NEW YORK CITY BOARD OF STANDARDS AND APPEALS

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

Appellants,

BSA Cal. No. 2019- 94-A

Appeal from Building Permit issued April 11, 2019

Concerning Block 1118, Lot 45

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REPLY STATEMENT OF FACTS AND LAW OF THE CITY CLUB *ET AL.*

Appellants submit this Reply Statement in response to the Statements of West 66th Sponsor LLC ("Extell") and the Department of Buildings ("DOB").[1]

I. THE NEED FOR AN EXPEDITIOUS DECISION

Recognizing the need for a rapid decision in this matter, at the hearing in the Supreme Court case brought by Appellants regarding this building, Justice Jaffe urged Extell to join with Appellants in asking this Board to expedite the case, which it agreed to do and has done. *See City Club of N.Y. v. Extell Dev. Co.*, 2019 NY Slip Op. 31645(U), at **8, 12 (stating that "defendants do not dispute that appeals to the BSA can take a year or more," and that "there is apparently an astonishing possibility that the BSA will take more time to render a decision than it would take to build a 775-foot building notwithstanding the parties' joint request for an expedited

[1] Because Extell's Statement contains all or almost all the arguments also made by DOB, almost all the arguments below refer to and cite to Extell's Statement only. Unless otherwise stated, the Board may assume that they are addressed to DOB's arguments as well.

ruling"). Appellants also stressed the need for expedition in letters to this Board dated May 10th and June 6th.

Appellants filed this appeal on or about May 7, 2019. Responding to the parties' requests, the Board scheduled a hearing in this matter for August 6th instead of September as originally forecast. However, even three months is a long time in this situation. Appellants request that further steps in this matter also be expedited as much as possible.

The reason for this urgency is that given the Court of Appeals' decision in *Dreikausen v. Zoning Board of Appeals*, 98 N.Y.2d 165 (2002), it is very difficult, if not impossible, for Appellants to obtain a preliminary injunction halting construction. Once construction reaches the point where demolition would be required if Appellants were to prevail, Appellants will be without a remedy, even if a tribunal ultimately finds their case to be meritorious.

Dreikausen created an unfortunate paradox such that, if that case is followed strictly, it is a logical impossibility for a petitioner to get a preliminary injunction to stop ongoing construction. The Court of Appeals there held that once a building has reached "substantial completion," any claims for violations of zoning, environmental or similar laws will be moot – unless petitioners have moved for a preliminary injunction as soon as permits were issued and have renewed their request at every possible juncture. *Dreikausen*. 98 N.Y.2d at 173-174. By pressing for injunctive relief, the Court held, petitioners prove their seriousness, and thereby put the developer on notice that it proceeds with construction at its own risk.

The paradox is that a preliminary injunction requires a showing of irreparable harm. The harm is that by the time the case reaches an appellate court, the building will be complete and petitioner's case will be moot. But *Dreikausen* says that by the very act of seeking an injunction, the petitioner has avoided the harm. Because the petitioner cannot meet a basic requirement for

injunctive relief, it can never win the motion. Indeed, in *City Club v. Extell*, Justice Jaffee denied the preliminary injunction because plaintiffs could not meet the irreparable harm requirement: "[H]aving sought an injunction, plaintiffs preserved their right to seek demolition of the building." *City Club v. Extell*, at **12(citing *Dreikausen*).[2]

Dreikausen's promise that making this unwinnable motion will protect Appellants' future right to relief is false. *Dreikausen* states that "relief remains at least theoretically available even after completion of the project," that "structures changing the use of property most often can be destroyed," and that "a race to completion cannot be determinative." *Dreikausen,* 98 N.Y.2d at 172. But "theoretically" remains the operative word. The reality is that even where petitioners' cases are held not to be moot, they still don't win: the race to completion is in fact determinative. There is no reported case in which a building has been ordered demolished at the behest of a private litigant who alleges a zoning or similar violation.

This is because the courts are extremely reluctant to order even partial demolition of buildings. "[A] mandatory injunction to remove or destroy a building is a drastic remedy which will only be granted if the benefit to the movant if the injunction were granted and the irreparable harm to the movant if the injunction were not granted substantially outweighs the injury to the party against whom the injunction is sought." *Angiolillo v. Town of Greenburgh*, 21 A.D.3d 1101, 1104 (2d Dept. 2005); *Sunrise Plaza Associates, L.P. v International Summit Equities Corp.*, 288 A.D.2d 300, 301 (2d Dep't 2001) (same). This can be a very hard standard to meet.

[2] The logical impossibility of obtaining a preliminary injunction is compounded by the fact that even petitioners who are granted that relief may be unable to post the undertaking that a court could well require to protect a developer who might incur substantial costs from delay. In this case, for example, Extell alleged that its damages would run to over $4 million per month.

In the great majority of cases, a developer can start construction upon receiving its foundation permit, knowing that under the current rules it will likely win the "race to completion." The extremely rare instances in which demolition has been ordered are ones in which that remedy was obtained by a local government because an owner or developer had blatantly and egregiously flouted the law. The one case that is frequently cited is *Parkview Associates v. City of New York*, 71 N.Y.2d 274 (1988), where, following a decision by this Court, the developer was required to remove twelve stories from an almost finished Manhattan apartment building. That case pitted the City, not a private party, against a developer. The City had issued a stop-work order and the developer sued to be allowed to finish the building. Although the developer claimed to have misread the zoning map, the Court of Appeals found that that it had acted in bad faith. *Id*. at 282.

If Appellants are to have an opportunity to have their case heard in the courts, it is imperative that this Board and the courts reach the merits in a timely manner. In this case, Extell represented to Justice Jaffee that its building would reach 200 feet, the height of the first mechanical void, by next March. If Appellants are not to be deprived of their right to seek review in the courts and obtain a judgment on the merits before then, this Board and the courts must act expeditiously.

II. THE BULK PACKING RULE

Extell argues that the Bulk Packing Rule, which was intended to limit the height of towers, applies even where towers are not allowed, with the result that it can lawfully use that Rule to actually increase the height of its tower beyond what would otherwise be permitted. Indeed, according to Extell that Rule has nothing to do with towers, and ZR §§ 82-34 and 82-36 are not tower-on-a-base rules at all. Extell Statement, 14-15. The Tower Coverage Rule and the Bulk Packing Rule are, Extell says, "separate requirements . . . not

linked." *Id.* at 20. Extell uses these arguments to conclude that applying the Bulk Packing Rule to a district where towers are not allowed is actually mandated by ZR § 82-34.

Although the Bulk Packing Rule (also known as the Bulk Distribution Rule) does not have in it the word "tower," it is overwhelmingly obvious from its language, context, and legislative history that it applies to towers, and only to towers.

No fewer than 21 times, Extell claims that the Rule's "plain language" supports, and even requires, the absurd results of its interpretation. It is Extell's interpretation, however, not Appellants, that contravenes the language, as well as the purpose, of the Rule. Consistent with common use of the English language, the phrase "Within the Special District" does not mean "Everywhere within the Special District." It means "Within the Special District where applicable," where it makes sense to apply it, *i.e.*, where towers are allowed.

In amending the Special District regulations to add the Tower Coverage and Bulk Packing Rules with the specific parameters of minimum 30 percent tower coverage and minimum 60 percent bulk below 150 feet, the City Planning Commission made very clear that it was imposing what it believed to be a clear, if flexible, height limit of "low-30 stories." This limit is achieved if and only if the two rules work together as intended.

Extell can articulate no conceivable purpose that a rule limiting the height of towers would serve in the R8 district, where towers are not allowed. In the ordinary case, applying the Bulk Packing Rule in R8 would be meaningless, and the phrase "Within the Special District," even read as Extell would read it, would have no effect at all, because buildings in R8 are not tall enough to have more than 40 percent of their bulk above 150 feet. The fact that the Rule is almost always irrelevant in R8 may have caused the drafters to pay little heed to whether or not it technically "applied" there. But in this case, which involves a

split lot, Extell's interpretation actually increases the height of its tower beyond the height it could have were it entirely in the C4-7 district. Extell does not dispute this. This is a result directly opposite to the Rule's stated purpose.

"The legislative intent is the great and controlling principle" of all statutory interpretation. *Council if the City of New York v. Giuliani*, 93 N.Y.2d 60, 68-69 (1999). Therefore, even if the words of the statute could only be read as Extell does – and that is far from the case here – the Bulk Packing Rule still would not apply to a situation in which, as here, applying it is so directly contrary to the statutory intent. *See, e.g., Matter of Jamie J.*, 30 N.Y.3d 275, 283-284 (2017) ("courts should not adopt 'vacuum-like' readings of statutes in 'isolation with absolute literalness' if such interpretation is 'contrary to the purpose and intent of the underlying statutory scheme'").[3] The statutory language here supports Appellants' reading, not Extell's. But if there is any ambiguity in it, the law is clear that this Court must look to the Rule's purpose and the intent of the Legislature and reject Extell's interpretation.

A. The Bulk Packing Rule of ZR § 82-34 and the Special Tower Coverage and Setback Regulations of ZR § 82-36 Are Intended to Work Together to Limit Height

Extell's contention that the Special District Bulk Packing Rule has nothing to do with tower-on-a-base is belied by (1) the obvious identity of the Special District and general rules in concept and, substantially, in language as well, (2) the linkage of the concept of "packing-the-bulk" with that of minimum tower coverage in their joint history and in the City

[3] There are many other cases to the same effect. *See, e.g.*, *Long v. Adirondack Park Agency*, 76 N.Y.2d 416, 420, 422 (1990); *New York State Bankers Ass'n v. Albright*, 38 N.Y.2d 430, 436-37 (1975).

Planning Commission's reports, and (3) the Commission's frequent statements that the purpose and effect of these two rules together is to limit building heights to "the low-30 stories."

1. The Tower Coverage and Bulk Packing Rules of ZR § 23-651 and ZR §§ 82-34 and 82-36 Are Identical in Concept and Substantially Identical in Language

The text of the statutes enacted in 1993 for R9 and R10 districts generally and, with variations, for the Special District, leave no doubt that the Special District's version is precisely that: a variation on a theme.

A side-by-side comparison of the language of the tower coverage rules shows that they are practically identical:

ZR § 23-651(a)	**ZR § 82-36**
(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:	(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 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	(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
(ii) not less than 30 percent of the #lot area# of a #zoning lot#.	(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 that #story# directly below it.	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.

The bulk packing rules of ZR § 23-651(a) and ZR § 82-34 are identical in concept, but they vary in their specifics. These differences would have made it very awkward

to draft the Special District's version as a modification of the general rule, as Extell argues that the City Planning Commission should have done. The general rule is to be found at § 23-651(a)(3). It provides as follows:

> 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

In other words, in the general rule, the amount of bulk that must be below 150 feet increases from 55 percent to 60 percent as the lot coverage decreases from the maximum allowed of 40 percent to the minimum allowed of 30 percent. This ensures that height will stay constant regardless of variation in tower coverage – and regardless, too, of lot size.

There is no substantive difference between the general rule and its Special District equivalent, ZR § 82-34, but the Special District's version is simpler. In this version, the required

percentage of floor area below 150 feet remains at 60, regardless of tower coverage. ZR § 82-34 provides, in relevant part:

> Within the Special District, at least 60 percent of the total #floor area# permitted on a #zoning lot# shall be within #stories# located partially or entirely below a height of 150 feet from #curb level#.

This means that if a developer chooses to build a squatter tower, with tower coverage greater than 30 percent, the maximum achievable height will be less rather than remaining constant. Nevertheless, the basic concept of both provisions is the same: most of the bulk – in both instances, around 60 percent – must be in the base, the purpose being to reduce the height of the tower. In both instances, too, the maximum achievable height will be the exactly the same, regardless of lot size, limited by the minimum tower coverage of 30 percent and the requirement that 60 percent of allowable floor area be below 150 feet (sometimes referred to below as the requirement of "60 below 150").

2. Both Generally and in the Special District, Bulk Packing and Minimum Tower Coverage Are Linked to One Another and to Tower-on-Base by a Common History and Purpose

From the earliest appearance of the tower-on-a-base concept in 1989, that concept has included "packing-the-bulk" and requiring a minimum tower coverage as its two central components which, working together, would achieve the purpose of limiting building heights to "the low-30 stories." As the City Planning Department then wrote, "The thrust of new regulations would be toward a 'tower-on-a-base' form of building with specified controls on the amount of floor area that could be massed in the tower portion." DCP, Regulating Residential Towers and Plazas (Exh. L), at 26.[4] A central concern motivating these proposals was the "significant increases in the heights of buildings" from an average of 30 to 32 stories

[4] Letter exhibits are used for Appellants' exhibits and number exhibits for Extell's.

to an average of 40 stories, caused by the decrease in tower coverage from "the 40 percent standard" to "a coverage of 27 percent on average." *Id.* at 16-17. The Report proposed as a solution the enactment of both bulk packing and minimum tower coverage rules:

> Envelope controls would be established that would govern the massing and height of new buildings. A potentially effective approach could be to require that a minimum percentage of the total floor area of the zoning lot be located at elevations less than 150 feet above the curb level. The DCP working group refers to this concept as "Packing-the-Bulk." In exploring this approach, staff analyzed recent developments and their zoning lot configurations, and concluded that a minimum percentage in the low 60's would result in an appropriate relationship between the base and the tower portions of new buildings. In some instances, an appropriate relationship might be established by coupling other envelope controls, such as a minimum tower coverage, with a lower minimum percentage for the proposed Packing-the-Bulk regulations.

Id. at 27. (underlining added).

Several things are notable about this 1989 discussion. First, it clearly states that the Bulk Packing Rule is about towers, and is a key part of tower-on-a-base. Packing the bulk and requiring minimum tower coverage were to be "coupled" to create the tower-on-a-base building form as a mechanism to limit heights. Bulk Packing is not, and never was, a free-floating provision as Extell contends.

Second, already in this early proposal, the goal was identical to that of the 1993 statutes, *i.e.*, to restore building heights to the previous average of "30 to 32 stories." The specifics of the proposed bulk packing mechanism were also substantially identical to ZR § 82-34 and ZR § 23-651(a)(3) in requiring that the base be 150 feet high and that it contain around 60 percent ("a minimum percentage in the low 60's") of floor area.

Third, this discussion highlights the fact that the requirement that a given percentage of floor area be in the base was intended to limit "the amount of floor area that could be massed in the tower portion." *Id.* at 26. Although it is already obvious, this makes

explicit the zero-sum concept that Appellants described, which Extell questions and its building so blatantly violates.

The subsequent history abundantly confirms that the Special District Bulk Packing Rule is a central component of tower-on-base that works with the Tower Coverage Rule to limit building heights to "the low-30 stories." The May 1993 Special District Zoning Review expressly refers to the proposed Special District rules, including the regulation it refers to as "Packing-the-Bulk," as "reinforcing the 'tower on a base' form already mandated along Broadway," and, as it twice reiterates, ensuring building heights "in the range of the mid-20 to 30 stories tall." DCP, Special Lincoln Square District Zoning Review (May 1993) (Exh. B), at 1, 14.

The subsequent 1993 City Planning Commission reports that accompanied the Special District regulations (ZR §§ 82-34 and 82-36) and the regulations for R9 and R10 districts (ZR § 23-651), both dated December 20, 1993, described in strikingly similar language the respective provisions and their purposes. Thus, the general report stated:

> The height of the tower would be effectively regulated by using a defined range of tower coverage (30 to 40%) together with a required percentage of floor area under 150 feet (55 to 60%). ... Under this proposal, the height of residential towers and the effect of zoning lot mergers on building scale would become more predictable, resulting in buildings likely to range in height from 28 to 33 stories (including up to 4 penthouse floors).

CPC Report N 940013 ZRM (Dec. 20, 1993), at 5 (underlining added).[5] The Special District report stated:

> [I]n order to control the massing and height of development, envelope and floor area distribution regulations should be introduced throughout the district. These proposed regulations would introduce tower coverage controls for the base and tower portions of new development and require a minimum of 60 percent of a development's total floor area to be located below an elevation of 150 feet. This

[5] Available at https://www1.nyc.gov/assets/planning/download/pdf/about/cpc/940013.pdf.

> would produce building heights ranging from the mid-20 to the low-30 stories (including penthouse floors) on the remaining development sites.

CPC 1993 CPC Special District Report, at 18-19 (Exh. P)[6] (hereinafter referred to as "" or "Special District report") (underlining added).[7]

In each of the two reports, as quoted above, the Bulk Packing and Tower Coverage Rules are described within the same sentence as working together to "control the massing and height of development" (Special District Report) or "effectively regulate" "the height of the tower" (general Report). Both provisions – not just one – are said to be necessary to "control" or "effectively regulate" the height of towers.

Moreover, in both reports the Commission stated that the application of these two rules would limit building heights "to the low-30 stories" (Special District Report) or "33 stories" (general Report). Although the tower-on-a-base rules also had other purposes such as preserving the continuity of street walls, limiting height was their central purpose. In making its case against proponents of a simple height limit, the Commission's Report for the Special District Report was adamant that working together these two rules would limit building height to a specific maximum as well as, or even better than, a simple height limit:

> In response to the Community Board's concern that a height limit of 275 feet should be applied throughout the district, the Commission believes that specific limits are not generally necessary in an area characterized by towers of various heights, and that the proposed mandated envelope and coverage controls should predictably regulate the heights of new development. The Commission also believes that these controls would sufficiently regulate the resultant building form and scale even in the case of development involving zoning lot mergers.

[6] Appellants previously submitted only excerpts from the 1993 CPC Special District Report as Exhibit A to their Statement. Exhibit P contains that full Report and attachments, including the Borough President's Report.

[7] Note that the Commission referred to both Bulk Packing and Tower Coverage as applying "throughout the district," even though this was obviously limited to those portions of the District, or those contexts, in which there were towers.

1993 CPC Special District Report, at 19 (Exh. P) (underlining added); *see also* CPC Report N 940013 ZRM, at 13 (alternatives such as height limits "do not provide the same level of predictability in regard to building height").

The Commission's repeated statements that under these rules building heights would be predictable and limited to "the low-30 stories," regardless of lot size, were true and correct – but only if the Tower Coverage Rule is coupled with the Bulk Packing Rule, and the two work together. *See* Appellants' prior Statement, at 12-13. The Commission did not pick these two rules and their parameters (minimum tower coverage of 30 percent and minimum required square footage in the base of 60 percent) at random. As it stated in its Report, it considered "the range of urban forms presented by the Department and the community, and as depicted in the Environmental Simulation Center model and video analysis," and thereafter chose these two specific rules and these specific parameters in order to "produce building heights ranging from the mid-20 to the low-30 stories (including penthouse floors)." 1993 CPC Special District Report at 15, 19 (Exh P).[8] Note especially, too, the Commission's statement that these limits would apply "even in the case of development involving zoning lot mergers." The Commission could make the statements it made about building height only because it

[8] The environmental simulation process that led to the adoption of these rules and these parameters is described in greater detail in the Report of Borough President Ruth Messinger, dated Nov. 15, 1993 (attached to the 1993 CPC Special District Report) (Exh P), at 15, 18. Interestingly, the Borough President's Report notes, at 18, that the analysis used by the Commission was funded by Landmark West!, and specifically thanks Arlene Simon, then head of Landmark West! and an appellant herein.

The predicted results of building heights in "the mid-20 to the low-30 stories (including penthouse floors)" are consistent with Appellants' simplified examples of the application of the two rules to different sized lots, discussed in their prior Statement, at 12. These examples show that applying the two rules would allow a 13.3 story tower, regardless of lot size. Assuming 10-foot floor-to-floor heights, as was traditional in New York City residential housing, the 150-foot-high base could have 15 floors, for a total of 28.3 floors.

understood that the two rules working together created a mechanism that kept height constant. Therefore, Extell's assertion, at 18, that support for Appellants' argument that the mechanism of the Tower Coverage and Bulk Packing Rules kept height constant regardless of lot size is "nowhere to be found in the 1993 CPC Report" is false.

The Commission's repeated invocation of a specific height range and upper limit that would be obtained by the joint operation of the Tower Coverage and Bulk Packing Rules is conclusive proof that the Commission enacted these two rules as parts of a single mechanism. By divorcing the Bulk Packing Rule from the Tower Coverage Rule, Extell has been able to increase the height of its tower very significantly above what it would be if the two rules both operated over the same lot area, thereby violating the mechanism so carefully worked out by the Commission.

3. Extell's Arguments as to How the Bulk Packing Rule Is a Stand-Alone Provision That Applies Where Towers Are Prohibited Do Not Withstand Scrutiny

In the face of all the above evidence, Extell argues that the Special District Bulk Packing Rule has nothing to do with the tower-on-base version of the same rule, and therefore is not linked to the Tower Coverage Rule. Extell Statement at 14-15. These arguments are cannot withstand scrutiny.

Extell first argues that the two versions of the Bulk Packing Rule are different from one another. They are, but not in any way that matters here. Obviously, they apply in different districts, and obviously, § 23-651(a)(3) does not apply in the Special District. But so what? This difference in no way negates Appellants' argument that the two versions have the same purpose and work the same way.

Nor does it matter whether the differences are best characterized as "major" or "minor." Extell notes that § 23-651(a)(3) applies only to zoning lots with wide street frontage, whereas the equivalent Special District rule applies on narrow streets as well, and submits a table showing various differences between the Special District Bulk Packing Rule and the same rule applicable in R9 and R10 districts generally. Extell Exh. 21. But once again, it does not explain how any of these differences are in any way relevant to the question before the Board, which is whether the Bulk Packing and Tower Coverage Rules work together to limit towers to a prescribed height, both in the Special District and in R9 and R10 districts generally.

In fact, these differences are not relevant. If anything, they only reinforce Appellants' interpretation that the phrase "Within the Special District" was intended to differentiate the rule of § 82-34 from that of § 23-651.

Extell next argues that if the City Planning Commission had meant to indicate that the two rules were similar, it would have used different language than the language it used. According to Extell,

> had CPC intended to apply the Tower-on-a-Base regulations in the SLSD, it easily could have done so. This is illustrated by ZR Section 35-64(a) (adopted in 1993 as part of the Tower-on-Base zoning), which expands the locations to which Tower-on-a-Base regulations apply beyond the R9 and R10 districts specified in ZR Section 23-651.

Extell Statement, at 15. Similarly, Extell argues that

> there are in fact provisions of the SLSD which specifically incorporate the Tower-on-a-Base regulations by reference, again demonstrating that where CPC wished the Tower-on-a-Base regulations to apply, it knew how to do so.

Id. (citing ZR § 82-36(c), which makes applicable ZR § 35-64, with modifications).

As with others of Extell's hypertechnical arguments, one just needs to take a step back to realize the full extent of the fallaciousness of this argument. The Commission had no need to cross-reference the two versions of the Bulk Packing Rule, or to indicate in any

way that they are essentially the same, because the fact that they are the same was irrelevant to the Commission's purpose. Moreover, that fact is staring us in the face, self-evident, ineluctable. On the other hand, it would have severely challenged the drafters, and resulted in an incomprehensible provision, had they tried to draft the Special District version as a modification of the general version, as Extell suggests, because although the essence of the two provisions is the same, they differ in many of their particulars, as shown above.[9]

Addressing the legislative history, Extell misstates Appellants' arguments. Appellants never claimed that the six soft sites identified by the May 1993 SLSD Zoning Review and the December 1993 CPC Special District Report are the only sites to which the SLSD's tower-on-a-base amendments apply. What Appellants do claim, and Extell cannot rebut, is that these and similar locations were the ones that the drafters had in mind, not the R8 portion of the District. In 1993, the very small R8 portion was entirely developed with substantial residential buildings and the large and then relatively new building of the Jewish Guild for the Blind, so it is unlikely that the drafters would have considered that that portion of the Special District might be redeveloped, much less that it would be redeveloped with a tower.

