the Hotel constitutes a commercial building occupied as a class B hotel, as defined in MDL § 4, and used as a transient hotel under ZR § 12-10 in applying bulk regulations to the Proposed Building.

Therefore it is Resolved, that the determination of the Department of Buildings, dated March 1, 2017, acting on a public challenge to New Building Application No. 122128679, shall be and hereby is *upheld* and that this appeal shall be and hereby is *denied*.

Adopted by the Board of Standards and Appeals, September 20, 2017.

16 For instance, MDL § 4(31) states that a lot "may be occupied wholly or in part by a dwelling," but ZR § 12-10 contains no reference to residences in the "zoning lot" definition. Likewise, ZR § 12-10 states that a "zoning lot" "may or may not coincide with a lot as shown on the official tax map of the City of New York," but MDL § 4(31) contains no such disclaimer.

A true copy of resolution adopted by the Board of Standards and Appeals, September 20, 2017.
Printed in Bulletin No. 39, Vol. 102.

Copies Sent
To Applicant
Fire Com'r.
Borough Com'r.

14-11-A

APPLICANT – Law Office of Fredrick A. Becker, for Chaya Schron and Eli Shron, owners.

SUBJECT – Application February 2, 2011 – Appeal challenging a determination by the Department of Buildings that a proposed cellar to a single family home is contrary to accessory use as defined in §12-10 in the zoning resolution.

R2 zoning district.

PREMISES AFFECTED – 1221 East 22th Street, between Avenues K and L, Block 7622, Lot 21, Borough of Brooklyn.

COMMUNITY BOARD #14BK

APPEARANCES –

For Applicant: Hai Blorfmen.

ACTION OF THE BOARD – Application Denied.

THE VOTE TO GRANT –

Affirmative:.....0

Negative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.....5

THE RESOLUTION –

WHEREAS, this is an appeal of a Department of Buildings ("DOB") final determination dated January 7, 2011, issued by the Acting First Deputy Commissioner (the "Final Determination"); and

WHEREAS, the Final Determination reads in pertinent part:

> [A] cellar that exceeds 49% of the total floor space of the residence to which it is appurtenant (the principal use) is not considered an "accessory use" as that term is defined by Section 12-10 of the ZR. An accessory use is a use which is "clearly incidental to, and customarily found in connection with" the principal use conducted on the same zoning lot. Here, the proposed principal use is a two-story, single-family dwelling. The proposed accessory use is a storage cellar that extends well beyond the footprint of the dwelling and well below ground. More importantly, the cellar has nearly as much floor space as the dwelling has floor area. In such an arrangement there is nothing "incidental" about the cellar; it is essentially a principal use. As indicated in the August determination, the cellar cannot exceed 49% of the floor space of the residential dwelling.1 Beyond 49% the cellar use ceases to be "incidental" to the principal use and therefore does not comply with the Section 12-10 definition of accessory use. Accordingly, the cellar as proposed is not permitted; and

WHEREAS, the appeal was brought on behalf of the owners of 1221 East 22nd Street (hereinafter the "Appellant"); and

WHEREAS, a public hearing was held on this application on May 17, 2011 after due notice by publication in *The City Record*, with continued hearings on June 21, 2011 and August 18, 2011, and then to decision on October 18, 2011; and

WHEREAS, DOB appeared and made submissions in opposition to this appeal; and

WHEREAS, the premises and surrounding area had site and neighborhood examinations by Chair Srinivasan, Commissioner Hinkson, Commissioner Montanez, and Commissioner Ottley-Brown; and

THE PROPOSED PLANS

WHEREAS, the subject site is located on East 22nd Street between Avenue K and Avenue L, within an R2 zoning district and is currently occupied by a two-story single-family home (the "Home"); and

WHEREAS, on August 13, 2009, the Appellant submitted Alteration Application No. 320062793 to DOB for the proposed enlargement of the Home pursuant to ZR § 73-622; and

WHEREAS, the proposal includes a total of 6,214.19 sq. ft. of floor area (1.04 FAR) and a cellar with a floor space of 5,100 sq. ft. (the equivalent of approximately 0.85 FAR, if cellar space were included in zoning floor area, and 82 percent of the Home's above-grade floor space); and

WHEREAS, the proposed cellar extends beyond the footprint of the first floor; includes two levels; and is proposed to contain storage area, a home theater, and a multi-level gymnasium/viewing area, among other uses; and

WHEREAS, on September 3, 2009, DOB issued 23 objections to the plans, the majority of which were later resolved; however, on January 7, 2011, DOB determined that the proposed cellar failed to satisfy the ZR § 12-10 definition of "accessory use" in that it was not "clearly incidental to" and "customarily found in connection with" the principal use of the lot and, thus, the cellar objection remains; and

WHEREAS, DOB states that because the cellar extends beyond the Home's footprint, its maximum permitted size is 49 percent of the proposed Home's floor area square footage, which equals 3,043.25 sq. ft.; and

WHEREAS, the Appellant concurrently filed the subject appeal and an application for a special permit (BSA Cal. No. 3-11-BZ) pursuant to ZR § 73-622; at the Appellant's request, the Board has adjourned the special permit application pending the outcome of the subject appeal; and

RELEVANT ZONING RESOLUTION PROVISIONS

WHEREAS, the following provisions are relevant

1 As used in this determination, "floor space" includes any space in the dwelling, whether or not the space is included in the "floor area" per ZR section 12-10. (original footnote)

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definitions set forth at ZR § 12-10, which read in pertinent part:

> Accessory Use, or accessory
> An "accessory use":
> (a) is a #use# conducted on the same #zoning lot# as the principal #use# to which it is related (whether located within the same or an #accessory building or other structure#, or as an #accessory use# of land) . . .; and
> (b) is a #use# which is clearly incidental to, and customarily found in connection with, such principal #use#; and
> (c) is either in the same ownership as such principal #use#, or is operated and maintained on the same #zoning lot# substantially for the benefit or convenience of the owners, occupants, employees, customers, or visitors of the principal #use# . . .
>
> * * *
>
> Dwelling unit
> A "dwelling unit" contains at least one #room# in a #residential building#, #residential# portion of a #building#, or #non-profit hospital staff dwelling#, and is arranged, designed, used or intended for use by one or more persons living together and maintaining a common household, and which #dwelling unit# includes lawful cooking space and lawful sanitary facilities reserved for the occupants thereof.
>
> * * *
>
> Residence, or residential
> A "residence" is one or more #dwelling units# or #rooming units#, including common spaces such as hallways, lobbies, stairways, laundry facilities, recreation areas or storage areas. A #residence# may, for example, consist of one-family or two-family houses, multiple dwellings, boarding or rooming houses, or #apartment hotels#. . .
> "Residential" means pertaining to a #residence#.
>
> * * *
>
> Residential use
> A "residential use" is any #use# listed in Use Group 1 or 2; and
>
> * * *
>
> Rooms
> "Rooms" shall consist of "living rooms," as defined in the Multiple Dwelling Law; and

THE APPELLANT'S POSITION

WHEREAS, the Appellant makes the following primary arguments: (1) the proposed cellar meets the ZR § 12-10 definition of accessory use; (2) DOB has approved cellars which extend beyond the building footprint, like the proposed, and must approve the proposal to be consistent with its practice; (3) prior Board cases and case law support the contention that the cellar use is accessory; and (4) DOB cannot impose bulk limitations on a use definition; and

WHEREAS, as to the definition of accessory use, the Appellant asserts that the proposed cellar meets the criteria as it is: (a) located on the same zoning lot as the principal use (the single-family home), (b) the cellar uses are incidental to and customarily found in connection with a single-family home, and (c) the cellar is in the same ownership as the principal use and is proposed for the benefit of the owners of the Home who occupy the upper floors as a single-family home; and

WHEREAS, the Appellant asserts that DOB's interpretation of "accessory use" is erroneous because it is not consistent with the ZR § 12-10 definition and because DOB may not limit a residence's principal use to "habitable rooms" or sleeping rooms as set forth in the Building Code or Housing Maintenance Code ("HMC"); and

WHEREAS, specifically, the Appellant cites to DOB's argument that "all portions of a residence that are not used for sleeping, cooking, or sanitary functions are accessory to the residence and are permitted only to the extent they are customarily found in connection with and clearly incidental to the residence;" and

WHEREAS, the Appellant asserts that the proposed cellar is "incidental" to the primary use as it is "less important than the thing something is connected with or part of;" and

WHEREAS, further, the Appellant asserts that the ZR § 12-10 definition of residence is broad and includes rooms other than those for sleeping and that as per the Multiple Dwelling Law ("MDL"), every room used for sleeping purposes shall be deemed a living room, but rooms other than those used for sleeping shall also be considered living rooms; and

WHEREAS, as to DOB's approvals, the Appellant initially submitted cellar plans for seven homes approved by DOB with cellars that extend beyond the footprint of the building to support the claim that such cellars are customary and that DOB has a history of approving them; and

WHEREAS, the Appellant contends that the examples reflect cellars that extend beyond the footprint of the home and exceed 49 percent of the home's floor area, thus, DOB is arbitrary to now deny this request; and

WHEREAS, as to Board precedent, the Appellant sites to BSA Cal. No. 60-06-A (1824 53rd Street, Brooklyn/Viznitz), a case that involved the analysis of whether a catering facility associated with a synagogue and yeshiva was accessory to the primary synagogue and yeshiva use or whether it was a primary use not permitted by zoning district regulations; and

WHEREAS, the Appellant cites the Board's decision for the point that certain accessory uses noted in ZR § 12-10's definition of accessory use could also be

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primary uses, but the majority of them are ancillary uses that support the site's primary use; accordingly, the Appellant likens the proposed cellar uses – exercise areas and a home theater - to those on the list of accessory uses in that they are not primary uses; and

WHEREAS, the Appellant also cites to the Board's decision at BSA Cal. No. 202-05-BZ (11-11 131st Street, Queens/InSpa) in which the Board, when evaluating whether a small percentage of a physical culture establishment's floor area dedicated to massage in comparison to the large size of the facility made it appropriate for the massage area to establish the primary use; the Appellant notes that the Board stated in its decision that there was not any mention of size limitations in the ZR § 12-10 accessory use definition; and

WHEREAS, the Appellant cites to Mamaroneck Beach & Yacht Club v. Zoning Board of Appeals, 53 A.D.3d 494 (2008), for the determination that proposed seasonal residential use at a yacht club was deemed to be accessory to the primary yacht club use even though it would occupy more than 50 percent of the total building floor area on the site; and

WHEREAS, the Appellant also cites to New York Botanical Garden v. Board of Standards and Appeals, 91 N.Y.2d 413 (1998), in which the court rejected the Botanical Garden's assertion that a radio tower was too large to be considered clearly incidental to or customarily found in connection with the principal use and upheld the Board's determination that the radio tower was accessory to the university use; and

WHEREAS, finally, the Appellant asserts that DOB does not have the authority to impose bulk limitations on a use and to impose a quantitative measurement where the ZR is silent; and

WHEREAS, the Appellant asserts that the ZR does not limit the size of the subject accessory use as it does certain other accessory uses such as home occupation and that the absence of a size limit in the ZR is evidence that there is no such limit; and

WHEREAS, the Appellant asserts that since zoning regulations are in derogation of the common law, they should be construed against the property owner and, thus, DOB should not be permitted to add a limitation not written in the text that imposes a burden on property owners; and

WHEREAS, further, the Appellant asserts that DOB's restriction that residential cellars not exceed 49 percent of the floor area of the home is not fair, consistent, or proportional and cites as an example of inequity the fact that a 1,000 sq. ft. home with one-story could have a cellar with 1,000 sq. ft. if built within the building's footprint, but if that 1,000 sq. ft. home were two stories and had a footprint of 500 sq. ft., the cellar could only be 500 sq. ft.; and

DOB'S POSITION

WHEREAS, DOB states that its cellar size limitation is: (1) based on a rational construction of the definition of accessory use, particularly the phrase "clearly incidental," which furthers the intent of the ZR; (2) a reasonable restriction developed pursuant to the principles of fairness, consistency, and proportionality; (3) applicable only to residences, and based on an assessment of the needs presented by residences; (4) not new but rather, a consistent approach that is challenged for the first time; (5) in accordance with the Board's cases concerning accessory uses; and (6) consistent with the Board's cases regarding DOB's authority to establish measurements that are not clearly stated within the text in order to clarify terms; and

WHEREAS, as to whether or not the proposed use is accessory, DOB asserts that the size of the proposed cellar is neither customary, nor clearly incidental to the home and that its multi-level configuration is not customary; and

WHEREAS, DOB states that the proposed storage, theater, and gymnasium rooms in the cellar are not part of the principal use of the residence and must meet the definition of "accessory use;" and

WHEREAS, DOB's analysis includes that several ZR § 12-10 definitions together define (1) a "residence" as those rooms used for sleeping, cooking and sanitary purposes, (2) a "residence" is a building or part of a building containing dwelling units, (3) a "dwelling unit" consists of one or more "rooms" plus lawful cooking space and lawful sanitary facilities, and (4) a "room" is a room used for sleeping purposes in accordance with the definition of a "living room" as defined by MDL § 4.18; and

WHEREAS, DOB states that sleeping rooms are the essential component of a dwelling unit and the principal use and the rooms in the Home's cellar, none of which are sleeping rooms, must be accessory to the residence; and

WHEREAS, DOB asserts that all portions of a residence that are not for used for sleeping, cooking, or sanitary functions are accessory to the residence and are permitted only to the extent that they are customarily found in connection with and clearly incidental to the residence and, further, cellar floor space that exceeds 49 percent of a residence's floor area is not accessory where the cellar walls extend below or beyond the footprint of the superstructure; and

WHEREAS, DOB states that its restriction on residential cellar size is appropriate since limiting the size beyond the perimeter of the cellar walls, results in cellars of a size that are customarily found, because historically, the cellar walls were directly below the above-grade walls—and may be considered clearly incidental because its size is no greater than is required for the utilitarian purpose of carrying the loads imposed by the superstructure; and

WHEREAS, DOB notes that the proposed cellar extends beyond the Home's footprint and extends so far

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below grade that another staircase must be installed to access the lower portion of it, thus the proposed cellar is undeniably different than cellars traditionally found in connection with detached, single-family homes and, further that the proposed cellar is not clearly incidental to the home above it; and

WHEREAS, DOB finds that the proposed cellar is simply too large and too significant in comparison to the home to be clearly incidental to it; and

WHEREAS, as to the 49 percent measure, DOB states that it is appropriate because it is its reasoned determination that something cannot be clearly incidental to something else and be fully half as large as it and that (1) the size limitation furthers the intent of the ZR to allow such spaces that normally accompany residential rooms to remain secondary in nature, (2) the percentage is an appropriate measure since it allows for proportionality based on different home sizes, (3) the limitation is only for these residential uses and not for other types of uses, and (4) its restriction on cellar size is not new and that it has required it in the past; and

WHEREAS, DOB articulates the following two-step process for measuring the permissible cellar size: (1) if the cellar matches the footprint of the superstructure, it is permitted regardless of how much floor space it has in comparison to the floor area of the building, and (2) if the cellar extends beyond the footprint of the superstructure, the cellar may not exceed 49 percent of the floor area of the building; and

WHEREAS, DOB states that the 49 percent parameter ensures that, for a typical two-story, single-family home, the cellar floor space does not eclipse an entire story of floor area and that in a three-story home, somewhat more than one story's worth of floor area would be permitted for the cellar; and

WHEREAS, DOB asserts that the size of the permitted accessory use directly corresponds to the size of the principal use at a constant rate and follows the plain text of the ZR, gives meaning to the undefined terms, and is consistent with the policy of allowing certain accessory uses to exist, to an appropriate degree, in connection with certain principal uses; and

WHEREAS, as to the Appellant's assertion that DOB's prior approvals require it to approve the proposal, DOB disagrees and states that the plans submitted as precedent are incomplete and cannot be verified and that most of the buildings depicted (Drawings 1, 3, 4, 5 and 7) appear to be three stories in height, which might allow for an extension beyond the footprint; and

WHEREAS, however, DOB states that to the extent that any of the plans show applications that were approved with accessory cellars extending beyond the footprint of the building and having more than 49 percent of the total floor area of the homes, such approvals were issued in error; and

WHEREAS, DOB asserts that the Board has recognized that size limitation is appropriate in two prior cases BSA Cal. No. 45-96-A (27-01 Jackson Avenue, Queens) and BSA Cal. No. 748-85-A (35-04 Bell Boulevard, Queens); and that the Board has recognized DOB's authority to impose size limits which are not stated in the ZR see BSA Cal. No. 320-06-A (4368 Furman Avenue, Bronx), 189-10-A (127-131 West 25th Street, Manhattan), and 247-07-A (246 Spring Street, Manhattan); and

WHEREAS, as to the case law, DOB asserts that neither Mamaroneck nor Botanical Garden can be read to include a limit on the cellar size in a single-family home; DOB asserts that Mamaroneck is distinguishable and Botanical Garden supports its position, rather than Appellant's; and

WHEREAS, specifically, DOB notes that the seasonality of the residences, which were specifically permitted by Mamaroneck's zoning, was the limitation imposed by the plain text of the Mamaroneck Zoning Code, and the zoning board went beyond the plain text to impose a size limitation; and

WHEREAS¸ by contrast, DOB asserts that cellars are only permitted if they are accessory and size is relevant to the analysis of whether or not they are accessory; and

WHEREAS¸ DOB finds support for its position in Botanical Garden in that it finds that the court's holding is limited to stating that a size analysis is not appropriate for a radio tower, but does not extend to whether a size analysis may be appropriate in other situations with accessory uses; specifically it cites to the court decision: "the fact that the definition of accessory radio towers (in Section 12-10) contains no [size restrictions such as a "home occupation" or "living or sleeping accommodations for caretakers"] supports the conclusion that the size and scope of these structures must be based upon an individualized assessment of the need;" and

WHEREAS, DOB asserts that Botanical Garden supports the position that where the ZR does not provide a size limitation, the appropriate limitation is based on an "individualized assessment of the need" for the accessory use and its two-part test follows the Botanical Garden "assessment of the need" analysis, in that it was developed by balancing the historical and practical purpose of accessory cellars (the "need") with the policy considerations within the definition of accessory use; and

THE DRAFT BULLETIN

WHEREAS, during the course of the hearing and at the Board's request, DOB drafted a proposed bulletin (the "Bulletin"), which sets forth the restrictions on cellar space and a version of which DOB proposes to issue after the Board's decision in the subject appeal; and

WHEREAS, the Bulletin has the defined purpose of "clarifying size of non-habitable accessory cellar space in residences," and includes the following:

. . .Within a residence, all rooms are either

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> habitable or non-habitable. Habitable rooms, in contrast to non-habitable rooms, are rooms in which sleeping is permitted. The ZR classifies uses on a zoning lot as either principal or accessory. Where habitable rooms are the principal use on a zoning lot, non-habitable rooms are not part of the principal use; they are accessory to the principal use, and are permitted pursuant to subsection (b) of the ZR definition of "accessory use" only to the extent that they are clearly incidental to and customarily found in connection with such habitable rooms. Thus, the definition of "accessory use" contains a limitation on the size of residential cellars containing non-habitable rooms . . .; and

WHEREAS, the Appellant made the following supplemental arguments in response to the Bulletin; and

WHEREAS, the Appellant asserts that the Bulletin is not a logical interpretation of the relevant regulations; and

WHEREAS, specifically, the Appellant asserts DOB's comparison of habitable space to the HMC definition is flawed because the HMC definition of "dwelling" does not address "living rooms," but defines a dwelling as "any building or other structure or portion thereof which is occupied in whole or in part as the home, residence or sleeping place of one or more human beings;" and

WHEREAS, the Appellant asserts that the HMC definition does not limit a dwelling to the specific rooms used for sleeping and thus is not comparable to DOB's definition of habitable space; and

WHEREAS, the Appellant adds that the HMC definition of "living room" is broader than DOB suggests and that DOB fails to provide support for equating a space's habitability to its status as a principal or accessory use; and

WHEREAS, the Appellant asserts that the cellar size limit of 49 percent of a home's floor area when it extends beyond the building footprint is arbitrary and that DOB cannot enact additional limitations not written in the text and cannot make a rule limiting cellar size that applies to certain (residential) and not all uses; and

CONCLUSION

WHEREAS, the Board has determined that DOB is reasonable to restrict the size of residential cellars and that (1) its position is supported by the Zoning Resolution, (2) it has the authority to set forth and apply parameters for limiting the size of residential cellars and its parameters are reasonable, and (3) all of the authorities the Appellant cites can be distinguished from the subject application and do not support its position; and

WHEREAS, as to the Zoning Resolution, the Board refers to the ZR § 12-10 definitions of dwelling unit, residence or residential, residential use, and rooms cited above; and

WHEREAS, the Board first notes that a residence is one or more "dwelling units" including common spaces (which also addresses multiple dwellings) such as (but not limited to) hallways, lobbies, stairways, laundry facilities, recreation areas, or storage areas; and

WHEREAS, the Board notes that residences include single-family or two-family homes, thus the proposed single-family home is a "dwelling unit;" and

WHEREAS, the Board notes that the proposed enlargement is for a single-family home which is (1) a "residence" and therefore a "dwelling unit," and (2) as a dwelling unit, it must contain at least one "room," and includes lawful cooking space and lawful sanitary facilities; and

WHEREAS, further, the Board notes that a dwelling unit comprises "rooms" (defined in the ZR as the same as "living rooms" in the MDL) and cooking and sanitary facilities; therefore, a residential use (such as the proposed single-family home) is a "dwelling unit" which contains "rooms" (ZR or MDL "living rooms") and cooking and sanitary facilities; and

WHEREAS, the Board finds that the primary use of a residence is limited to living rooms (which DOB refers to as "habitable" in this context), and cooking and sanitary facilities; all other uses become accessory; and

WHEREAS, the Board notes that its proffered zoning interpretation establishes that (1) spaces above grade that are habitable including recreation spaces, libraries, studies, attic space, are all considered "rooms" and part of the primary use and also counted as floor area and (2) below grade space that is habitable and may be used as a sleeping room is also part of the primary use and would be considered as floor area and should be not included in the accessory calculation; the Board notes that below grade space that is not habitable is not included in zoning floor area calculations; and

WHEREAS, the Board notes that DOB does not need to rely on the Building Code definition of habitable space, as the Appellant suggests, but rather chooses "habitable" as a shorthand way to encompass the living rooms which constitute a dwelling unit; and

WHEREAS, the Board notes that the ZR directly references the MDL and therefore reflects an expected link between ZR "rooms" and MDL "living rooms" acknowledged by the ZR; the Board also finds that the Appellant's concern about there potentially being above-grade space that would be deemed accessory rather than primary is unavailing because the above grade space (1) counts towards floor area, is within the anticipated volume of the building, and is covered by the relevant restrictions on floor area and (2) could potentially be converted to primary use as it can become habitable space; and

WHEREAS, the second part of the Board's analysis considers whether DOB may appropriately put a quantitative measure on cellar size; and

WHEREAS, the Board finds that DOB may place a

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quantitative measure to ensure that the accessory use remains incidental to the primary use; and

WHEREAS, the Board acknowledges that size may not always be a relevant factor when establishing accessory use but when cellars go beyond the customary boundary of the building's footprint, it is appropriate to restrict the size in order to maintain its incidental relationship to the primary use; and

WHEREAS, the Board does not find DOB's application of the restriction only to residential uses to be arbitrary since it stems from the ZR definition of residential uses and the distinction between habitable and non-habitable space which does not arise for nonresidential uses; and

WHEREAS, the Board distinguishes its two prior cases that the Appellant cites; and

WHEREAS, first the Board notes that in Viznitz, the Board clearly stated that "a determination of whether a particular use is accessory to another use requires a review of the specific facts of each situation" and quoted the Court of Appeals in Botanical Garden for the theory that "[w]hether a proposed accessory use is clearly incidental to and customarily found in connection with the principal use depends on an analysis of the nature and character of the principal use . . . taking into consideration the over-all character of the particular area in question" when determining whether a catering use was primary or accessory to the synagogue or yeshiva; and

WHEREAS, the Board also distinguishes InSpa in that it involved a PCE special permit application, not an interpretive appeal and, thus the decision in that case is limited to the unique circumstances of a PCE special permit; if the Board had agreed that the small amount of massage space in comparison to the large size of the overall facility would make such use accessory, it would follow that the remaining uses could have existed as-of-right (for example as a Use Group 13 commercial pool with accessory massage); and

WHEREAS, the Board notes that the InSpa case was before the Board because DOB has taken a conservative approach that any amount of space dedicated to a defined PCE, no matter how small in proportion to the whole use, triggers the requirement for a PCE special permit rather than allowing small PCE uses to be subsumed by a larger as of right use and sidestep the special permit; this furthers the intent of the ZR to have City oversight, including conditional approval and term limits, of certain specific physical improvement uses; and

WHEREAS, the Board finds that the intent and the purpose of the analysis in the InSpa case cannot be applied to the subject case; and

WHEREAS, as to the case law, the Board does not find that either Mamaroneck or Botanical Garden supports the Appellant's position; and

WHEREAS, as to Mamaroneck, the Board distinguishes the facts since Mamaroneck is within a different jurisdiction subject to a different zoning code and seasonal residences were explicitly permitted under zoning without a restriction on size; and

WHEREAS, as to Botanical Garden, the Board finds that the court did not prohibit size as a consideration across the board but rather said to employ an individualized assessment of need and a consideration of the facts, as cited above; and

WHEREAS, the Board finds it inappropriate to compare the assessment of need for a radio tower, which has technical requirements, and a home's cellar, which is based on a homeowner's preferences; and

WHEREAS, the Board upheld DOB's authority to interpret and impose quantitative guidelines not found in the ZR in BSA Cal. No. 320-06-A (4368 Furman Avenue, Bronx) and also upheld DOB's authority to fill in gaps not set forth in relevant statutes in BSA Cal. No. 121-10-A (25-50 Francis Lewis Boulevard, Queens); the Board notes that the court recently upheld its decision in Francis Lewis Boulevard at 25-50 FLB v. Board of Standards and Appeals, 2011 NY Slip Op 51615(U) (S. Ct. 2011); and

WHEREAS, in 25-50 FLB, the Supreme Court recognized DOB's authority to fill in gaps in instances where specific procedures are not codified and upheld the Board's decision based on its recognition of that authority; and

WHEREAS, the Board finds that size can be a rational and consistent form of establishing the accessory nature of certain uses such as home occupations, caretaker's apartments, and convenience stores on sites with automotive use, but may not be relevant for other uses like radio towers or massage rooms; and

WHEREAS, the Board does not find that any of the prior cases the Appellant relies on include any recognition of the distinction between above grade and below grade space and the associated questions of habitability; and

WHEREAS, as to the Appellant's assertion that DOB has been inconsistent and has a history of approving cellars like the proposed, the Board notes that the drawings the applicant submitted lack sufficient detail to make such a conclusion; the Appellant submitted only one case which has a certificate of occupancy and zoning calculations, which shows that DOB has allowed cellars greater than 49 percent of the building's floor area; and

WHEREAS, the Board notes that the other six examples which show larger cellars do not provide any analysis regarding the 49 percent standard; and

WHEREAS, the Board notes that (1) even if the examples do support the Appellant's claim that DOB approved cellars with area in excess or 49 percent of the homes' floor area, seven examples do not establish a compelling established practice, (2) it is possible that DOB did not have sufficient information to perform the analysis, and (3) DOB has the authority to correct erroneous approvals; and

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WHEREAS, the Board has determined that DOB has the authority to issue the Bulletin and that it is appropriate to do so immediately following the Board's decision since this zoning issue has emerged and its regulation requires memorialization; and

WHEREAS, the Board does not find DOB's discrete application of the rule to be arbitrary as the distinction between habitable and non-habitable use is not relevant or applicable to the non-targeted uses; and

WHEREAS, the Board also notes the following considerations, which support limiting the size of residential cellars: (1) there is a distinction between above grade habitable space, which provides access to light and air, and below grade space, which does not, and yet homes function as a whole so there is a public interest in distinguishing between the primary habitable space and the accessory non-habitable space and limiting the amount of non-habitable space; (2) the ZR intends to limit, and there is a public interest in limiting, the volume of homes; and (3) the ZR sets limits on above grade floor area, which counts towards zoning floor area and so it is reasonable to limit the below grade floor space, which is not addressed within bulk regulations as it does not count towards bulk, but does contribute to the home's overall occupation of space; and

WHEREAS, as to the Appellant's concern that the cellar limitation is inequitable and disproportionate, the Board considered the effect the Bulletin (with the variation that a cellar built beyond the footprint may not exceed 50 percent of the home's floor area) would have on homes within an R3-2 zoning district; for example a 6,000 sq. ft. lot built out could choose from the following parameters: (1) a home with a maximum floor area of 3,600 sq. ft. (0.6 FAR) and a maximum footprint of 2,585 sq. ft., which would permit a cellar of either 2,585 sq. ft. or 1,800 sq. ft., if built to a smaller footprint and multiple stories, or (2) if a property owner obtains a special permit pursuant to ZR § 73-622, it may potentially build to a floor area of 6,000 sq. ft. (1.0 FAR), a maximum footprint of 3,055 sq. ft., and provide a cellar of either 3,055 sq. ft. or 3,000 sq. ft., if the built to a smaller footprint; and

WHEREAS, the Board finds that the results are not inequitable or disproportionate in that a property owner, like the subject property owner seeking a special permit, would be permitted virtually the same size cellar 3,055 sq. ft. vs. 3,000 sq. ft. whether it builds to the maximum footprint size or not; and

WHEREAS, based on the applicant's actual special permit proposal for 1.04 FAR, a 50 percent limit on the size of the cellar would result in 3,107 sq. ft., which the Board deems to be a reasonable outcome; and

WHEREAS, as to the Bulletin, the Board finds 50 percent to be a more appropriate guideline and, thus, the Board respectfully requests that DOB modify the Bulletin to replace "should not be greater than 49%" with "should be less than 50% of the total FAR," with regard to the size of the cellar, and to include a provision that exceptions must be reviewed and approved by its technical affairs division or by another DOB authority with inter borough oversight to ensure a consistent application in all five boroughs; and

WHEREAS, based on the above, the Board has determined, the Final Determination must be upheld and this appeal must be denied; and

Therefore it is Resolved that this appeal, which challenges a Department of Buildings final determination dated January 7, 2011, is denied.

Adopted by the Board of Standards and Appeals, October 18, 2011.

A true copy of resolution adopted by the Board of Standards and Appeals, October 18, 2011.
Printed in Bulletin Nos. 41-43, Vol. 96.

Copies Sent
To Applicant
Fire Com'r.
Borough Com'r.

***CORRECTION**

This resolution adopted on November 20, 2012, under Calendar No. 151-12-A and printed in Volume 97, Bulletin Nos. 46-48, is hereby corrected to read as follows:

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APPLICANT – Christopher M. Slowik, Esq./Law Office of Stuart Klein, for Paul K. Isaacs, owner.

SUBJECT – Application May 9, 2012 –

Appeal challenging the Department of Buildings' determination that a roof antenna is not a permitted accessory use pursuant to ZR § 12-10. R8 zoning district.

PREMISES AFFECTED – 231 East 11th Street, north side of E. 11th Street, 215' west of the intersection of Second Avenue and E. 11th Street, Block 467, Lot 46, Borough of Manhattan.

COMMUNITY BOARD #3M

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown and Commissioner Hinkson…….4

Negative: Commissioner Montanez 1

THE RESOLUTION –

WHEREAS, this is an appeal of a Department of Buildings ("DOB") final determination dated April 10, 2012, issued by the First Deputy Commissioner (the "Final Determination"); and

WHEREAS, the Final Determination reads in pertinent part:

> The request to lift the Stop Work Order associated with application no. 120213081 to legalize a ham radio antenna above the existing 5 story residential building is hereby denied.
>
> As per ZR 22-21, radio or television towers, non-accessory, are permitted by special permit of the BSA.
>
> The proposed ham radio antenna, approximately 40 feet high, is not customarily found in connection with residential buildings and is therefore not an accessory use to the building; and

WHEREAS, the appeal was brought on behalf of the owner of 231 East 11th Street (hereinafter the "Appellant"); and

WHEREAS, a public hearing was held on this application on August 21, 2012 after due notice by publication in *The City Record*, with a continued hearing on October 16, 2012, and then to decision on November 20, 2012; and

WHEREAS, DOB appeared and made submissions in opposition to this appeal; and

WHEREAS, the premises and surrounding area had site and neighborhood examinations by Chair Srinivasan, Vice-Chair Collins, Commissioner Hinkson, Commissioner Montanez, and Commissioner Ottley-Brown; and

WHEREAS, the subject site is located on the north side of East 11th Street between Second Avenue and Third Avenue, within an R8B zoning district; and

WHEREAS, the site has approximately 25'-6" of frontage of East 11th Street, a depth of 100 feet, and a total lot area of 2,550 sq. ft.; and

WHEREAS, the site is occupied by a five-story residential building with a height of approximately 58'-0" (the "Building"); a radio tower with a height of approximately 40'-0" is located on the rooftop of the Building (the "Radio Tower"); and

PROCEDURAL HISTORY

WHEREAS, on November 2, 2009 DOB issued Notice of Violation No. 34805197M charging work without a permit for the Radio Tower contrary to Administrative Code Section 28-105.1; the violation was sustained by an Administrative Law Judge of the Environmental Control Board on October 26, 2010; and

WHEREAS, on or about November 30, 2009, the Appellant filed Job Application No. 120213081 for a permit to legalize the Radio Tower, and on September 30, 2010 DOB issued Permit No. 120213081-01-AL for the Radio Tower; and

WHEREAS, on or about December 16, 2010, DOB reexamined the application and determined that it was approved in error contrary to the Zoning Resolution and on January 13, 2011, DOB issued an Intent to Revoke Approval(s) and Permit(s), Order(s) to Stop Work Immediately letter with an objection that "Proposed antenna is not accessory to the function or principal use of the building"; on or about February 9, 2011, a stop work order was served upon the Appellant and the Radio Tower permit was revoked; and

WHEREAS, on July 12, 2011, DOB denied the Appellant's request to reinstate the permit and rescind the stop work order; the July 12, 2011 determination was renewed by DOB on April 10, 2012, and forms the basis of the Final Determination; and

RELEVANT ZONING RESOLUTION PROVISIONS

WHEREAS, the Appellant and DOB cite the following Zoning Resolution provisions, which read in pertinent part:

> ZR § 12-10 (Accessory Use, or accessory)
>
> An "accessory use":
>
> (a) is a #use# conducted on the same #zoning lot# as the principal #use# to which it is related (whether located within the same or an #accessory building or other structure#, or as an #accessory use# of land) . . .; and
>
> (b) is a #use# which is clearly incidental to, and customarily found in connection with, such principal #use#; and
>
> (c) is either in the same ownership as such principal #use#, or is operated and

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maintained on the same #zoning lot# substantially for the benefit or convenience of the owners, occupants, employees, customers, or visitors of the principal #use# . . .

An #accessory use# includes…

(16) #Accessory# radio or television towers…

* * *

ZR § 22-21 (By the Board of Standards and Appeals)

In the districts indicated, the following #uses# are permitted by special permit of the Board of Standards and Appeals, in accordance with standards set forth in Article VII, Chapter 3…

R1 R2 R3 R4 R5 R6 R7 R8 R9 R10

Radio or television towers, non-#accessory#...

* * *

ZR § 73-30 (Radio or Television Towers)

In all districts, the Board of Standards and Appeals may permit non-#accessory# radio or television towers, provided that it finds that the proposed location, design, and method of operation of such tower will not have a detrimental effect on the privacy, quiet, light and air of the neighborhood.

The Board may prescribe appropriate conditions and safeguards to minimize adverse effects on the character of the surrounding area; and

THE APPELLANT'S POSITION

WHEREAS, the Appellant makes the following primary arguments: (1) the Radio Tower meets the ZR § 12-10 definition of accessory use; and (2) the Zoning Resolution is preempted by federal law and regulation from precluding international communications, and to the extent DOB maintains the Radio Tower is impermissible due to its height, DOB's interpretation is subject to limited preemption because it has not "reasonably accommodated" the Appellant's needs; and

1. Accessory Use

WHEREAS, as to the definition of accessory use, the Appellant asserts that the proposed Radio Tower meets the criteria as it is: (a) located on the same zoning lot as the principal use (the residential building), (b) the Radio Tower use is incidental to and customarily found in connection with a residential building, and (c) the Radio Tower is in the same ownership as the principal use and is proposed for the benefit of the owner of the Building; and

WHEREAS, the Appellant notes that DOB acknowledges that the principal use of the site is as a residential building, and that the owner maintains a residence at the Building; and

WHEREAS, the Appellant states that the owner has been a licensed "ham" radio operator since 1957, and is in frequent contact with other amateur radio operators around the world; and

WHEREAS, the Appellant notes that the owner is an amateur radio operator (amateur radio license No. W2JGQ) and is not engaged in a commercial use of the Radio Tower; and

WHEREAS, the Appellant submitted a needs analysis prepared by an engineer which concludes that, based on the owner's desired use of the ham radio to engage in communication to Israel and the Middle East, "a significantly taller tower should be utilized to provide optimal coverage," however the proposed Radio Tower with a height of 40 feet "is an acceptable compromise adequate for moderate needs of the amateur radio operator when measured against commonly used engineering metrics;" and

WHEREAS, the Appellant cites to 7-11 Tours, Inc. v. Board of Zoning Appeals of Town of Smithtown, 454 N.Y.S.2d 477, 478 (2d Dept. 1982) for the following discussion of the definition of "accessory use":

> "[I]ncidental", when used to define an accessory use, must also incorporate the concept of reasonable relationship with the primary use. It is not enough that the use be subordinate; it must also be attendant or concomitant…The word "customarily" is even more difficult to apply. Courts have often held that the use of the word "customarily" places a duty on the board or court to determine whether it is usual to maintain the use in question in connection with the primary use. The use must be further scrutinized to determine whether it has commonly, habitually and by long practice been established as reasonably associated with the primary use; and

WHEREAS, the Appellant asserts that the owner's use of the Radio Tower is clearly that of a hobbyist engaged in an avocation from his own residence, and that the owner's hobby as an amateur ham radio operator is both "attendant to" and "commonly, habitually, and by long practice reasonably associated with" the primary use of the Building as a residence; and

WHEREAS, as to whether amateur radio antennas are customarily found in New York City, the Appellant notes that the FCC website lists the names of all amateur radio licensees in the country, and as of May 7, 2012 the site listed a total of 1,086 active amateur radio licensees in Manhattan, while at least 2,235 additional licensees are located in the other four boroughs of New York City; and

WHEREAS, the Appellant asserts that almost all of the licenses reflected on the FCC website are issued to natural persons who enjoy long distance amateur radio communications from their residences; thus, the outdoor radio antennas are commonly in use by radio amateurs in New York City to support international communications; and

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WHEREAS, in support of its position that ham radio antennas are customarily found in connection with residences, the Appellant cites to the Oxford English Dictionary definition of "customarily" as "in a way that follows customs or usual practices; usually"; and

WHEREAS, the Appellant contends that a use can be "customary" without being very common, such as swimming pools and tennis courts, which are undoubtedly "customarily" found as accessories to residences, regardless of the frequency with which they so appear; and

WHEREAS, the Appellant argues that it is clear that ham radio antennas are "usually" found as accessories to residences, in that when such antennas are found, they are found appurtenant to residences, and the fact that amateur radio towers may be a relatively rare use is irrelevant to the consideration of whether such use is accessory to a residence; and

WHEREAS, at the Board's request and to support its contention that ham radio antennas are "customarily found in connection with" a residence, the Appellant submitted a series of photographs depicting similar antennas maintained throughout New York City, which provides the borough, underlying zoning district, size, and use group of the residence to which the antenna is accessory, and where available and to the extent possible to obtain such information, it also provides the height of the antennas pictured; and

WHEREAS, specifically, the Appellant submitted photographs of nine other antennas found in Manhattan, the Bronx, Brooklyn, and Queens, which are associated with various types of buildings, from single-family homes to 19-story apartment buildings, and which are found in residential, commercial and manufacturing zoning districts; and

WHEREAS, the Appellant asserts that despite the diversity amongst the buildings depicted, they are all residences, and the ham radio antennas attached to each residence is an accessory use to the main use of the building as a residence; and

WHEREAS, the Appellant represents that the antennas pictured in the photograph array are comparable in size to the Radio Tower, and in some cases, larger than the Radio Tower; and

WHEREAS, the Appellant further represents that there are many more such antennas annexed to other residences throughout the City, however, given the time constraints of the Board's hearing process and the reluctance of some ham radio operators to expose themselves to possible enforcement action by DOB, the Appellant provided the aforementioned photographs as representative of the type of antenna systems found throughout the City; and

WHEREAS, the Appellant also submitted an array of 23 photographs of antennas from other jurisdictions, many of which are significantly taller than the subject Radio Tower with a height of 40 feet, which the Appellant argues reflects that the subject Radio Tower is modest in size and scope; and

WHEREAS, the Appellant also submitted a copy of a memorandum from then-DOB Commissioner Bernard J. Gillroy, dated November 22, 1955, on the subject of radio towers (the "1955 Memo"), which states that "[n]umerous radio towers have been erected throughout the city for amateur radio stations," and further states that such towers "may be accepted in residence districts as accessory to the dwelling;" and

WHEREAS, the Appellant contends that the 1955 Memo serves as evidence that amateur radio towers were numerous throughout New York City and DOB customarily found them as accessory to residences since at least 1955; and

2. Preemption

WHEREAS, the Appellant argues that the Zoning Resolution is preempted by federal law and regulation from precluding international communications, and to the extent DOB maintains the Radio Tower is impermissible due to its height, DOB's interpretation of the Zoning Resolution as it applies to the site is subject to limited preemption because DOB has not "reasonably accommodated" the owner's needs; and

WHEREAS, the Appellant states that federal laws and FCC regulations strongly favor the maintenance of ham radio equipment such as the Radio Tower, and pre-empt local ordinances which prohibit the maintenance of such equipment, either on their face or as applied; and

WHEREAS, specifically, the Appellant asserts that FCC Opinion and Order PRB-1, Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities, 101 FCC 2d 952, 50 Fed. Reg. 38813 (Sept. 25, 1985) ("PRB-1"), requires local authorities to reasonably accommodate amateur radio; and

WHEREAS, the Appellant notes that PRB-1 was codified as a regulation of the FCC at 47 CFR § 97.15(b)(2006), which states:

> Except as otherwise provided herein, a station antenna structure may be erected at heights and dimensions sufficient to accommodate amateur service communications. (State and local regulation of a station antenna structure must not preclude amateur service communications. Rather, it must reasonably accommodate such communications and must constitute the minimum practicable regulation to accomplish the state or local authority's legitimate purpose. See PRB-1, 101 FCC 2d 952 (1985) for details.); and

WHEREAS, the Appellant further notes that PRB-1 explains that antenna height is important to effective radio communications as follows:

> Because amateur station communications are only as effective as the antennas employed, antenna height restrictions directly affect the

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effectiveness of amateur communications. Some amateur antenna configurations require more substantial installations than others if they are to provide the amateur operator with

the communications that he/she desires to engage in…Nevertheless, local regulations which involve placement, screening, or height of antennas based on health, safety, or aesthetic considerations must be crafted to accommodate reasonably amateur communications, and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose; and

WHEREAS, the Appellant states that the needs analysis it submitted reflects that the proposed Radio Tower with a height of 40 feet is the minimum bulk necessary to accommodate the owner's desired communications; and

WHEREAS, accordingly, the Appellant argues that DOB's position that the Radio Tower is impermissible as an accessory use due to its height fails to reasonably accommodate the international amateur service communications that the owner desires to engage in, and therefore DOB's position is subject to the limited preemption of PRB-1 and 47 CFR § 97.15(b), and is preempted as applied; and