[9] The Commission's Reports do not explain the reason for these differences, but presumably they have to do with the differences in the pre-existing regulations for the Special District as compared to the R9 and R10 districts generally.

In any event, "The fact that the parties could have used different language to communicate [a] legal concept is not fatal to [a party's] argument." *Burlington Ins. Co. v NYC Tr. Auth.*, 29 N.Y.3d 313, 323 (2017); *see also Avella v City of New York*, 29 N.Y.3d 425, 437 (2017) (different language in another statute is not probative).

B. The Tower Coverage Rule and the Bulk Packing Rule Both Apply to Towers, and Only to Towers

Mr. Karnovsky's argument that the Bulk Packing Rule applies where towers are prohibited flies in the face of his own reasoning. In his December 2017 email to Council Member Helen Rosenthal, Mr. Karnovsky asserted that the Tower Coverage Rule applies only to the C4-7 portion of the Special District because "the tower regulations applicable to the Extell site . . . apply only to the portion of the zoning lot located in a C4-7 district. There is no ability to construct a tower in the portion of the Extell lot mapped R8. ... Accordingly, the calculation of tower lot coverage is measured on the basis of the portion of the zoning lot governed by the tower regulations, i.e., the C4-7 portion." Exh. G, at 2. Similarly, little over two months ago, in the Supreme Court case concerning this building, Mr. Karnovsky submitted an affirmation in which he stated:

> In contrast to Zoning Resolution § 82-34, the Special District provision governing tower coverage (ZR § 82-36) applies only to those portions of the Special District where towers are permitted, *i.e.*, the C4-7 district, and not to the R8 district, where towers are not permitted.

Affirmation of David Karnovsky, dated May 21, 2019, ¶ 41 (submitted in relevant part herewith as Appellants' Exhibit Q) (underlining added).

Mr. Karnovsky is absolutely right: it does not make sense to apply the Tower Coverage Rule "to the R8 district, where towers are not permitted." However, he fails to recognize that it is just as nonsensical to apply the Bulk Packing Rule to that district. Although the Bulk Packing Rule does not have the word "tower" in its name, it is just as much about towers as the Tower Coverage Rule. The Bulk Packing Rule's requirement that 60 percent of the total allowable floor area be located below 150 feet is completely unnecessary and pointless in a building that does not have a tower. Every mention of that Rule in every City Planning Commission report is in connection with limiting the height of towers. Moreover, as

Appellants demonstrated (and Extell does not dispute this), it is only by applying both these rules together that it is possible to achieve their purpose of keeping height constant regardless of lot size. As Mr. Karnovsky points out, in the tower-on-a-base regulations applicable elsewhere in the City, these two rules "are two subparts of the same provision of the Zoning Resolution, ZR § 23-65." Exh. Q, at ¶ 47. This further demonstrates their intrinsic relatedness. On the other hand, Mr. Karnovsky has not articulated any conceivable purpose that this Rule would serve in any context where towers are not allowed. His argument that the Bulk Packing Rule stands alone and can usefully be applied where towers are not allowed does not withstand the laugh test.

C. Extell Does Not Seriously Dispute That Its Interpretation Produces Absurd Results

Appellants previously cited *Long v. Adirondack Park Agency*, 76 N.Y.2d 416 (1990), in which the Court of Appeals held that even if, "[r]ead in vacuum-like isolation with absolute literalness, the statute could be amenable to [Extell's] construction" – which it cannot – that construction would have to be rejected where it "would lead to an absurd result that would frustrate the statutory purpose," and where that purpose "would be rendered literally meaningless and useless." *Id.* at 420, 422.[10] Appellants explained that to the extent that the requirement of 60 below 150 can be satisfied by counting square footage from outside the C4-7 district, more of the square footage allowable within the C4-7 district can be put in the tower. This is the opposite of what the rule is supposed to do: force into the base a percentage of the

[10] *See also, e.g., New York State Bankers Ass'n v. Albright*, 38 N.Y.2d 430, 436-37 (1975) (When the words of a statute lead "to absurd or futile results, ... this Court has looked beyond the words to the purpose of the act. ... [E]ven 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.").

total allowable square footage that could otherwise go into the tower. Appellants described how, in a hypothetical case, all of the base could be in the R8 district, where towers are not allowed, and all of the allowable square footage in the C4-7 portion of the lot could be in a tower, above 150 feet, resulting in a building that would be 1,019 feet tall (assuming the voids in the current design). Appellants' Statement, at 13, 15-18,

Amazingly, Extell does not dispute this reasoning. It argues, however, that although the result in Appellants' hypothetical might be absurd, the result in this case is not, because the building is "only" six stories and 96 feet too high – an exceedance that it characterizes as "permissible." Extell Statement, at 19, 20.

According to Extell, "the difference between [Appellants'] preferred method for applying ZR Section 82-34 to the Project Site and how it has been applied by DOB amounts to only an approximately 5-story difference," or six stories, as it says in the next sentence. This calculation is based on a hypothetical building on the C4-7 portion of Extell's zoning lot, not on the building that Extell is actually building. In fact, Extell is careful to state that as much: its hypothetical six-floor reduction in height is the result, it says, of applying Appellants' methodology to the "Project Site," not to the building that is now going up. In Extell's hypothetical building, shown in its Exhibit 24, the base has 232,844 square feet in the C4-7 portion of the lot. But in the real building as approved, the base has only 201,847 square feet in C4-7 portion of the lot.[11] The size of the tower is determined by the size of the base, so if the base is smaller, the tower must also necessarily be smaller. If the building's base is

[11] *See* ZD1 approved July 26, 2018 (Exh. R), at 4. As Appellants previously pointed out, Extell would have difficulty building a base with the maximum allowable square footage, because half of the area of the base is occupied by the landmarked Armory, and building over the Armory would require a Certificate of Appropriateness from the Landmarks Preservation Commission.

built as approved – and it is under construction now – and if the lawful 60/40 ratio of base to tower is maintained, the height of the tower will have to be reduced by eight or nine floors, not five or six.[12] At 16-foot floor-to-floor heights, nine floors adds up to 144 feet, and would bring the building's height down from 775 feet to 631 feet. (This is without counting any reduction in height from elimination of the mechanical voids.)

Nor would it be practical for Extell to amend its plans to build the building described in Exhibit 24. In that hypothetical building, the base is expanded 30 feet to the east at a full 14 stories. The ground floor is entirely built out, whereas the current plan leaves some open areas. Once construction progresses beyond the cellar level, it will be difficult to amend the lower floors to follow this plan, and it will become more difficult the more construction progresses. Further, this hypothetical building has no windows on the eastern wall of the C4-7 portion of the lot that would allow for habitable rooms. This building would therefore have an extraordinarily large base with very little access to light and air for dwelling units.

Even if, however, the stakes here were only six floors rather than eight or nine, and 96 feet rather than 144, Extell does not explain how a zoning violation that leads to a building having six illegal floors and being 96 feet taller than the law allows would be "permissible."

[12] The arithmetic for this is as follows. As shown in Appellants' prior Statement, at 17 n.29, the average size of a residential floor in the tower is 10,420 sf. Extell's Zoning Diagram shows that the floor area in the C4-7 portion of the base of the building (below 150 feet) is 201,847 sf. If this is 60% of the building's total allowable floor area, that total is 336,411 sf. The tower floors (above 150 feet) cannot exceed the remaining 40% of this total, or 134,564 sf. The 2019 Zoning Diagram, however, shows 219,313 sf above 150 feet – an excess of 84,749 sf over what is allowed. Dividing 84,749 sf (the excess) by 10,420 sf (the size of the average residential tower floor), the result is 8.13 floors.

Extell also argues that "DOB's application of ZR Section 82-34 to the Project functioned to significantly reduce the amount of floor area within the tower and its height relative to what could be developed absent the bulk distribution requirement." Extell states that if the Bulk Packing Rule were not applied at all, its building could have been four floors higher than it is. Extell Statement at 19. In other words, "Be glad it wasn't worse!" But although things could be worse, Extell is still violating the Zoning Resolution and increasing the height of its tower by eight or nine illegal floors, and its tower still constitutes 52 percent of the square footage allowable in the C4-7 area, rather than the maximum allowable of 40 percent. This is, as Appellants previously wrote, an inversion of the mandated ratio.

It is, of course, absurd that Extell's interpretation could produce a 1,019-foot building, but more importantly, that interpretation it leads to a result that is absurd even in the ordinary split-lot case, no matter the size of the effect, because it is precisely opposite to what the Legislature intended: it increases rather than decreases tower height. This fact alone demonstrates the illegality of Extell's interpretation.

Extell criticizes Appellants' explanation of how the Bulk Packing and Tower Coverage Rules work together to keep building height constant regardless of lot size by saying that that these formulations are not to be found in the regulations or the legislative history. Extell Statement, at 19-20. But as shown above, this is untrue. The 1993 CPC Special District Report and the attached report of the Borough President make absolutely clear that the Commission worked with the New School's Environmental Simulation Laboratory to study how these two rules would work together to limit height to "the low-30 stories," and chose parameters that would achieve precisely this result. It knew exactly what it was doing.

Strikingly, Extell never disputes that the two rules do work together to limit height in precisely the manner that Appellants described.

D. The Plain Language, the Meaning of "Within the District" and the Absence of Specific Locational Exclusions

Extell invokes the mantra of "plain language" 21 times in its Statement. However, the plain language of the Bulk Packing Rule does not support Extell's reading of it. The words "Within the Special District" are equivocal at best. The Rule does not say, "Everywhere within the Special District." In accordance with the ordinary use of the English language, "Within the Special District" means "Within the Special District where otherwise applicable," or "Within the Special District when towers are permitted." These implicit qualifications are routinely read into language all the time. If, for some perverse and unlikely reason, the Legislature had really intended to enact a Rule that contradicts, in relevant part, that same Rule's very reason for being – and Extell does not deny that it does – it would have said more than these inconclusive words.

Much of Extell's opposition is devoted to showing how other provisions in the Special District regulations and elsewhere in the Zoning Resolution specifically state any locational exceptions, whereas § 82-34 does not expressly limit its applicability to the C4-7 portion of the District. Surely, Extell argues, if the City Planning Commission had intended § 82-34 not to apply to the R8 portion of the District, it would have said so.

However, this is not necessarily so. An exclusion need not be explicit where it is obvious on the face of it that the rule is inapplicable to a certain class of situations or to a portion of the District. Section 82-22 ("Location of Floors Occupied by Commercial Uses") does not state any locational limitations or exclusions, but it is not applicable in the R8 portion

of the District, because just as the Bulk Packing Rule applies only to towers, § 82-22 applies only where commercial uses are allowed, and they are not allowed in R8.

In two places, moreover, the Commission's 1993 Special District Report states that both the Tower Coverage Rule and the Bulk Packing Rule, apply "throughout the district," even though, as Extell agrees and insists, the Tower Coverage Rule only applies to the C4-7 portion of the District, where towers are allowed. 1993 CPC Special District Report, at 7-8, 18-19. On the other hand, there are rules that are applicable throughout the District, but do not say so. *See*, *e.g.* § 82-39 ("Permitted Obstructions Within Required Setback Areas").

Extell states that even Appellants cannot dispute that the Bulk Packing Rule could apply to a community facility tower, which is allowed in R8. Extell Statement at 11. Such towers are extremely rare, but this application would be permissible, because the Rule applies in the context of towers. It is even conceivable, though unlikely, that the drafters had this possibility in mind when they wrote "Within the District." But this point favors Appellants, not Extell: it shows that even if the phrase "Within the Special District" means what Extell says it means, *i.e.* that the Rule can apply everywhere in the Special District, this does not necessarily mean that it must apply everywhere. It only applies everywhere when there can be towers.

Like the Tower Coverage Rule, the Bulk Packing Rule, which applies only to towers, cannot reasonably be read as applying in a context where towers are not allowed. That is all the more the case because it most likely never crossed the minds of the drafters that the Bulk Packing Rule could ever be applied in the R8 portion of the District any more than can the Tower Coverage Rule. Indeed, the drafters did not foresee any development occurring in the tiny R8 portion of the District. Finally, as noted above, even if the literal language of the

statute could only be read as Extell does, it still would not apply to a situation in which, as here, applying it defeats the statutory purpose.

The bottom line is that Extell has said absolutely nothing to support its implausible view that the words "Within the Special District" mean "Everywhere and always within the Special District," or to raise a question about Plaintiffs' reading of those words. It has also said nothing to bring into question Plaintiffs' assertion that in order to function, the Bulk Packing Rule and the Tower Coverage Rule must be applied over the same area: the C4-7 portion of the zoning lot.[13]

III. THE MECHANICAL VOIDS ISSUE

A. The Absence of a Specific Limit on the Height of Mechanical Spaces Does Not Prevent the Board from Holding That These Enormous Voids Are Illegal

Extell's statement of facts never reckons with the vast body of law affirming the power — and indeed, responsibility — of courts to draw lines that may be missing from certain statutes, to provide guidance to those administering the laws. Courts routinely provide that guidance; it is called "interpretation." Extell asserts by fiat that the most relevant case on this point, *Educational Construction Fund v. Verizon New York,* 36 Misc.3d 1201(A) (Sup. Ct. N.Y. Co. 2012), 2012 N.Y. Misc. LEXIS 2949***, *aff'd,* 114 A.D.2d 529 (1st Dep't 2014), is irrelevant. Extell Statement at 8, n. 11. On the contrary, and in connection with the interpretation of this very statute, it confirms the power and responsibility of agencies and courts to refine open-ended laws:

[13] Extell argues that a building at 1930 Broadway constitutes a precedent for its interpretation of the Bulk Packing Rule. This example carries no weight at all. The R8 portion of this zoning lot is only 9 square feet, or .0003 of the total zoning lot area of 28,774 square feet. *See* Exh. 20. The difference between the correct methodology and the Karnovsky methodology on this lot amounts to an additional 22 square feet of tower space – the size of a broom closet, maybe. It is questionable whether DOB even noticed this. Certainly, it was not challenged.

"Since there is no specific definition of 'mechanical equipment' in the Zoning Resolution or any definitive finding by DOB on this issue, it demands administrative determination in the first instance. . . ." *Educational Construction Fund,* 2012 N.Y. Misc. LEXIS 2949 at ***15..

In this case, before the text amendments were even proposed, the Chair of the City Planning Commission, Marisa Lago, acknowledged the necessary presence of limits on floor height in the then-existing law. "The notion that there are empty spaces for the sole purpose of making the building taller for the views at the top is not what was intended [by the City's zoning laws]."[14]

Extell stumbles trying to distinguish the many cases in which courts have drawn lines where there were none in the statute — pertinently, the Court of Appeals in *N.Y. Botanical Garden v. BSA,* 91 N.Y.2d 413 (1998), in which the Court held that a 480-foot radio tower on the Fordham campus could not be deemed a customary accessory use for a university. Extell's description of the holding — that "the court looked to the signal strength and not the height of Fordham's proposed radio tower" — is flat-out false. *See* Extell Statement at 7 n. 11. The case is about when tall is too tall, and is precisely analogous to ours. Just as the Court there was called upon to consider whether the 480-foot-tall tower was qualitatively different from the smaller ones that had been built on university campuses and were determined to be customary, so the BSA is now called upon to consider whether these mechanical spaces, so vastly different from ordinary 12- to 15-foot-tall spaces, can still be determined to be customary. In *N.Y. Botanical Garden*, the Court of Appeals gladly exercised its interpretive duty: "The fact that the definition of accessory radio towers contains no such size restrictions supports the conclusion that the size and scope of

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

these structures must be based upon an individualized assessment of need." *Id.* at 413. The statute's silence was an invitation for judicial intervention, not recusal.

B. The Recent Mechanical Voids Amendment Was a Clarification of Existing Law, and Does Not Legalize Extell's Voids

Extell's other argument fares no better. It is simply a *non sequitur* to suggest that because a text amendment sets a specific test for a statute that had not previously set one, there can have been no limitations at all before the amendment was passed. Indeed, City Planning Commission Chair Lago affirmed this principle as well at the town hall meeting last year: "We are already working under the mayor's direction with the Department of Buildings to see how we can make sure that the intent of the rules is followed." In other words, the amendment was intended to clarify the existing language of Section 12-10.[15]

New York State and City law are replete with examples of statutes passed in order to clarify existing law. Often this is to set standards and guidelines for the original statute — as in *Sasso v. Osgood,* 86 N.Y.2d 374 (1995), where the Court of Appeals described an amendment to a local variance law as intended to "clarify existing law by setting forth readily understandable guidelines for both Zoning Boards of Appeal and applicants for variances and to eliminate the confusion that then surrounded applications for area variances." *Id.* at 383.

[15] Extell cites the CPC report accompanying the text amendment as support for its position. Extell Statement at 5. But all the report says is that the Zoning Resolution "does not specifically identify a limit to the height of such 'mechanical spaces.'" CPC Report N190230 ZRY, Apr. 10, 2019 (Exh. 12), at 1. No one disputes that the pre-amendment statute included no "specific" height limit; the question is whether the BSA or courts should interpret it to imply one — or at least identify the height of a particular space that vastly exceeds where any reasonable line might be drawn. In any event, a later statement of prior legislative intent respecting legislation passed by an earlier legislature, while entitled to some weight, is not conclusive in determining the construction to be given it. "How much weight should be given it will depend upon a number of factors, including the number of persons who continued as members of the same Legislature." *Park West Village Associates v. Abrams*, 127 Misc. 2d 372, 373 (Sup. Ct. N.Y. Co. 1984) (citing *Chatlos v McGoldrick*, 302 NY 380, 388 (1951)).

Courts have been especially ready to describe superseding statutes as "clarifications" when they arise from a specific controversy over the proper interpretation of the existing law:

> The force to be given subsequent legislation as affecting prior legislation also depends somewhat upon the time of the enactment and the surrounding circumstances, including the history of the various enactments. If it follows soon after controversies have arisen as to the interpretation of the original act, it may well be construed as explanatory of the ambiguities over which such controversies arose.

McKinney's Cons. Laws of N.Y., Book 1, Statutes [1942 ed.], § 193, *quoted in Application of Barry Equity Corp*., 276 A.D. 685, 691 (1st Dep't 1950) (concurring opinion); *see also Garal Wholesalers Ltd. v. Miller Brewing Co*., 193 Misc. 2d 630 (Sup. Ct. Suffolk Co. 2002) (citations omitted) ("An act that has been passed to clarify an existing statute, that is, one that was passed shortly after controversies arose as to the judicial interpretation of the original act, is also to be applied retroactively.").

C. Mechanical Voids Are Neither "Customary" and "Accessory" Uses Nor "Floor Space Used for Mechanical Equipment"

Without Extell's two arguments, we are back to the original question regarding the building's mechanical voids: Can they be excluded from the calculation of floor area, and indeed are they legal, either because (1) they are "accessory uses, or (2) "they are "floor space used for mechanical equipment."

1. "Customary and "Accessory" "Use"

Extell argues that mechanical space is not a "use" of any kind. Extell Statement at 6-7. In its Statement, DOB specifically rejects this argument. As DOB explained and as we also explained in our prior Statement, it plainly is a use. DOB Statement at 7-8; Appellant Statement at 25-26. But if that is the case, Extell is required to demonstrate that its cavernous voids are a "customary" and "accessory" use. To be more precise, it must demonstrate that this use has

"commonly, habitually and by long practice been established as reasonably associated with the primary use." *Gray v. Ward,* 74 Misc.2d 50, 55 (Sup. Ct. Nassau Co. 1973), *aff'd on opinion below,* 44 A.D.3d 597 (2d Dep't 1974) (emphasis added). It is ludicrous to argue that 64-foot-tall mechanical spaces in residential buildings meet that test.

Extell relies heavily on the BSA's decision in 15 East 30th Street. To be sure, the Board found that the voids in that case met the "customary" test. BSA Cal. No. 2016-4327-A. But, as Appellants argued in their prior Statement, that decision was based in part on the appellant's failure to provide any evidence or expert testimony in support of its claim that such voids were truly "irregular," and must be reconsidered in light of the City Planning Department's subsequent 2018 survey of mechanical spaces, which provided incontrovertible evidence supporting that claim. Appellant Statement at 25. In light of DCP's later findings, we believe that the analysis in 15 East 30th Street no longer applies.

DOB does not even attempt to argue that voids are a customary use. Instead, it argues more generally that "[m]echanical equipment, indeed entire floors containing mechanical equipment, is customarily found within buildings for which residential uses are the principal use in the building." DOB Statement at 8. Appellants have no quarrel with that proposition, but it misses the point. The question is whether 64-foot-tall mechanical floors and a total of 196 vertical feet of mechanical space are "customarily found within buildings for which residential uses are the principal use in the building." In DOB's notice of intent to revoke, the Manhattan Borough Commissioner found that they were not:

The proposed mechanical space on the 18th floor of the Proposed Building does not meet the definition of "accessory use" of § 12-10 of the New York City Zoning Resolution. Specifically, the mechanical space with floor-to-floor height of approximately 160 feet is not

customarily found in connection with residential uses.[16] The point is so inarguable that Extell is reduced to meekly burying its response in a parenthetical, one that utterly fails to meet the necessary burden of proving "a commonly, habitually and by long practice" use:

> But whether tall mechanical spaces are common in residential buildings (and the record before the Board in Cal. No. 2016-4327-A showed that they have proliferated) is irrelevant. As discussed above, DCP conducted the study with the clear understanding that tall mechanical spaces could be built without restriction with regard to height, recognizing that the Board had correctly determined that the issue could be addressed only by legislative amendment.

Extell Statement at 8. So Extell's sole argument in favor of defining mechanical voids as customary is an unfounded claim about DCP's intentions in conducting the survey. But plainly the survey was a factual inquiry, not an attempt to interpret the statute.

2. "Floor Space Used for Mechanical Equipment"

Regarding the second point, all Extell can say is that the use of the word "floor" in the original exemption — "floor space used for mechanical equipment" — implies that the use here must be analyzed in two dimensions (*i.e.,* area), not three (*i.e.,* volume). In other words, if the floors were covered with six-inch-tall mechanical equipment, the developer would have satisfied the requirement, and be free to build a 64-foot-tall space to house them.

Extell has never supported even the claim that it will need anywhere near the amount of horizontal mechanical space in this building. More importantly, the text amendment itself makes clear that the Zoning Resolution construes "floor space" as three-dimensional. The new Section 23-16(a) states: "For the purpose of applying this provision, the height of such floor space shall be measured from the top of a structural floor to the bottom of a structural floor directly above such space." Any analysis of whether space is "used for mechanical equipment" must

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

consider the volume, not just the area, of the used space. And as we said in our earlier brief, there is no mechanical equipment yet imagined by humans that requires a 48- or 64-foot tall clearance in a residential building.

D. Extell's Foundation Was Far From Vesting

As Extell recognizes, even if the Board concludes that the project was legal under the pre-amendment Zoning Resolution, if the project did not vest before the City Council enacted the new law on May 29, 2019 — that is, if the foundation was not completed by that date – it must be deemed illegal under the amended statute. *See* ZR § 11-331.

The developer asserts that "On April 15, 2019, DOB was advised that the foundation had been completed and the Project was therefore vested." Extell Statement at 4. Presumably it was Extell that so advised. If so, this is just Extell's *ipse dixit*, based on a spurious definition of "completion." Extell's own foundation plans make clear that the foundation would not be completed until the sub-cellar and cellar floors were finished and the first-floor slab poured. *See* Foundation Sections FO-300.03 and FO-301.01, approved July 26, 2018 (Exh. S).