DOB'S POSITION

WHEREAS, DOB makes the following primary arguments in support of its revocation of the Permit for the Radio Tower: (1) the Radio Tower is not accessory to the principal residential use and therefore requires a special permit from the Board as a non-accessory radio tower; and (2) the Zoning Resolution provides a "reasonable accommodation" in accordance with federal law; and

WHEREAS, DOB asserts that pursuant to ZR § 22-21, in R8B zoning districts, "radio or television towers, non-accessory" are permitted only "by special permit of the Board of Standards and Appeals," and because no special permit has been issued for the Appellant's radio tower, it must satisfy the ZR § 12-10 definition of "accessory use"; and

WHEREAS, DOB contends that the Radio Tower does not satisfy the ZR § 12-10 definition of accessory use primarily because it does not satisfy the criteria that such a radio tower be "customarily found in connection with" the principal use of the site as a residence; and

WHEREAS, specifically, DOB argues that the proposed Radio Tower is significantly taller and more elaborate than the traditional accessory radio towers (or "aerials") that have been found atop residences for decades in New York City, which are typically used to receive remotely broadcast television and/or AM/FM signals for at-home private listening or viewing and are usually 12 feet or less in height and often affixed directly to chimneys or roof bulkheads; and

WHEREAS, DOB distinguishes traditional "aerials" with the proposed Radio Tower which extends 40 feet above the roof of the Building and must be secured to the roof at multiple points by one-half inch steel wires; and

WHEREAS, DOB further distinguishes the proposed Radio Tower because it functions differently than traditional aerials in that it both receives and transmits radio signals (as opposed to traditional aerials which merely receive radio signals) and is powerful enough to communicate with people living in South America and the Middle East; and

WHEREAS, accordingly, DOB considers the proposed Radio Tower to be categorically distinct from the aerials that are "customarily found in connection with" New York City residences, and argues that the plain text of the Zoning Resolution does not support its use as accessory to the principal use of the zoning lot as a residence; and

WHEREAS, DOB asserts that while the Appellant has cited a number of cases from other states that support the general notion that ham radio use may be permitted as accessory to a residence, the subject case is controlled by the Court of Appeals decision in Matter of New York Botanical Garden v. Board of Standards and Appeals of the City of New York, 91 N.Y.2d 413 (1998); and

WHEREAS, DOB notes that in Botanical Garden the Board agreed with DOB's determination that a 480-ft. radio tower on the campus of Fordham University adjacent to the New York Botanical Garden was a permitted accessory use for an educational institution that operated a radio station, finding that the radio tower was clearly incidental to and customarily found in connection with an educational institution; and

WHEREAS, DOB states that, in upholding the Board's determination, the Court of Appeals explained that there was "more than adequate evidence to support the conclusion that [the operation of a 50,000 watt radio station with a 480-ft. radio tower] is customarily found in connection with a college or university" and articulated the following standard for determining whether a use is accessory under the Zoning Resolution:

> [w]hether a proposed accessory use is clearly incidental to and customarily found in connection with the principal use depends on an analysis of the nature and character of the principal use of the land in question in relation to the accessory use, taking into consideration the over-all character of the particular area in question. Botanical Garden, 91 N.Y.2d at 420; and

WHEREAS, DOB notes that the Court also stressed that the accessory use analysis is fact-based and that "[t]he issue before the [Board] was: is a station of this particular size and power, with a 480-foot tower, customarily found on a college campus or is there something inherently different in this radio station and

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tower that would justify treating it differently" Botanical Garden, 91 N.Y.2d at 421; and

WHEREAS, DOB argues that, based on the standard set forth in Botanical Garden, the proposed Radio Tower is not permitted as accessory to the Building; and

WHEREAS, specifically, DOB asserts that the Radio Tower is incompatible with the principal use and the surrounding area, in that it adds an additional 40 feet of height to the Building and its supporting wires and structures, which are permanently affixed, occupy a substantial portion of the roof; thus, when measured by its size in relation to the Building, the Radio Tower is not clearly incidental; and

WHEREAS, DOB further asserts that the Radio Tower is out of context with the subject residential neighborhood, as it is located on an interior lot situated mid-block in a contextual, medium-density residential district on a narrow street of a quintessential East Village block on which no other buildings have aerials approaching the size and complexity of the proposed Radio Tower; and

WHEREAS, DOB argues that, even if the proposed Radio Tower were considered "clearly incidental" to the residential building, the Appellant has also not demonstrated that the Radio Tower of this size and power is "customarily found in connection with" New York City residences; and

WHEREAS, as to the photographs and evidence submitted by the Appellant of other radio towers within New York City, DOB asserts that they do not constitute sufficient evidence to establish that a rooftop radio tower with a height of 40 feet is customarily found in connection with the principal use of a residential building located in an R8B zoning district; and

WHEREAS, specifically, DOB states that of the nine photographs provided by the Appellant, five photographs show rooftop radio towers which are not comparable to the subject Radio Tower because they are located on buildings which are 11 to 19 stories tall, and none of which appear to be close to the height of the residential building below the tower; and

WHEREAS, DOB further states that of the remaining four photographs that show radio towers that are located on or near buildings less than 11 stories, only one is located on the roof of a building and that radio tower appears to be approximately half the height of the two-story dwelling; the other three photographs do not appear to show radio towers located on the roofs of the buildings, and the only one of those three that appears to be more than 40 feet in height is a stand-alone radio tower with a height of 80 feet associated with a two-story residential building, and DOB represents that it would not consider such a radio tower to be an accessory use; and

WHEREAS, DOB contends that in order for the subject Radio Tower to satisfy the "customarily found in connection with" criteria, it is not sufficient to provide evidence of other radio towers with similar heights as the subject Radio Tower; rather, the Appellant would have to provide evidence that it is customary to have a radio tower with a height of 40 feet on the rooftop of a four-story building of similar height as the Building, within an R8B zoning district; and

WHEREAS, accordingly, DOB asserts that the evidence submitted by the Appellant is insufficient to establish that a rooftop radio tower with a height of 40 feet located on a four-story residential building in an R8B zoning district is customary, and therefore it does not meet the ZR § 12-10 definition of accessory use; and

WHEREAS, DOB argues that the evidence submitted by the Appellant reflects a similarity between the facts in the subject case and those of BSA Cal. No. 14-11-A (1221 East 22nd Street, Brooklyn), which involved a challenge to DOB's denial of a permit for an accessory cellar that was nearly as large as the single-family residence to which it was to be appurtenant; and

WHEREAS, DOB asserts that the Board affirmed DOB's denial in that case, in part, because the appellant failed to demonstrate that such oversized, non-habitable cellars were customarily found in connection with residences, and that in the subject case the Appellant's evidence similarly fails to demonstrate that a rooftop radio tower with a height of 40 feet is customarily found on a four-story residential building; and

WHEREAS, by letter dated November 8, 2012, the Department of City Planning ("DCP") states that it expresses no opinion regarding the merits of the subject case but requests that the Board take the height of the antenna into account in determining whether it is accessory, as it did in BSA Cal. No. 14-11-A, because the size of a use can be relevant to whether it is "incidental to" and "customarily found in connection with" a principal use; and

WHEREAS, as to the 1955 Memo submitted by the Appellant, DOB asserts that the 1955 Memo merely deals with the permitting safety requirements, and specifications for the construction of radio towers, and does not indicate that radio towers are necessarily accessory uses to residences; and

WHEREAS, DOB acknowledges that the Zoning Resolution is clear that some radio towers are accessory, however it is also clear that some radio towers are not accessory, and the 1955 Memo does not state which type of radio towers could be considered accessory or non-accessory; and

WHEREAS, in response to the Appellant's preemption argument, DOB contends that the Zoning Resolution does provide a "reasonable accommodation" in accordance with federal law; and

WHEREAS, DOB asserts that PRB-1 is a declaratory ruling issued by the FCC requiring that "local regulations which involve placement, screening, or height of antennas based on health, safety, or aesthetic

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considerations must be crafted to accommodate reasonably amateur communications;" and

WHEREAS, DOB contends that its interpretation of the Zoning Resolution to prohibit the proposed radio tower as accessory to the subject residence as-of-right was proper and consistent with PRB-1, and that it has reviewed the proposal at the highest level and determined that it had no authority to allow the radio tower because a special permit is required pursuant to ZR §§ 22-21 and 73-30; and

WHEREAS, DOB further contends that ZR § 73-30, which authorizes the radio tower by special permit, contemplates the sort of fact-finding and analysis required by PRB-1; accordingly the Zoning Resolution as interpreted by DOB is consistent with the FCC's "reasonable accommodation" requirement; and

THE APPELLANT'S RESPONSE

WHEREAS, in response to the arguments set forth by DOB, the Appellant asserts that DOB's reliance on Botanical Garden and BSA Cal. No. 14-11-A are misplaced; and

WHEREAS, as to Botanical Garden, the Appellant first notes that that case involved a radio tower that was accessory to an educational institution rather than an amateur radio tower that is accessory to a residence, and that to the extent that case is comparable to the subject case, a clear reading shows that it actually supports the Appellant's position; and

WHEREAS, at the outset, the Appellant states that in Botanical Garden, DOB, the Board, the Supreme Court, the Appellate Division, and the Court of Appeals all found that the Fordham antenna was an accessory use, using arguments similar to those advanced by the Appellant; and

WHEREAS, the Appellant notes that, in upholding the lower courts in Botanical Garden, the Court of Appeals rejected the appellant's contention that it is not customary for universities to maintain radio towers of such height, stating that "[t]his argument ignores the fact that the Zoning Resolution classification of accessory uses is based upon functional rather than structural specifics." Botanical Garden, 91 N.Y.2d at 421; and

WHEREAS, the Appellant contends that Botanical Garden therefore reflects that DOB's contention that the Radio Tower is not an accessory use because of its size conflates use regulation and bulk regulation in a way that is not contemplated by the Zoning Resolution; and

WHEREAS, the Appellant asserts that Botanical Garden also supports its position that the Radio Tower is an accessory use because it is "customarily found in connection with" the principal use, as the Court of Appeals observed:

> The specifics of the proper placement of the station's antenna, particularly the height at which it must be placed, are dependent on site-specific factors such as the surrounding geography, building density and signal strength. This necessarily means that the placement of antennas will vary widely from one radio station to another. Thus, the fact that this specific tower may be somewhat different does not render the Board's determination unsupported as a matter of law, since the use itself (i.e., radio operations of this particular size and scope) is one customarily found in connection with an educational institution. Moreover, Fordham did introduce evidence that a significant number of other radio stations affiliated with educational institutions in this country utilize broadcast towers similar in size to the one it proposes. Botanical Garden, 91 N.Y.2d at 422; and

WHEREAS, finally, the Appellant notes that in Botanical Garden the Court of Appeals recognized that, unlike other examples of accessory uses listed in ZR § 12-10, there is no height restriction associated with accessory radio towers and that it would be inappropriate for DOB to arbitrarily restrict the height of such radio towers, as the Court stated that:

> Accepting the Botanical Garden's argument would result in the judicial enactment of a new restriction on accessory uses not found in the Zoning Resolution. Zoning Resolution § 12-10 (accessory use) (q) specifically lists "[a]ccessory radio or television towers" as examples of permissible accessory uses (provided, of course that they comply with the requirements of Zoning Resolution § 12-10 [accessory use] [a], [b] and[c]). Notably, no height restriction is included in this example of a permissible accessory use. By contrast, other examples of accessory uses contain specific size restrictions. For instance, Zoning Resolution § 12-10 defines a "home occupation" as an accessory use which "[o]ccupies not more than 25 percent of the total floor area and in no even more than 500 square feet of floor area" (§ 12-10 [accessory use][b][2]). The fact that the definition of accessory radio towers contains no such size restrictions supports the conclusion that the size and scope of these structures must be based upon an individualized assessment of need. Botanical Garden, 91 N.Y.2d at 422-23; and

WHEREAS, accordingly, the Appellant asserts that Botanical Garden reflects that there is no "bright line" height restriction in the Zoning Resolution beyond which an accessory antenna becomes non-accessory, and since there is no law, rule, or regulation which permits DOB to deem the Radio Tower non-accessory on the grounds of its purportedly excessive height, DOB thus makes an error of law in trying to forbid the Appellant's

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maintenance of the Radio Tower as non-accessory in the absence of a guiding statute; and

WHEREAS, the Appellant contends that DOB's reliance on BSA Cal. No. 14-11-A to support the position that size of a use can be relevant to whether it is "incidental to" and "customarily found in connection with" a principal use is similarly misguided; and

WHEREAS, specifically, the Appellant notes that in that case, in a discussion of the Botanical Garden case, the Board expressly rejected the use of size as a criterion in evaluating whether radio antennas are accessory uses, noting that "size can be a rational and consistent form of establishing the accessory nature of certain uses such as home occupations, caretaker's apartments, and convenience stores on sites with automotive use, but may not be relevant for other uses like radio towers…"; and

WHEREAS, the Appellant also distinguishes BSA Cal. No. 14-11-A from the subject case in that in the former there was an attempt to promulgate and follow universally applicable standards for determining accessory use in cellars, while in the subject case DOB's determination is limited to this single antenna and not based on any articulated standard; and

WHEREAS, finally, the Appellant argues that BSA Cal. No. 14-11-A is only implicated if it is conceded that the Radio Tower is somehow "too big" for the Building; however, the Appellant asserts that the Radio Tower is in no way "too big" for the site, as it is a standard-sized, if not smaller than standard-sized, amateur radio antenna chosen specifically for the types of communications that the amateur operator desires to engage in, the intended distance of communications, and the frequency band; and

WHEREAS, the Appellant also refutes DOB's contention that, because the Radio Tower both receives and transmits signals (as opposed to merely receiving signals) the subject Radio Tower is somehow not an accessory use; and

WHEREAS, the Appellant asserts that there is absolutely no support in any statute for this proposition, and the Zoning Resolution does not treat antennas differently depending on whether or not they transmit; and

CONCLUSION

WHEREAS, the Board has determined that the subject Radio Tower satisfies the ZR § 12-10 definition of an accessory use to the subject four-story residential building, such that the maintenance of the Radio Tower at the site does not require a special permit from the Board under ZR § 73-30; and

WHEREAS, specifically, the Board finds that the Radio Tower meets the criteria of an accessory use to the residence because it is: (a) located on the same zoning lot as the principal use (the residential building), (b) the Radio Tower use is clearly incidental to and customarily found in connection with a residential building, and (c) the Radio Tower is in the same ownership as the principal use and is proposed for the benefit of the owner of the Building; and

WHEREAS, the Board agrees with the Appellant that the owner's hobby as an amateur ham radio operator is clearly incidental to the principal use of the site as a residence, and is not persuaded by DOB's argument that the Radio Tower is not clearly incidental to the Building merely because the height of the Radio Tower (40 feet) is comparable to that of the Building (58 feet); and

WHEREAS, the Board finds that the Appellant has submitted sufficient evidence reflecting that, when amateur radio antennas are found, they are customarily found appurtenant to residences, and agrees with the Appellant that the fact that amateur radio antennas are not a common accessory use is not dispositive as to whether or not such use is accessory to a residential building; and

WHEREAS, as to DOB's contention that the subject Radio Tower does not qualify as an accessory use because it functions differently than traditional aerials in that it both receives and transmits radio signals (as opposed to traditional aerials which merely receive radio signals), the Board agrees with the Appellant that the fact that the Radio Tower transmits radio signals is of no import as to whether or not it qualifies as an accessory use; and

WHEREAS, the Board notes that DOB has acknowledged that amateur ham radio antennas can qualify as accessory uses, and since all ham radio operators by definition both receive and transmit radio signals, it appears that DOB has accepted certain amateur radio towers which both receive and transmit radio signals as accessory uses; and

WHEREAS, as to DOB's contention that the subject Radio Tower does not qualify as an accessory use because it is significantly taller and more elaborate than traditional accessory radio towers, the Board finds that the Appellant has submitted sufficient evidence to establish that radio towers similar to the subject Radio Tower are customarily found in connection with residential buildings in New York City; and

WHEREAS, specifically, the Appellant submitted photographs of nine other ham radio towers maintained throughout the City, and the Board notes that several of the photographs depict radio towers similar in size to the subject Radio Tower; and

WHEREAS, the Board further notes that the Appellant was able to ascertain the height of five of the radio towers for which it submitted photographs, which include: (1) a radio tower with a height of approximately 40 feet located on the rooftop of an 11-story residential building with ground floor commercial use within an M1-5M zoning district in Manhattan; (2) a radio tower with a height of approximately 50 feet located on the rooftop of a 13-story residential building with ground floor commercial use within an R10-A zoning district in Manhattan; (3) a radio tower with a height of approximately 28 feet located on the rooftop of a nine-

151-12-A story residential building within an R8B zoning district in Manhattan; (4) a radio tower with a height of approximately 80 feet located in the backyard of a two-story residential building within an R4-1 zoning district in Brooklyn; and (5) a radio tower with a height of 15 feet located on the rooftop of a two-story residential building within an R2A zoning district in Queens; and

WHEREAS, the Board considers the photographs submitted by the Appellant to be a representative sample of the amateur ham radio antennas maintained by the approximately 3,321 licensed ham radio operators located throughout the City, and finds that the photographs submitted to the Board, in particular those of the rooftop radio towers in Manhattan with heights of 40 feet and 50 feet, respectively, serve as evidence that radio towers similar in height to the subject Radio Tower with a height of 40 feet are customarily found in connection with residential buildings in the City; and

WHEREAS, the Board is not convinced by DOB's argument that these radio towers cannot be relied upon as evidence that radio towers similar in size to the subject Radio Tower are customarily found in connection with residential buildings merely because they are located on taller buildings than the subject Building; and

WHEREAS, the Board does not find the height of the building upon which a radio tower is to be located to be the controlling factor as to whether or not that radio tower is deemed to be an accessory use; and

WHEREAS, as to DOB's contention that the subject case is controlled and consistent with Botanical Garden, the Board acknowledges that the case reflects that it is appropriate to take the overall character of the particular area into consideration when determining whether an accessory use is clearly incidental to and customarily found in connection with the principal use, however, the Board agrees with the Appellant that the facts of the case actually weigh in favor of the Appellant's position; and

WHEREAS, in particular, the Board notes that DOB is requesting that the Board rely on Botanical Garden to support the position that the subject Radio Tower is not an accessory use, despite the fact that the ultimate holding in Botanical Garden was that the radio tower in question qualified as an accessory use based on similar arguments advanced by the Appellant in the subject case; and

WHEREAS, the Board agrees with the Appellant that the Court's determination that "the Zoning Resolution classification of accessory uses is based upon functional rather than structural specifics" Botanical Garden, 91 N.Y.2d at 421, and "[t]he fact that the definition of accessory radio towers contains no such size restrictions supports the conclusion that the size and scope of these structures must be based upon an individualized assessment of need" Botanical Garden, 91 N.Y.2d at 422-23, weighs in favor of the Radio Tower as an accessory use, as the Appellant submitted a needs analysis which reflects that the antenna height of 40 feet is based upon an individualized assessment of the owner's needs to communicate with Israel and the Middle East and is the minimum necessary height required for the ham radio tower to function properly in communicating with these areas of the world; and

WHEREAS, the Board also does not find support in Botanical Garden for DOB's contention that the Radio Tower is non-accessory merely because there are no similarly-sized radio towers located on similarly-sized buildings in the immediately surrounding block, as in that case Fordham was the only university in the surrounding area and the Court supported the Board's consideration of the custom and usage of other universities which were not located near the site in reaching its determination that such radio antennas were customarily found as accessory uses to universities; and

WHEREAS, accordingly, the Board notes that while Botanical Garden set forth a standard that the overall character of the area should be taken into consideration in the accessory use analysis, the facts of that case itself reflect that such a standard does not require that there be an identical radio tower accessory to an identical building in the immediately surrounding area, as DOB appears to be requiring in the instant case; and

WHEREAS, the Board agrees with the Appellant that the fact that no other buildings on the immediate block have similar radio towers is not dispositive of whether the subject Radio Tower is an accessory use, and finds that the Appellant has submitted evidence that rooftop radio towers with heights of 40 feet are "customarily found in connection with" residential buildings in New York City; and

WHEREAS, as to BSA Cal. No. 14-11-A, the Board agrees with the Appellant that that case is also distinguishable from the subject case, as it was based on significantly different facts and in its decision the Board specifically noted that "size can be a rational and consistent form of establishing the accessory nature of certain uses such as home occupations, caretaker's apartments, and convenience stores on sites with automotive use, but may not be relevant for other uses like radio towers…"; and

WHEREAS, the Board further agrees with the Appellant that, unlike the subject case, BSA Cal. No. 14-11-A involved DOB's attempt to promulgate and follow a universally applicable standard for determining whether a cellar was an accessory use, which has since been memorialized in Buildings Bulletin 2012-008; and

WHEREAS, specifically, the Board notes that in BSA Cal. No. 14-11-A, DOB sought to apply a single objective standard to all cellars in every zoning district, while in the subject case DOB is proposing to make a case-by-case analysis of each amateur ham radio tower that is constructed in the City and make a discretionary determination as to whether it is accessory based upon

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factors such as the height of the radio tower, the height of the associated building, the prevalence of similar radio towers on similar buildings in the immediately surrounding area, the character of the surrounding area, and other subjective criteria; and

WHEREAS, the Board agrees with the Appellant that DOB has provided no provision of the Zoning Resolution or any other law, rule, or regulation which sets forth a standard for finding the subject Radio Tower non-accessory solely based upon its height; and

WHEREAS, the Board considers the lack of an objective standard for determining whether an amateur ham radio tower of a given height is accessory to be problematic and prone to arbitrary results, and while the Board does not make a determination as to whether amateur ham radio towers of any height may qualify as accessory, it recognizes that establishing a bright line standard for the permissible height of accessory radio towers may require an amendment to the Zoning Resolution or the promulgation of a Buildings Bulletin, as was the case in BSA Cal. No. 14-11-A; and

WHEREAS, the Board agrees with DCP that the size of a use can be relevant to whether it is "incidental to" and "customarily found in connection with" a principal use; however, it finds that in the case of amateur radio towers, unlike cellars and certain other uses, there is no articulated standard to guide DOB in determining at what height a particular radio tower becomes non-accessory; and

WHEREAS, as to the Appellant's argument that in not accepting the Radio Tower as an accessory use DOB has failed to "reasonably accommodate" the owner's needs contrary to federal laws and regulations, the Board recognizes that federal laws and FCC regulations favor the maintenance of ham radio equipment such as the Radio Tower and pre-empt local ordinances which prohibit the maintenance of such equipment; and

WHEREAS, however, because the Board has determined that the subject Radio Tower satisfies the ZR § 12-10 definition of accessory use, the Board deems it unnecessary to make a determination on the preemption issue in order to reach a decision on the merits of the subject appeal; therefore, the Board finds it appropriate to limit the scope of its determination accordingly; and

WHEREAS, the Board concludes that, based upon the above, the Radio Tower satisfies the ZR §12-10 criteria for an accessory use to the subject residential building.

Therefore it is Resolved that the subject appeal, seeking a reversal of the Final Determination of the Manhattan Borough Commissioner, dated April 10, 2012, is hereby granted.

Adopted by the Board of Standards and Appeals, November 20, 2012.

***The resolution has been revised to correct the amateur radio license No. which read "*WTJGQ*" now reads "*W2JGQ*". Corrected in Bulletin Nos. 1-2, Vol. 98, dated January 16, 2013.**

A true copy of resolution adopted by the Board of Standards and Appeals, November 20, 2012.
Printed in Bulletin Nos. 46-48, Vol. 97.
Copies Sent
To Applicant
Fire Com'r.
Borough Com'r.

136-08-A
APPLICANT – John Beckmann.
OWNER: Pauline & Gus Englezos.
SUBJECT – Application May 2, 2008 – An appeal seeking to revoke a permit that allows off- street parking in the front yard of an attached dwelling contrary to §25-621. R4-1 Zoning District.
PREMISES AFFECTED – 846 70th Street, between 8th Avenue and Fort Hamilton Parkway, Block 5896, Lot 25, Borough of Brooklyn.
COMMUNITY BOARD #10BK
APPEARANCES –
For Applicant: John Beckmann.
ACTION OF THE BOARD – Appeal denied.
THE VOTE TO GRANT –
Affirmative: Commissioner Hinkson and Commissioner Montanez 2
Negative: Chair Srinivasan, Vice Chair Collins and Commissioner Ottley-Brown.....3
THE RESOLUTION:[1]

WHEREAS, the instant appeal comes before the Board in response to a determination of the Brooklyn Borough Commissioner, dated April 3, 2008, to uphold the approval of an Alteration Type 3 permit (310077092) for the installation of a new curb cut, made in conjunction with an Alteration Type 2 permit issued for renovation of the subject premises; and

WHEREAS, the Final Determination reads, in pertinent part:

> "This is in response to your letter dated March 25, 2008 and its attachments regarding allowable off-street parking in a side lot ribbon in R4-1 zoning district.
> "Off-street parking is a permitted obstruction within front yards where no more than two parking spaces are required, provided such yards are located within a permitted side lot ribbon.
> "[T]he side lot ribbon is that contiguous area that extends along the entire length of a side lot line from the street line to an intersecting rear lot line.
> "[O]ff-street parking in a residential building located in R4-1, where no more than two parking spaces are required, is permitted within any portion of the side lot ribbon, regardless of the location of this portion whether in the front, side or rear yard.
> "[T]he Zoning Resolution as written does not put any distinction between detached, semi-detached and attached residential buildings in regard to off-street parking as long as located in the locations described as per ZR 25-621(a)(1).
> "The approval of the parking location as filed under application #310077092 complies with the zoning requirements. Any appeal of this decision shall be filed with the Board of Standards and Appeals."

WHEREAS, a public hearing was held on this appeal on September 24, 2008, after due notice by publication in the *City Record*, and then to decision on October 28, 2008; and

WHEREAS, the premises and surrounding area had site and neighborhood examinations by Chair Srinivasan, Vice-Chair Collins, Commissioner Hinkson, and Commissioner Montanez; and

PARTIES AND SUBMITTED TESTIMONY

WHEREAS, this appeal is brought by the owner of 852 70th Street (the "appellant"), a neighbor to the subject premises; and

WHEREAS, the appellant and the Department of Buildings ("DOB") have been represented by counsel throughout this proceeding; and

WHEREAS, Community Board 10, Brooklyn, recommends approval of this appeal; and

WHEREAS, Councilmember Vincent J. Gentile provided written and oral testimony in support of this appeal; and

WHEREAS, State Senator Martin J. Golden also provided testimony in support of this appeal; and

WHEREAS, representatives of the United Neighborhood Association of Fort Hamilton Parkway and the Bay Ridge Conservancy also provided written and oral testimony in support of this appeal; and

WHEREAS, the owner of 846 70th Street (the "owner") testified at hearing in opposition to this appeal; and

PROCEDURAL HISTORY

WHEREAS, the instant appeal concerns the installation of a ten foot curb cut for parking in the front yard of an attached home; and

WHEREAS, on January 9, 2008, DOB issued an Alteration Type 3 Permit No. 310077092 for the installation of a ten foot curb cut, made in conjunction with an Alteration Type 2 permit issued for renovation of the subject premises; and

WHEREAS, on March 25, 2008, Community Board 10, Brooklyn, wrote the Brooklyn Borough Commissioner requesting reconsideration of DOB's approval; and

WHEREAS, on April 3, 2008, the Brooklyn Borough Commissioner issued the Final Determination, cited above, that forms the basis of the instant appeal; and

WHEREAS, on May 2, 2008, the appellant filed the instant appeal at the BSA; and

THE SITE

WHEREAS, the subject site consists of a two-story attached home on the south side of 70th Street, between 8th Avenue and Fort Hamilton Parkway; and

1 Headings are utilized only in the interests of clarity and organization.

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WHEREAS, the subject site is located in an R4-1 zoning district; and

WHEREAS, the owner proposes to install a new ten foot curb cut for parking in the portion of the front yard adjoining the neighboring property; and

WHEREAS, the subject site is part of a continuous grouping of 19 uniform attached rowhouses located on the 800 block of 70th Street; and

PROVISIONS OF THE ZONING RESOLUTION RELEVANT TO THIS APPEAL

WHEREAS, in pertinent part, the following provisions of the Zoning Resolution are cited herein:

Z.R. § 25-621 ("Location of Parking Spaces in Certain Districts") sets forth the locations where off-street parking is permitted in certain residential zoning districts; and

Z.R. § 25-621(a)(1) applies to R2X, R3, R4, and R5 zoning districts, and provides, "[i]n the districts indicated, except R4B or R5B Districts, accessory off-street parking spaces shall be permitted only in the side lot ribbon, within a building or in any open area on the zoning lot which is not between the street line and street wall or prolongation thereof of the building. Access to the accessory spaces through a front setback area or required front yard shall be only through the side lot ribbon;"

Z.R. § 25-621(a)(3) applies to R4B, R5B, R6B, R7B, and R8B zoning districts, and provides that, "[i]n the districts indicated, accessory off-street parking spaces shall be located only within a building, or in any opens area on the zoning lot which is not between the street line and the street wall of the building or its prolongation. Access to such parking spaces shall be provided only through the side lot ribbon or through the rear yard; and

Z.R. § 12-10 ("Definitions"), defines a 'side lot ribbon' as "that portion of the zoning lot that is contiguous to, and extends along the entire length of, a side lot line from the street line to an intersecting rear lot line, side lot line or other street line;" and

Z.R. § 23-44(a)(1) ("Permitted Obstructions in Required Yards or Rear Yard Equivalents") provides that "[p]arking spaces, off-street, open, within a front yard are accessory to a residential building" in R2X, R3, R4 and R5 Districts . . ., provided such spaces are located in a permitted side lot ribbon;

"However, no such parking spaces shall be permitted in any front yard within a R4B or R5B District, and no such required spaces shall be permitted in any front yard within any R1, R2, R3, R4A or R4-1 District within a lower density growth management area;" and

Z.R. § 12-01 ("Rules Applying to Text of Resolution") provides:

"(b) In case of any difference of meaning or implication between the text of this Resolution and any caption, illustration, summary table or illustrative table, the text shall control.

"(c) The word 'shall' is always mandatory and not discretionary. The word 'may' is permissive.

"(h) Unless the context clearly indicates the contrary, where a regulation involves two or more items, conditions, provisions, or events connected by the conjunction 'and,' 'or,' or 'either…or,' the conjunction shall be interpreted as follows:

(1) 'and' indicates that all the connected items, conditions, provisions or events shall apply;
(2) 'or' indicates that the connected items, conditions, provisions or events may apply singly or in any combination; and
(3) 'either…or' indicates that the connected items, conditions, provisions or events shall apply singly but not in any combination;" and

ISSUES PRESENTED

WHEREAS, the appellant makes the following primary arguments in support of its position that DOB should revoke the permit for the subject site: (i) the Zoning Resolution expressly prohibits parking in the front yard of an attached home; and in the alternative, (ii) the text of the Zoning Resolution is ambiguous and therefore the Board must look to legislative intent, which is contrary to DOB's interpretation that parking is permitted in the front yard of an attached home; and

WHEREAS, these two arguments are addressed below; and

Challenged Parking is Expressly Prohibited by the Zoning Resolution

WHEREAS, the appellant argues that Z.R. §§ 25-621(a) and 12-10 expressly prohibit parking in the front yard of attached homes; and

WHEREAS, Z.R. § 25-621(a) provides that "off-street parking spaces shall be permitted only in the side lot ribbon, within a building or in any open area on the zoning lot which is not between the street line and street wall or prolongation thereof of the building;" and

WHEREAS, the appellant contends that Z.R. § 25-621(a) expressly prohibits parking in any portion of the front yard of an attached home because the challenged parking is within an open area between the street line and the "prolongation thereof of the building;" and

WHEREAS, the appellant elaborates that Z.R. § 25-621(a) expressly prohibits parking in any portion of the front yard of an attached home because the phrase "prolongation thereof of the building" refers to a building

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that extends the length of a zoning lot, such as an attached home; and

WHEREAS, the appellant also contends that Z.R. § 25-621(a) prohibits front yard parking for attached houses because the restriction on parking between "the street line and street wall or prolongation thereof of the building" restricts parking in the side lot ribbon of the front yard as well; and

WHEREAS, DOB argues, and the Board agrees, that Z.R. § 25-621(a) does not distinguish between detached, semi-detached, and attached houses in regard to front yard parking, provided that such parking is within a side lot ribbon or within a building; and

WHEREAS, further DOB argues, and the Board agrees, that the text of Z.R. § 25-621(a) imposes no limitation on where parking may be located in a side lot ribbon and because the word "or" separates the areas where off-street parking is permitted, it is clear that each area specified in the statute represents a separate location where parking is allowed; thus, parking is allowed anywhere in the side lot ribbon; and

WHEREAS, the Board also notes that, at hearing, DOB submitted a memorandum by the Department of City Planning (the "DCP Memo") stating that Z.R. § 25-621(a) permits parking within the portion of the side lot ribbon that traverses a front yard, despite the overlap of the "side lot ribbon" and the open area "between the street line and street wall or prolongation thereof of the building," and

WHEREAS, the appellant further contends that parking is not permitted within the side lot ribbon of an attached home because, pursuant to Z.R. § 12-10, side lot ribbons do not exist on lots with attached homes; and

WHEREAS, Z.R. § 12-10 defines a side lot ribbon as "that portion of the zoning lot that is contiguous to, and extends along the entire length of, a side lot line from the street line to an intersecting rear lot line, side lot line or other street line;" and

WHEREAS, the appellant contends that side lot ribbons do not exist on lots with attached houses because the definition of 'side lot ribbon' in Z.R. § 12-10 contemplates a side yard that is completely open to the sky from the street line to an intersecting rear lot line, and which serves as a through space to an accessory parking space in the rear of the lot; and

WHEREAS, DOB argues, and the Board agrees, that the text of Z.R. § 12-10 does not state that a side lot ribbon must be open to the sky, and does not indicate that a side lot ribbon can only exist on a lot with a side yard; and

WHEREAS, DOB states, and the Board agrees, that the definition of "side lot ribbon" in Z.R. § 12-10 allows parking "along the entire length of a side lot line," even if there is an attached home on the lot; and

WHEREAS, the Board notes that the DCP Memo states that Z.R. § 12-10 does not require that a side lot ribbon be continuously developed as a driveway extending from the street line to the rear lot line, or that the area be continuously open to the sky; and

WHEREAS, the Board notes that, in contrast to its definition of a "side lot ribbon," Z.R. § 12-10 defines a "yard" as "that portion of a zoning lot extending open and unobstructed from the lowest level to the sky along the entire length of a lot line"; and

WHEREAS, the Board therefore concludes that the appellant is apparently urging the Board to interpret the definition of a "side lot ribbon" as coextensive with that of a "side yard," despite the fact that Z.R. § 12-10 specifically requires a side yard to be "unobstructed from the lowest level to the sky," while the definition of a side lot ribbon lacks such language; and

WHEREAS, the Board cannot expand the definition of a side lot ribbon to require it to be unobstructed, because a statute cannot be extended by construction beyond its express terms or reasonable implications to its language (see Statutes § 94 (N.Y. Cons. L. 2008)); and

WHEREAS, therefore, a finding that a side lot ribbon must be open to the sky cannot be imputed, absent specific language in the Zoning Resolution providing so; and

WHEREAS, the appellant argues that the text of Z.R. § 25-621(a) restricting parking between "the street line and street wall or prolongation thereof of the building" also restricts parking in the side lot ribbon of the front yard; and

WHEREAS, Z.R. § 25-621(a) provides that off-street parking is permitted in "the side lot ribbon, within a building *or* in any open area on the zoning lot not between the street line and street wall" (emphasis added); and

WHEREAS, the appellant claims that pursuant to Z.R. § 12-01(h)(2), the "or" in in Z.R. § 25-621(a) requires the three types of areas where parking is permitted to be read in combination; and

WHEREAS, therefore, the appellant argues that parking is not permitted within a side lot ribbon if it's in an open area between the street line and street wall;

WHEREAS, the Board however notes that the provision describes three discrete types of areas where parking is permitted, because the word "or" indicates that the connected items "may apply singly or in any combination," pursuant to Z.R. § 12-01(h); and

WHEREAS, the Board further notes that under the Rules for Construction of Language in the Zoning Resolution, the word "shall" is always mandatory, while the word "may" is permissive; (see Z.R. § 12-01(c)) and that, unless the context clearly indicates the contrary, where a regulation involves two or more items connected by the word "and," it indicates that all the connected items shall apply, but if the items are connected by the

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word "or," the connected items "may apply singly or in any combination" (see Z.R. § 12-01(h)); and

WHEREAS, the Board observes that the use of the word "or" rather than "and" in the cited portion of Z.R. § 25-621(a) indicates that the application of the connected items is permissive and not mandatory and therefore that parking is permitted in a side lot ribbon and does not need to be read in combination with or be restricted by an open area which is not between the street line and the street wall; and

WHEREAS, the Board concludes Z.R. § 25-621(a) restricts parking between the "street line and street wall or prolongation thereof of the building" within the area of the front yard that is not within the side lot ribbon; and

WHEREAS, the Board notes that the Zoning Resolution Rules of Construction codified in ZR § 12-10 support a finding that the language of Z.R. § 25-621(a) is clear and unambiguous; and

WHEREAS, the appellant has failed to offer a convincing rationale to read Z.R. § 25-621(a) in a way that is contrary to the plain meaning of the text; and

WHEREAS, further, under New York law, where statutory language is clear and unambiguous, it must be construed according to the plain meaning of the words used," Patrolmen's Benevolent Assn. v. City of New York, 41 N.Y. 2d 205 (1976); and

WHEREAS, the Board therefore rejects the appellant's argument that the text of Z.R. § 25-621(a) restricting parking between "the street line and street wall or prolongation thereof of the building" should be interpreted to also restrict parking in the side lot ribbon of the front yard; and

WHEREAS, DOB additionally contends that parking within the front yard of an attached home is permitted because it is a permitted obstruction in an R4-1 zoning district pursuant to Z.R. § 23-44(a), provided that the parking is located within the side lot ribbon; and

WHEREAS, the DCP Memo further provides that parking in a side lot ribbon of the front yard is specifically allowed as a permitted obstruction under Z.R. § 23-44(a); and

WHEREAS, the appellant argues that, because Z.R. § 23-44(a) requires that the front yard parking space be located within a side lot ribbon, and side lot ribbons do not exist on lots with attached homes, Z.R. § 23-44(a) is therefore inapplicable to the subject lot; and

WHEREAS, the Board notes that, as discussed above, a side lot ribbon is an existing portion of a zoning lot even when the lot is occupied by an attached home and has no side yard; and

WHEREAS, DOB contends, and the Board agrees, that the subject parking space is located within a side lot ribbon, and is therefore authorized as a permitted obstruction under Z.R. § 23-44(a); and

WHEREAS, the Board notes that it is a fundamental rule of statutory construction that all parts of a statute are to be read together and construed as a whole; and

WHEREAS, the Board finds that the plain language of Z.R. §§ 25-621(a), 12-10, and 23-44(a), when read together, clearly permit parking within the side lot ribbon of an attached home within an R4-1 zoning district; and

WHEREAS, the Board therefore rejects the appellant's argument that Z.R. §§ 25-621(a) expressly prohibits parking within the side lot ribbon of an attached home in an R4-1 zoning district; and

Challenged Parking is Prohibited by the Intent of the Zoning Resolution

WHEREAS, in the alternative, the appellant contends that the Board should look beyond the plain meaning of the New York City Zoning Resolution to find that the challenged parking is prohibited based on: (1) the prohibition on parking in the front yard of attached homes in R4B and R5B zoning districts; and (2) the inferred intent underlying Z.R. §§ 25-621(a) and 12-10; and

WHEREAS, the appellant contends that the intent of the Zoning Resolution to prohibit parking in the front yard of an attached home in an R4-1 zoning district can be inferred from the language of Z.R. § 25-621(a), which prohibits parking in the front yards of attached homes in R4B and R5B zoning districts; and

WHEREAS, the appellant contends that because the subject R4-1 zoning district is characterized by attached rowhouses, which are also common to R4B and R5B zoning districts, that the restriction on parking in R4B and R5B zoning districts in Z.R. § 25-621 should likewise be extended to prohibit parking in the front yards of attached homes in R4-1 zoning districts; and

WHEREAS, the Board notes that § 25-621 specifically prohibits parking in the front yards of attached homes in R4B and R5B zoning districts, while the provision is silent concerning parking in the subject R4-1 zoning district; and

WHEREAS, the Board further notes that if all attached homes were meant to be exempted from provisions permitting accessory off-street parking in front yards, as the appellant contends, the restriction on front yard parking listed in Z.R. §§ 25-621(a) and 23-44(a) for R4B and R5B zoning districts would be redundant and unnecessary; and

WHEREAS, however, there is no reason to presume that these provisions are superfluous; thus, the Board finds that the exemption on front yard parking in Z.R. §§ 25-621(a) and 23-44 applies only to R4B and R5B districts and cannot be applied to prohibit parking in front yards of R4-1 districts; and

WHEREAS, the Board notes again that the plain meaning of the Zoning Resolution with respect to the application of Z.R. § 25-621(a) to the subject zoning

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district is unambiguous; and

WHEREAS, under New York law, the Board is not permitted to look beyond the plain meaning of the text to ascertain the intent of the Zoning Resolution, but is limited to the "four corners" of the statute (see Statutes § 94 (N.Y. Cons. L. 2008)); and

WHEREAS, the Board is also aware that it must presume that the framers of the Zoning Resolution deliberately drafted the relevant zoning text with a specific purpose; and

WHEREAS, the DCP Memo states that the purpose of the Lower Density Contextual Zoning text amendments was to prohibit front yard parking in R4B and R5B districts, specifically; and

WHEREAS, the appellant has submitted no evidence contradicting the clear statement of intent submitted by the Department of City Planning, the agency which frames the Zoning Resolution, to support an inference that Z.R. § 25-621(a) was intended to prohibit parking in the front yards of attached homes in R4-1 zoning districts; and

WHEREAS, for the reasons stated, the Board finds that the restrictions on parking in R4B and R5B districts provide no evidence of an intent on the part of the framers to impose restrictions on parking in an R4-1 district which are not found within the plain language of ZR § 25-621; and

WHEREAS, the appellant contends that the intent of the Zoning Resolution to prohibit front yard parking in R4-1 districts is also demonstrated by a 1989 Department of City Planning report entitled "Lower Density Contextual Zoning Study" ("DCP Report") and by the agency's 1990 Zoning Handbook and the 2006 Zoning Handbook; and

WHEREAS, in support of its position, the appellant points to illustrations of side lot ribbons in the DCP Report, the 1990 Zoning Handbook, and the 2006 Zoning Handbook, each of which depict the side lot ribbon as an open area located within a side yard that serves as a through space to an accessory parking space located to the rear of a property; and

WHEREAS, the Board notes that, under New York law, where the legislative language is clear, as in the instant appeal, there is no occasion for examination into extrinsic evidence to discover legislative intent (See Statutes § 120 (N.Y. Cons. L. 2008, see also Raritan Dev. Corp. v. Silva, 91 N.Y.2d (1997) (when a provision in the Zoning Resolution is unambiguous, reliance on external statutes or sources is erroneous)); and

WHEREAS, DOB argues, and the Board agrees, that the legislative language in Z.R. §§ 25-621(a) and 12-10 is unambiguous, and therefore, the illustrations of side lot ribbons in the DCP Report, the 1990 Zoning Handbook, and the 2006 Zoning Handbook, cannot serve as support for an alternative interpretation of the statute; and

WHEREAS, the Board further notes that the illustrations cited by the appellant are not dispositive of every condition where parking may occur, and observes that a 1990 DCP study entitled "Lower Density Contextual Zoning" ("DCP Study") contains an illustration indicating that front yard parking is contemplated within the side lot ribbon of an attached home; and

WHEREAS, the appellant also contends that the DCP Report demonstrates that the framers of Z.R. § 12-10 did not intend for a side lot ribbon to exist on a lot with an attached home, because the stated objective for creating the side lot ribbon was to prevent continuous curb cuts and to encourage unpaved open space in the front yard; and

WHEREAS, the Board observes that the appellant's argument is contradicted by the "Parking Location" section of the DCP Report, which states that the side lot ribbon "would pass through the front yard, a side yard *or a building*…and the rear yard" (emphasis added), which establishes, again, that a side lot ribbon traverses a front yard and can run uninterrupted through an attached home, such as in the instant appeal; and

WHEREAS, the DCP Memo further indicates that the purpose for creating the side lot ribbon was to regulate the width and placement of driveways on narrow lots, to preserve the ability to plant front yards and to ensure sufficient on-street parking between curb cuts on adjacent lots, and not to prevent parking in front yards; and

WHEREAS, in addition, the Board notes that, consistent with the DCP Report, the DCP Memo points out that Z.R. § 23-141 allows a floor area bonus if a detached garage is provided in the portion of the rear yard within the side lot ribbon, and

WHEREAS, the appellant also contends that the provisions in the DCP Report concerning parking in R4B districts demonstrate that the framers of Z.R. § 25-621(a) intended to include R4-1 zoning districts among those districts in which front yard parking is prohibited for attached houses; and

WHEREAS, the appellant points to a provision in the DCP Report, under the heading "R4B," which states, "[f]or subdivisions creating detached or semi-detached houses, R4-1 curb cut location regulations would apply. Parking would have to be within a building, or in a side or rear yard. For attached houses, regardless of subdivisions, parking must be grouped, and within a building or yard other than a front yard;" and

WHEREAS, the appellant argues that the language restricting parking in the front yard of "attached houses, regardless of subdivisions," is evidence of an intent to restrict parking in the front yard of attached houses in R4-1 districts; and

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WHEREAS, the Board notes that there is no indication that the cited DCP Report was meant to apply beyond R4B zoning districts, and

WHEREAS, accordingly, the Board therefore finds that the cited documents provide no support for the proposition that the underlying intent of Z.R. §§ 25-621(a) and 12-10 was to preclude parking in the side lot ribbon of an attached home within the R4-1 district; and

WHEREAS, the appellant has therefore provided no evidence supporting a finding that parking in the side lot ribbon of an attached home in an R4-1 zoning district is expressly or impliedly prohibited by the Zoning Resolution; and

WHEREAS, the Board finds therefore that the subject premises complies with all legal requirements for the issuance of an alteration permit for the installation of a curb cut in an R4-1 zoning district, and that there is therefore no basis for the revocation of the permit; and

Therefore it is Resolved, that the instant appeal is denied.