Extell's own attorneys have also confirmed that a foundation is complete only with the pouring of the first-floor slab. In a similar matter which alleges zoning violations concerning a building at 200 Amsterdam Avenue, Charles Weinstock, one of the attorneys representing the City Club here, participated in the negotiation of a stipulation with Jeffrey Braun and Paul Selver, partners at Kramer Levin Naftalis and Frankel LLP. Mr. Braun also represents Extell in *City Club v. Extell*. The stipulation, dated May 9, 2018, provided for the postponement of plaintiffs' motion for a temporary restraining order and preliminary injunction until "the completion of the foundation," and required the owner to "notify Plaintiffs' counsel of the expected completion of the foundation no later than ten days before the completion of the foundation." As Mr. Weinstock describes in an affirmation submitted herewith as Exhibit T, during the negotiation of this

stipulation, Mr. Weinstock asked Mr. Selver when the foundation would be said to be "complete." Mr. Selver responded that it would be complete when the first-floor slab was poured. A representative of the client was in the room and he agreed with that interpretation.

Proof that the client and Kramer Levin agreed that completion of the foundation meant completion of the first-floor slab is the fact that they waited to make the required notification until shortly before the first-floor slab was poured — and long after the foundation walls and sub-cellar floor were poured.[17]

In contrast to that case, the foundation of the building at issue here was nowhere near ready for the pouring of the first-floor slab, either on April 15, 2019, when Extell notified DOB that its foundation was complete or even on May 29, 2019, when the voids amendment was enacted by the City Council. Proof of this is in the photographs of the site taken by appellant Jan Constantine from her apartment on May 2, 2019 and May 30. 2019, and submitted herewith as Exhibit U. Because Extell's foundation was nowhere near completion on May 29, 2019, its permit did not vest.

[17] The May 9, 2018 stipulation, the August 31, 2018 notification, and a photo showing the first-floor slab was ready for pouring on September 23, 2018 are attached to Mr. Weinstock's affirmation.

CONCLUSION

For the reasons stated above and in Appellants' prior submission, Appellants respectfully request that the Board revoke the Developer's permit.

Dated: Brooklyn, New York
August 1, 2019

Respectfully submitted,

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CITY PLANNING COMMISSION

December 20, 1993/Calendar No. 3

N 940127 (A) ZRM

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

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

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

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

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

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

RELATED ACTION

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

BACKGROUND

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

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

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

In terms of urban design controls, it was found that the height of buildings in the Special District needed to be regulated. Several buildings in the district have exceeded 40 stories in height, and are out of character with the neighborhood. Current district requirements do not effectively regulate height, nor govern specific aspects of urban design which relate to specific conditions of the Special District. In addition, the mandated tower-on-a-base form along Broadway needs to be refined so that development on large sites is compatible with the district.

Existing Zoning

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

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

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 incentive bonuses permitted development on a zoning lot up to 14.4 FAR, with no more than 12 FAR for residential uses.

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

The following is a description of current special district controls:

Land Use. Most of the Special District is zoned C4-7, which permits high density residential, commercial and community facility development with a maximum FAR of 10, bonusable to 12. A small area of the district is zoned R8, which permits mid-density residential and community facility development. The Special District encourages retail uses compatible with the area by permitting those commercial uses allowed in the underlying zoning district or listed in Use Group L. Use Group L comprises uses selected from those permitted in the C4-7 district which promote pedestrian oriented activity and serve visitors to the area. Those uses not listed in Use Group L are limited to 40 feet of street frontage.

Urban Design. The Special District's urban design regulations require buildings fronting on Broadway, located on the east side of Broadway between West 61st and West 65th streets, West 67th and 68th streets, the east side of Columbus Avenue between West 65th and West 66th Streets, and the west side of Broadway between West 65th and 68th streets and West 60th and 62nd streets to have an 85-foot high base built at the

streetline, with the tower above set back at least 15 feet on wide streets and 20 feet on narrow streets.

The special district recognized the distinct character of two sites in the area: the "bow tie" sites, located on the block bounded by West 66th, West 67th, Columbus Avenue and Broadway, and the block bounded by West 62nd, West 63rd, Columbus Avenue and Broadway. On these two blocks which frame the bow tie intersection and parks, the building walls of new developments must coincide with the streetlines, without any setback and with no minimum or maximum height specified.

Arcades. The Special District requires that mandatory arcades be provided on the following street frontages: the north side of West 61st Street between Central Park West and Broadway, the east side of Broadway between West 61st and West 65th Streets, and the east side of Columbus Avenue between West 65th and West 66th Streets. The arcade generates a bonus at the rate of seven square feet per square foot of arcade, for a maximum of 1 FAR.

Subway Improvements. Subway improvements affecting general accessibility, safety, or improving circulation are eligible to generate a bonus for a maximum of 2 FAR.

Parking and Loading. Accessory off-street parking and public parking garages are permitted only by CPC special permit. Off-street loading facilities are only permitted in conjunction with the granting of a special permit.

Existing Land Use

The Department's discussion document examined land use trends in the district since 1969 and identified three distinct sub-areas:

Sub-district A: The northern section of the district, between West 64th and West 68th streets, contains special district development that has predominately replicated the

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

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

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

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

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

TEXT AMENDMENT AS ORIGINALLY REFERRED

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

A summary of the major changes are listed below:

Underlying zoning

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

Use Restrictions

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

Urban Design

Certain urban design changes would apply throughout the District:

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

The following would apply along Broadway:

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

For the Bow Tie sites, the following would apply:

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

- Section 82-40 would establish a 300 foot height limit, with the penthouse provision permitted for up to 4 stories above this height.

On the Mayflower Block, the following would apply, in addition to the controls applicable to Broadway sites:

- Section 82-37 would require a contextual, high street wall envelope on the Central Park West frontage.

Mandatory Arcades

Text Amendment N 940127 ZRM proposes to:

- Retain the arcade as a mandated urban design requirement, with a reduced bonus from seven square feet per square foot of arcade to three square feet per square foot of arcade.
- Eliminate the requirement for an arcade on the north side of West 61st Street.

Text Amendment N 940128 ZRM proposes to:

- Eliminate the arcade as a mandated urban design requirement and the bonus generated by the provision.

Subway Access

- Section 82-11 would require subway stair relocation or access be provided in the development of sites adjacent to the West 66th Street and the 59th Street/Columbus Circle subway stations.
- Section 82-32 would retain the subway improvement bonus.

Parking and Loading Requirements

- Eliminate the district's special permit for public parking garages, since a special permit mechanism is provided in the underlying zoning regulations, Section 74-52.
- Section 82-50 would permit loading docks pursuant to underlying regulations, and establish a City Planning Commission authorization for curb cuts in instances

when they could not be accommodated on a narrow street, 50 feet from the intersection of a wide street.

Supplementary Use Regulations

Section 82-22 would permit commercial use to be located at or above the level of residential uses in the same building, provided that there is separate direct access to the street and no access to the residential portion of the building.

Right to Construct

Section 82-05 would terminate the right to continue construction 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 the City Planning Commission.

POST-REFERRAL CHANGES

The zoning text amendment was referred to Manhattan Community Board 7 and the Manhattan Borough President on October 5, 1993. After referral, a number of issues were raised concerning the height of new development. As a result, the Department amended the proposed text. The changes included:

N 940127 (A) ZRM and N 940128 (A) ZRM, filed on November 15, 1993, proposes an alternative modification to Section 82-40 to reduce the special height limitation on Blocks 1 and 2 from 300 feet, with the penthouse provision, to 275 feet, with the penthouse provision.

N 940127 (B) ZRM and N 940128 (B) ZRM, filed on November 23, 1993, proposes a second set of alternative modifications to the applications to Sections 82-36 and 82-40 to eliminate the penthouse provision throughout the district, and to reduce the special height limitation on Blocks 1 and 2 from 300 feet, with the penthouse provision, to 275 feet, without the penthouse provision.

ENVIRONMENTAL REVIEW

These applications have been reviewed pursuant to the New York State Environmental Quality Review Act (SEQRA), and the SEQRA regulations set forth in Volume 6 of the New York Code of Rules and Regulations, Section 617.00 et seq. and the City Environmental Quality Review (CEQR) Rules of Procedure of 1991 and Executive Order No. 91 of 1977. The designated CEQR number is 94DCP007M. The lead agency is the City Planning Commission.

After a study of the potential environmental impact of the proposed action, a Negative Declaration was issued on October 4, 1993.

After issuance of the Negative Declaration, the Department modified several sections of the proposed text amendment.

The Environmental Assessment and Review Division reviewed the modifications and determined these changes to be a minor modification on December 20, 1993.

PUBLIC REVIEW

On October 5, 1993 the original applications (N 940127 ZRM and N 940128 ZRM) were referred to Manhattan Community Board 7 and the Borough President of Manhattan.

Community Board Public Hearing

Community Board 7 held a public hearing on the original applications on October 28, 1993, and, on November 3, 1993, by a vote of 39 to 1 with 0 abstentions, adopted a resolution recommending approval of the application with the following conditions:

1. "A maximum FAR of 10. CB 7 believes this is an appropriate allowable density given the crowded conditions in the Special District. 10 FAR could be achieved by either reducing the density to 8 FAR and allowing a 2 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."

3. "Require a special permit for new development throughout the Special District... As prerequisite, any development within the Special District must abide by the following regulations:
Throughout the District: Maximum 10 FAR; 275 height limit;
Along the east side of Broadway (excluding bow tie sites): 85 foot streetwall, 15 foot setback, arcade requirement without bonus;
Mayflower site: 125 foot streetwall, 15 foot setback on Central Park West;
Northern bow tie site: Specific regulations to be determined during ULURP, though CB7 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 streetwall on remaining 30 % of linear frontage on Columbus..."

4. "Theaters should not be restricted to 1 FAR."

5. "Restrict zoning lot mergers to 20 percent of floor area"

Borough President Recommendation

The original applications were considered by the Manhattan Borough President, who issued a recommendation conditionally approving the application with conditions on November 15, 1993.

1. The Manhattan Borough President agrees with CB 7 that 10 FAR is more appropriate in the Lincoln Square area than 12 FAR.

2. In the event that the issues of density is deemed to fall outside the scope of the current action, the Borough President recommends 1) that the matters found to be within scope be evaluated within this public review process and adopted or modified, and 2) that DCP 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.

3. 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 are granted

more clearly and directly to the effectiveness of the subway improvements in mitigating the impacts of high density development.

4. The Borough President recommends a 275 foot height limit on each of the two bow-tie sites as well as a district wide height limit.

5. A special permit requirement would result in better building design for what is really a unique area.

6. The Borough President supports the community's solution with regard to streetwall heights, setbacks and other building design controls and thinks that either CB 7's recommendation or those of Landmark West! are preferable to specifics of the DCP proposal.

7. The idea of restricting zoning lot mergers is generally a good one, and the Board's recommendation of 20 percent seems appropriate.

8. The Borough President is concerned about specific conditions on the Bank Leumi site (bow-tie site) and supports the preservation of the occupied tenements.

9. The Borough President supports the Board's position opposing the elimination of 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.

10. The Borough President acknowledges ABC's importance to the City and to the neighborhood. Therefore, continued dialogue between DCP/CPC and ABC is encouraged so that solutions to existing conflicts may be found.

11. DCP is urged to work with the community and other appropriate city agencies to help achieve improvements to the "bow-tie" parks and malls.

12. The Borough President urges DCP to move to expedite a full traffic/pedestrian circulation study of this area after adoption of the text.

City Planning Commission Public Hearing

On November 3, 1993 (Calendar Nos. 6 and 7), the City Planning Commission scheduled November 17, 1993 for public hearings on the original applications (N 940127 ZRM and N 940128 ZRM). The hearings were duly held on November 17, 1993 (Calendar Nos. 15 and 16) and were continued to December 1, 1993, (Cal. Nos. 8 and 9), and December 15, 1993 (Cal Nos. 21 and 22), when the hearing was closed.

On November 17, 1993 (Supplemental Calendar Nos. 1 and 2), the City Planning Commission scheduled December 1, 1993 for public hearings on the modified applications (N 940127 (A) ZRM and N 940128 (A) ZRM). The hearings were duly held on December 1, 1993 (Calendar Nos. 6 and 7) and were continued to December 15 1993, (Cal. Nos. 23 and 24), and then closed.

On December 1, 1993 (Supplemental Calendar Nos. 1 and 2), the City Planning Commission scheduled December 15, 1993 for public hearings on the second modified applications (N 940127 (B) ZRM and N 940128 (B) ZRM). The hearings were duly held on December 15, 1993 (Calendar Nos. 25 and 26), and then closed.

On November 17, 1993, there were three speakers in favor of the application, and 22 speakers in opposition. Numerous speaking slips were submitted by people who were registered in opposition; however they did not speak.

Speakers in favor of the application included representatives of two property owners within the Special District.

Those opposed included the Manhattan Borough President, the local City Council member, two State Senators, a State Assemblyman, the chairperson of Community Board 7, representatives of civic organizations, a representative of a property owner and neighborhood residents.

Those in favor supported the appropriateness of the proposed changes to the zoning text, including the reduction in commercial density in the northern portion of the district and the changes to the urban design regulations.

Many of those testifying against the proposal indicated that they would support the Department's proposal for changes to the Special District, provided that additional actions be undertaken by the Commission, such as reducing the district's overall

The Commission further recognizes that one of the district's most distinguishing features is the strength of the Broadway retail corridor. Therefore the Commission believes that the retail continuity and transparency provisions of the proposed text would ensure to protect and enhance this character.

Urban Design: The Commission recognizes that the district's urban design controls need to be improved in response to the issues raised by the height and form of recent developments and specific site concerns for the remaining development sites within the district. After considering the range of urban forms presented by the Department and the community, and as depicted in the Environmental Simulation Center model and video analysis, the Commission believes that the urban design proposal as modified and described below is appropriate.

The Commission notes that since 1969 the special district's urban design regulations have required buildings fronting on Broadway to have an 85-foot high base built at the streetline, with the tower set back from the streetline at least 15 feet on wide streets and 20 feet on narrow streets. Subsequently, the 85-foot streetwall has come to strongly characterize the Broadway streetscape.

In terms of the height of new development, the Commission noted that buildings built under special district regulations range from 18 to 42 stories or 192 to 419 feet in height along Broadway, and that another project under construction will reach a height of 545 feet. The current regulations which prescribe only a maximum tower coverage, not a minimum tower coverage, have proven not be an effective control on the height of new development.

The Commission believes that development along Broadway should continue to maintain the current controls requiring an 85 foot high base along Broadway to relate to existing special district development and Lincoln Center, with tower development subject to setbacks as currently prescribed. Furthermore, in order to control the massing and

pedestrian and vehicular traffic generated by this concentration of commercial uses greatly exceeds that of more typical district buildings which average about 1 FAR of commercial use.

The original proposal contained a restriction on commercial development in Sub-district A, where residential and institutional development predominates. The restriction would limit commercial uses to 3.4 FAR for as-of-right projects. This would in effect limit commercial use on the three large Broadway development sites in the sub-district to approximately 100,000 square feet of floor area. After evaluating the impact of the proposed regulation, the Commission modified this proposal to limit the amount of commercial floor area on a zoning lot to 100,000 square feet for as-of-right projects. Commercial use greater than 100,000 square feet would be permitted by City Planning Commission special permit only. The regulation would have essentially the same impact on the large Broadway sites, yet would permit more commercial use on smaller zoning lots. The Commission notes that the overall density of the sub-area would remain constant, while the amount of as-of-right commercial use would be reduced on the large development sites, thereby limiting the amount of future trips that would be generated from these uses. In special permit cases, the Commission would assess the proposed use, site plan and environmental effects on a case-by-case basis.

The Commission believes that the C4-7 district in the southern portion of the district, Sub-district C, where commercial uses predominate, and Sub-district B, where the district's major institutions are located, should be retained.

The original proposal contained a 1 FAR limitation on Use Group 8 and 12 in sub-districts A and C, in order to limit the amount of future movie theater development and the related traffic generated. The Commission has decided to delete this limitation, in response to Community Board 7's concerns that this limitation was not consistent with encouraging the expansion of entertainment uses within the district.

Those in favor spoke of both changes to the original text testified regarding the appropriateness of the 275 height limitation on the bow tie sites, and inappropriateness of permitting development above that height. Some speakers mentioned that they were not opposed to penthouses, but rather any development whatsoever above 275 feet in the district.

Those in favor of the 275 foot height limitation, but not the elimination of the penthouse provisions, asserted that without the penthouse provisions the bow tie site would not be developed with a full Broadway block frontage, and would therefore be a less desirable development solution.

Those in favor of the penthouse provision discussed the importance of permitting the architectural flexibility to shape the top of buildings, since so many New York City buildings are distinguished by their tops.

The hearing was closed.

CONSIDERATION

The Commission believes that the zoning text amendment to the Special Lincoln Square District, as modified, is appropriate. During the course of review, the Commission considered a wide range of issues in relation to the Special District including the urban design proposal; land use controls; arcades; and previously a approved special permit.

Land Use Controls: The Commission carefully considered the land use regulations of the Special District. Since 1969, the great majority of special district development has been predominately residential, with only limited amounts of commercial and/or community facility uses. In contrast, an as-of-right project now under construction will contain about 5 FAR of retail, movie and health club uses (plus another 1 FAR of below-grade, commercial use). The intensity of activity and the large amount of

density, applying height limitations district-wide, repealing bonus mechanisms, restricting zoning lot mergers, adding special permit requirements for development and prescribing the location of the low income built under the inclusionary housing program.

On December 1, 1993, there were 2 speakers in favor of the application for a reduction in the height limitation on Blocks 1 and 2, and 1 speaker in opposition. Those in favor included a representative of the Manhattan Borough President and a property owner. A representative of the New York City Chapter of the American Institute of Architects spoke against the proposal.

Of those speakers in favor of the 275 foot height limitation on the bow tie sites, one speaker was in favor of the continuation of the penthouse provision, and the other spoke in favor of eliminating the penthouse provision. The speaker opposed to the 275 foot height limitation asserted that there was no need for special height limitations in the district, since height limits are not as effective in minimizing the impact of development as compared with coverage controls and architectural articulation.

On December 15, 1993, there were 13 speakers. There were ten speakers in favor of the reduction in the height limitation on Blocks 1 and 2, and the elimination of the penthouse provision; two speakers in favor of the height limitation, but opposed to the elimination of the penthouse provision; one speaker in favor of the original proposal and opposed to the elimination of the penthouse provision; and one speaker was against the proposal as a whole. Those in favor of both modifications included representatives of local community groups, a representative of the Municipal Art Society and neighborhood residents. Those in favor of the height limit, yet opposed to the elimination of the penthouse provision included representative of the owner or developer of Development Block 1. Those opposed to the elimination of the penthouse provision included a representative of the Park Summit Realty Corp., a property owner. Those who were opposed included the local city council member, who remained opposed to the entire proposal.

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

In response to the Community Board's concern that a height limit of 275 feet should be applied throughout the district, the Commission believes that specific limits are not generally necessary in an area characterized by towers of various heights, and that the proposed mandated envelope and coverage controls should predictably regulate the heights of new development. The Commission also believes that these controls would sufficiently regulate the resultant building form and scale even in the case of development involving zoning lot mergers.

Articulation: The Commission embraces the goal of articulating the buildings within the district, especially in light of the fact that certain remaining development sites contain full block frontages along Broadway up to 230 feet long. Thus far, certain district developments have provided little articulation in the base form. The required minimum and maximum recesses range from 15 to 30 percent of the streetwall length, and shall have depths between one and ten feet. Consistent with current practice, details of recessed windows and the location of glass lines are unspecified. Therefore, the Commission believes that the mandated recesses in the base of Broadway developments would help to articulate the block fronts and would provide a better scale relationship with the street.

The dormer allowances in the required setback would provide articulation of the building above the base and provide a transition between the tower and base portions by promoting the incorporation of different architectural elements into the built form. Further, in response to suggestions from members of the New York City Chapter of the

AIA, the Commission has modified this provision to allow an additional dormer option which would permit a small amount of additional encroachment into the area of tower setback, and allow a higher streetwall base for up to 50 percent of the street frontage.

Penthouse Provisions (Section 82-36 and 82-40): During the course of public review, the Commission considered whether or not the penthouse provisions were a desirable element in the district. The penthouse provision as originally proposed permits the highest four stories or 40 feet of a development, whichever is less, to cover less than 30 percent minimum coverage which applies throughout the district, provided that the gross area of each story does not exceed 80 percent of the gross area of the story directly below it. The Commission believes that this option allows for greater architectural flexibility at a building's top, and therefore believes that the penthouse provisions of Section 82-36 and 82-40 should be maintained.

Development Blocks 1 and 2 (Bow Tie Sites): The Commission considered special urban design controls for Development Blocks 1 and 2, also known as the bow tie sites, due to their significant location at the confluence of Broadway and Columbus Avenue, and facing the district's two public spaces, Richard Tucker Park and Dante Park. According to the amendments as originally proposed and referred, these sites would have been required to be developed with a streetwall building setback at 150 feet, continuing around the adjoining corners for one-half of the Broadway and Columbus Avenue block frontages, on the southern half of the northern bow tie site and the northern half of the southern bow tie site. The remaining portion of the Broadway frontage would be required to provide an 85 foot streetwall. In addition, two different ranges of recesses would be required (below and above 85 feet); an expression line would be required at 20 feet; dormers would be permitted above 150 feet; and a 300 foot height limit would apply, with the penthouse provision permitted for up to 4 stories above this height.

The Commission studied the various urban design alternatives proposed for these sites, and has modified the proposal to require that new development rise without setback on streetwalls facing the public spaces and continuing around the corners for one-half of the Broadway and Columbus Avenue block frontages. The remaining Broadway frontages shall be required to contain an 85 foot high streetwall base, as originally proposed. The Commission also studied the appropriate height limitation for the sites, and has decided to adopt N 940127 (A) ZRM, the modified proposal to reduce the special height limitations to 275 feet, and maintain the ability to apply the penthouse provision above that height. Furthermore, the Commission notes that the other mandated articulation controls are important elements of the urban design controls. In total, the modified requirements are a large improvement over the simple 1969 requirements which only required that development coincide with the streetlines without setbacks, and contained no provision for variation or articulation in the building wall.

Development Block 3: The Commission believes that there are site conditions that warrant the addition of special controls for Development Block 3, known as the Mayflower site. This is the only site within the district to contain frontage on Central Park West, and it is immediately adjacent to the Central Park West Historic District and a New York City Landmark, the Century apartment house. Therefore, the Commission believes that contextual, high streetwall R10 A type envelope controls, rather than tower controls, should be required for the Central Park West frontage, which would ensure compatibility with adjacent historic structures.

Arcades: The Commission carefully considered the option of whether or not to continue the arcade requirement, as presented in the alternative text amendments. It was noted that since 1969, three arcades have been constructed along Broadway, and that one of these has been constructed in a modified form. They have provided an expanded and protected area for pedestrians along the length of Broadway opposite Lincoln Center and extra space for outdoor seating for the area's eating places which support the district's entertainment uses.

The Commission believes that the arcades have not been successful in providing the signature element along Broadway that was originally envisioned, and do not support retaining them as a mandated urban design requirement which generates a bonus. However, it is noted that the remaining sites along Broadway are adjacent to built arcades and present an opportunity to create a unified design feature that integrate the pedestrian space with activities characteristic of the Special District. Therefore, the mandated arcade of the proposed N 940127 (A) ZRM text amendment is modified, changing it from a mandated requirement with a bonus to a permitted option without a bonus.

Grandfather Clause: If adopted as proposed, the text amendment would have had the effect of jeopardizing a previously approved special permit granted for a project which has yet to be implemented. The Commission believes that this is inappropriate, and has modified Section 82-05 to provide a grandfather clause which would permit development under approved conditions.