Adopted by the Board of Standards and Appeals, October 28, 2008.

A true copy of resolution adopted by the Board of Standards and Appeals, October 28, 2008.
Printed in Bulletin Nos. 41-43, Vol. 93.
Copies Sent
To Applicant
Fire Com'r.
Borough Com'r.

153-06-A

APPLICANT – Sheldon Lobel, P.C., for Paul Ullman, owner.

SUBJECT – Application July 12, 2006 – Appeal challenging the Department of Buildings interpretation that Quality Housing Bulk regulations may be utilized by a single-family residence seeking to enlarge in a non-contextual zoning district.

PREMISES AFFECTED – 159 West 12th Street, Seventh Avenue and Avenue of the Americas, Block 608, Lot 69, Borough of Manhattan.

COMMUNITY BOARD #14M

APPEARANCES –

For Applicant: Josh Rinesmith.

ACTION OF THE BOARD – Appeal denied.

THE VOTE TO GRANT –

Affirmative: 0

Negative: Chair Srinivasan, Vice Chair Collins and Commissioner Ottley-Brown……...3

THE RESOLUTION:

WHEREAS, the instant appeal is brought by the owner of 157 West 12th Street (hereinafter, "Appellant"), a neighbor to the subject premises (hereinafter, the "Owner's Lot"); and

WHEREAS, on November 6, 2006, DOB issued a building permit (No. 104306528; the "Permit") for an enlargement and conversion of the existing three-story, two-family townhouse on the Owner's Lot to a single-family residence (the "Enlargement"); and

WHEREAS, the appeal challenges a DOB final determination as to the Permit, signed by Acting Manhattan Borough Christopher M. Santulli, P.E., dated June 19, 2006 and issued to Appellant (the "Final Determination"); and

WHEREAS, the Final Determination reads in pertinent part:

> "This letter is in reference to your June 6, 2006 letter regarding the above-referenced matter and former Manhattan Borough Commissioner Laura Osorio's interpretation of the Quality Housing Program (QHP) bulk regulations.
>
> Ms. Osorio's previous determination, that the QHP bulk regulations may be utilized by a single-family residence seeking to enlarge in a non-contextual zoning district, is hereby *affirmed*. This is the Department's final decision on this matter and it may be appealed to the Board of Standards and Appeals pursuant to New York City Charter § 666(6)(a)."; and

WHEREAS, DOB clarified that this determination applies not just to the Owner's Lot, but globally; and

WHEREAS, in addition to challenging the applicability of the QHP bulk regulations to single-family homes, Appellant also argues that the plans associated with the Permit do not even show compliance with the QHP regulations; and

WHEREAS, a public hearing was held on this appeal on October 31, 2006, after due notice by publication in *The City Record*, and then to decision on January 9, 2007; and

WHEREAS, Appellant, the Owner, and DOB were represented by counsel in this proceeding; and

WHEREAS, another nearby neighbor appeared in support of the appeal; and

WHEREAS, counsel to the Department of City Planning submitted a letter supporting the position of DOB; and

WHEREAS, the Owner's Lot has a lot area of 2,151.04 sq. ft. and is occupied by a three-story two-family townhouse; and

WHEREAS, both the Owner's Lot and Appellant's lot are within an R6 non-contextual zoning district; and

WHEREAS, on December 7, 2005, the Owner applied to DOB to enlarge the existing townhouse and to convert it from a two-family to a single-family residence under DOB Application No. 104306528; and

WHEREAS, in connection with this application, the Owner sought to utilize the QHP bulk regulations; and

WHEREAS, the ZR provisions describing the QHP are found at ZR § 28-00, *et seq.* (Article II, Chapter 8); and

WHEREAS, ZR § 28-01 sets forth the applicability of Chapter 8 and provides "[t]he Quality Housing Program is a specific set of standards and requirements for buildings containing residences."; and

WHEREAS, more specifically, the QHP is a set of zoning parameters that may be utilized in certain instances on an optional basis in non-contextual districts unless specifically prohibited; and

WHEREAS, ZR § 28-01 provides that for non-contextual districts such as the subject R6 zoning district, when the QHP is elected, the bulk regulations applicable to the QHP as set forth in Article II, Chapter 3 may be applied as an alternative to the normal bulk regulations, also set forth in Article II, Chapter 3; and

WHEREAS, additionally, certain amenities may be required to be provided, as set forth in Article II, Chapter 8; and

WHEREAS, after the application for the Enlargement was filed, Appellant wrote DOB, contending that the QHP bulk regulations could not be used for a single-family home; and

WHEREAS, after some internal discussion at DOB, the Final Determination was issued in response to this contention; and

WHEREAS, Appellant then filed this appeal; and

WHEREAS, subsequently, DOB issued the Permit on November 6, 2006; and

WHEREAS, as noted above, Appellant makes two primary arguments in support of the position that DOB should revoke the Permit: (1) the QHP bulk regulations apply only to multi-family housing (three units or more) and not to single and two-family dwellings; and (2)

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even if the QHP bulk regulations are determined to apply to such dwellings, the Enlargement is non-complying as to floor area, FAR, and lot coverage; and

WHEREAS, as to the application of the QHP bulk regulations, Appellant first argues that the intent of the QHP was to promote the construction of multi-family housing, rather than single and two-family dwellings; and

WHEREAS, Appellant cites to the general purpose provision of ZR § 28-00, which provides in part that "the Quality Housing Program is established to foster the provision of multi-family housing"; and

WHEREAS, Appellant argues that this provision makes clear that the provision of single-family homes was not an intended goal of the QHP, and that QHP regulations are thus not applicable to them; and

WHEREAS, however, DOB argues that ZR § 28-00 is not inconsistent with the application of the QHP to single or two-family dwellings; and

WHEREAS, DOB notes that not every project that is eligible to use the QHP bulk regulations will necessarily satisfy each element of the general purpose section; and

WHEREAS, for example, ZR § 28-00(b) provides that the QHP is established to foster the provision of multi-family housing that "provides on-site recreation space to meet the needs of its occupants"; and

WHEREAS, however, ZR § 28-31, which concerns "Required Recreation Space", specifically provides that recreation space is only required in QHP developments, enlargements, extensions, or conversions with nine or more dwelling units; and

WHEREAS, DOB properly concludes that it was contemplated that there would be some multi-family housing built pursuant to the QHP regulations that will not provide on-site recreation space and therefore not satisfy this goal of the purpose section; and

WHEREAS, the Board concurs with DOB that ZR § 28-00 cannot be properly read to be a restriction on the applicability of the QHP regulations to single-family homes; and

WHEREAS, this provision, like other general purpose sections in the ZR, explains what the goals of the subsequently listed operative provisions are; and

WHEREAS, the Board observes that general purpose sections in the ZR do not list exclusions; and

WHEREAS, further, to the extent that such a section would contain a specific exclusion, this would be obvious from the plain language; and

WHEREAS, any language that explicitly provides that the QHP does not apply at all to single-family homes is noticeably absent from ZR § 28-00; and

WHEREAS, further, the Board agrees that the application of the QHP regulations to single-family homes does not compromise or conflict with the goal of fostering multi-family housing; and

WHEREAS, thus, any argument that ZR § 28-00 acts to prohibit applicability of the QHP to single-family homes is erroneous; and

WHEREAS, the Board also finds that Appellant's reliance on ZR 28-01 as evidence that single and two-family homes are excluded from the QHP is misplaced; and

WHEREAS, ZR § 28-01 provides that in contextual districts some QHP requirements will be mandatory for development or enlargement of buildings other than single and two-family homes; and

WHEREAS, however, this provision does not prohibit the application of the QHP to single-family homes in non-contextual districts; it merely speaks to the mandatory nature of some requirements for multi-family buildings; and

WHEREAS, the Board concludes that the ZR does not contain any explicit prohibition on the applicability of the QHP to single and two-family homes; and

WHEREAS, Appellant also argues that since single and two-family dwellings are not specifically listed as included housing forms in the QHP provisions, they must be excluded; and

WHEREAS, DOB disagrees, noting that the plain language of various provisions leads to a conclusion that the QHP program applies to single-family homes; and

WHEREAS, first, DOB cites to ZR § 23-01, which is listed under the heading "Bulk Regulations for Residential Buildings in Residence Districts" and sets forth the applicability of all bulk regulations in Article II, Chapter 3 of the ZR, which also includes the bulk regulations that are applicable under the QHP; and

WHEREAS, this provision reads in pertinent part: "The bulk regulations of the Chapter apply to any building or other structure…on any zoning lot or portion of a zoning lot located in any Residence District, including all…enlargements."; and

WHEREAS, the subject home meets the ZR § 12-10 definition of "building or other structure" as "any building or structure of any kind."; and

WHEREAS, the home also meets the ZR § 12-10 definition of "residence or residential", which provides that a residence is a "building or part of a building containing dwelling units or rooming units, including one-family or two-family houses, multiple dwellings, boarding or rooming houses, or apartment hotels."; and

WHEREAS, thus, the subject home is a residence in a residence district, and the Chapter 3 bulk regulations, including the QHP regulations, are applicable to it; and

WHEREAS, second, DOB cites to specific provisions related to the QHP; and

WHEREAS, specifically, DOB cites to ZR § 28-01, which, as noted above, concerns the applicability of the QHP and provides that the program "is a specific set of standards for buildings containing residences"; and

WHEREAS, again, the definition of "residence" includes single-family homes; and

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WHEREAS, DOB also notes that ZR § 28-01 specifically provides that in non-contextual districts "residential developments or residential enlargements" may use the QHP; and

WHEREAS, by definition, a residential enlargement may be of a single or two-family home; and

WHEREAS, finally, the Board observes that certain exceptions to the applicability of the QHP regulations are set forth at ZR § 23-011(c); and

WHEREAS, one of these exceptions (ZR § 23-011(c)(3)) provides that within R6 districts and certain geographically-defined study areas, the QHP does not apply to single-family homes "where more than 70 percent or more of the aggregate length of the blockfronts in residential use on both sides of the street facing each other are occupied by residences."; and

WHEREAS, this provision clearly indicates that under certain circumstances, single-family homes were contemplated to be excluded from the QHP if they were in certain study areas and on blocks as described by this provision; and

WHEREAS, the Board observes that if single-family homes in R6 zoning districts were meant to be excluded altogether from the QHP, as Appellant contends, the exception listed in ZR § 23-011(c)(3) would be redundant and unnecessary; and

WHEREAS, however, there is no reason to presume that the provision is superfluous; thus, ZR § 23-011(c)(3) reinforces the fact that the QHP is applicable to single-family homes; and

WHEREAS, in sum, the Board finds that the plain language of the above-mentioned provisions makes clear that the QHP is applicable to single-family homes; and

WHEREAS, therefore, the Board finds that: (1) Appellant has failed to establish that the QHP provisions expressly exclude single-family homes; and (2) DOB has sufficiently established that the inclusion of single-family homes in the QHP has a textual basis; and

WHEREAS, further, since the plain language of the ZR provides a basis for the applicability of the QHP to single-family homes, a review of the QHP's legislative history is unnecessary; and

WHEREAS, Appellant's secondary argument is that even if the QHP provisions were to apply, the Enlargement does not comply with bulk regulations as to floor area, floor area ratio, and lot coverage; and

WHEREAS, DOB disagrees, stating that the plans submitted with the Permit show full compliance with applicable QHP regulations; and

WHEREAS, Appellant was given the opportunity to review the same plans during the hearing process; and

WHEREAS, Appellant's most recent submission contains the claim that based upon a review of the plans, the calculations for existing and proposed floor area and lot coverage on one of the drawings are incorrect; and

WHEREAS, however, Appellant made no attempt to explain how the calculations are wrong, which precludes Board consideration of this claim; and

WHEREAS, in the absence of any explanation as to why the calculations may reflect a non-compliance with the applicable QHP regulations, the Board must reject Appellant's secondary argument as unsubstantiated and accept DOB's technical review that concludes that the plans show compliance; and

WHEREAS, in sum, the Board concludes as follows: (1) the QHP provisions do apply to the Enlargement; and (2) Appellant has provided no evidence of the Enlargement's alleged non-compliance with the QHP bulk regulations; and

Therefore it is Resolved that this appeal, which challenges a Final Determination issued by DOB on June 19, 2006 concerning DOB Permit No. 104306528, is denied.

Adopted by the Board of Standards and Appeals, January 9, 2007.

A true copy of resolution adopted by the Board of Standards and Appeals, January 9, 2007.
Printed in Bulletin Nos. 1-3, Vol. 92.

Copies Sent
To Applicant
Fire Com'r.
Borough Com'r.

Chapter 2 - Special Lincoln Square District (L)

82-00 - GENERAL PURPOSES

LAST AMENDED
4/24/1969

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.

82-01 - Definitions

LAST AMENDED
2/2/2011

Development

For purposes of this Chapter, a "development" includes both ***development*** and ***enlargement***, as defined in Section 12-10 (DEFINITIONS).

82-02 - General Provisions

LAST AMENDED
2/9/1994

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.

82-03 - Requirements for Applications

LAST AMENDED
2/9/1994

An application to the City Planning Commission for the grant of a special permit or an authorization respecting any ***development*** under the provisions of this Chapter shall include a site plan showing the location and the proposed ***use*** of all ***buildings or other structures*** on the site; the location of all vehicular entrances and exits and proposed off-street parking spaces, and such other information as may be required by the Commission for its determination as to whether or not a special permit or an authorization is warranted. Such information shall include, but not be limited to, justification of the proposed ***development*** in relation to the general purposes of the ***Special Lincoln Square District***.

82-04 - District Plan

LAST AMENDED
2/9/1994

The District Plan for the ***Special Lincoln Square District***, included as Appendix A, identifies specific subdistricts in which special zoning regulations carry out the general purposes of the ***Special Lincoln Square District***. These areas are: Subdistrict A, Subdistrict B and Subdistrict C.

The District Plan also identifies ***blocks*** with mandatory ***front lot line street walls***. The District Plan is hereby incorporated as an integral part of the ***Special Lincoln Square District***.

82-10 - MANDATORY DISTRICT IMPROVEMENTS

LAST AMENDED
2/9/1994

The provisions of this Section specify mandatory or optional physical improvements to be

provided in connection with ***developments*** on certain ***zoning lots*** located within the Special District.

82-11 - Special Provisions for Optional Arcades

LAST AMENDED
2/9/1994

Any ***development*** located on a ***zoning lot*** with a ***lot line*** which coincides with either of the following ***street lines*** - the east side of Broadway between West 61st and West 65th Streets or the east side of Columbus Avenue between West 65th and West 66th Streets - may contain an ***arcade*** as defined in Section 12-10, except that:

(a) the ***arcade*** shall extend the full length of the ***zoning lot*** along the ***street lines*** described above; however, the required ***arcade*** along the east side of Columbus Avenue may be terminated at a point 40 feet south of West 66th Street;

(b) the exterior face of ***building*** columns shall lie along the ***street lines*** described above;

(c) the minimum depth of the ***arcade*** shall be 15 feet (measured perpendicular to the exterior face of the ***building*** columns located on the ***street line***) and the minimum height of the ***arcade*** along the center line of its longitudinal axis shall not be less than 20 feet;

(d) the ***arcade*** shall contain no permanent obstruction within the area delineated by the minimum width and height requirements of this Section except for the following:

(1) unenclosed cafes, provided that there is at least a six foot wide unobstructed pedestrian way adjacent to the ***street wall***. In no event may such cafes be enclosed at any time; and

(2) structural columns not exceeding two feet by three feet provided that the longer dimension of such columns is parallel to the ***street line***, that such columns are spaced at a minimum of 17 feet on center, and that the space between such columns and the face of the ***street wall*** is at least 13 feet wide. No other columns shall project beyond the face of the ***street wall*** ;

(e) no ***signs*** may be affixed to any part of the ***arcade*** or ***building*** columns except on a parallel to the ***street wall*** projecting no more than 18 inches therefrom parallel to the ***street line*** along which the ***arcade*** lies; and

(f) the ***arcade*** shall be illuminated only by incandescent lighting to a standard of average eight foot-candle intensity with a minimum five foot-candle intensity at any point within the ***arcade***.

82-12 - Mandatory Off-street Relocation of a Subway Stair

LAST AMENDED
10/17/2007

Where a ***development*** is constructed on a ***zoning lot*** that fronts on a sidewalk containing a stairway entrance into the West 59th Street (Columbus Circle) or the West 66th Street subway station and such ***zoning lot*** contains 5,000 square feet or more of ***lot area***, the existing entrance shall be relocated from the ***street*** onto the ***zoning lot*** in accordance with the provisions of Sections 37-41 (Standards for Location, Design and Hours of Public Accessibility) and 37-42 (Administrative Procedure for a Subway Stair Relocation or Renovation).

82-13 - Special Provisions for a Transit Easement

LAST AMENDED
2/9/1994

Any ***development*** located on the east side of Broadway between West 66th Street and West 67th Street shall provide an easement on the ***zoning lot*** for public access to the subway mezzanine or station when required by the New York City Transit Authority (TA) in accordance with the procedure set forth in Section 95-04 (Certification of Transit Easement Volume) and hereby made applicable.

82-20 - SPECIAL USE AND SIGN REGULATIONS

LAST AMENDED
2/9/1994

In order to provide for the special cultural needs, convenience, enjoyment, education and recreation of the residents of the area and of the many visitors who are attracted to the Lincoln Center for the Performing Arts, a limitation is imposed on the ground floor ***uses*** within the Special District.

The provisions of this Section shall apply to a ***development*** or change of ***use*** within the Special District.

82-21 - Restrictions on Street Level Uses

LAST AMENDED
2/2/2011

Within 30 feet of Broadway, Columbus Avenue or Amsterdam Avenue ***street lines***, ***uses*** within ***stories*** on the ground floor or with a floor level within five feet of ***curb level***, shall be limited to those listed in Use Groups 3A, 3B, 6A, 6C, 8A, 10A and eating or drinking establishments listed in 12A or 12B. Within Use Groups 3A or 3B, ***uses*** shall be limited to colleges, universities including professional schools, museums, libraries or non-commercial art galleries. Within such area, lobby space, required accessory loading berths, or access to

subway stations are permitted.

82-22 - Location of Floors Occupied by Commercial Uses

LAST AMENDED
2/2/2011

The provisions of Section 32-422 (Location of floors occupied by commercial uses) shall not apply to any ***commercial use*** located in a portion of a ***mixed building*** that has separate direct access to the ***street*** and has no access within the ***building*** to the ***residential*** portion of the ***building*** at any ***story***. In no event shall such ***commercial use*** be located directly over any ***dwelling units***.

82-23 - Street Wall Transparency

LAST AMENDED
2/2/2011

When the front ***building*** wall or ***street wall*** of any ***building developed*** after February 9, 1994, is located on Broadway, Columbus Avenue or Amsterdam Avenue, glazing shall be provided in accordance with the transparency requirements set forth in Section 37-34 (Minimum Transparency Requirements).

82-24 - Supplementary Sign Regulations

LAST AMENDED
6/23/2005

No permitted ***sign*** shall extend above ***curb level*** at a height greater than 20 feet or obstruct an ***arcade***.