During the deliberations on the text amendment, members of the Commission expressed frustration that many of the broader issues raised by Community Board 7 and others (i.e. a reduction in the density permitted in the district, height limits for all development, further restrictions in zoning lot mergers, the location of low and moderate income housing that qualifies for a bonus, special permits for all developments and a requirement for glazing above the first floor) were not included in the Department's application, and therefore could not be reviewed by the Commission. In addition, the Commission notes that the Department is scheduled to conduct a study of traffic and pedestrian circulation in the Lincoln Square bow tie during 1994. The Commission further recognizes that the Department of City Planning and the Manhattan Borough President have already convened a working group to discuss how one might substantiate the planning and environmental implication of these, and perhaps other, proposals.

RESOLVED, that the City Planning Commission finds that the action described herein will have no significant impact on the environment; and be it further

RESOLVED, by the City Planning Commission, pursuant to Section 200 of the New York City Charter, that based on the environmental determination and the consideration described in this report, the Zoning Resolution of the City of New York, effective as of December 15, 1961, and as subsequently amended, is further amended by the modification of Article VIII, Chapter 2, Section 82-00, as follows:

Matter in Underline is new, to be added;
Matter in ~~strikeout~~ is old, to be deleted;
Matter in italics or within # # is defined in Section 12-10;
*** indicate 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 this 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 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. ~~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~~

82-03
Requirements for Applications

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 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 purpose 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 chapter, any #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 or 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# with a #lot line# which coincides with ~~any~~ either of the following #street lines#: ~~the north side of 61st Street between Central Park West and Broadway,~~ 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 ~~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 shall 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 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.

~~82-06~~
82-20

SPECIAL USE AND SIGN REGULATIONS

~~In order to ensure that a wide variety of consumer and service needs of local residence are met, a special limitation is imposed on the amount of street frontage that can be elevated 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 floor #uses# within the Special District.

The provisions of this Section shall apply to ~~all~~ a #development# or change of #use# within the Special District.

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

~~#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 Avenues or Broadway, the maximum length of street frontage along Broadway or Columbus or Amsterdam Avenues 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.

~~82-062~~
~~Use Group L~~
Delete entire section

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 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

The provisions of Sections 23-16, 24-14 or 33-13 (Floor Area Bonus for a Plaza), Sections 23-17, 24-15 or 33-14 (Floor Area Bonus for a Plaza-Connected Open Area), Sections 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, by 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 maintaining the public amenity; and

(iii) 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 not 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)Paragraphs (b), (c) and (d) 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 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 than 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, which-ever is less, may cover less than 30 per cent of the #lot area# of a #zoning lot# if the gross area of each #story# does not exceed 80 per cent 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 not apply to such portion.

~~82-11~~
~~Building Walls Along Certain Street Lines~~
Delete the entire section

82-37
Street Walls along Certain Street 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 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)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 four floors or 40 feet, whichever is less, and extend 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 rises 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 per cent 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#, no 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 that height shall be decreased by one per cent 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

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 per cent 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 DISTRICTS 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 findings 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~~
82-70
EXISTING PLAZAS OR OTHER PUBLIC AMENITIES

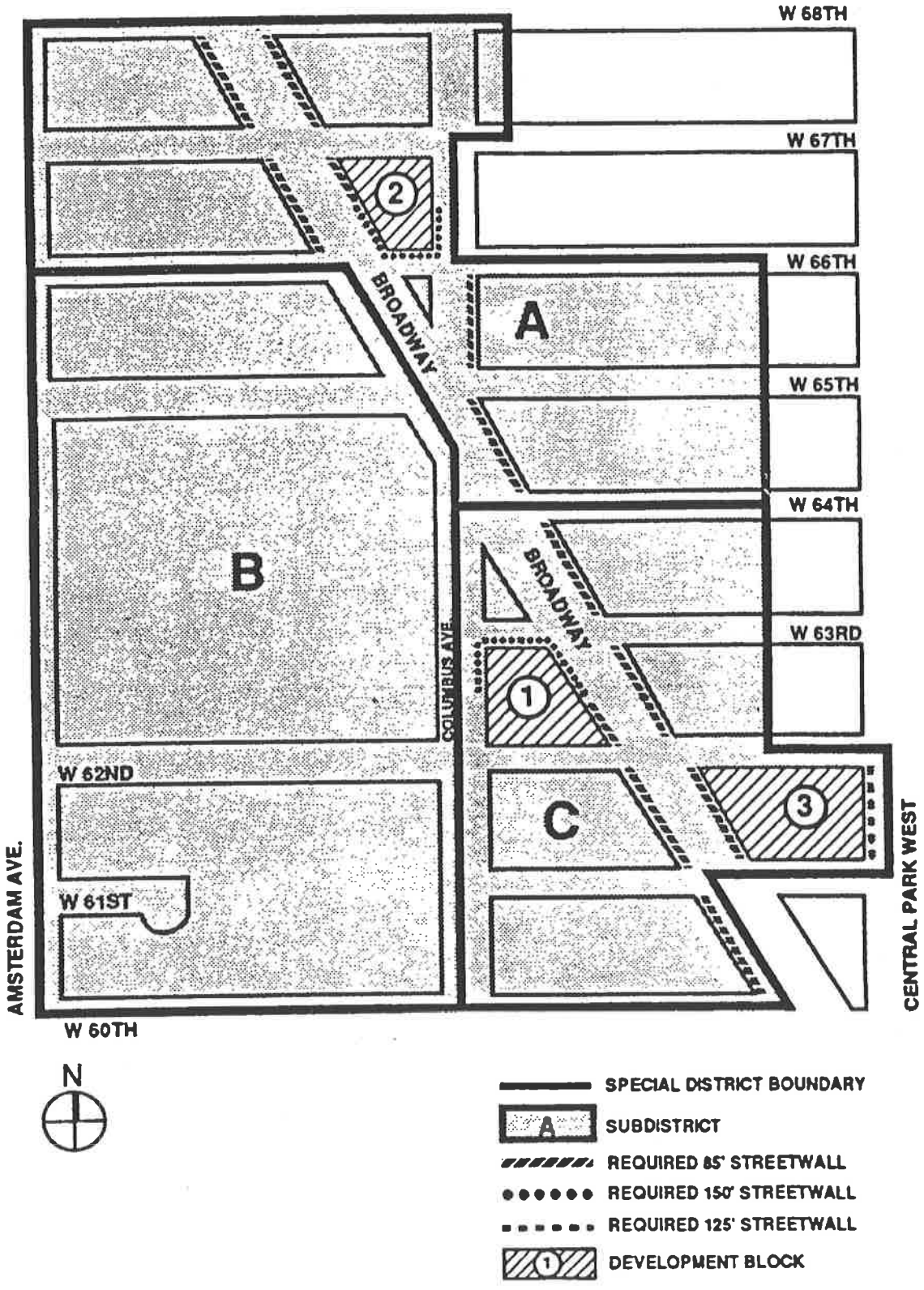
No existing #plaza# or other public amenity, open or enclosed, for which a #floor area# bonus has been received, pursuant to regulations antedating May 24, 1984 shall be eliminated or reduced in size anywhere within the #Special Lincoln Square District#, without a corresponding reduction in the #floor 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 and the 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.

RICHARD L. SCHAFFER, Chairman
VICTOR G. ALICEA, Vice-Chairman
EUGENIE L. BIRCH, A.I.C.P., ANTHONY I. GIACOBBE, ESQ., MAXINE GRIFFITH, JOEL A. MIELE, SR., P.E., ANALISA TORRES, ESQ., JACOB B. WARD, ESQ., Commissioners

AMANDA M. BURDEN, A.I.C.P., BRENDA LEVIN, Commissioners voting no

RONALD SHIFFMAN, A.I.C.P., Commissioner voting no, dissenting report attached

JAMES C. JAO, R.A., EDWARD T. ROGOWSKY, Commissioners abstaining

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.

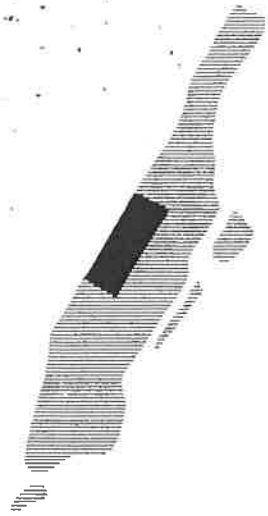
Substantive comments and proposals on issues such as density controls, height limits, inclusionary housing requirements, limits on zoning lot mergers, urban design considerations and special permit requirements that were put forth by Community Board 7 and the Manhattan Borough President's Office were 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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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.

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

MUNICIPAL BUILDING
NEW YORK, N.Y. 10007
(212) 669-8300

RUTH W. MESSINGER
BOROUGH PRESIDENT

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE CITY CLUB OF NEW YORK, 10 WEST 66TH STREET CORPORATION, JAMES C.P. BERRY, JAN CONSTANTINE, VICTOR A. KOVNER, AGNES C. McKEON, and ARLENE SIMON, Plaintiffs, -against – EXTELL DEVELOPMENT COMPANY and WEST 66TH SPONSOR LLC, Defendants.	Index No. 154205/2019 IAS Part 12 Justice Jaffe Motion Sequence #1 **AFFIRMATION OF DAVID KARNOVSKY IN OPPOSITION TO MOTION FOR A PRELIMINARY INJUNCTION**

DAVID KARNOVSKY, an attorney admitted to practice in the courts of the State of New York, affirms under the penalties of perjury that the following is true:

1. I am a member of the law firm of Fried, Frank, Harris, Shriver & Jacobson LLP, land use counsel to West 66th Sponsor, LLC ("Owner"), the owner and developer of the project (the "Project") at 36-44 West 66th Street in Manhattan (the "Project Site"). The Project Site extends from West 66th Street to West 65th Street on the block between Central Park West and Columbus Avenue. The Project consists of a 41-story residential tower containing 127 condominium units, with a 30,000-square-foot synagogue in its base. I understand that excavation of the Project Site and construction of the Project's foundation has been completed. On April 5, 2019, after careful review and consideration, the New York City Department of Buildings ("DOB") approved amendments to a previously issued New Building permit, thereby allowing for construction of the entire Project. The New Building permit was renewed and reissued on April 11, 2019.

2. I make this affirmation in opposition to an application for a preliminary injunction that would halt construction of the Project pending a resolution of Plaintiffs' claims.

3. In my law practice at the Fried Frank law firm, I focus on land use, zoning, real estate development and environmental review relating to projects in New York City, which has been my primary area of work for most of my legal career. I graduated from Harvard Law School in 1982, worked at a private law firm in Washington, D.C. from 1982 to 1987, and joined the New York City Law Department in 1987. I served as an Assistant Corporation Counsel, eventually becoming Chief of the Legal Counsel Division of the Office of the Corporation Counsel, and served thereafter as special counsel and policy advisory to the Deputy Mayor for Operations. For 15 years from 1999 until 2014, I served as General Counsel to the New York City Department of City Planning ("DCP"), which provides staff support to the City Planning Commission ("CPC"). I left City government in 2014 and joined the Fried Frank firm's Real Estate Department. In private practice, I regularly appear before New York City land use agencies, including the DCP and the CPC, the Board of Standards and Appeals ("BSA"), and DOB, as well as before local community boards, the Borough Presidents, and the City Council.

A. The Role of DOB and the BSA as Expert Agencies

4. DOB is the City agency with primary responsibility for enforcing the City's Zoning Resolution and other laws governing construction activities. City Charter § 643. It has the "powers and duties exclusively, subject to review only by the [BSA] as provided by law," to "examine and approve or disapprove plans for the construction or alteration of any building or structure." Charter § 645(b)(1).

5. The BSA is constituted under the City Charter as a panel of experts, with three of its five members required to be, respectively, a registered architect, a licensed professional engineer, and a city planner, each with at least ten years' professional experience. Charter § 659. The BSA is the agency vested with the authority to interpret the Zoning Resolution, and with the jurisdiction to hear and decide appeals from DOB determinations. Charter § 666(6)(a); see also ZR § 72-01(a) (the BSA has jurisdiction to "hear and decide appeals from and review interpretations of this Resolution"). In deciding whether to grant an appeal from a DOB determination to approve a building permit, the BSA may determine that the permit is invalid due to a failure to comply with applicable provisions of the Zoning Resolution; in such situations, the permit is voided.

6. Because of the BSA's expertise, the courts have consistently recognized the pivotal role of the BSA's review of DOB determinations, and have required parties claiming to be aggrieved by DOB determinations to exhaust their administrative remedies by appealing to the BSA before they seek judicial review. See, e.g., Towers Mgmt. Corp. v. Thatcher, 271 N.Y. 94, 97–98 (1936); Wilkins v. Babbar, 294 A.D.2d 186 (1st Dep't 2002); Delafield 246 Corp. v. Dep't of Buildings, 218 A.D.2d 613, 614 (1st Dep't 1995); Vandoros v. Hatzimichalis, 131 A.D.2d 752, 754 (2d Dep't 1987); Meyermac Elmhurst, Inc. v. Esnard, 111 A.D.2d 789, 789–90 (2d Dep't 1985). In an early case on the subject, decided only six years after the City enacted its first comprehensive zoning ordinance, the Appellate Division stressed that the BSA's appellate review of DOB determinations "insures the benefit of trained and competent expert opinion and judgment, applied to the facts of each particular case by an experienced tribunal." People ex rel. Broadway & Ninety-Sixth St. Realty Co. v. Walsh, 203 App. Div. 468, 474 (1st Dep't 1922).

7. In recognition of the BSA's expertise in technical matters, the courts have recognized that BSA determinations "'may not be set aside in the absence of illegality, arbitrariness or abuse of discretion,' and 'will be sustained if it … is supported by substantial evidence.'" Soho Alliance v. Bd. of Standards & Appeals, 95 N.Y.2d 437, 440 (2000) (quoting Consol. Edison Co. v. Hoffman, 43 N.Y.2d 598, 608 (1978)); see also, e.g., New York Botanical Garden v. Bd. of Standards & Appeals, 91 N.Y.2d 413, 420 (1998); Appelbaum v. Deutsch, 66 N.Y.2d 975, 977–78 (1985); Golia v. Srinivasan, 95 A.D.3d 628 (1st Dep't 2012); Parkway Vill. Equities Corp. v. N.Y.C. Bd. of Standards & Appeals, 279 A.D.2d 299 (1st Dep't 2001); Weissman v. City of New York, 96 A.D.2d 454, 456 (1st Dep't 1983).

8. In seeking injunctive relief at this time, the Project's opponents are asking this Court to usurp the role of the BSA and evaluate the merits of DOB's determination and the objections to the Project that DOB rejected—prior to a determination of those matters by the BSA. Indeed, on May 7, 2019, some of the Plaintiffs here filed an appeal to the BSA from the DOB's decision to approve the Project and requested that the BSA consider their appeal "on an urgent basis." A copy of the Application Form and Statement of Facts of Law is Exhibit A hereto.[1] That appeal raises the very same zoning issues that Plaintiffs are asking the Court to resolve in this proceeding, demonstrating that they are seeking here to secure multiple bites at the proverbial apple and to bypass the BSA. Plaintiffs did not file their pending appeal until May 7—after they sought (and did not receive) a Temporary Restraining Order from this Court.

9. Plaintiffs' request is thus inconsistent with the finality requirement embodied in CPLR 7801, which requires litigants to exhaust their administrative remedies before

[1] On May 13, 2019, Landmark West, a West Side community group, also filed an appeal to the BSA. A copy of the Application Form and Statement of Facts is Exhibit B hereto.

seeking judicial intervention. Judicial intervention in this dispute at this time would be especially inappropriate in this case, because DOB is itself an expert agency, the issues have been reviewed and passed upon by senior DOB officials with expertise in the Zoning Resolution, and the BSA—an expert agency—has primary jurisdiction to review DOB's determination.

10. In addition, as discussed below, Plaintiff 10 West 66th Street has previously raised its concerns about the Project before the DOB, which gave careful consideration to the issues and rejected the arguments made. Plaintiffs thus cannot satisfy their burden of making a persuasive showing of a likelihood of ultimate success on the merits of their objections to the Project by re-raising the same issues in this forum and not even challenging the binding administrative determinations through the appropriate review process.

B. A Brief History of This Project's Approvals

11. Owner originally sought to obtain permits to develop a building on a smaller zoning lot consisting of Tax Lots 45-48 within Manhattan Block 1118 (the "Initial Project"). Owner obtained initial approval from DOB for foundation work for the Initial Project on October 25, 2016, and obtained a new building permit for a 25-story building on June 7, 2017 (Exhibit C hereto). Thereafter, Owner ultimately succeeded in its efforts to acquire an additional parcel (Tax Lot 14), as well as in acquiring unused development rights from an adjacent parcel (Tax Lot 52) for use on the Project Site. Those acquisitions enabled Owner to develop a more significant development on the Project Site. On November 17, 2017, after securing those additional rights, Owner filed Post-Approval Amendments with DOB, seeking approval of plans for a 41-story building at the Project Site. Plaintiffs complain that this evolution from a smaller building to a larger building was somehow improper or deceptive; however, Owner did not own the requisite parcels and development rights needed to file plans for the larger project until it

negotiated and closed on those acquisitions. No City law, rule or regulation required Owner to provide advance notice that it was pursuing opportunities to expand the size of the development footprint and add floor area through the acquisition of an additional parcel and a zoning lot merger.

12. On July 26, 2018, DOB issued a foundation permit for the Project based on an approved Zoning Diagram (a "ZD-1" form) (Exhibit D hereto) showing how the Project as a whole complied with applicable zoning regulations.

13. On or about September 8, 2018, the building located at 10 West 66th Street (also a Plaintiff in this proceeding), together with a West Side community group called Landmark West, submitted to DOB a challenge (Exhibit E hereto) to the ZD-1 pursuant to procedures established by the DOB which give members of the public an opportunity to review and challenge zoning determinations with respect to new buildings as shown on such diagrams. The primary objections under the challenge asserted that (1) the Project would not comply with Zoning Resolution requirements governing the footprint of the tower portion of the Project, (2) the Project's mechanical floors allegedly were not compliant with the Zoning Resolution, and (3) the Project's mechanical floors presented fire safety issues that required review and approval by the Fire Department ("FDNY"). The challengers who filed that objection with the DOB, including Plaintiff 10 West 66th Street, did *not* challenge the calculation of the Project's compliance with ZR § 82-34—an argument they now highlight in their papers in this Court. Indeed, the objection the challengers filed with the DOB was predicated on their concession that Owner and the DOB had *properly* calculated the area to which ZR § 82-34 (Bulk Distribution) applied, by applying that rule to the entire Project Zoning Lot. I explain in more detail below why the challengers were correct in this regard. See Para. 38 below.

14. On November 19, 2018, DOB issued a "ZRD2" form setting forth a detailed response to each of the objections, rejecting the challenge made by Landmark West and 10 West 66th Street and reaffirming the DOB's approval of the ZD-1 (Exhibit F hereto). The ZRD2 form set forth a detailed response to each of the challengers' objections.

15. In December 2018, Landmark West initiated an appeal to the BSA from DOB's rejection of its challenge to the Project.

16. Subsequently, on January 14, 2019, DOB issued a notice of its intention to revoke its approval of the ZD-1 on the ground that the height of the mechanical floors was improper in the absence of a response from Owner addressing certain issues DOB raised concerning the mechanical floors' compliance with the Zoning Resolution (Exhibit G hereto). Under the terms of that notice, DOB also revoked its prior ZRD-2 determination, thereby rendering Landmark West's appeal moot.

17. By letter dated January 25, 2019 (Exhibit H hereto), I responded to DOB's notice on Owner's behalf and explained why the mechanical floors comply with the Zoning Resolution and, moreover, that the position articulated in DOB's January 14 notice was wholly inconsistent with decisions of the BSA and prior determinations of DOB itself. DOB took no further action thereafter to revoke its approval of the ZD-1.

18. During this period, Owner and its consultants participated in several in-person meetings and telephone conversations with FDNY's operations and engineering teams to address their concerns. In conformity with FDNY's requests, Owner revised the plans for the Project in a number of ways, including but not limited to (i) connecting between various forms of egress within the mechanical spaces, (ii) refining the format of FDNY access levels, (iii) providing for special FDNY equipment on all elevator cars, and (iv) constructing a steel catwalk

to allow unobstructed access to the entire building perimeter. By letter dated March 7, 2019 (Exhibit I hereto), FDNY confirmed to Owner that, "[b]ased on the submitted drawings" and consultation with DOB, FDNY "has **no further objection** to the proposed design" of the Project (emphasis in original).

19. In response to these submissions, and based on a detailed review of all plans and drawings, DOB approved the architectural plans for the Project on April 4, 2019, and approved the structural, mechanical, plumbing and fire and life safety plans on the following day (Exhibit J hereto). Accordingly, as of April 5, 2019, Owner's Post-Approval Amendments to the New Building permit issued on May 9, 2017 were fully approved and Owner therefore holds a New Building permit for the project.

20. A new ZD-1 was also approved for the Project on April 4, 2019 (Exhibit K hereto), and as a result the January 14, 2019 Letter of Intent to Revoke was rescinded (Exhibit L hereto). From a zoning perspective, the Project shown on the new ZD-1 differs only in limited respects from the building shown on the July 26, 2018 ZD-1. One difference is the configuration of the Project's mechanical spaces, which were modified to consist principally of three spaces located at the 17th, 18th and 19th floors, having floor-to-ceiling heights of 64, 64 and 48 feet, respectively.

21. At this stage, the foundation has been completed in accordance with a permit issued for that purpose. Construction of the building superstructure has commenced.

C. **The Objections to the Project Approvals Are Without Merit**

22. Plaintiffs are not likely to succeed on the merits of their objection to the Project, because the objections are not well founded and are predicated on misunderstandings and misapplication of the controlling regulations. Plaintiffs offer two objections: (1) an objection

to the height of the mechanical spaces and (2) an objection based on the bulk distribution rule under ZR § 82-34.

23. At bottom, Plaintiffs' dissatisfaction is with the height added to the building as a result of its mechanical spaces, and not the additional five stories they claim result from the alleged misapplication of ZR § 82-34 (See Pl. Mem. at 30).[2] But knowing full well that the Project is fully vested against the application of new regulations restricting the floor to ceiling heights of mechanical spaces that are likely to be adopted in the next several weeks, Plaintiffs have turned to arguments concerning ZR § 82-34 in an attempt to invalidate the Project's building permit in the hope that by doing so, any subsequent building permit application would be required to comply with these new restrictions. Petitioners' arguments concerning ZR § 82-34 are therefore nothing more than a pretext for denying Owner its right to proceed with a development that includes mechanical spaces that are fully compliant with the law under which it was permitted.[3]

(1) The Mechanical Space Objection

24. The first basis for plaintiffs' challenge relates to the Project's mechanical spaces. Plaintiffs object to the height of the Project's mechanical floors as allegedly inconsistent with the Zoning Resolution. There is no merit to this objection. A comprehensive explanation of Owner's response to the objection about the mechanical spaces is set forth in my January 25, 2019 letter to DOB that is Exhibit H hereto, and is set forth in more summary fashion below.

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[2] Citations to "Pl. Mem." refer to plaintiffs' "Memorandum of Law in Support of Motion for Preliminary Injunction," filed April 25, 2019.

[3] Not content to acknowledge that their arguments concerning ZR § 82-34 are simply a means to an end, i.e., to preclude Owner from lawfully developing the Property under current regulations, Plaintiffs suggest that what is at stake here is nothing less than a world in which buildings of 1000 feet or more could be built under DOB's implementation of that provision (Pl. Mem. at 33). There is no possibility whatsoever of this occurring in the Special District and this should be seen for what it is—a diversionary scare tactic. If Plaintiffs continue to believe this to be the case, however, their remedy lies in seeking a legislative amendment to the regulations.