Within Subdistrict B, permitted ***signs*** facing upon West 65th Street shall not exceed a height of 40 feet above ***curb level***, and permitted ***signs*** facing upon Broadway between West 65th Street and West 66th Street shall not exceed a height of 60 feet above ***curb level***. However, ***signs*** facing in an easterly or southerly direction upon that portion of the public place designated on the City Map that is located within an area bounded by West 65th Street and the prolongation of the south side of West 64th Street shall not exceed a height of 40 feet above the level of such public place.

82-30 - SPECIAL BULK REGULATIONS

LAST AMENDED
2/9/1994

82-31 - Floor Area Ratio Regulations for Commercial Uses

LAST AMENDED
2/2/2011

Within Subdistrict A, for any ***building*** in a C4-7 District, the maximum permitted ***commercial floor area*** shall be 100,000 square feet.

82-311 - Floor area increase by special permit

LAST AMENDED
2/2/2011

The City Planning Commission may by special permit allow the ***commercial floor area ratio*** permitted on a ***zoning lot*** pursuant to Section 82-31 (Floor Area Ratio Regulations for Commercial Uses) within Subdistrict A to be increased to 10.0 for ***commercial uses***. As a condition for such special permit, the Commission shall find that:

(a) the ***uses*** are appropriate for the location and shall not unduly affect the ***residential uses*** in the nearby area or impair the future land use and development of the adjacent areas;

(b) the ***uses*** shall not require any significant addition to the supporting services of the neighborhood or that provision for adequate supporting services has been made;

(c) the additional ***bulk*** devoted to ***commercial uses*** shall not create or contribute to serious traffic congestion and will not unduly inhibit vehicular and pedestrian flow; and

(d) the ***streets*** providing access to such ***use*** are adequate to handle the traffic generated thereby or provision has been made to handle such traffic.

The Commission may prescribe appropriate conditions and safeguards to minimize adverse effects of any such ***uses*** on the character of the surrounding area.

82-32 - Special Provisions for Increases in Floor Area

LAST AMENDED
2/2/2011

No ***floor area*** bonuses shall be permitted within the ***Special Lincoln Square District*** except as provided in this Section. The following ***floor area*** increases may be used separately or in combination, provided that the total ***floor area ratio*** permitted on a ***zoning lot*** does not exceed 12.0.

(a) ***Floor area*** increase for Inclusionary Housing

For any ***development*** to which the provisions of Section 23-90 (INCLUSIONARY HOUSING) are applicable, the maximum permitted ***residential floor area ratio*** may be increased by a maximum of 20 percent under the terms and conditions set forth in Section 23-90.

(b) ***Floor area*** bonus for public amenities

On a ***zoning lot*** that is adjacent to the West 59th Street (Columbus Circle) or the West 66th Street subway station mezzanine, platform, concourse or connecting passageway, where no tracks intervene to separate the ***zoning lot*** from these elements, and such ***zoning lot*** contains 5,000 square feet or more of ***lot area***, the City Planning Commission may, by special permit pursuant to Section 74-634 (Subway station improvements in Downtown Brooklyn and in Commercial Districts of 10 FAR and above in Manhattan), grant a maximum of 20 percent ***floor area*** bonus.

For a subway station improvement or for a subsurface concourse connection to a subway, the amount of ***floor area*** bonus that may be granted shall be at the discretion of the Commission. In determining the precise amount of ***floor area*** bonus, the Commission shall consider:

(1) the direct construction cost of the public amenity;

(2) the cost of maintaining the public amenity; and

(3) the degree to which the station's general accessibility and security will be improved by the provision of new connections, additions to, or reconfigurations of, circulation space, including the provision of escalators or elevators.

82-33 - Modification of Bulk Regulations

LAST AMENDED
2/2/2011

The City Planning Commission may, by special permit, modify the height and setback regulations, ***yard*** regulations, regulations governing minimum distance between ***buildings*** on a single ***zoning lot***, and regulations governing ***courts*** and minimum distance between ***legally required windows*** and walls or ***lot lines***, provided the Commission finds that such modifications are necessary to:

(a) facilitate good design;

(b) allow design flexibility for any ***development*** to which the mandatory provisions of Section 82-10 (MANDATORY DISTRICT IMPROVEMENTS) are applicable; or

(c) incorporate a ***floor area*** allowance pursuant to Section 82-32 (Special Provisions for Increases in Floor Area) where inclusion of the proposed public amenity will

significantly further the specific purposes for which the ***Special Lincoln Square District*** is established.

82-34 - Bulk Distribution

LAST AMENDED
2/9/1994

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.

82-35 - Height and Setback Regulations

LAST AMENDED
2/2/2011

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***.

82-36 - Special Tower Coverage and Setback Regulations

LAST AMENDED
2/2/2011

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.

82-37 - Street Walls Along Certain Street Lines

LAST AMENDED
2/2/2011

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

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

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

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

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

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

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

(b) On a ***zoning lot*** in Block 1, as indicated on the District Plan in Appendix A of this Chapter, with a ***front lot line*** coincident with any of the following ***street lines***, a ***street***

wall shall be located on such ***street lines*** for the entire frontage of the ***zoning lot*** on that ***street***:

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

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

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

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

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

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

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

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

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

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

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

over the ***zoning lot*** at a ratio of 2.5 : 1.

82-38 - Recesses in the Street Wall

LAST AMENDED
2/2/2011

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

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

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

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

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

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

82-39 - Permitted Obstructions Within Required Setback Areas

LAST AMENDED
2/9/1994

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

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

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

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

82-40 - SPECIAL HEIGHT LIMITATION

LAST AMENDED
2/2/2011

On Block 1 or 2, as indicated on the District Plan in Appendix A of this Chapter, the maximum height of a ***building or other structure*** shall not exceed 275 feet above ***curb level***, except that a penthouse may be located above such height, provided that such penthouse:

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

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

82-50 - OFF-STREET PARKING AND OFF-STREET LOADING REGULATIONS

LAST AMENDED
5/8/2013

The regulations of Article I, Chapter 3 (Comprehensive Off-street Parking and Loading Regulations in the Manhattan Core) and the applicable underlying district regulations of Article III, Chapter 6, relating to Off-street Loading Regulations, shall apply in the ***Special Lincoln Square District*** except as otherwise provided in this Section. In addition, the entrances and exits to all off-street loading berths shall not be located on a ***wide street*** except by

authorization as set forth in this Section.

(a) ***Accessory*** off-street parking spaces

Accessory off-street parking spaces are permitted only by the applicable special permit of the City Planning Commission pursuant to Section 13-45 (Special Permits for Additional Parking Spaces), inclusive.

(b) Curb cuts

The City Planning Commission may authorize curb cuts within 50 feet of the intersection of any two ***street lines***, or on ***wide streets*** where such curb cuts are needed for off-street loading berths, provided the location of such curb cuts meets the findings in Section 13-441.

(c) Waiver of loading berth requirements

The City Planning Commission may authorize a waiver of the required off-street loading berths where the location of the required curb cuts would:

(1) be hazardous to traffic safety;

(2) create or contribute to serious traffic congestion or unduly inhibit vehicular and pedestrian movement; or

(3) interfere with the efficient functioning of bus lanes, specially designated streets or public transit facilities.

The Commission shall refer these applications to the Department of Transportation for its comments.

82-60 - EXISTING PUBLICLY ACCESSIBLE OPEN AREAS

LAST AMENDED
5/8/2013

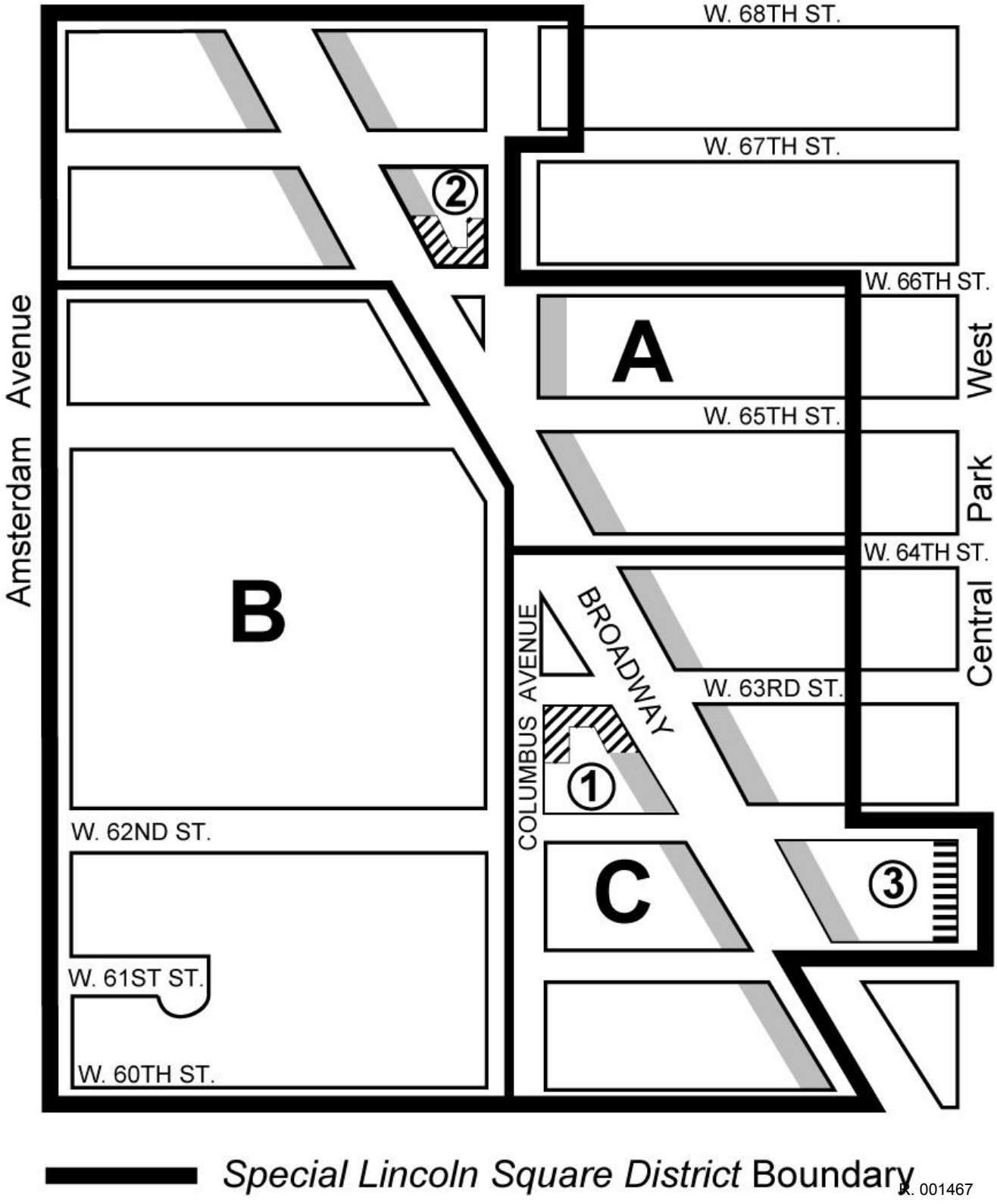
No existing ***publicly accessible open area*** or other public amenity, open or enclosed, for which a ***floor area*** bonus has been utilized shall be eliminated or reduced in size, except by special permit of the City Planning Commission, pursuant to Section 74-761 (Elimination or reduction in size of public amenities).

Any existing open area for which a ***floor area*** bonus has not been utilized that occupies the same ***zoning lot*** as an existing ***publicly accessible open area*** or other public amenity, open or enclosed, for which a ***floor area*** bonus has been utilized, may be reduced in size or eliminated only upon certification of the Chairperson of the City Planning Commission that all bonused amenities comply with the standards under which such ***floor area*** bonus was granted.

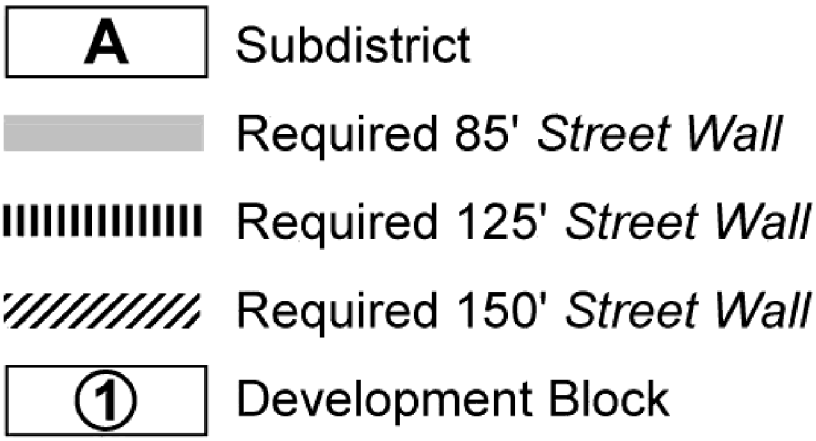
Appendix A

Special Lincoln Square District Plan

Last Amended
2/9/1994
History



R. 001467


A
Subdistrict
Required 85' *Street Wall*
Required 125' *Street Wall*
Required 150' *Street Wall*
1
Development Block

11-331 - Right to construct if foundations completed

LAST AMENDED
2/2/2011

If, before the effective date of an applicable amendment of this Resolution, a building permit has been lawfully issued, as set forth in paragraph (a) of Section 11-31, to a person with a possessory interest in a ***zoning lot***, authorizing a minor development or a major development, such construction, if lawful in other respects, may be continued provided that:

(a) in the case of a minor development, all work on foundations had been completed prior to such effective date; or

(b) in the case of a major development, the foundations for at least one ***building*** had been completed prior to such effective date.

In the event that such required foundations have been commenced but not completed before such effective date, the building permit shall automatically lapse on the effective date and the right to continue construction shall terminate. An application to renew the building permit may be made to the Board of Standards and Appeals not more than 30 days after the lapse of such building permit. The Board may renew the building permit and authorize an extension of time limited to one term of not more than six months to permit the completion of the required foundations, provided that the Board finds that, on the date the building permit lapsed, excavation had been completed and substantial progress made on foundations.

11-341 - Building applications filed before July 8, 2017

LAST AMENDED
5/29/2019

If, before July 8, 2017, an application has been filed with the Department of Buildings for a ***development*** on a ***corner lot*** with a ***lot area*** of less than 5,000 square feet, located in a C5-2 District in Community District 5 of the Borough of Manhattan, the provisions established in N 190230 ZRY pertaining to calculating ***floor area*** in a tower containing ***residences*** shall not apply in the portion of such ***building*** below a height of 130 feet above the ***base plane***, provided that the aggregate height of any floor space on ***stories*** occupied predominantly by mechanical equipment provided pursuant to paragraph (8) of the definition of ***floor area*** in Section 12-10 (DEFINITIONS), and any floor space that is or becomes unused or inaccessible within a ***building***, pursuant to paragraph (k) of the definition of ***floor area*** in Section 12-10, does not exceed 80 feet.

12-10 - DEFINITIONS

LAST AMENDED
12/19/2017

Words in the text or tables of this Resolution which are ***italicized*** shall be interpreted in accordance with the provisions set forth in this Section.

Abut, or abutting (2/2/11)

“Abut” is to be in contact with or join at the edge or border. “Abutting” ***buildings*** are ***buildings*** that are in contact with one another on the same or another ***zoning lot***, except as subject to separations required for seismic load as set forth in the New York City Building Code. A ***building*** may also ***abut*** a ***lot line***. In addition, for ***buildings*** existing prior to February 2, 2011, such existing ***building*** shall be considered ***abutting*** if it is within six inches of a ***lot line*** or another ***building***.

Accessory use, or accessory (4/30/12)

An "accessory use":

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

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

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

When "accessory" is used in the text, it shall have the same meaning as ***accessory use***.

An ***accessory use*** includes:

(1) Living or sleeping accommodations for servants in connection with a ***use*** listed in Use Groups 1 and 2;

(2) Living or sleeping accommodations for caretakers in connection with any ***use*** listed in

Use Groups 3 through 18 inclusive, provided that:

(i) no ***building*** contains more than one living or sleeping accommodation for caretakers;

(ii) no such living or sleeping accommodation shall exceed 1,200 square feet of ***floor area***;

(iii) the owner shall sign a Restrictive Declaration that any such caretaker will provide maintenance and/or repair services, and containing a list of services to be performed by such caretaker. Such Restrictive Declaration shall be recorded in the Office of the City Register, or, where applicable, the County Clerk's Office, of the county where the ***building*** is located. A copy of such declaration shall be provided to the Department of Buildings;

(iv) in C6-2M, C6-4M, M1-5M, M1-6M, M1-5A and M1-5B Districts, no living or sleeping accommodation for caretakers is permitted in any ***building*** which contains a ***residential use*** or a ***joint living-work quarters for artists***; and

(v) such living or sleeping accommodation shall not be considered a ***residential use*** or cause a ***building*** to be considered a ***mixed building***.

(3) Living or sleeping accommodations in connection with ***commercial*** or ***manufacturing uses***, including living or sleeping accommodations in connection with a studio listed in Use Group 9, provided that:

(i) no ***building*** contains more than two kitchens; and

(ii) no such living or sleeping accommodations are located in a C7, C8 or ***Manufacturing District***.

(4) Keeping of domestic animals, but not for sale or hire. A ***commercial*** stable or kennel is not an ***accessory use***.

(5) Swimming pools not located within a ***building*** listed in Use Group 1 or 2, provided that:

(i) the ***use*** of such pools shall be restricted to occupants of the principal ***use*** and guests for whom no admission or membership fees are charged;

(ii) if ***accessory*** to a ***use*** listed in Use Group 2, except if such ***use*** is a ***single-family*** or ***two-family residence***, the edge of the pool shall be located not less than 100 feet from any ***lot line***;

(iii) if ***accessory*** to a ***use*** listed in Use Group 1 or Use Group 2, which ***use*** is a ***single-family residence*** or ***two-family residence***, the edge of the pool shall be located not less than five feet from any ***lot line***, except that such minimum

distance between the edge of the pool and any ***side lot line*** may be not less than three feet in the case of lots less than 25 feet in width, providing that it is screened from adjoining lots by a six foot high continuous solid opaque fence along the ***side lot line*** adjacent to such pool. In the event that such pool is located between 50 and five feet from any ***rear lot line*** or ***side lot line***, it shall be screened by a continuous fence supplemented with a strip of densely planted trees or shrubs at least four feet high at the time of planting along such ***rear lot line*** to such pool; and

(iv) illumination of such pools shall be limited to underwater lighting.

Swimming pool clubs are not ***accessory uses***.

(6) Domestic or agricultural storage in a barn, shed, tool room, or similar ***building or other structure***.

(7) ***Home occupations***.

(8) A newsstand primarily for the convenience of the occupants of a ***building***, which is located wholly within such ***building*** and has no exterior ***signs*** or displays.

(9) Incinerators.

(10) In connection with ***commercial*** or ***manufacturing uses***, the storage of goods normally carried in stock, used in, or produced by such ***uses***, unless the storage is expressly prohibited under the applicable district regulation. The ***floor area*** used for such ***accessory*** storage shall be included in the maximum ***floor area*** permitted for specified ***uses*** set forth in the Use Groups.

(11) Incidental repairs, unless expressly prohibited under the applicable district regulations. The ***floor area*** used for such ***accessory*** repairs shall be included in the maximum ***floor area*** permitted for specified ***uses*** set forth in the Use Groups.

(12) The removal for sale of sod, loam, clay, sand, gravel or stone in connection with the construction of a ***building or other structure*** on the same ***zoning lot***, or in connection with the regrading of a ***zoning lot***, but in the latter case, not below the legal ***street*** grade.

(13) ***Accessory*** off-street parking spaces, open or enclosed.

(14) ***Accessory*** off-street loading berths.

(15) ***Accessory signs***.

(16) ***Accessory*** radio or television towers.

(17) ***Accessory*** activities when conducted underground as part of the operation of railroad passenger terminals, such as switching, storage, maintenance or servicing of trains.

(18) ***Accessory*** sewage disposal plants, except such plants serving more than 50 ***dwelling units***.

(19) An ambulance outpost operated by or under contract with a government agency or a public benefit corporation and located either on the same ***zoning lot*** as, or on a ***zoning lot*** adjacent to, a ***zoning lot*** occupied by a fire or police station.

(20) Electric vehicle charging in connection with parking facilities.

(21) Solar energy systems.

Adult establishment (2/2/11)

(1) Adult Establishment: An "adult establishment" is a ***commercial*** establishment which is or includes an adult book store, adult eating or drinking establishment, adult theater, or other adult ***commercial*** establishment, or any combination thereof, as defined below:

(a) An adult book store is a book store that offers "printed or visual material" for sale or rent to customers where a "substantial portion" of its stock-in-trade of "printed or visual material" consists of "adult printed or visual material," defined as "printed or visual material" characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas";

(b) An adult eating or drinking establishment is an eating or drinking establishment which regularly features in any portion of such establishment any one or more of the following:

(1) live performances which are characterized by an emphasis on "specified anatomical areas" or "specified sexual activities"; or

(2) films, motion pictures, videocassettes, slides or other photographic reproductions which are characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas"; or

(3) employees who, as part of their employment, regularly expose to patrons "specified anatomical areas"; and

which is not customarily open to the general public during such features because it excludes or restricts minors.

Flashing sign — see Sign, flashing

Flood maps (10/9/13)

"Flood maps" shall be the most recent advisory or preliminary maps or map data released by the Federal Emergency Management Agency (FEMA) after October 28, 2012, until such time as the City of New York adopts new final Flood Insurance Rate Maps. When new final Flood Insurance Rate Maps are adopted by the City of New York superseding the Flood Insurance Rate Maps in effect on October 28, 2012, ***flood maps*** shall be such new adopted final Flood Insurance Rate Maps.

Flood zone (10/9/13)

The "flood zone" is the area that has a one percent chance of flooding in a given year, as indicated on the effective Flood Insurance Rate Maps, plus any additional area that has a one percent chance of flooding in a given year, as indicated on the ***flood maps***.