25. Quite simply, the Zoning Resolution does not contain any limitation upon the floor-to-floor height of mechanical spaces—as recognized by DOB and DCP (which is responsible for drafting the Zoning Resolution's text), and confirmed by the BSA.

26. To illustrate: in a ZRD-2 dated June 29, 2016, responding to a zoning challenge objecting to the heights of mechanical spaces proposed for a building at 15 East 30th Street in Manhattan having a total height of 132 feet, DOB stated that "[t]here is no prohibition in the Zoning Resolution on the height of building stories regardless of use or occupancy" (ZRD-2, at p. 2). As quoted in a subsequent BSA decision, DOB further stated that "[t]he Zoning Resolution does not regulate the floor-to-ceiling height of a building's mechanical spaces." BSA Calendar No. 2016-4327-A (Sept. 20, 2017), at p.1. In its own decision, the BSA stated that "the Board finds that the Zoning Resolution does not control the floor-to-floor ceiling height of floor space used for mechanical equipment." Id. at p. 4. A copy of the ZRD-2 and the BSA decision in that case is Exhibit M hereto.

27. Plaintiffs nevertheless argue that the Project's mechanical spaces are unlawful because they do not meet the definition of an "accessory use" under the Zoning Resolution because an "accessory use" is defined in part as a use that is "customarily found in connection with" another use, and the Project's mechanical spaces are taller than the norm in New York City buildings. However, mechanical spaces are not a "use" at all—much less an "accessory use."

28. The Zoning Resolution sets forth the various residential, commercial, manufacturing and community facility uses permitted in zoning districts in detailed use regulations set forth in Article II, Chapter 2 (Residence District Regulations) (e.g., a residential building or hospital), Article III, Chapter 2 (Commercial District Regulations) (e.g., an office or

restaurant), and Article 4, Chapter 2 (Manufacturing District Regulations) (e.g., an apparel manufacturer). "Mechanical space" is nowhere listed in these use regulations and meets none of the basic definitions of "use" found in ZR § 12-10.[4] Likewise, "mechanical space" in no way meets the definition of an "accessory" use, i.e., a use that is incidental to another use, such as an automobile repair shop that is found at an automobile dealership. [5] Indeed, the term "mechanical space" is not defined anywhere in the Zoning Resolution, and appears only in reference to the statute's definition of "floor area," which excludes mechanical space from the calculation of floor area.[6] "Mechanical space" is therefore no more a "use" under the Zoning Resolution than cellar space, elevators or stair bulkheads, attic space or other forms of space that are similarly, and explicitly, excluded from the statute's definition of "floor area."[7]

29. Furthermore, even assuming *arguendo* that mechanical space can somehow qualify as an "accessory use," the BSA's decision in Cal. No. 2016-4327-A would preclude any case-by-case determination that the particular floor-to-floor height of any particular mechanical space is not "customarily found in connection" with another use, because, as the

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[4] The ZR § 12-10 definition of "use" is "any purpose for which a building or other structure or an open tract of land may be designed, arranged, intended, maintained or occupied" or "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."

[5] The ZR § 12-10 definition of an "accessory use" provides, in relevant part, that an "accessory use" is "a use conducted on the same zoning lot as the principal use to which it is related" which is "clearly incidental to, and customarily found in connection with, such principal use" and 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." Parking spaces located in a residential building and provided for use of the building residents is another example of a use that is "accessory" to another use under this definition.

[6] The ZR § 12-10 definition of "floor area" generally defines "floor area" as "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" and includes a specific listing of the types of spaces that are included and excluded from this calculation. Floor space used for mechanical equipment (with certain exceptions that apply in lower density zoning districts and are not applicable here) is specifically excluded from this calculation. See ZR § 12-10 definition of "floor area," exclusion paragraph 8.

[7] See ZR § 12-10 definition of "floor area."

BSA concluded in that case, the floor-to-floor heights of mechanical spaces are not a subject that is regulated by the Zoning Resolution.[8]

30. Finally, there is no better proof of the lack of existing height restrictions on mechanical spaces in the Zoning Resolution than the fact that the CPC recently approved an amendment to the text of the Zoning Resolution to address this exact issue. In its report for the text amendment, the CPC states in the opening paragraph that "[t]he [Zoning] Resolution does not specifically identify a limit to the height of such [mechanical] spaces." CPC Report No. 190230 ZRY (Exhibit N hereto). As a direct result of the absence of any limitation upon the height of mechanical spaces under current zoning rules, the CPC has approved new Zoning Resolution provisions that for the first time would establish a height limit for mechanical spaces in residential and mixed-use buildings in certain parts of the City.[9] In accordance with the land use review procedure set forth in § 200 of the City Charter, these amendments now are pending final action by the City Council and, if approved, will take effect upon the Council's approval. However, having obtained a full building permit and completed its excavation of the Project Site and construction of the Project's foundation, the Project is fully "vested" pursuant to the express provisions of ZR § 11-331.[10] Therefore, the Project will not be subject to these new rules if they

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[8] While the DOB subsequently invoked the "accessory use" argument in its January 14, 2019 notice of intent to revoke as a potential basis for revocation, it did not pursue that theory any further after its issuance of the notice. My January 25, 2019 letter to DOB (Exhibit H hereto) sets forth in detail the several reasons presented to DOB why there is no basis for such a conclusion under the Zoning Resolution.

[9] These provisions would require that in non-contextual R9 and R10 residential districts and their equivalent commercial districts, floors occupied predominantly by mechanical space that is taller than 25 feet would be counted as floor area. Every additional 25 feet of height of the mechanical floor would count as an additional floor of floor area. See CPC Report No. 190230 ZRY.

[10] ZR § 11-331 of the Zoning Resolution generally provides that an owner may continue construction of a building pursuant to zoning regulations no longer in effect provided that two conditions are met: (a) a new building permit was lawfully issued pursuant to the regulations in effect prior to amendment; and (b) building foundations have been completed. Here, the New Building permit was originally issued on May 9, 2017 and the Post-Approval Amendments to that permit for the 41-story Project were approved on April 5, 2019.

are enacted. That is, Owner can proceed with construction of the Project under the current zoning rules, which do not regulate the floor-to-floor heights of mechanical spaces.

31. In short, DOB properly approved the Project's new building permit in accordance with current regulations governing mechanical spaces. Therefore, Plaintiffs cannot show a likelihood of success on the merits on this issue.

(2) The Special District Rule Objection

32. Plaintiffs' second objection is to DOB's approval of the New Building permit for the Project on the basis of DOB's allegedly mistaken application of a regulation of the Lincoln Square Special District, which governs the Project's zoning lot. Quite simply, Plaintiffs would prefer that a different regulation had been enacted, and they therefore assert that the regulation the City put in place should be read differently from its plain language. As in the case of floor-to-floor heights of mechanical spaces, however, Plaintiffs' remedy is to seek a legislative change. They are not entitled to judicial intervention to rewrite the terms of the plain language of the Zoning Resolution. See, e.g., Peyton v. N.Y.C. Bd. of Standards & Appeals, 166 A.D.3d 120 (1st Dep't 2018).

(a) The Project Zoning Lot and the Split Lot Rules

33. The Project's zoning lot has a total lot area of 54,687 square feet and is divided into two portions: 35,105 square feet of the zoning lot is located within a C4-7 zoning district mapped along West 66th Street, and 19,582 square feet of the zoning lot is located within an R8 zoning district mapped along West 65th Street. See ZD-1, Exhibit K. This means that the Project zoning lot is a "split lot," i.e., a zoning lot divided between two zoning districts, and subject to special regulations known as the "split lot" rules.

34. The split lot rules generally provide that where a zoning lot is divided by a boundary between two or more zoning districts, each portion of the zoning lot is regulated by all

the provisions applicable to the district in which such portion of the zoning lot is located.[11] Thus, for example, a C4-7 zoning district permits commercial use while an R8 district does not; under the "split lot" rules, this means that a commercial use could be located within the C4-7 portion of the Project's zoning lot, but not within the R8 portion of the lot.

35. As consistently interpreted and applied by the DOB and the BSA (and as upheld by the Court in Beekman Hill Ass'n v.Chin, 274 A.D.2d 161 (1st Dept. 2000), leave to appeal denied 95 N.Y.2d 767 (2000)), the split lot rules are applied on a regulation-by-regulation basis; that is, a zoning lot may be viewed as a split lot for purposes of applying one zoning regulation and as a single zoning lot for other purposes, with the distinction depending upon whether the regulation in question applies in all portions of the zoning lot or in only one portion of the zoning lot. See Beekman, 274 A.D.2d at 175 ("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."). Thus, in the example above, the Project zoning lot would be a "split lot" for purposes of the location of any commercial use, because commercial use is allowed in the C4-7 district but not in the R8 district.[12] However, to the extent that other regulations apply in both portions of the zoning lot (the C4-7 and R-8 districts), the Project zoning lot is not a "split lot" for purposes of application of that regulation, and the regulation applies across the entire zoning lot without differentiation between the zoning districts.[13]

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11 See ZR § 77-02. This general rule is subject to certain exceptions related to the date of establishment of the zoning lot not relevant here. See ZR § 77-03.

12 Owner is not proposing to include any commercial use within the new building and the discussion of commercial use herein is for illustrative purposes only.

13 In Beekman, for example, the Court considered whether residential floor area could be distributed from a portion of a zoning lot zoned C1-9 to a portion of the zoning lot zoned C5-2. While the regulations applicable in these two zoning districts differ in certain respects, the Court upheld determinations by the DOB and the BSA that,

(b) Application of the Split Lot Rules to the Bulk Packing Regulation of the Lincoln Square Special District

36. The Project Site is also located within the Lincoln Square Special District, a zoning special district in which additional regulations apply. See Zoning Resolution Article VIII, Chapter 2 (establishing the "Special Lincoln Square District"[14]). The Lincoln Square Special District zoning regulations may differ from or supplement the underlying rules of the zoning districts mapped within its boundaries. Id. Accordingly, while sites within the Special District are mapped with C4-7 and/or R8 zoning districts, superseding or supplementary Special District rules can apply to sites with those district designations. In some cases, the Special District regulations apply to only a portion of the Special District or to only one of the underlying zoning districts. See, e.g., ZR § 82-31 (providing that "[w]ithin Subdistrict A [of the Special District], for any building in a C4-7 District, the maximum permitted commercial floor area shall be 100,000 square feet"). In other instances, the Special District regulations apply throughout the Special District. See, e.g., ZR § 82-35 (providing that "[w]ithin the Special District, all buildings shall be subject to the height and setback regulations of the underlying districts," subject to certain enumerated exceptions).

37. One provision which applies throughout the Special District is § 82-34 (entitled "Bulk Distribution"), which provides, in relevant part, that "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."

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because both districts have the same maximum floor area ratio for residential use (10.0), the zoning lot was properly considered a single lot, rather than a split lot, for purposes of residential floor area, thereby allowing for the distribution of such floor area across the zoning district boundary from the C1-9 district to the C5-2 district. See Beekman, 274 A.D.2d at 176.

[14] While the Zoning Resolution refers to the "Special Lincoln Square District," it is generally referred to as the "Lincoln Square Special District." The two terms are synonymous.

38. By its plain terms, Zoning Resolution § 82-34 applies "Within the Special District"—not to designated Subdistricts or specified locations in the Special District (in contrast to ZR § 82-31, for example). That is, Zoning Resolution § 82-34 applies to all portions of any zoning lot within the Special District, irrespective of underlying zoning district designation(s) of the site. It therefore applies equally and fully to: (a) a zoning lot mapped with an R8 district only; (b) a zoning lot mapped with a C4-7 district only; and (c) a zoning lot, such as the Project Site's zoning lot, which is split between C4-7 and R8 districts. Stated differently, it is a regulation not specified for any particular zoning district, and applicable to all development in the Special District. To illustrate: had Owner here instead developed two separate buildings on the two zoning lots in the Project Site, one entirely within the R8 district and the other building entirely within in the C4-7 district, both of those buildings and zoning lots would have to comply with ZR § 82-34.

39. In its challenge to the DOB filed together with Landmark West, Plaintiff 10 West 66th Street itself acknowledged that ZR § 82-34 applies to all portions of any zoning lot within the Special District. Indeed, Plaintiff 10 West 66th Street argued vigorously that the entire Project Site (including the C4-7 and R8 districts) had to comply with the Bulk Distribution rule set forth in that provision, thereby recognizing that it applies to all lots in the Special District.[15]

40. Plaintiffs now argue that in applying § 82-34 to the Project Site, the R8 portion of the zoning lot should be ignored and not included in the calculation of the 60% of total floor area of the zoning lot which must be located below 150 feet on the Project Site. The regulation says nothing of the sort. Ignoring this, Plaintiffs point to the method for calculating

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15 In the Zoning Challenge it filed together with Landmark West, Plaintiff 10 West 66th Street stated that ZR 82-34 applies to the entire zoning lot, including the R8 portion. Exhibit E at 8.

"tower coverage," but this is a different regulation which applies to only the C4-7 portion of the Project Site's zoning lot.[16] Plaintiffs incorrectly argue that the calculation under § 82-34 must be similarly limited to the amount of floor area within the C4-7 portion of the zoning lot, but fail to acknowledge the critical difference between these two regulations.

41. In contrast to Zoning Resolution § 82-34, the Special District provision governing tower coverage (ZR § 82-36) applies only to those portions of the Special District where towers are permitted, i.e., the C4-7 district, and not to the R8 district, where towers are not permitted.[17] This difference in treatment flows directly from the terms of the applicable regulations and from application of the Zoning Resolution's "split lot" rules, discussed above. Tower development is not permitted in the R8 district, and the calculation of permitted tower lot coverage is therefore based on the portion of the Project zoning lot located within the C4-7 district (where tower development is permitted) only. By contrast, ZR § 82-34 applies everywhere in the Special District, and therefore to both the C4-7 and R8 districts of the Project zoning lot. The calculation of the 60% of floor area required to be below 150 feet under § 82-34 must therefore be based on the floor area of the entire Project Site, which entire area is subject to that regulation. The difference between the application of ZR §§ 82-36 and 82-34 to the

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16 A tower is defined as a portion of a building that penetrates a sky exposure plane (a virtual sloping plane that begins at a specified height above the street line and rises inward over the zoning lot) (see ZR Section 23-65 and 33-45) and thereby produces the distinctive form of high-rise development allowed in high-density areas of New York City. Tower lot coverage defines the percentage of the zoning lot that the tower portion of the building is permitted to cover.

17 Under ZR § 82-36 (Special Tower Coverage and Setback Regulations), tower development within the Special District is governed by the underlying requirements of ZR §§ 33-45 (Tower Regulations) or 35-64 (Special Tower Regulations for Mixed Buildings), subject to certain modifications related to, inter alia, the calculation of tower lot coverage. Those underlying regulations of ZR §§ 33-45 and 35-64 apply in the C4-7 district but not in the R8 district, and the Project zoning lot is therefore a "split lot" for purposes of the calculation of tower lot coverage under ZR § 82-36. This result is in accord with the provisions of ZR § 33-48 which provide, in relevant part, that "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 [Special Provisions for Zoning Lots Divided by District Boundaries], shall apply."

Project's zoning lot is not "absurd," as Plaintiffs repeatedly assert (Pl. Mem. at 31); rather it is the direct result of DOB's implementation of two different regulations, with different scopes, as reflected in the plain language of those regulations.

42. This issue is not one of first impression. In 2002, DOB approved a residential tower within the Special District, located at 1930 Broadway. Like the Project Site here, the building in question was located on a zoning lot split between a C4-7 district and an R8 district. DOB approved the application of the 60% floor area calculation under § 82-34 based on the entire zoning lot, inclusive of the R8 district. In that case, DOB also approved application of § 82-36 properly to only the C4-7 district within the zoning lot, and approved a tower coverage calculation under § 82-36 based solely on the C4-7 portion of the zoning lot.[18] (Copies of the relevant drawings approved by the DOB for 1930 Broadway are attached as Exhibit O hereto.) In the present case, DOB has made the same determination, concluding in its November 19, 2018 ZRD2 form (in a portion that at no time was subject to possible rescission) that "Section 82-34 would be applicable to all portions of a zoning lot located within the Special District regardless of zoning district regulations," and that "the 'zoning lot' referenced in Section 82-36 [governing tower coverage] pertains only to the portion of the zoning lot within the C4-7 district" (Exhibit D at pp. 2–3).

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[18] As shown on Drawing Z-01, the 1930 Broadway zoning lot is divided between a C4-7 district (28,765 square feet) and an R8 district (9 square feet), for a total of 28,774 square feet. Also as shown on Drawing Z-01, the bulk distribution calculation under ZR § 82-4 approved by DOB was based on the amount of floor area provided on the entire zoning lot (345,239 square feet), including 345,180 square feet in the C4-7 district and 59 square feet in the R8 district. As shown on Drawing Z-02, the calculation of minimum and maximum tower coverage under ZR § 82-36 approved by DOB was based on the lot area of the C4-7 portion of the zoning lot only (28,765 square feet).

The calculations approved by DOB for the Project here follow an identical approach. The bulk distribution calculation under ZR § 82-34 was based on floor area over the entire zoning lot, while the calculation of tower coverage was based on the lot area of the C4-7 portion of the zoning lot only.

While in this instance the proportionate square footage in the R8 district was less than it is here, the 1930 Broadway plans make clear that DOB applied the regulations and the split lot rules consistently with their clear language and established precedent that refutes Plaintiffs' interpretation.

43. The Plaintiffs disregard how the split lot rules apply to § 82-34 in accordance with Beekman, effectively rewriting that provision, in relevant part, to read as follows:

> Within *only the C4-7 districts* within the Special District, at least 60 percent of the total floor area permitted on a zoning lot *(but not including the floor area of a portion of a zoning lot located within an R8 district where such zoning lot is divided between a C4-7 district and an R8 district)* shall be within stories located partially or entirely below a height of 150 feet from curb level.

That is plainly not what the controlling regulation provides.

44. In support of this creative rewriting of the provision, Plaintiffs claim that the phrase "within the Special District" was only meant to distinguish ZR § 82-34 "from the rule applicable in Manhattan's other high-density residential districts, ZR § 23-651(a)(2) [sic[19]], which the Commission approved on the same day" (Pl. Mem. at 34–35). According to Plaintiffs, the "general version" of the bulk packing rule, found in what are known as the "Tower on a Base" regulations, "differs from the Special District version in that it is slightly less demanding, and also more complex: the required percentage of floor area below 150 feet starts at 55 percent and increases to 59.5 percent as tower lot coverage decreases from 40 percent to 31 percent." Id. at 35. According to Plaintiffs, then, ZR § 82-34 meant to say that "*notwithstanding the required percentage of floor area set forth in ZR Section 23-651(a)(3) as required under the bulk packing rule of that section, the required percentage within the Special Lincoln Square District shall be 60%.*" But that is not what the regulation says at all. It does not call for the application of ZR § 23-651 and simply change one of the elements of that provision for purposes of the C8 portions

[19] The bulk packing regulation under Tower on a Base regulations is found in ZR § 23-651(a)(3), not 23-651(a)(2).

of the Special District. Instead, it enacts a clear and distinct Special District rule regarding "Bulk Distribution" that applies to all portions of the Special District.

45. Plaintiffs' tortured reading of the phrase "within the Special District" has a very specific purpose: the argument that ZR § 82-34 does no more than vary provisions of the Tower on a Base regulations governing the percentage of floor area subject to bulk distribution, is intended to suggest that (wholly irrespective of the plain language of ZR § 82-34) bulk distribution in the Special District should be calculated according to the method required under the Tower on a Base regulations, and applied only to the C4-7 portion of the Project's zoning lot.

46. However, Plaintiffs' attempted characterization of the Special District as governed by Tower on a Base regulations, subject only to a "minor" modification in the required percentage of bulk distribution under ZR § 82-34, is wrong. Quite simply, the Tower on a Base regulations, including the bulk packing regulation of ZR § 23-651(a)(3), apply only in R9 and R10 districts, or in C1-8, C1-9, C2-7 or C2-8 districts. See ZR §§ 23-651 and 35-64(a). They do not apply in C4-7 districts. Accordingly, ZR § 82-34 is a Special District regulation that operates wholly independent of—and not in conjunction with or as a modification or supplement to—the Tower on a Base regulations.[20]

47. Once ZR § 82-34 and the provisions of ZR § 23-651(a)(3) are properly understood as part of distinct sets of regulation, the clear differences between the two for purposes of application of the split lot rules also becomes clear. Under the Tower on a Base

[20] ZR § 35-64(a) (previously ZR § 35-63, adopted in 1993 as part of the Tower on a Base zoning) illustrates how the Tower on a Base Regulations expand to locations other than the R9 and R10 districts to which they apply under ZR § 23-651. ZR § 35-64(a) provides that the Tower on a Base Regulations apply to specified commercial districts (not including C4-7 districts), subject to certain modifications ("[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 . . . [list of modifications to building base regulations].") By contrast, ZR § 82-34 makes no cross-reference to ZR § 23-651 and does not otherwise incorporate the provisions of that section, with or without modifications.

regulations, the tower coverage requirement of ZR § 23-651(a)(1) and the bulk packing requirement of ZR § 23-651(a)(3) are two subparts of the same provision of the Zoning Resolution, ZR § 23-65. As stated in the prefatory language of ZR § 23-65, that section applies *only* in R9 and R10 zoning districts, both of which are districts in which towers are allowed. Accordingly, where a Tower on a Base building is built on a zoning lot split by a zoning district that permits towers (e.g., an R10 district) and a zoning district that does not (e.g., an R8 district), the bulk packing calculation is made based on the floor area of the portion of the zoning lot within the tower district only, consistent with the express terms of ZR § 23-65. By contrast, within the Lincoln Square Special District, the provisions of ZR § 82-36 governing the calculation of tower lot coverage apply *only* to the C4-7 district where such towers are permitted, while ZR § 82-34 expressly applies to *all* development within the Special District. Accordingly, where, as here, a tower is built within the Special District on a zoning lot split by a C4-7 district and an R8 district, the bulk distribution calculation is made based on the floor area of the entire zoning lot, consistent with the express terms of ZR § 82-34.

48. Plaintiffs make the illogical argument that because the amendments to the Special District regulations which added ZR §§ 82-36 and 82-34 were adopted by the City Planning Commission on the very same day (December 20, 1993) as the Tower on a Base regulations, they must operate the same way as ZR §§ 23-651(a)(1) and (a)(3). If anything, the opposite is true. The Special District and Tower on a Base regulations were adopted through separate actions, are different in their language and structure, and apply to different locations, with the Special District regulations applying only within the boundaries of the Special District and the Tower on a Base regulations applying only at locations outside the Special District. Plaintiffs' attempt to conflate the two sets of regulations on the basis that they were adopted on

the same date ignores a simple fact: they are different.[21] Plaintiffs are incorrect that "'[w]ithin the Special District' . . . does not mean that the Rule applies everywhere in the Special District" (Pl. Mem. at 4). Indeed, it means just that.

49. Under Plaintiff's mistaken interpretation of the bulk distribution rule, it is claimed that the height of the Project would be reduced by five floors. However, Plaintiffs' real objective is to eliminate the Project's mechanical spaces. With the Project fully vested under current regulations which do not regulate the heights of these spaces, they seek to invalidate the permit lawfully issued by DOB by means of an interpretation of ZR § 82-34, in the hopes that new regulations limiting the height of mechanical spaces will then be applied to any new permits that may be sought for the Project. However, Plaintiffs' interpretation of that provision contradicts its plain meaning and is inconsistent with the split lot rules. Accordingly, Plaintiffs fail to demonstrate a likelihood of success on the merits on the present motion.

D. Conclusion

50. For the foregoing reasons and those set forth in the accompanying Rothstein affidavit and memorandum of law, there is no basis for the issuance of a preliminary injunction that would stop construction work on the Project, and this action should be dismissed.

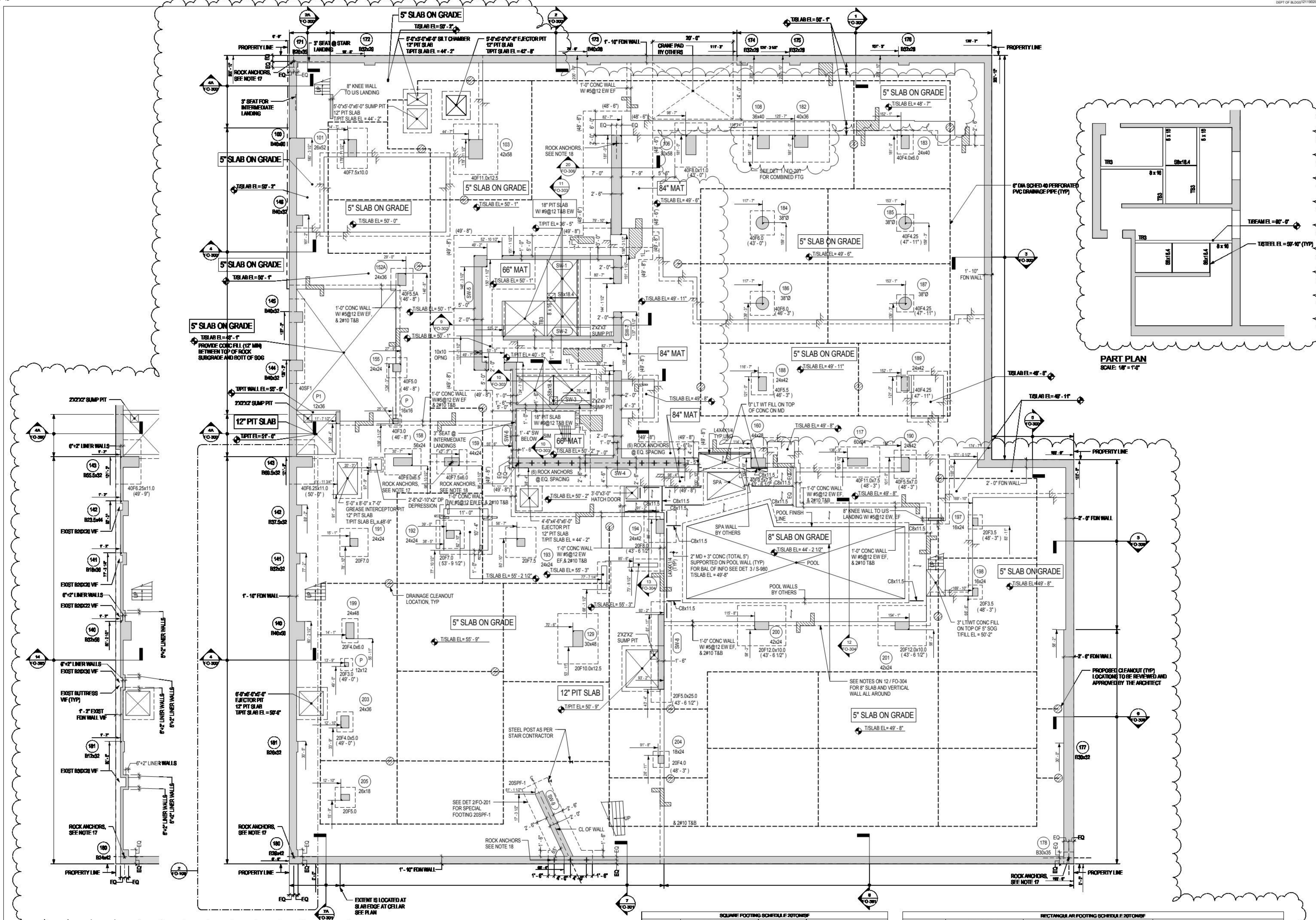
Dated: May 21, 2019
New York, NY

David Karnovsky

[21] Exhibit P hereto lists the significant number of differences between the Tower on a Base regulations and the provisions of ZR §§ 82-34 and 82-36 that are wholly ignored by Plaintiffs.

EXHIBIT R

Please see Extell Exhibit 2 for this exhibit, which is Extell's ZD1 (July 26, 2018).



2 FO-100 FOUNDATION PLAN (E) WALL ALTERNATE
SCALE: 1/8" = 1'-0"

FOUNDATION PLAN

SCALE: 1/8" = 1'-0"

FLOOR	T/SLAB ELEVATION, UNO
SUB CELLAR	49' - 11"

FLOOR TYPE	CONC STRENGTH	TYPICAL REINF	COMMENTS
8" SLAB	f'c= 5000 psi	#4@12 BOT MIN EACH WAY	
5" SLAB	f'c= 4000 psi	#3@12 TOP EACH WAY	

NOTES:

1. SEE S-00X SERIES DRAWINGS FOR GENERAL NOTES AND REQUIREMENTS, LEGEND AND ABBREVIATIONS
2. SEE ARCHITECTURAL DRAWINGS FOR WATERPROOFING REQUIREMENTS
3. SEE GEOTECHNICAL DRAWINGS FOR SUBGRADE PREPARATION REQUIREMENTS
4. SEE FO-20X SERIES DRAWINGS FOR TYPICAL FOUNDATION DETAILS
5. SEE FO-20X SERIES DRAWINGS FOR SLAB REINFORCING AT CMU WALLS, CONCRETE CURBS AND HOUSEKEEPING PADS. COORDINATE WITH ARCHITECTURAL AND MEP DRAWINGS FOR LOCATIONS
6. SEE FO-30X SERIES DRAWINGS FOR FOUNDATION SECTIONS
7. SEE S-91X SERIES DRAWINGS FOR COLUMN AND BUTTRESS SCHEDULE AND DETAILS
8. SEE S-93X SERIES DRAWINGS FOR SHEAR WALL REINFORCING AND DETAILS
9. CENTERLINE OF FOOTINGS SHALL MATCH CENTERLINE OF COLUMNS AND PIERS, UNO
10. GRADE BEAMS AND STRAP BEAMS SHALL BE PLACED MONOLITHICALLY WITH FOOTINGS
11. FOUNDATION WALL HORIZONTAL REINFORCING SHALL RUN CONTINUOUSLY THRU BUTTRESSES, UNO
12. < X'-X" > INDICATES TOP OF FOUNDATION WALL
13. [X'-X"] INDICATES BOTTOM OF FOUNDATION WALL
14. (X'-X") INDICATES TOP OF FOOTING ELEVATION. LOCATE 1'-5" BELOW TOP OF SLAB UNO
15. PROJECT ELEVATION IS BASED ON THE NORTH AMERICAN VERTICAL DATUM 1988 (NAVD 88)
16. FIRST FOOTING DIMENSION SHOWN IN SCHEDULE IS IN THE EAST - WEST DIRECTION
17. ✱ =245kips (SERVICE) 1 7/8" Ø GRADE 150 DOUBLE CORROSION PROTECTED ROCK ANCHORS BY CONTRACTOR'S PE
18. ✚ =465kips (SERVICE) 2 1/2" Ø GRADE 150 DOUBLE CORROSION PROTECTED ROCK ANCHORS BY CONTRACTOR'S PE
19. AT WEST FOUNDATION WALL, BUTTRESS SIZE IS MEASURED FROM THE FACE OF THE EXISTING FOUNDATION WALL
20. PROVIDE CONCRETE TOPPING WITH REINFORCEMENT SAME AS WITH 5" SLAB ON GRADE ON TOP OF SHEAR WALL MAT. TOP OF CONCRETE TOPPING TO MATCH TOP OF SLAB.
21. SHEAR WALL 66" & 84" THICK MAT FOUNDATION SHALL BEAR ON 40TSF ROCK OR BETTER.

SQUARE FOOTING SCHEDULE 20TON/SF

MARK	DIMENSIONS		REINFORCING	REMARKS
	SIZE	DEPTH		
20F3.0	3'-0" x 3'-0"	24"	(3)#6 BOT EW	
20F3.5	3'-6" x 3'-6"	24"	(3)#8 BOT EW	
20F4.0	4'-0" x 4'-0"	24"	(4)#8 BOT EW	
20F5.0	5'-0" x 5'-0"	24"	(5)#10 BOT EW	
20F6.5	6'-6" x 6'-6"	36"	(7)#11 BOT EW	
20F7.0	7'-0" x 7'-0"	36"	(8)#11 BOT EW	
20F7.5	7'-6" x 7'-6"	42"	(10)#11 BOT EW	
20F8.0	8'-0" x 8'-0"	42"	(11)#11 BOT EW	

SQUARE FOOTING SCHEDULE 40TON/SF

MARK	DIMENSIONS		REINFORCING	REMARKS
	SIZE	DEPTH		
40F3.0	3'-0" x 3'-0"	24"	(3)#8 BOT EW	
40F4.25	4'-3" x 4'-3"	24"	(5)#9 BOT EW	
40F5.0	5'-0" x 5'-0"	30"	(5)#11 BOT EW	
40F5.5	5'-6" x 5'-6"	30"	(5)#11 BOT EW	
40F5.5A	5'-6" x 5'-6"	36"	(7)#11 BOT EW	
40F6.0	6'-0" x 6'-0"	30"	(6)#11 BOT EW	

RECTANGULAR FOOTING SCHEDULE 20TON/SF

MARK	DIMENSIONS		REINFORCING		REMARKS
	SIZE	DEPTH	SHORT BARS	LONG BARS	
20F4.0x5.0	4'-0" x 5'-0"	24"	(5)#8 BOT	(5)#8 BOT	
20F4.0x6.0	4'-0" x 6'-0"	24"	(6)#8 BOT	(6)#8 BOT	
20F5.0x25.0	5'-0" x 25'-0"	36"	(26)#9 BOT	(8)#11 BOT	
20F10.0x12.5	10'-0" x 12'-6"	54"	(22)#11 BOT	(18)#11 BOT	NO 90° END HOOKS FOR SHORT & LONG BARS
20F12.0x10.0	12'-0" x 10'-0"	54"	(22)#11 BOT	(18)#11 BOT	NO 90° END HOOKS FOR SHORT & LONG BARS

RECTANGULAR FOOTING SCHEDULE 40TON/SF

MARK	DIMENSIONS		REINFORCING		REMARKS
	SIZE	DEPTH	SHORT BARS	LONG BARS	
40F4.0x6.0	4'-0" x 6'-0"	30"	(6)#9 BOT	(5)#10 BOT	
40F5.5x7.0	5'-6" x 7'-0"	36"	(8)#11 BOT	(7)#11 BOT	
40F6.25x11.0	6'-3" x 11'-0"	54"	(11)#11 BOT	(26)#11 BOT (2Layers)	PROVIDE (11)#9 TOP SHORT BARS NO 90° END HOOKS FOR LONG BARS
40F7.5x8.0	7'-6" x 8'-0"	36"	(8)#11 BOT	(7)#11 BOT	
40F7.5x10.0	7'-6" x 10'-0"	48"	(16)#11 BOT	(13)#11 BOT	
40F8.0x11.0	8'-0" x 11'-0"	54"	(20)#11 BOT	(17)#11 BOT	
40F8.5x10.0	8'-6" x 10'-0"	54"	(18)#11 BOT	(16)#11 BOT	
40F9.0x6.5	9'-0" x 6'-6"	42"	(12)#11 BOT	(9)#11 BOT	
40F9.5x7.5	9'-6" x 7'-6"	48"	(16)#11 BOT	(14)#11 BOT	
40F9.5x9.0	9'-6" x 9'-0"	54"	(17)#11 BOT	(17)#11 BOT	
40F11.0x7.5	11'-0" x 7'-6"	54"	(20)#11 BOT	(14)#11 BOT	
40F11.0x12.5	11'-0" x 12'-6"	66"	(26)#11 BOT	(25)#11 BOT	

STRIP FOOTING SCHEDULE 40TON/SF

MARK	DIMENSIONS		REINFORCING		REMARKS
	SIZE	DEPTH	SHORT BARS	LONG BARS	
40SF1	3'-10" x 21'-0"	24"	#9@10 BOT	(4)#8 BOT	

WEST 66TH STREET

36 WEST 66TH STREET, NEW YORK, NY

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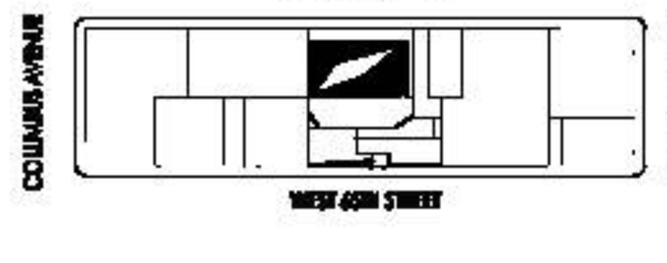
	07/13/18	ISSUED TO DOB
	06/04/18	CD PROGRESS SET
	05/04/18	50% CD SET
	04/12/18	FOUNDATION AND 16TH FL UPDATE
	03/19/18	CD PROGRESS SET
	11/15/17	DOB FILING
	11/14/17	100% DD
	11/03/17	FOUNDATION UPDATE
	09/21/17	PRICING SET
	09/06/17	PROGRESS CHECK SET
	06/23/17	50% DD Set
	02/14/17	90% SCHEMATIC DESIGN

B.O.B. NUMBER:
NB#

NORTH ARROW | Scale:

KEY PLAN:



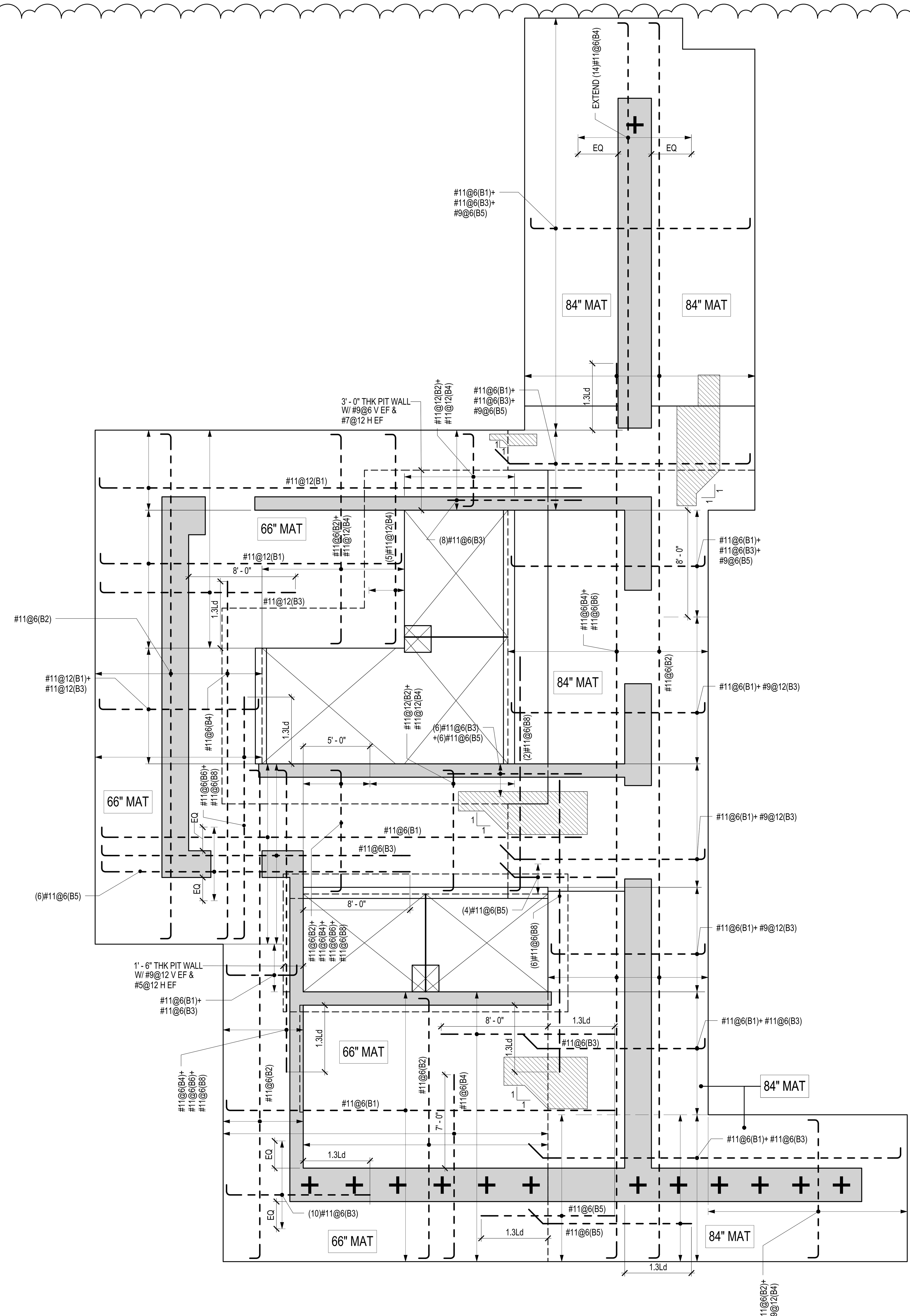
PROJECT:

DRAWING TITLE:
FOUNDATION PLAN

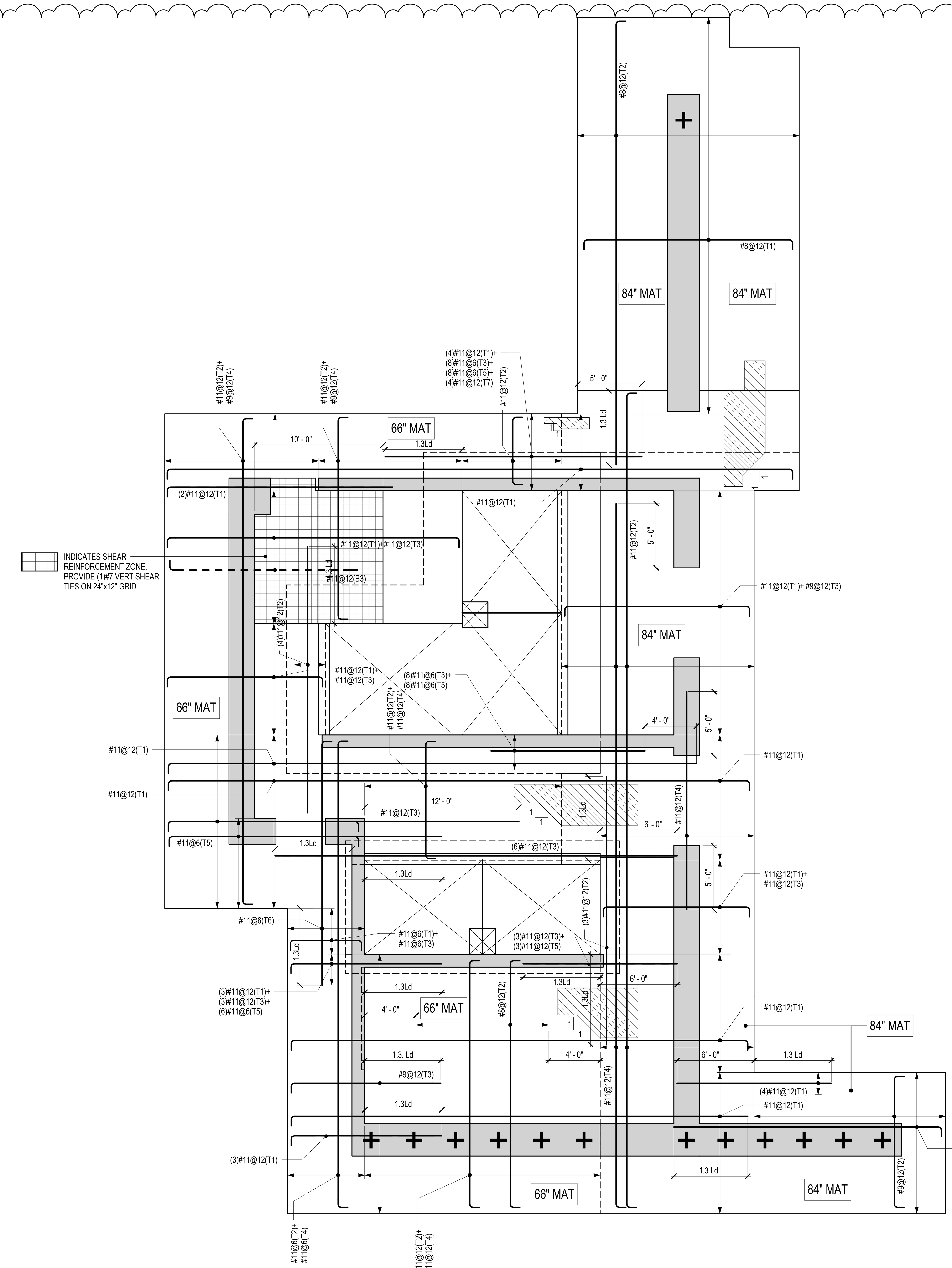
SEAL & SIGNATURE:

DATE: 01/17/2017
PROJECT No: 15049.00
DRAWN BY: Checker
CHECKED BY: Author
DRAWING No:
FO-100.03
DOB NO.