Floor area (3/22/16)

"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***. In particular, ***floor area*** includes:

(a) ***basement*** space, except as specifically excluded in this definition;

(b) elevator shafts or stairwells at each floor, except as specifically excluded in this definition;

(c) floor space in penthouses;

(d) attic space (whether or not a floor has been laid) providing structural headroom of five feet or more in R2A, R2X, R3, R4 or R5 Districts, eight feet or more in R1 and R2 Districts, other than R2A and R2X Districts, and eight feet or more for ***single-*** or ***two-family residences*** in R6, R7, R8, R9 and R10 Districts. For ***buildings*** with three or more ***dwelling units*** in R6, R7, R8, R9 and R10 Districts ***developed*** or ***enlarged*** prior to February 2, 2011, such attic space providing structural headroom of eight feet or more shall be considered ***floor area***. For ***buildings*** with three or more ***dwelling units*** in R6, R7, R8, R9 and R10 Districts ***developed*** or ***enlarged*** after February 2, 2011, any attic space shall be considered ***floor area***;

(e) floor space in galleries, interior balconies, mezzanines or bridges;

(f) floor space in open or roofed bridges, breeze ways or porches, if more than 50 percent of the perimeter of such bridge, breeze way or porch is enclosed, and provided that a parapet not higher than 3 feet, 8 inches, or a railing not less than 50 percent open and not higher than 4 feet, 6 inches, shall not constitute an enclosure;

(g) any other floor space used for dwelling purposes, no matter where located within a ***building***, when not specifically excluded;

(h) floor space in ***accessory buildings***, except for floor space used for ***accessory*** off-street parking;

(i) floor space used for ***accessory*** off-street parking spaces provided in any ***story*** after June 30, 1989:

(1) within ***detached*** or ***semi-detached single-*** or ***two-family residences*** in R1-2A, R2A, R2X, R3, R4 or R5 Districts, except that:

(i) in R2A Districts, ***floor area*** within such ***residences*** shall include only floor space in excess of 300 square feet for one such space; and

(ii) in all R1-2A Districts, and in R3, R4A and R4-1 Districts in ***lower density growth management areas***, ***floor area*** within such ***residences*** shall include only floor space in excess of 300 square feet for one such space and in excess of 500 square feet for two such spaces;

(2) within ***buildings*** containing ***residences developed*** or ***enlarged*** pursuant to the optional regulations applicable in a ***predominantly built-up area***;

(3) in excess of 100 square feet per required space in individual garages within other ***buildings*** containing ***residences*** (***attached buildings***, rowhouses or multiple dwellings) in R3-2, R4 or R5 Districts, except that in R3-2 Districts within ***lower density growth management areas***, ***floor area*** shall only include floor space in excess of 300 square feet for one such space and in excess of 500 square feet for two such spaces. However, all of the floor space within any ***story*** in individual garages shall be considered ***floor area*** where, subsequent to June 7, 1989, the level of any ***yard*** except that portion of a ***yard*** in front of a garage on the ***zoning lot*** is lowered below the lower of:

(i) ***curb level***; or

(ii) grade existing on June 7, 1989;

(4) within a ***group parking facility*** with five or more required spaces ***accessory*** to ***buildings*** containing ***residences*** in R3, R4 or R5 Districts that is located in a space with a ceiling height that is more than six feet above the ***base plane***, or, if the ***base plane*** is a sloping ***base plane***, six feet above the ***street wall line level*** used to establish such ***base plane***. On ***through lots*** with sloping ***base***

planes, the ***street wall line level*** closest to a ***street*** shall be used to determine whether such space is ***floor area***;

(5) which is located more than 23 feet above ***curb level*** in any other ***building***;

(6) which is unenclosed and covered by a ***building or other structure*** containing ***residential use*** for at least 50 percent of such ***accessory*** off-street parking space in R2A, R2X, R3, R4 and R5 Districts. Where such ***accessory*** off-street parking space is covered by any portion of a ***building or other structure*** containing ***residential use***, other than a ***single-*** or ***two-family detached*** or ***semi-detached residence*** in R3-2, R4 or R5 Districts, and not ***developed*** or ***enlarged*** pursuant to the optional regulations applicable in a ***predominantly built-up area***, such ***floor area*** shall include only that portion of the ***accessory*** off-street parking space in excess of 100 square feet per required space;

(j) floor space used for ***accessory*** off-street loading berths in excess of 200 percent of the amount required by the applicable district regulations;

(k) floor space that is or becomes unused or inaccessible within a ***building***;

(l) floor space that has been eliminated from the volume of an existing ***building*** in conjunction with the ***development*** of a new ***building*** or in the case of a major ***enlargement***, as set forth in Section 11-31 (General Provisions), of another ***building*** on the same ***zoning lot***;

(m) floor space used for mechanical equipment that exceeds 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*** in R2X, R3, R4 or R5 Districts. 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***;

(n) floor space in exterior balconies or in open or roofed terraces if more than 67 percent of the perimeter of such balcony or terrace is enclosed and provided that a parapet not higher than 3 feet, 8 inches, or a railing not less than 50 percent open and not higher than 4 feet, 6 inches, shall not constitute an enclosure. For the purposes of such calculation, exterior ***building*** walls on adjoining ***zoning lots abutting*** an open or roofed terrace shall not constitute an enclosure. A sun control device that is accessible for purposes other than for maintenance shall be considered a balcony; and

(o) any other floor space not specifically excluded.

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

(1) ***cellar*** space, except where such space is used for dwelling purposes. ***Cellar*** space used for retailing shall be included for the purpose of calculating requirements for ***accessory*** off-street parking spaces, ***accessory*** bicycle parking spaces and ***accessory*** off-street loading berths;

(2) elevator or stair bulkheads, ***accessory*** water tanks, or cooling towers, except that such exclusions shall not apply in R2A Districts;

(3) uncovered steps;

(4) attic space (whether or not a floor has been laid) providing structural headroom of less than five feet in R2A, R2X, R3, R4 or R5 Districts, less than eight feet in R1 and R2 Districts, other than R2A and R2X Districts, and less than eight feet for ***single-*** or ***two-family residences*** in R6, R7, R8, R9 and R10 Districts. For ***buildings*** with three or more ***dwelling units*** in R6, R7, R8, R9 and R10 Districts ***developed*** or ***enlarged*** prior to February 2, 2011, such attic space providing structural headroom of less than eight feet shall not be considered ***floor area***;

(5) floor space in open or roofed bridges, breeze ways or porches, provided that not more than 50 percent of the perimeter of such bridge, breeze way or porch is enclosed, and provided that a parapet not higher than 3 feet, 8 inches, or a railing not less than 50 percent open and not higher than 4 feet, 6 inches, shall not constitute an enclosure;

(6) floor space used for ***accessory*** off-street parking spaces provided in any ***story***:

(i) up to 200 square feet per required space existing on June 30, 1989, within ***buildings*** containing ***residences*** in R3, R4 or R5 Districts, and up to 300 square feet for one required space in R2A Districts. However, for ***detached*** or ***semi-detached single-*** or ***two-family residences*** in all R1-2A Districts and in R3, R4A and R4-1 Districts within ***lower density growth management areas***, ***floor area*** shall not include up to 300 square feet for one space and up to 500 square feet for two spaces;

(ii) up to 100 square feet per required space in individual garages in ***attached buildings*** containing ***residences***, rowhouses or multiple dwellings in R3, R4, or R5 Districts, except that in R3-2 Districts within ***lower density growth management areas***, up to 300 square feet for one such space and up to 500 square feet for two such spaces, except for:

(1) ***buildings*** containing ***residences developed*** or ***enlarged*** after June 30, 1989, pursuant to the optional regulations applicable in a ***predominantly built-up area***; or

(2) ***buildings*** containing ***residences*** where, subsequent to June 7, 1989, the level of any ***yard***, except that portion of a ***yard*** in front of a garage on the ***zoning lot*** is lowered below the lower of ***curb level*** or grade existing on June 7, 1989;

(iii) within an ***attached building*** containing ***residences***, ***building segment*** or multiple dwelling in R3-2, R4, or R5 Districts if such floor space is within a ***group parking facility*** with five or more required spaces that is located in a space with a ceiling height not more than six feet above the ***base plane***, or, if the ***base plane*** is a sloping ***base plane***, not more than six feet above the ***street wall line level*** used to establish such ***base plane***. On ***through lots*** with sloping ***base planes***, the ***street wall line level*** closest to a ***street*** shall be used to determine whether such space is ***floor area***;

(iv) located not more than 23 feet above ***curb level***, in any other ***building***, except where such floor space used for ***accessory*** parking is contained within a ***public parking garage***;

(v) in R3-2, R4 and R5 Districts, up to 100 square feet per required space which is unenclosed and covered by a ***building*** containing ***residences*** other than a ***single-*** or ***two-family detached*** or ***semi-detached residence*** for at least 50 percent of such ***accessory*** off-street parking space, except where such ***residences*** are or have been ***developed*** or ***enlarged*** pursuant to the optional regulations applicable in a ***predominantly built-up area***;

(7) floor space used for ***accessory*** off-street loading berths, up to 200 percent of the amount required by the applicable district regulation;

(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***;

(9) except in R1-2A, R2A, R2X, R3, R4 and R5 Districts, the lowest ***story*** (whether a ***basement*** or otherwise) of a ***residential building***, provided that:

(i) such ***building*** contains not more than two ***stories*** above such ***story***;

(ii) such ***story*** and the ***story*** immediately above it are portions of the same ***dwelling unit***;

(iii such ***story*** is used as a furnace room, utility room, auxiliary recreation room, or for other purposes for which ***basements*** are customarily used; and

(iv) such ***story*** has at least one-half its height below the level of the ground along at least one side of such ***building***, or such ***story*** contains a garage;

(10) floor space in exterior balconies or in open or roofed terraces provided that not more than 67 percent of the perimeter of such balcony or terrace is enclosed and provided that a parapet not higher than 3 feet, 8 inches, or a railing not less than 50 percent open and not higher than 4 feet, 6 inches, shall not constitute an enclosure. For the purposes of such calculation, exterior ***building*** walls on adjoining ***zoning lots abutting*** an open or roofed terrace shall not constitute an enclosure. A sun control device that is accessible for purposes other than for maintenance shall be considered a balcony;

(11) floor space within stairwells:

(i) at each floor of ***buildings*** containing ***residences developed*** or ***enlarged*** after April 16, 2008, that are greater than 125 feet in height, provided that:

(1) such stairwells are located on a ***story*** containing ***residences***;

(2) such stairwells are used as a required means of egress from such ***residences***;

(3) such stairwells have a minimum width of 44 inches;

(4) such floor space excluded from ***floor area*** shall be limited to a maximum of eight inches of stair and landing width measured along the length of the stairwell enclosure at each floor; and

(5) where such stairwells serve non-***residential uses*** on any floor, or are located within multi-level ***dwelling units***, the entire floor space within such stairwells on such floors shall count as ***floor area***;

(ii) at each floor of ***buildings developed*** or ***enlarged*** after April 28, 2015, that are 420 feet or greater in height, provided that:

(1) such stairwells serve a space with an occupancy group other than Group R-2, as classified in the New York City Building Code, that is located at or above a height of 420 feet; and

(2) such floor space excluded from ***floor area*** shall be limited to:

(aa) the 25 percent of stair and landing width required by the New York City Building Code which is provided in addition to the stair and landing widths required by such Code for means of egress; or

(bb) the one stairwell required by the New York City Building Code which is provided in addition to the stairwells required by such Code for means of egress. For the purposes of this paragraph, such additional stairwell shall include the stair and landings as well as any walls enclosing the stair and landings;

(12) exterior wall thickness, up to eight inches:

(i) where such wall thickness is added to the exterior face of a ***building*** wall existing on April 30, 2012, provided the added wall thickness has a thermal resistance (R-value) of at least 1.5 per inch; or

(ii) where such wall thickness is part of an exterior wall constructed after April 30, 2012, equal to the number of inches by which the wall's total thickness exceeds eight inches, provided the above-grade exterior walls of the ***building*** envelope are more energy efficient than required by the New York City Energy Conservation Code (NYCECC) as determined by the following:

(1) the area-weighted average U-factor of all opaque above-grade wall assemblies shall be no greater than 80 percent of the area-weighted average U-factor determined by using the prescribed requirements of the NYCECC; and

(2) the area-weighted average U-factor of all above-grade exterior wall assemblies, including vertical fenestrations, shall be no more than 90 percent of the area-weighted average U-factor determined by using the prescribed requirements of the NYCECC. For the purposes of calculating the area-weighted average U-factor, the amount of fenestration shall equal the amount of fenestration provided in such exterior walls, or an amount equal to the maximum fenestration area referenced in the NYCECC for the calculation of the baseline energy code requirement, whichever is less;

For the purposes of calculating compliance with this paragraph, (12)(ii), the term “above-grade” shall only include those portions of walls located above the grade adjoining such wall. Compliance with this paragraph shall be demonstrated to the Department of Buildings at the time of issuance of the building permit for such exterior walls. The total area of wall thickness excluded from the calculation of ***floor area*** shall be reflected on the next issued temporary or final certificate of occupancy for the ***building***, as well as all subsequent certificates of occupancy;

(13) floor space in a rooftop greenhouse permitted pursuant to Section 75-01 (Certification for Rooftop Greenhouses);

(14) floor space on a sun control device, where such space is inaccessible other than for maintenance.

Floor area ratio (2/2/11)

"Floor area ratio" is the total ***floor area*** on a ***zoning lot***, divided by the ***lot area*** of that ***zoning lot***. If two or more ***buildings*** are located on the same ***zoning lot***, the ***floor area ratio*** is the sum of their ***floor areas*** divided by the ***lot area***. (For example, a ***zoning lot*** of 10,000 square feet with a ***building*** containing 20,000 square feet of ***floor area*** has a ***floor area ratio*** of 2.0, and a ***zoning lot*** of 20,000 square feet with two ***buildings*** containing a total of 40,000 square feet of ***floor area*** also has a ***floor area ratio*** of 2.0)

Through lot — see Lot, through

Tourist cabin — see Motel or tourist cabin

Trailer (12/15/61)

A "trailer" is a vehicle standing on wheels or rigid supports that is used for living or sleeping purposes.

Trailer camp (2/2/11)

A "trailer camp" is a ***zoning lot*** or portion thereof used or designated for the ***use*** of two or more ***trailers***.

Transit Zone (3/22/16)

The “Transit Zone” is the area within the boundaries shown in APPENDIX I of this Resolution where special parking provisions apply.

Transient hotel — see Hotel, transient

Two-family residence (2/2/11)

A "two-family residence" is a ***building*** containing not more than two ***dwelling units***, and occupied by only two ***families***.

Unenclosed sidewalk cafe — see Sidewalk cafe, unenclosed

Urban plaza — see Plaza, urban

Use (2/2/11)

A "use" is:

(a) any purpose for which a ***building or other structure*** or an open tract of land may be designed, arranged, intended, maintained or occupied; or

(b) any activity, occupation, business or operation carried on, or intended to be carried on, in a ***building or other structure*** or on an open tract of land.

Waterfront area (4/22/09)

The "waterfront area" is the geographical area comprising all ***blocks*** between the pierhead line and a line 800 feet landward from the ***shoreline***. Where such line intersects a ***block***, the entire ***block*** shall be included and the ***waterfront area*** boundary shall coincide with the centerline of the landward boundary ***street*** or other ***block*** boundary. Notwithstanding the above, any ***zoning lot***, the boundaries of which were established prior to November 1, 1993, and which is not closer than 1,200 feet from the ***shoreline*** at any point and which does not ***abut*** a waterfront public park, shall not be included in the ***waterfront area***.

For the purposes of this definition, only ***blocks*** along waterways that have a minimum width of 100 feet between opposite ***shorelines***, with no portion downstream less than 100 feet in width, shall be included within the ***waterfront area***. However, ***blocks*** bounding the Gowanus Canal north of Hamilton Avenue, as shown on the City Map, Dutch Kills and the portion of the Bronx River located south of the prolongation of East 172nd Street, shall be included within the ***waterfront area***.

23-65 - Tower Regulations

LAST AMENDED
3/22/2016

R9 R10

In the districts indicated without a letter suffix, except for ***Quality Housing buildings***, and except as set forth in paragraph (c) of this Section, any portion or portions of ***buildings*** which in the aggregate occupy not more than 40 percent of the ***lot area*** of a ***zoning lot***, or for ***zoning lots*** of less than 20,000 square feet, the percentage set forth in the table below, may penetrate an established ***sky exposure plane*** in accordance with the provisions of this Section. Such portions of ***buildings*** that penetrate a ***sky exposure plane*** are hereinafter referred to as towers.

LOT COVERAGE OF TOWERS ON SMALL ZONING LOTS

Area of ***Zoning Lot*** (in square feet)	Maximum Percent of ***Lot Coverage***
10,500 or less	50
10,501 to 11,500	49
11,501 to 12,500	48
12,501 to 13,500	47
13,501 to 14,500	46
14,501 to 15,500	45
15,501 to 16,500	44
16,501 to 17,500	43
17,501 to 18,500	42

18,501 to 19,999	41

Buildings developed or ***enlarged*** with towers shall comply with either tower-on-a-base regulations or standard tower regulations, as follows:

(a) Applicability of tower-on-a-base regulations

The tower-on-a-base regulations of Section 23-651 shall apply to any such ***building*** that:

(1) contains more than 25 percent of its total ***floor area*** in ***residential use*** ; and

(2) is located on a ***zoning lot*** that fronts upon a ***wide street*** and is either within 125 feet from such ***wide street*** frontage along the short dimension of the ***block*** or within 100 feet from such ***wide street*** frontage along the long dimension of the ***block***.

If a portion of such ***building*** is ***developed*** or ***enlarged*** with a tower the entire ***zoning lot*** shall be subject to the provisions of Section 23-651 (Tower-on-a-base).

(b) Applicability of standard tower regulations

The standard tower regulations of Section 23-652 shall apply to any such ***building*** that does not meet the location and ***floor area*** criteria of paragraph (a) of this Section.

(c) Inapplicability of tower regulations

The provisions of this Section shall not apply to any ***building*** located wholly or partly in a ***Residence District***, that is within 100 feet of a ***public park*** with an area of one acre or more, or a ***street line*** opposite such a ***public park***.

23-651 - Tower-on-a-base

LAST AMENDED
3/22/2016

Any ***development*** or ***enlargement*** that meets the location and ***floor area*** criteria of paragraph (a) of Section 23-65 and includes a tower shall be constructed as a tower-on-a-base, in accordance with the regulations set forth in this Section. The height of all ***buildings or other structures*** shall be measured from the ***base plane***.

(a) Tower regulations

(1) At any level above a ***building*** base (referred to hereinafter as a "base"), any portion or portions of a ***building*** (referred to hereinafter as a "tower") shall

occupy in the aggregate:

(i) 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 percentage set forth in the table in Section 23-65 (Tower Regulations); and

(ii) 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 that ***story*** directly below it.

(2) Any tower located above a base shall not be subject to the provisions of Section 23-64 (Basic Height and Setback Requirements).

(3) At least 55 percent of the total ***floor area*** permitted on the ***zoning lot*** shall be located in ***stories*** located either partially or entirely below a height of 150 feet.

When the ***lot coverage*** of the tower portion is less than 40 percent, the required 55 percent of the total ***floor area*** distribution, within a height of 150 feet, shall be increased in accordance with the following requirement:

Percent of ***Lot Coverage*** of the Tower Portion	Minimum Percent of Total ***Building Floor Area*** Distribution Below the Level of 150 Feet
40.0 or greater	55.0
39.0 to 39.9	55.5
38.0 to 38.9	56.0
37.0 to 37.9	56.5
36.0 to 36.9	57.0
35.0 to 35.9	57.5
34.0 to 34.9	58.0

33.0 to 33.9	58.5
32.0 to 32.9	59.0
31.0 to 31.9	59.5
30.0 to 30.9	60.0

(4) At all levels, such tower shall be set back from the ***street wall*** of a base at least 15 feet along a ***narrow street*** and at least 10 feet along a ***wide street***, except that such dimensions shall include the depth of any permitted recesses in the ***street wall***.

(5) No tower or portion thereof shall be located on a ***narrow street*** at a distance that is more than 100 feet from the intersection with a ***wide street***.

Unenclosed balconies, subject to the provisions of Section 23-13 (Balconies), are permitted to project into or over open areas not occupied by towers.

For the purposes of determining the permitted tower coverage and the required minimum distance between ***buildings*** or portions thereof, that portion of a ***zoning lot*** located within 125 feet from the ***wide street*** frontage along the short dimension of a ***block*** shall be treated as if it were a separate ***zoning lot***.

(b) ***Building*** base regulations

(1) ***Street wall*** location

(i) On a ***wide street***, and on a ***narrow street*** within 125 feet of its intersection with a ***wide street***, the ***street wall*** of the base shall occupy the entire ***street*** frontage of a ***zoning lot*** not occupied by existing ***buildings***. At any height, at least 70 percent of the width of such ***street wall*** shall be located within eight feet of the ***street line***, and the remaining 30 percent of such ***street wall*** may be recessed beyond eight feet of the ***street line*** to provide ***outer courts*** or balconies.

However, no such recesses shall be permitted within 20 feet of an adjacent ***building*** fronting on the same ***street line*** or within 30 feet of the intersection of two ***street lines***.

(ii) On a ***narrow street*** beyond 125 feet from its intersection with a ***wide street***, no ***street wall*** of a base is required nor shall any ***street wall*** provided beyond 125 feet count toward the computation of any

permitted recesses on such wall.

(iii) Where the ***street wall*** of an adjacent ***building*** fronting on the same ***street line*** is located within 10 feet of the ***street line***, the ***street wall*** of the base shall be either located at the ***street line*** or aligned with the ***street wall*** of the adjacent ***building*** for a distance of not less than 20 feet measured horizontally from the side wall of such existing ***building***.