24 X 36

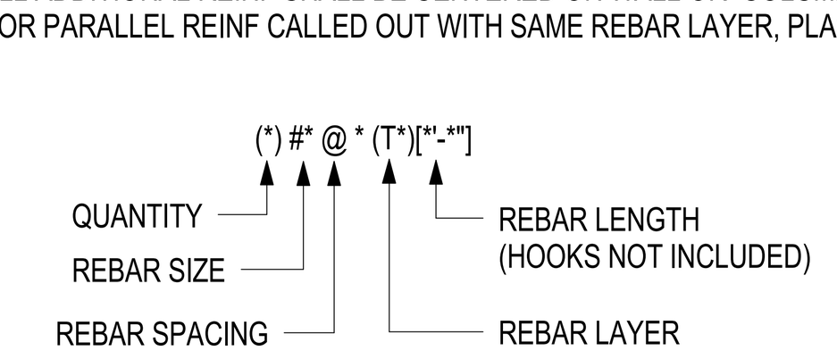


1 MAT FOUNDATION BOTTOM REINFORCEMENT
SCALE: 1/4" = 1'-0"

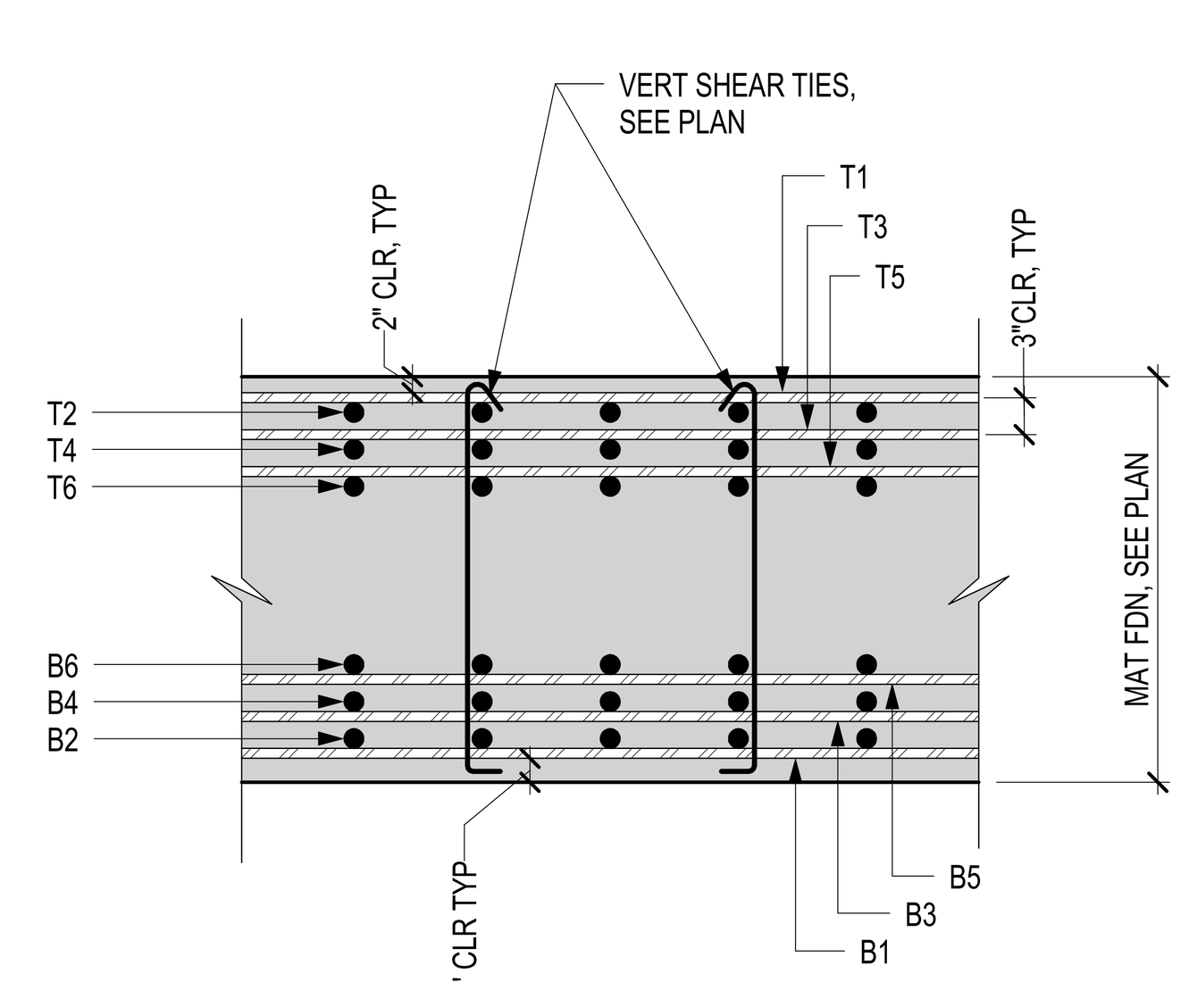


2 MAT FOUNDATION TOP REINFORCEMENT
SCALE: 1/4" = 1'-0"

NOTE:
1. FOR BALANCE OF NOTES SEE DWG FO-100.
2. ALL ADDITIONAL REINF SHALL BE CENTERED ON WALL OR COLUMNS UON.
3. FOR PARALLEL REINF CALLED OUT WITH SAME REBAR LAYER, PLACE REINF ALTERNATELY



REBAR CALLOUT



TYPICAL MAT FOUNDATION REINF LAYOUT

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	05/04/18	50% CD SET
	03/19/18	CD PROGRESS SET
	11/15/17	DOB FILING
	11/14/17	100% DD
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	09/21/17	PRICING SET

D.O.B. NUMBER:
NB#

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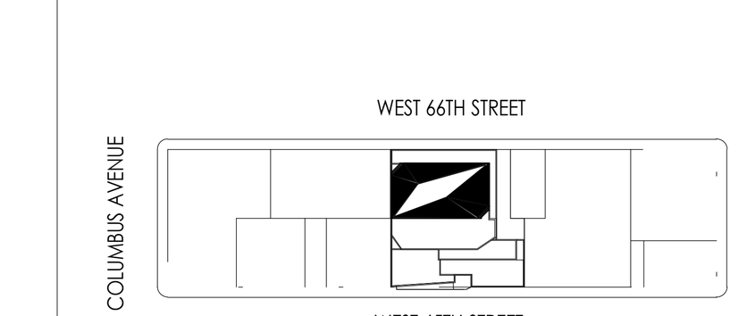
Scale:

KEY PLAN:



PROJECT:

DRAWING TITLE:
MAT FOUNDATION REINFORCEMENT

SEAL & SIGNATURE:

DATE:	01/17/2017
PROJECT No:	15049.00
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CHECKED BY:	Author

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FO-200.02
DOB NO.

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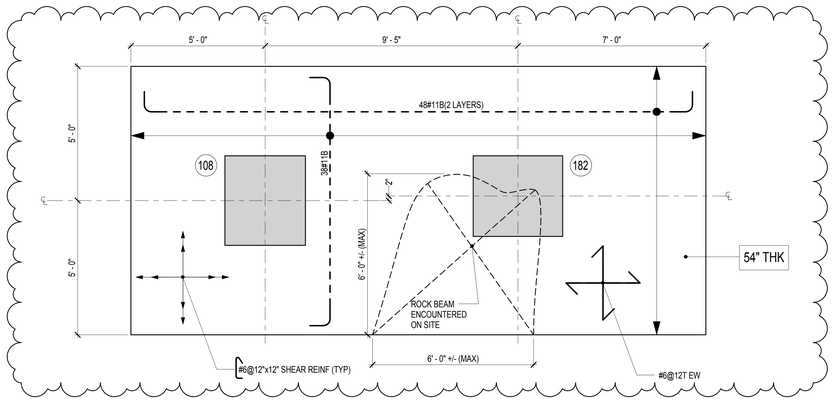
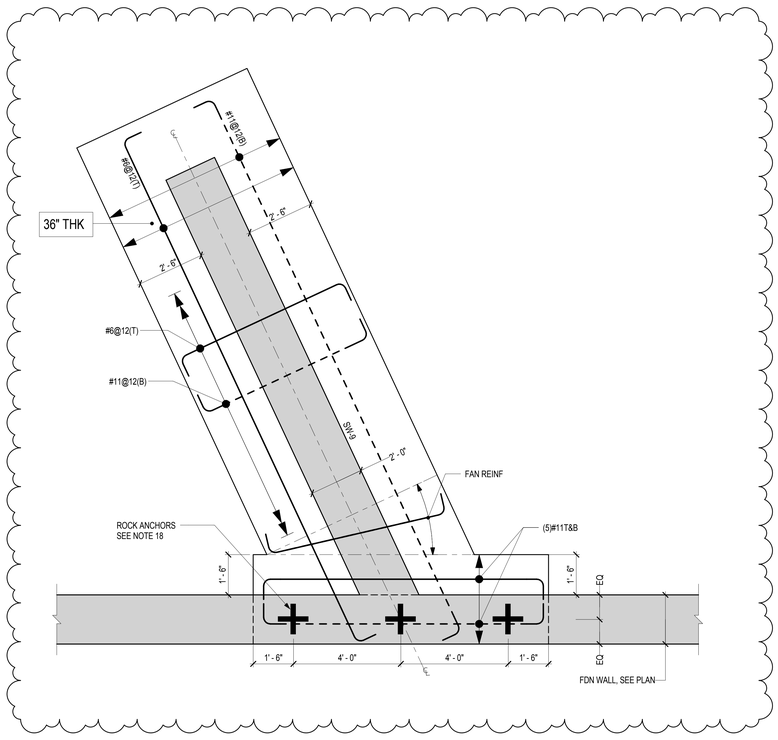


1 COMBINED FTG FOR COL 108/182 (40 TSF)

SCALE: 1/2" = 1'-0"



2 20SPF-1 DETAIL

SCALE: 1/2" = 1'-0"

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	11/14/17	100% DD
	11/03/17	FOUNDATION UPDATE

D.O.B. NUMBER:
NB#

NORTH ARROW | Scale:

KEY PLAN:

PROJECT:

DRAWING TITLE:
SPECIAL FOOTING DETAILS

Roxane Tarigotis, RA
APPROVED
Under Directive 14 of 2025
NYC Development Hub

SEAL & SIGNATURE:

DATE:	01/17/2017
PROJECT No:	1504900
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CHECKED BY:	Author
DRAWING No:	FO-201.01
DOB NO.	

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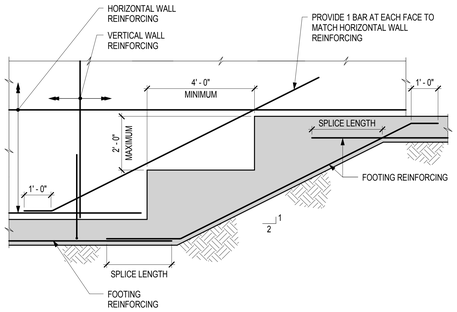
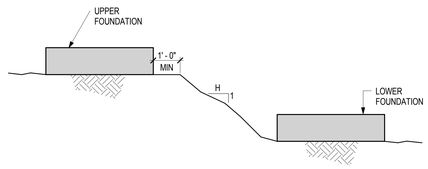
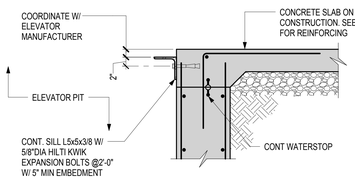


1 TYPICAL ELEVATION OF CONTINUOUS STEPPED WALL FOOTING

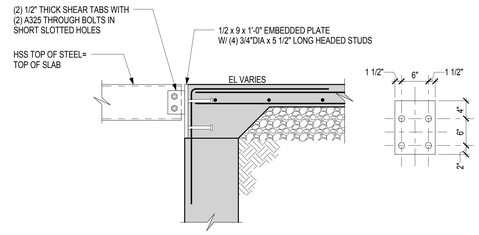


H = 2, UNLESS NOTED BY GEOTECHNICAL REPORT

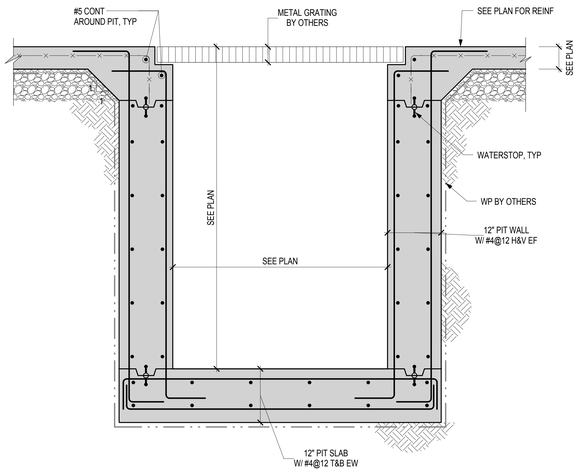
2 TYPICAL RELATIONSHIP OF FOOTINGS AT DIFFERENT ELEVATIONS



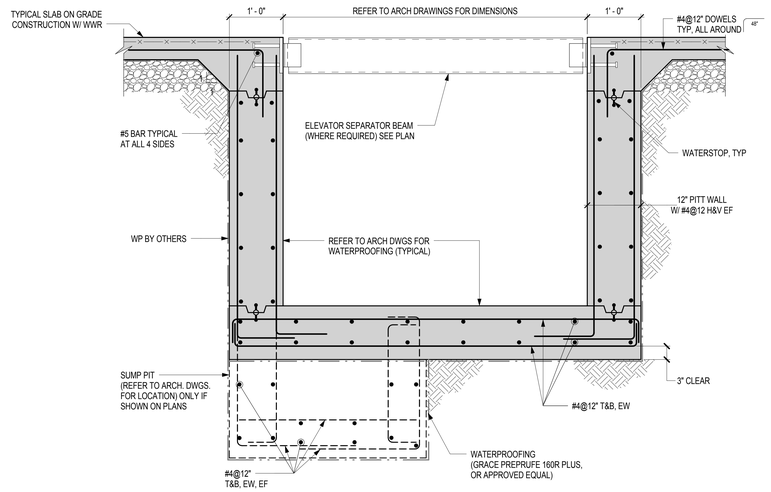
3 TYPICAL ELEVATOR SILL AT SLAB ON GRADE



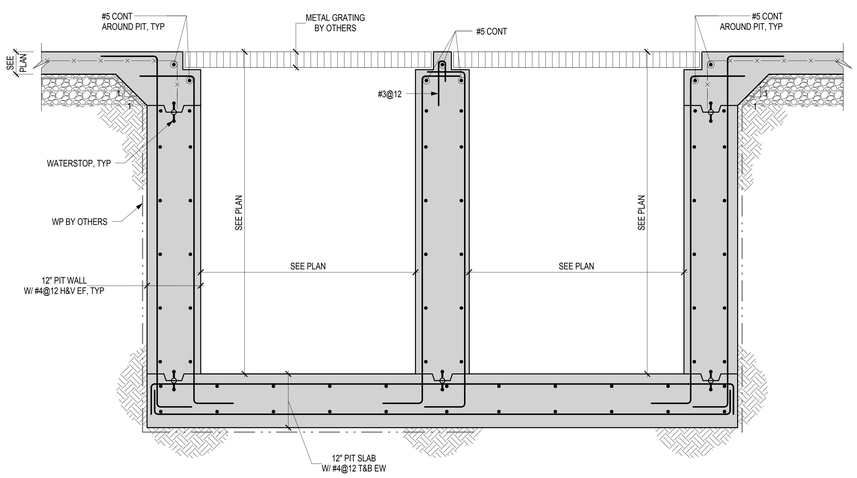
4 TYPICAL ELEVATOR SEPARATOR BEAM AT GROUND LEVEL



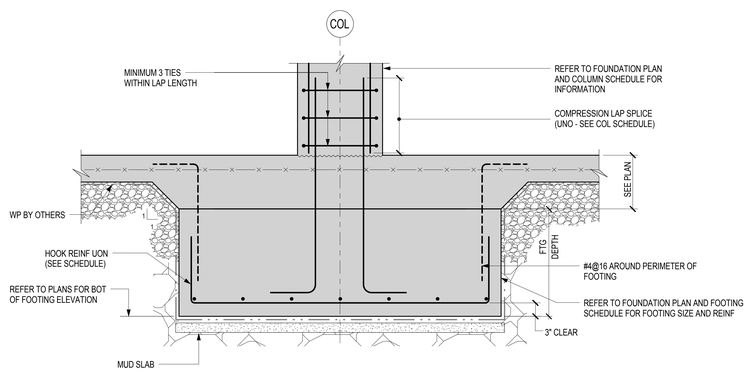
5 TYPICAL SECTION AT SUMP PIT



6 TYPICAL SECTION AT ELEVATOR PIT



7 TYPICAL SECTION AT SUMP PIT & SILT INTERCEPTOR



8 TYPICAL INTERIOR COLUMN FOOTING DETAIL

Roxane Tarigotis, RA
R. Tarigotis
APPROVED
DEPARTMENT OF BUILDINGS
Date: 12/08/2017
NYC Development Hub

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	11/14/17	100% DD
	09/21/17	PRICING SET
	09/06/17	PROGRESS CHECK SET
	06/23/17	50% DD Set
	02/14/17	90% SCHEMATIC DESIGN

D.O.B. NUMBER:
NB#

NORTH ARROW
Scale:

KEY PLAN:

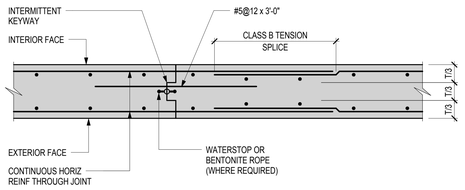
PROJECT:

DRAWING TITLE:
TYPICAL FOUNDATION DETAILS

SEAL & SIGNATURE:
STATE OF NEW YORK
093540
LICENSED PROFESSIONAL ENGINEER

DATE:	01/17/2017
PROJECT No:	13049.00
DRAWN BY:	BS
CHECKED BY:	JPM
DRAWING No:	FO-202.01
DOB NO.	

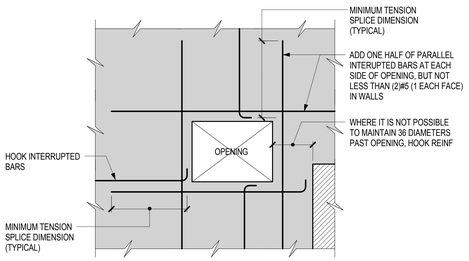
R. 00160 36 X 36



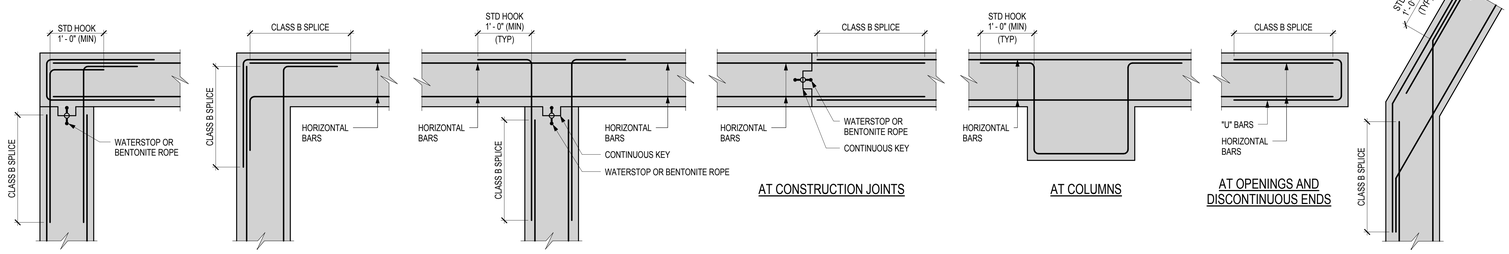
NOTES:

1. SPACE CONTROL JOINS AT 30 x THICKNESS OF THE WALL, 3 x HEIGHT OF THE WALL, OR 30FT. MAXIMUM, WHICHEVER IS LESS. COORDINATE SPACING WITH ARCHITECTURAL DRAWINGS.
2. DOUBLE-SIDED CONTROL JOINTS ARE PREFERRED AT WALLS WHERE BOTH SIDES OF WALL ARE EXPOSED TO VIEW. COORDINATE LOCATIONS WITH ARCHITECTURAL DRAWINGS.
3. COORDINATE REGLET GEOMETRY WITH ARCHITECTURAL DRAWINGS. DEPTH AND REGLET BOTTOM WIDTH IN DETAILS ARE REQUIRED. CHAMFER(S) ARE OPTIONAL BASED ON ARCHITECTURAL REQUIREMENTS. CHAMFERS ARE RECOMMENDED WHEN REGLET FORMS ARE TO BE REMOVED.
4. CONTROL JOINTS MAY ALSO SERVE AS CONSTRUCTION JOINTS. COORDINATE WITH ARCHITECTURAL DRAWINGS.
5. WATERSTOP IS OPTIONAL. COORDINATE WITH GEOTECHNICAL ENGINEER
6. ALL CONTROL AND CONSTRUCTION JOINTS ARE TO BE CLEARLY SHOWN ON SHOP DRAWINGS FOR REVIEW AND APPROVAL BY BOTH THE ARCHITECT AND ENGINEER OF RECORD.

1 TYPICAL CONSTRUCTION JOINT DETAIL AT VERTICAL WALL



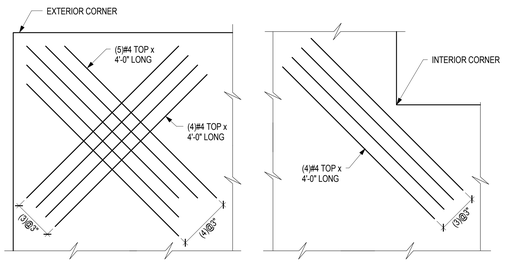
2 TYPICAL PLAN DETAIL OF HORIZONTAL WALL REINFORCING



NOTE:

1.- VERTICAL REINF BARS ARE NOT SHOWN FOR CLARITY (TYP)

3 TYPICAL REINFORCING AT OPENINGS IN CONCRETE WALLS

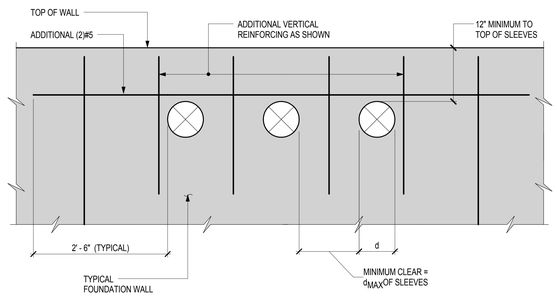


AT EXTERNAL AT INTERNAL

NOTE:

1.- AT REINFORCED CONCRETE SLABS ONLY (NOT SLABS ON METAL DECK UNO)

4 TYPICAL MULTI-SLEEVE DETAIL AT FOUNDATION WALL

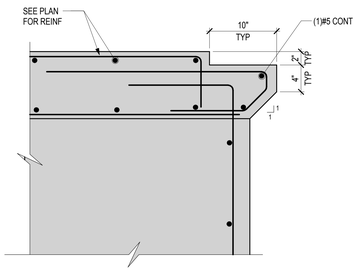


USE FOR 3 OR MORE SLEEVES

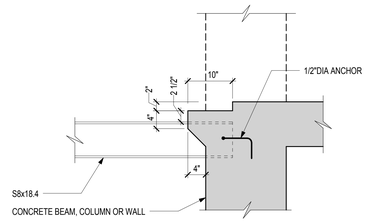
NOTE:

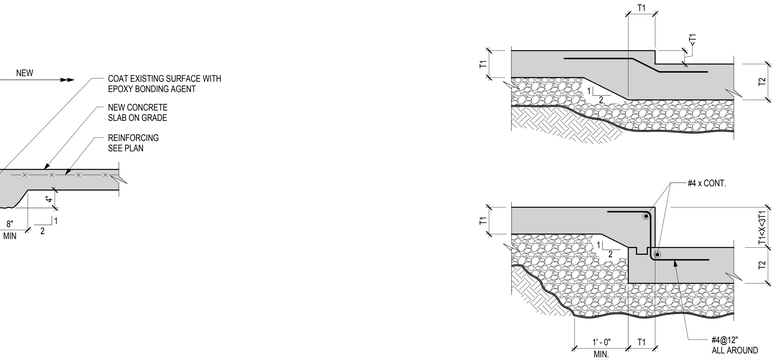
1.- ALL SLEEVES SHALL BE CLEARLY SHOWN ON SHOP DRAWINGS FOR APPROVAL.