(2) Height of ***street wall***

All ***street walls*** of a base shall rise vertically without setback to a height of not less than 60 feet nor more than 85 feet except:

(i) On a ***wide street***, if the height of the ***street wall*** of an adjacent ***building*** fronting on the same ***street line*** exceeds 60 feet and if such ***street wall*** is located within 10 feet of the ***street line***, the ***street wall*** of the base shall match the height of the ***street wall*** of the adjacent ***building*** to a maximum height of 100 feet by either of three alternatives:

(a) the ***street wall*** of the base shall be extended vertically to the height of the adjacent ***building*** for a distance of not less than 20 feet measured horizontally from the side wall of such adjacent ***building*** ;

(b) at least 50 percent of the width of the ***street wall*** of the base shall be extended vertically to the height of the adjacent ***building*** ; or

(c) a dormer shall be provided pursuant to paragraph (b)(3) of this Section. Such dormer shall match the height of the adjacent ***building***.

Such ***street wall*** of the base fronting on a ***wide street*** may be extended along a ***narrow street*** within 70 feet of its intersection with the ***wide street***.

(ii) On a ***narrow street*** beyond 100 feet of its intersection with a ***wide street***, the ***street wall*** of a base shall rise vertically to a height of at least 60 feet when the adjacent ***building*** is either less than 60 feet or greater than 85 feet, or match the height of the adjacent ***building*** when the height of such ***building*** is between 60 feet and 85 feet.

For the purposes of this paragraph, (b)(2), inclusive, the height of an adjacent ***building*** shall be the height of a ***street wall***, before setback, if applicable, of that portion of an existing ***building*** nearest the ***development*** or ***enlargement***, fronting on the same ***street line***, and located on the same or an adjoining

zoning lot.

(3) Dormer

For the purposes of this Section, a dormer shall be a vertical extension of the ***street wall*** of a base allowed as a permitted obstruction within a required front setback area. A dormer may be located anywhere on a ***wide street***, and on a ***narrow street*** within 70 feet of its intersection with a ***wide street***.

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

(4) Open areas

All open areas at ground level, located between the ***street line*** and the ***street wall*** of a base shall be landscaped except in front of entrances and exits to the ***building***.

(c) Modification of tower coverage and ***floor area*** distribution requirements

The tower ***lot coverage*** and ***floor area*** distribution requirements set forth in paragraph (a)(3) of this Section shall be modified for ***buildings*** that provide articulation of a base in accordance with the following provisions:

(1) Recesses

Recesses shall occupy, in the aggregate, between 30 and 50 percent of the width of each eligible ***story*** of the base, and measure at least two feet in depth. In addition, the width of any individual recess provided within eight feet of the ***street line*** shall not exceed 25 percent of the width of the ***street wall*** of the base, unless such recess is provided in combination with an additional recess located beyond eight feet of the ***street line***.

Furthermore, all recesses shall comply with the provisions of paragraph (b)(1) of this Section or paragraph (a)(1) of Section 35-64 (Special Tower Regulations for Mixed Buildings), as applicable. For each ***street*** frontage of a ***building*** with recesses provided in accordance with this paragraph, (c)(1), the percent of ***lot coverage*** of the tower portion of the ***building*** may be decreased by 0.5 percent, and the minimum percent of total ***building floor area*** distribution below a level of 150 feet may be reduced by 0.25 percent.

(2) Dormers

For each ***street*** frontage with dormers, provided in accordance with paragraph (b)(3) of this Section, that measure, at their lowest level, at least 50 percent of the width of the ***street wall*** of the highest ***story*** of the base, and measure, at their highest level, at least 25 percent of the width of the highest ***story*** of the base, and rise at least 25 feet above the base, the percent of ***lot coverage*** of the tower portion of the ***building*** may be decreased by 0.5 percent, and the minimum percent of total ***building floor area*** distribution below a level of 150 feet may be reduced by 0.25 percent.

(3) Matching provision

For each ***street*** frontage that provides an extension of the ***street wall*** of a base that matches the height of an adjacent ***building*** in accordance with paragraph (b)(2)(i)(b) of this Section, the percent of ***lot coverage*** of the tower portion of the ***building*** may be decreased by 0.5 percent, and the minimum percent of total ***building floor area*** distribution below a level of 150 feet may be reduced by 0.25 percent.

However, the total percent of ***lot coverage*** of the tower portion of the ***building*** shall not be decreased by more than 2.0 percent, nor shall the minimum percent of total ***building floor area*** distribution below a level of 150 feet be reduced by more than 1.0 percent.

23-652 - Standard tower

LAST AMENDED
2/2/2011

Any ***development*** or ***enlargement*** that does not meet the location and ***floor area*** criteria of paragraph (a) of Section 23-65 and includes a tower shall be constructed as a standard tower in accordance with the regulations set forth in this Section.

At all levels, a tower shall be located not less than 15 feet from the ***street line*** of a ***narrow street*** and not less than 10 feet from the ***street line*** of a ***wide street***.

Unenclosed balconies, subject to the provisions of Section 23-13 (Balconies), are permitted to project into or over open areas not occupied by towers.

24-54 - Tower Regulations

LAST AMENDED
3/22/2016

R7-2 R8 R9 R10

(a) In the districts indicated without a letter suffix, for ***buildings*** other than ***Quality Housing buildings***, except as set forth in paragraph (b) of this Section, any portion or portions of ***buildings*** which in the aggregate occupy not more than 40 percent of the ***lot area*** of a ***zoning lot*** or, for ***zoning lots*** of less than 20,000 square feet, the percentage set forth in the table in this Section, may penetrate an established ***sky exposure plane*** in accordance with the provisions of this Section. (Such portion of a ***building*** that penetrates a ***sky exposure plane*** is hereinafter referred to as a tower.)

LOT COVERAGE OF TOWERS ON SMALL ZONING LOTS

Area of ***Zoning Lot*** (in square feet)	Maximum Percent of ***Lot Coverage***
10,500 or less	50
10,501 to 11,500	49
11,501 to 12,500	48
12,501 to 13,500	47
13,501 to 14,500	46
14,501 to 15,500	45
15,501 to 16,500	44
16,501 to 17,500	43
17,501 to 18,500	42
18,501 to 19,999	41

Buildings developed or ***enlarged*** with towers shall comply with either tower-on-a-base regulations or standard tower regulations as follows:

(1) Applicability of tower-on-a-base regulations

The tower-on-a-base regulations of Section 23-651 shall apply in R9 and R10 Districts to any such ***building*** that:

(i) is located on a ***zoning lot*** that fronts upon a ***wide street*** and is either within 125 feet from such ***wide street*** frontage along the short dimension of the ***block*** or within 100 feet from such ***wide street*** frontage along the long dimension of the ***block***; and

(ii) contains more than 25 percent of its total ***floor area*** in ***residential use***.

If a portion of such ***building*** is ***developed*** or ***enlarged*** as a ***tower*** the entire ***zoning lot*** shall comply with the provisions of Section 23-651.

(2) Applicability of standard tower regulations

(i) In R7-2 and R8 Districts, the standard tower regulations of Section 23-652 shall apply only to ***buildings developed*** or ***enlarged*** as towers, where such towers are comprised, at every level, of only ***community facility uses***.

(ii) In R9 and R10 Districts, the standard tower regulations of Section 23-652 shall apply to any ***building developed*** or ***enlarged*** as a tower that does not meet the location and ***floor area*** criteria of paragraph (a)(1) of this Section.

(b) Inapplicability of tower regulations

R7-2 R8 R9 R10

In the districts indicated, the provisions of this Section shall not apply to any ***development*** or ***enlargement*** located wholly or partly in a ***Residence District*** that is within 100 feet of a ***public park*** with an area of one acre or more, or a ***street line*** opposite such a ***public park***.

33-45 - Tower Regulations

LAST AMENDED
12/15/1961

33-451 - In certain specified Commercial Districts

LAST AMENDED
3/22/2016

C4-7 C5-2 C5-3 C5-4 C5-5 C6-4 C6-5 C6-6 C6-7 C6-8 C6-9

In the districts indicated, any ***buildings*** or portions thereof which in the aggregate occupy not more than 40 percent of the ***lot area*** of a ***zoning lot*** or, for ***zoning lots*** of less than 20,000 square feet, the percent set forth in Section 33-454 (Towers on small lots), may penetrate an established ***sky exposure plane***. (Such ***building*** or portion thereof is hereinafter referred to as a tower.) At any given level, except where the provisions set forth in Section 33-455 (Alternate regulations for towers on lots bounded by two or more streets) or 33-456 (Alternate setback regulations on lots bounded by two or more streets) or 33-457 (Tower setbacks on narrow blocks) are applicable and where the option is taken to be governed by such provisions, such tower may occupy any portion of the ***zoning lot*** not located less than 15 feet from the ***street line*** of a ***narrow street***, or less than 10 feet from the ***street line*** of a ***wide street***, provided that the aggregate area so occupied within 50 feet of a ***narrow street*** shall not exceed 1,875 square feet and the aggregate area so occupied within 40 feet of a ***wide street*** shall not exceed 1,600 square feet.

If all of the ***buildings*** on a ***zoning lot*** containing such tower do not occupy at any level more than the maximum percent of the ***lot area*** set forth in this Section or Section 33-454 for towers, the tower may occupy any portion of the ***zoning lot*** located 20 feet or more from the ***street line*** of a ***narrow street*** or 15 feet or more from the ***street line*** of a ***wide street***, provided that the aggregate area so occupied within 50 feet of a ***narrow street*** shall not exceed 2,250 square feet and the aggregate area so occupied within 40 feet of a ***wide street*** shall not exceed 2,000 square feet.

Unenclosed balconies, subject to the provisions of Section 24-166 (Balconies), are permitted to project into or over open areas not occupied by towers.

33-452 - Community facility buildings in C1 or C2 Districts when mapped within R7-2, R8, R9 or R10 Districts

LAST AMENDED
6/29/1994

C1-1 C1-2 C1-3 C1-4 C1-5 C2-1 C2-2 C2-3 C2-4 C2-5

In the districts indicated, when mapped within an R7-2, R8, R9 or R10 District, the provisions set forth in Section 33-451 (In certain specified Commercial Districts) shall apply to any ***community facility building***. If a ***building*** is used for both ***community facility*** and ***commercial uses***, no portion of such ***building*** occupied by ***commercial use*** shall penetrate the ***sky exposure plane*** as set forth in Sections 33-43 (Maximum Height of Walls and Required Setbacks) or 33-44 (Alternate Front Setbacks).

33-453 - Community facility buildings in certain specified Commercial Districts

LAST AMENDED
6/29/1994

C1-6 C1-7 C1-8 C1-9 C2-6 C2-7 C2-8 C4-4 C4-5 C4-6 C5-1 C6-1 C6-2 C6-3 C8-3 C8-4

In the districts indicated, the provisions set forth in Section 33-451 (In certain specified Commercial Districts) shall apply to any ***community facility building***. If a ***building*** is used for both ***community facility*** and ***commercial uses***, no portion of such ***building*** occupied by ***commercial use*** shall penetrate the ***sky exposure plane*** as set forth in Section 33-43 (Maximum Height of Walls and Required Setbacks) or 33-44 (Alternate Front Setbacks).

33-454 - Towers on small lots

LAST AMENDED
12/15/1961

C1 C2 C4-4 C4-5 C4-6 C4-7 C5 C6 C8-3 C8-4

In the districts indicated, a tower permitted under the provisions of Sections 33-451, 33-452 or 33-453 may occupy the percent of the ***lot area*** of a ***zoning lot*** set forth in the following table:

LOT COVERAGE OF TOWERS ON SMALL ZONING LOTS

Area of ***Zoning Lot*** (in square feet)	Maximum Percent of ***Lot Coverage***
10,500 or less	50
10,501 to 11,500	49
11,501 to 12,500	48

12,501 to 13,500	47
13,501 to 14,500	46
14,501 to 15,500	45
15,501 to 16,500	44
16,501 to 17,500	43
17,501 to 18,500	42
18,501 to 19,999	41

33-455 - Alternate regulations for towers on lots bounded by two or more streets

LAST AMENDED
2/2/2011

C5-3 C5-5 C6-6 C6-7 C6-9

In the districts indicated, if a ***zoning lot*** is bounded by at least two ***street lines***, a tower may occupy the percent of the ***lot area*** of a ***zoning lot*** set forth in this Section, provided that, except as otherwise set forth in Section 33-457 (Tower setbacks on narrow blocks), all portions of any ***building*** or ***buildings*** on such ***zoning lot***, including such tower, are set back from ***street lines*** as required in this Section.

(a) The maximum percent of ***lot area*** that may be occupied by such tower, shall be the sum of 40 percent plus one-half of one percent for every .10 by which the ***floor area ratio*** of such ***zoning lot*** is less than the ***floor area ratio*** permitted under the provisions of Sections 33-12 (Maximum Floor Area Ratio), 33-13 (Floor Area Bonus for a Public Plaza) or 33-14 (Floor Area Bonus for Arcades). The maximum ***lot coverage*** for any tower built under the provisions of this Section or for any ***building*** or ***buildings*** on any ***zoning lot*** occupied by such tower shall be 55 percent of the ***lot area*** of such ***zoning lot***.

(b) At all levels, including ground level, such ***building*** shall be set back from the ***street line*** as follows:

(1) On ***narrow streets***, by a distance equal to at least the fraction of the ***aggregate width of street walls*** of the tower, the numerator of which fraction is one and

the denominator of which fraction is the sum of 3.0 plus .0667 for every .10 by which the ***floor area ratio*** of such ***building*** is less than the ***floor area ratio*** permitted under the provisions of Sections 33-12, 33-13 or 33-14, provided that such fraction shall be no less than one-fifth, and provided further that such setback need not exceed 45 feet.

(2) On ***wide streets***, by a distance equal to at least the fraction of the ***aggregate width of street walls*** of the tower, the numerator of which fraction is one and the denominator of which fraction is the sum of 4.0 plus .10 for every .10 by which the ***floor area ratio*** of such ***building*** is less than the ***floor area ratio*** permitted under the provisions of Sections 33-12, 33-13 or 33-14, provided that such fraction shall be no less than one-seventh, and provided further that such setback need not exceed 35 feet.

(c) If a ***zoning lot*** occupies an entire ***block***, the maximum setback, set forth in paragraph (b) of this Section, of 45 feet on each ***narrow street*** bounding the ***zoning lot*** may be reduced by one foot for every six feet of setback provided on a ***wide street*** bounding the ***zoning lot*** in addition to the setbacks otherwise required for ***wide streets*** as set forth in such paragraph, provided that no setback on a ***narrow street*** resulting from such reduction shall be less than 35 feet or one-tenth the ***aggregate width of street walls*** of the tower, whichever shall require the greater setback.

(d) The additional setbacks on ***wide streets*** set forth in paragraph (c) of this Section may be provided entirely on one ***wide street*** or divided in any proportion among any two ***wide streets*** bounding the ***zoning lot***.

(e) Notwithstanding any other provision set forth in this Section, no ***building*** or portion of a ***building*** built under the provisions of this Section shall be set back less than 25 feet from the ***street line*** on ***narrow streets*** or less than 15 feet from the ***street line*** on ***wide streets***.

33-456 - Alternate setback regulations on lots bounded by two or more streets

LAST AMENDED
2/2/2011

C5-3 C5-5 C6-6 C6-7 C6-9

In the districts indicated, except as otherwise set forth in Section 33-457 (Tower setbacks on narrow blocks), if a ***zoning lot*** is bounded by at least two ***street lines***, a tower occupying not more than the percent of ***lot area*** set forth in Section 33-451 (In certain specified Commercial Districts) or 33-454 (Towers on small lots), may be set back from a ***street line*** as follows:

(a) On ***narrow streets***, by a distance equal to at least the fraction of the ***aggregate width of street walls*** of the tower, the numerator of which fraction is one and the

denominator of which fraction is the sum of 3.0 plus .0333 for each .10 by which the ***floor area ratio*** of the ***zoning lot*** is less than the ***floor area ratio*** permitted under the provisions of Section 33-12, 33-13 or 33-14, provided that such fraction shall be no less than one-fifth, and provided further that such setback need not exceed 45 feet.

(b) On ***wide streets***, by a distance equal to at least the fraction of the ***aggregate width of street walls*** of the tower, the numerator of which fraction is one and the denominator of which fraction is the sum of 4.0 plus .05 for each .10 by which the ***floor area ratio*** of the ***zoning lot*** is less than the ***floor area ratio*** permitted under the provisions of Sections 33-12 (Maximum Floor Area Ratio), 33-13 (Floor Area Bonus for a Public Plaza) or 33-14 (Floor Area Bonus for Arcades), provided that such fraction shall be no less than one-seventh, and provided further that such setback need not exceed 35 feet.

(c) Notwithstanding any other provisions set forth in this Section, no tower built under the provisions of this Section shall be set back less than 25 feet from the ***street line*** on ***narrow streets*** or less than 15 feet from the ***street line*** on ***wide streets***.

33-457 - Tower setbacks on narrow blocks

LAST AMENDED
4/22/1965

C5-3 C5-5 C6-6 C6-7 C6-9

In the districts indicated, if a ***zoning lot*** is bounded by at least three ***street lines***, and any two of the ***street lines*** are opposite to each other and parallel or within 45 degrees of being parallel to each other, and their average distance apart is 150 feet or less, the minimum distance a tower is required to be set back from such opposite ***street lines*** under the provisions of Section 33-455 (Alternate regulations for towers on lots bounded by two or more streets) or Section 33-456 (Alternate setback regulations on lots bounded by two or more streets), is reduced in accordance with the following table:

TOWER SETBACKS ON NARROW BLOCKS

	Reduction of Required Tower Setback	Minimum Setback for Tower Built under Provisions of this Section
On ***narrow street***	30 percent or 10 feet, whichever is less	15 feet
On ***wide street***	40 percent or 10 feet, whichever is less	10 feet

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

LAST AMENDED
8/14/1987

C1 C2 C3 C4 C5 C6 C7 C8

In all districts, as indicated, whenever a ***zoning lot*** is divided by a boundary between districts, or is subject to other regulations resulting in different height and setback regulations, or whenever a ***zoning lot*** is divided by a boundary between a district to which the provisions of Section 33-45 (Tower Regulations) apply and a district to which such provisions do not apply, the provisions set forth in Article VII, Chapter 7, shall apply.

35-64 - Special Tower Regulations for Mixed Buildings

LAST AMENDED
3/22/2016

C1 C2 C4 C5 C6

In the districts indicated without a letter suffix, when a ***mixed building*** is subject to tower regulations, the ***residential*** tower regulations of paragraphs (a) and (b) or the ***commercial*** tower regulations of paragraph (c) of this Section shall apply to the entire ***building***.

(a) In C1 or C2 Districts mapped within R9 or R10 Districts, or in C1-8, C1-9, C2-7 or C2-8 Districts, a ***mixed building*** that meets the location and ***floor area*** criteria of paragraph (a) of Section 23-65 (Tower Regulations) shall be governed by the provisions of Section 23-651 (Tower-on-a-base), except that the ***building*** base regulations of paragraph (b) of Section 23-651 shall be modified, as follows:

(1) On a ***wide street***, and on a ***narrow street*** within 30 feet of its intersection with a ***wide street***, the entire width of the ***street wall*** of a base shall be located on the ***street line***.

However, to allow for articulation of corners at the intersection of two ***street lines***, the ***street wall*** may be located anywhere within an area bounded by the two ***street lines*** and a line connecting such ***street lines*** at points 15 feet from their intersection. Recesses, not to exceed three feet in depth from the ***street line***, shall be permitted on the ground floor where required to provide access to the ***building***.

(2) On a ***narrow street*** beyond 30 feet of its intersection with a ***wide street***, the ***street wall*** of a base shall be located within eight feet of a ***street line***.

(3) On a ***wide street***, recesses above the ground floor are permitted at any level in the ***street wall*** of a base for ***outer courts*** or balconies. The aggregate width of such recesses shall not exceed 50 percent of the width of the entire ***street wall*** at any level.

However, not more than 30 percent of the aggregate width of such recesses shall exceed a depth of eight feet. Furthermore, no recesses shall be permitted below a height of 12 feet, within 20 feet of an adjacent ***building***, or within 30 feet of the intersection of two ***street lines***, except for corner articulation as provided for in paragraph (a)(1) of this Section.

(4) On a ***narrow street***, recesses are permitted at any level in the ***street wall*** of a base for ***outer courts*** or balconies. The aggregate width of such recesses shall not exceed 50 percent of the width of the entire ***street wall*** at any level.

However, not more than 30 percent of the aggregate width of such recesses shall exceed a depth of eight feet. Furthermore, no recesses shall be permitted below a height of 12 feet within 20 feet of an adjacent ***building***, or within 30 feet of the intersection of two ***street lines***, except for corner articulation as provided for in paragraph (a)(1) of this Section.

(b) In C4-6, C5-1 or C6-3 Districts, the ***residential*** portion of a ***mixed building*** that in the aggregate occupies not more than 40 percent of the ***lot area*** of a ***zoning lot*** or, for ***zoning lots*** of less than 20,000 square feet, the percent set forth in Section 23-65, may be constructed in conformance with the provisions of Section 23-652 (Standard tower), provided the following conditions are met:

(1) at least 65 percent of the total allowable ***floor area*** on a ***zoning lot*** under the applicable district regulations is occupied by ***residential uses***;

(2) all ***uses*** within such ***mixed building*** comply with the provisions of Section 32-42 (Location Within Buildings); and

(3) only the ***residential*** portion of such ***mixed building*** penetrates the ***sky exposure plane*** as set forth in Sections 33-432 or 33-442 (In other Commercial Districts).

(c) In C4-7, C5-2, C5-3, C5-4, C5-5, C6-4, C6-5, C6-6, C6-7, C6-8 or C6-9 Districts, the tower regulations applicable to any ***mixed building*** shall be the regulations set forth in Section 33-45.

However, in C4-7, C5-2, C5-4, C6-4, C6-5 or C6-8 Districts, when no more than two ***stories*** of a ***mixed building*** are occupied by non-***residential uses***, the tower regulations applicable to the ***residential*** portion of such ***mixed building*** may be governed by Section 23-652 or, for towers on small lots, the percentages set forth in Section 23-65.

All ***uses*** within such ***mixed building*** shall comply with the provisions of Section 32-42.