5 TYPICAL ELEVATOR SILL DETAIL @ PIT



6 TYPICAL ELEV SEPERATOR BM CONN

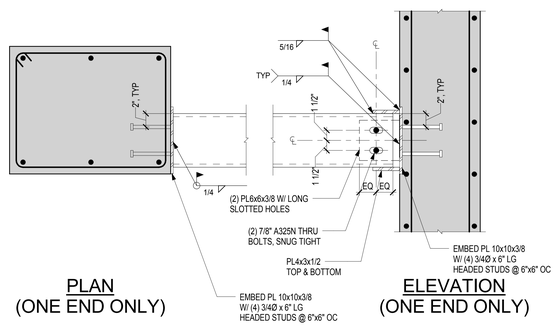




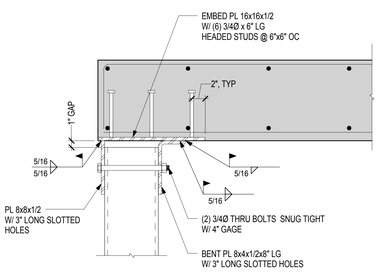
7 TYPICAL ADDITIONAL REINFORCING AT SLAB CORNERS

8 TYPICAL SLAB ON GRADE INFILL DETAIL

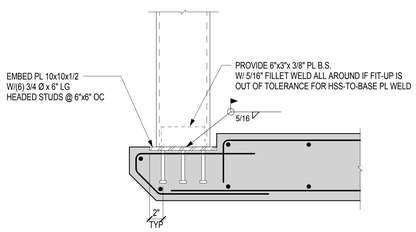
9 TYPICAL SLAB ON GRADE DEPRESSIONS



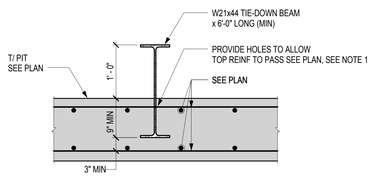
10 TYP HSS ELEVATOR FRAMING BEAM TO CONC COLUMN/WALL



11 TYP HSS ELEVATOR FRAMING POST CONN TO U/S OF SLAB



12 TYPICAL CONNECTION DETAIL FOR ELEVATOR FRAMING POST TO CONC SLAB COPY



NOTE:
1. TOP REINF AT ELEVATOR TIE-DOWN BEAMS SHALL NOT BE LESS THAN #5@12
2. COORDINATE QUANTITY, POSITION AND LENGTH OF TIE-DOWN BEAM WITH ELEVATOR CONTRACTOR

13 TYPICAL ELEVATOR TIE-DOWN BEAM

WEST 66TH STREET

36 WEST 66TH STREET, NEW YORK, NY

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c/o Paul Hastings, LLP
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EXECUTIVE ARCHITECT:
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1359 BROADWAY NEW YORK, NY 10018 TEL.: (212) 979-8400 FAX.: (212) 979-8387

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e-mail: eng@vdaassoc.com
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INERIOR DESIGNER:
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LIGHTING DESIGNER:
FILAMENT33 INC
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Philadelphia, PA 19118
TEL.: (464) 674-0133

No.:	Date:	Revision:
07/13/18		ISSUED TO DOB
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05/04/18		50% CD SET
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09/06/17		PROGRESS CHECK SET
06/23/17		50% DD Set
02/14/17		90% SCHEMATIC DESIGN

D.O.B. NUMBER:
NB#

NORTH ARROW

Scale:

KEY PLAN:

PROJECT:

DRAWING TITLE:
TYPICAL FOUNDATION DETAILS

SEAL & SIGNATURE:

Roxane Tsiripotis, RA
APPROVED
NYC Development Hub

STATE OF NEW YORK 093540 REGISTERED PROFESSIONAL ENGINEER

DATE:	01/17/2017
PROJECT No:	13049.00
DRAWN BY:	BS
CHECKED BY:	JPM
DRAWING NO:	FO-203.00
DOB NO:	

36 X 36

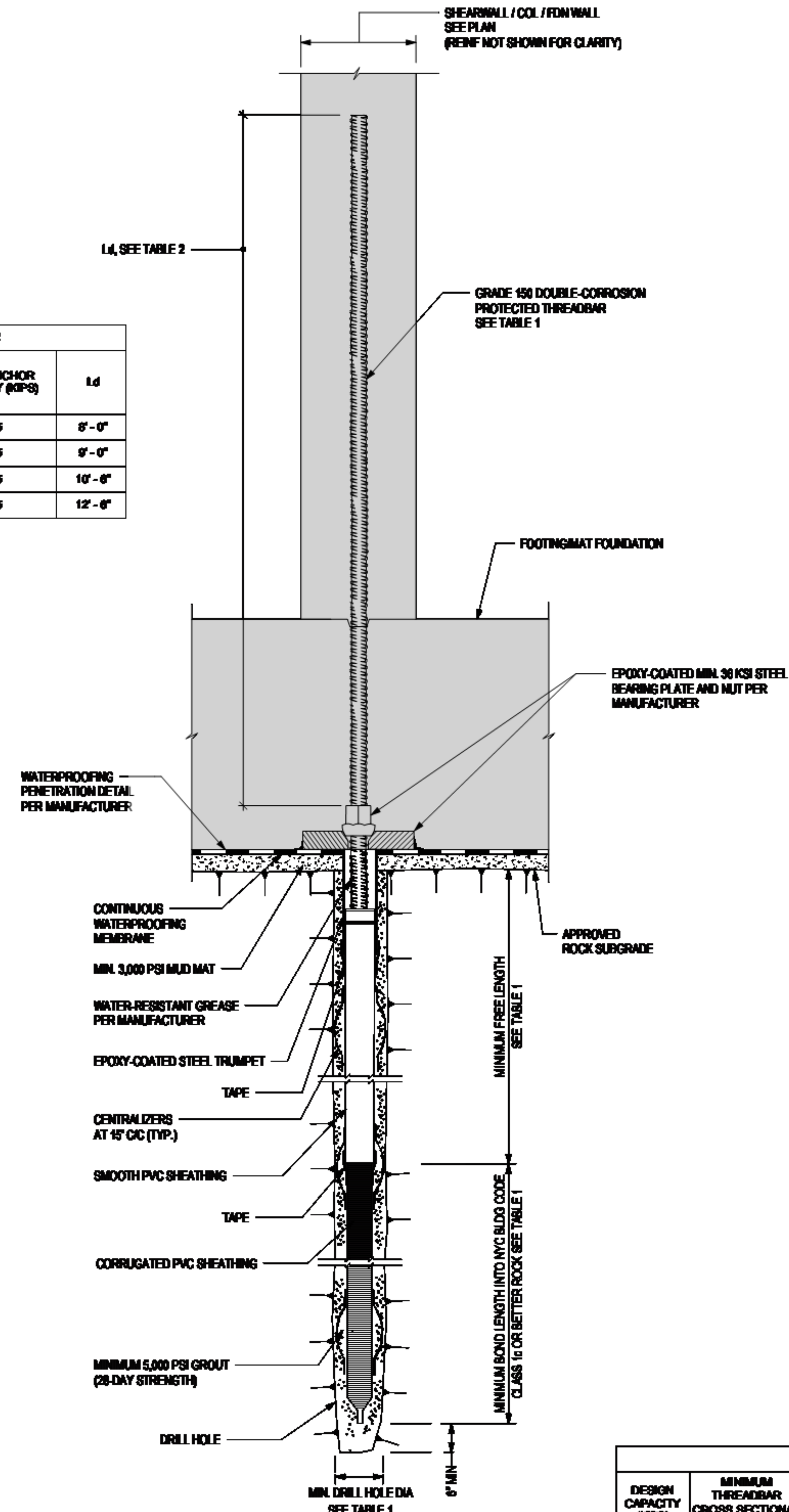


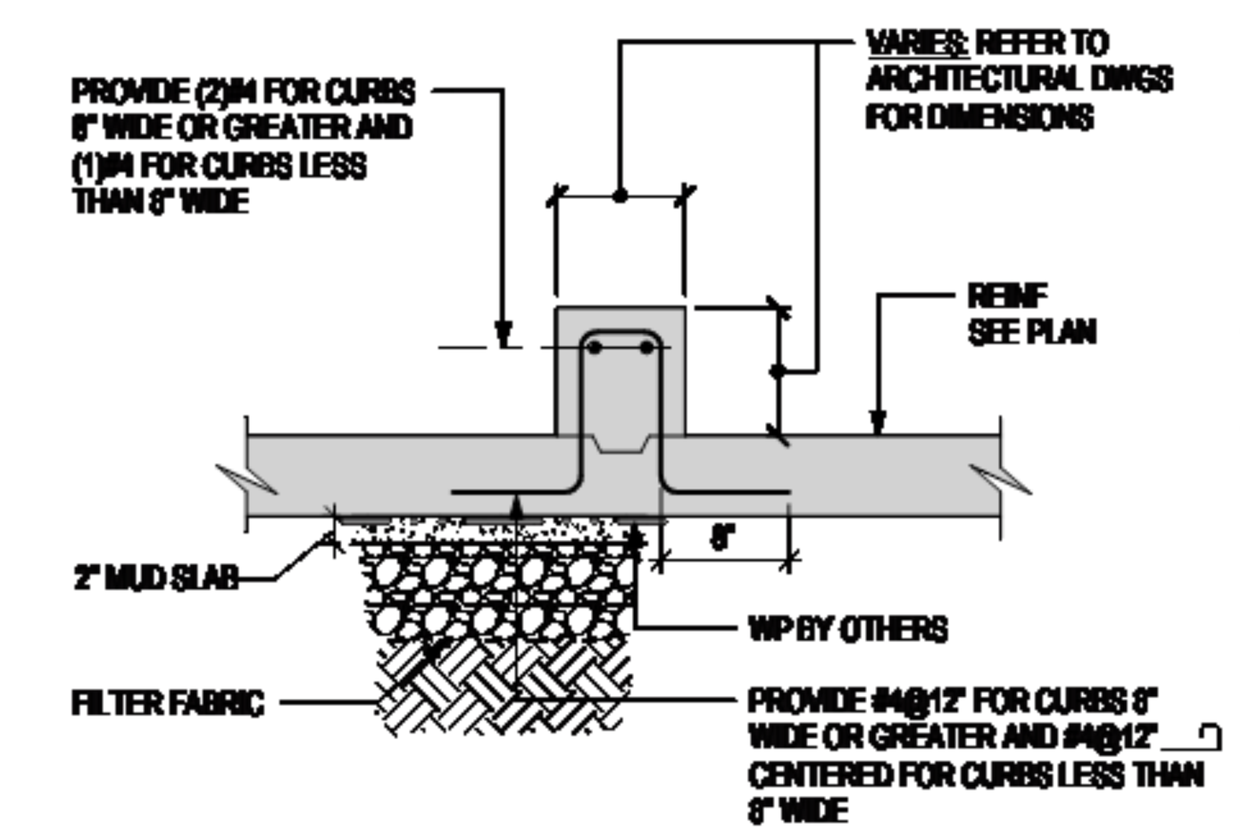
TABLE 2		
LOCATION	ROCK ANCHOR CAPACITY (KIPS)	Ld
COL 169	245	8' - 0"
FDN WALLS	245	9' - 0"
SW-4 & NORTH OF SW-7	405	10' - 6"
SOUTH OF SW-9	405	12' - 6"

TABLE 1					
DESIGN CAPACITY (KIPS)	MINIMUM THREADBAR CROSS SECTIONAL AREA (IN^2)	LOCATION	MINIMUM FREE LENGTH (FEET)	MINIMUM BOND LENGTH (FEET)	MINIMUM DRILL HOLE DIAMETER (INCHES)
245	2.72	ALL	15	20	5
405	5.16	SW-4	20	30	6
		SW-9	20		
		OTHER	15		

1 ROCK ANCHOR DETAIL

NOTE:

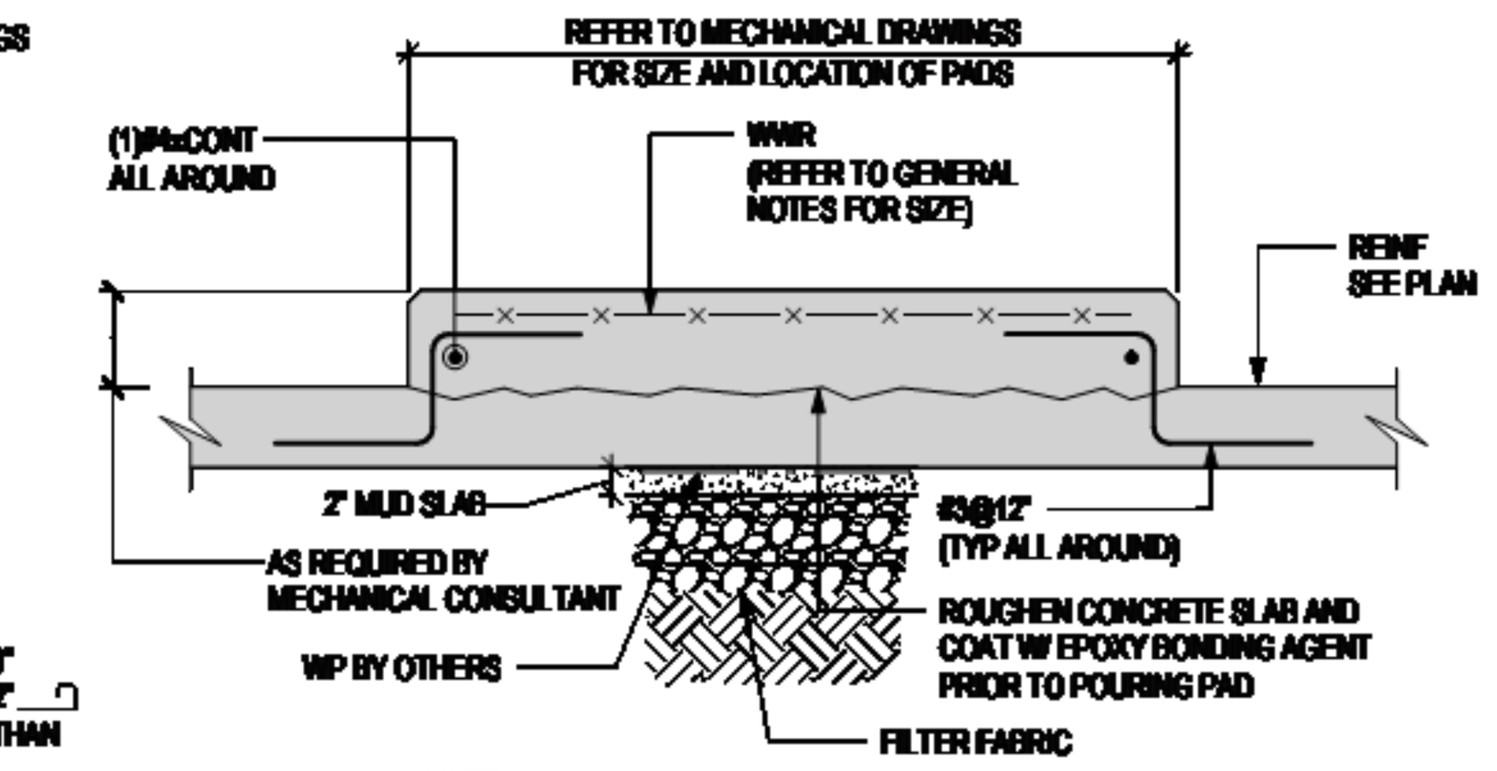
1. NOT TO SCALE.
2. REFER TO SPECIFICATION SECTION 316800 FOR ANCHOR INSTALLATION AND TESTING REQUIREMENTS.



NOTE:

1.- USE SIMILAR DETAIL AT FRAMED STRUCTURAL SLABS, UNO.

CONCRETE CURB



NOTE:

1.- USE SIMILAR DETAIL AT FRAMED STRUCTURAL SLABS, UNO.

HOUSEKEEPING PAD

2 TYPICAL SLAB ON GRADE DETAILS

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

OWNER/DEVELOPER:
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DESIGN ARCHITECT:
Snøhetta

STRUCTURAL ENGINEER:
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New York, NY 10036
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MEP ENGINEER:
ICOR CONSULTING ENGINEERS

GEOTECHNICAL ENGINEER:
Langan Engineering

FACADE CONSULTANT:
Heintges & Associates

FACADE MAINTENANCE:
Entek Engineering LLC

ELEVATOR CONSULTANT:
vda

INTERIOR DESIGNER:
SHAMIR SHAH DESIGN

INTERIOR DESIGNER:
AB CONCEPT

POOL CONSULTANT:
TRACE POOL DESIGN

LIGHTING DESIGNER:
FOCUS LIGHTING

LIGHTING DESIGNER:
FILAMENT33 INC

07/13/18 ISSUED TO DOB
06/04/18 CD PROGRESS SET

No: Date: Revision:

NB#

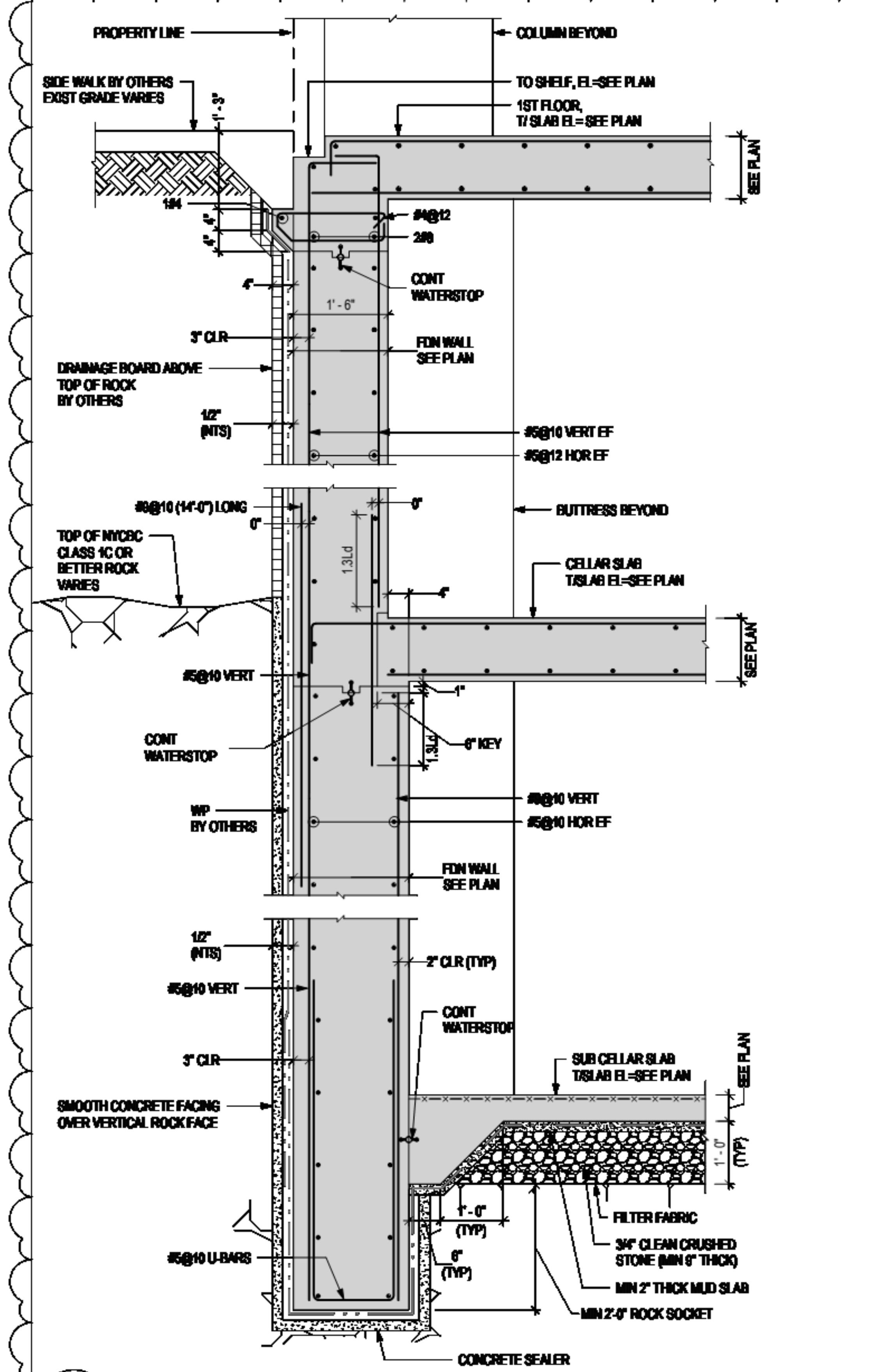
KEY PLAN:

PROJECT:

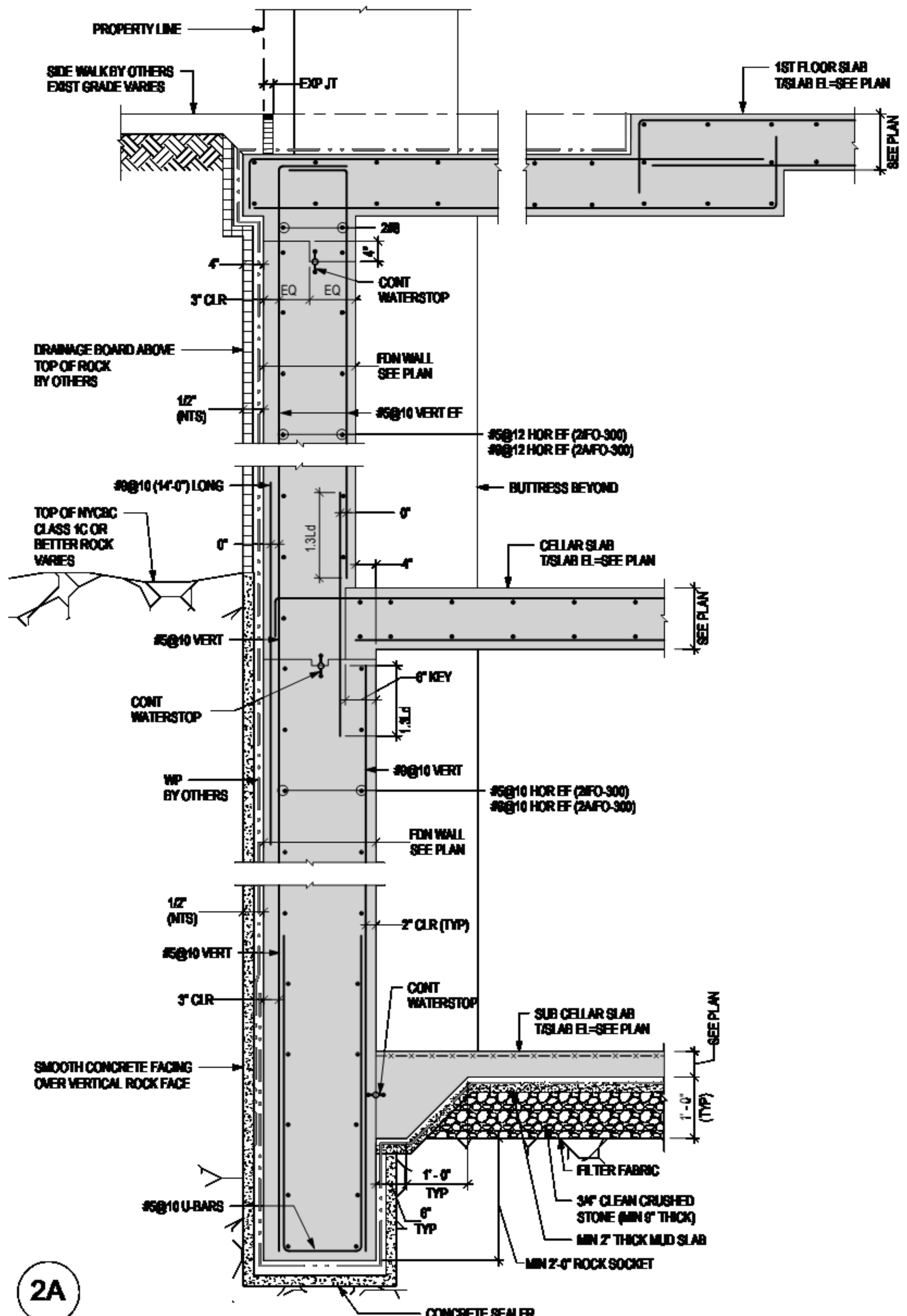
DRAWING TITLE:
TYPICAL FOUNDATION DETAILS

SEAL & SIGNATURE:

DRAWING No:
FO-204.00



1 SECTION
SCALE: 3/4" = 1'-0"



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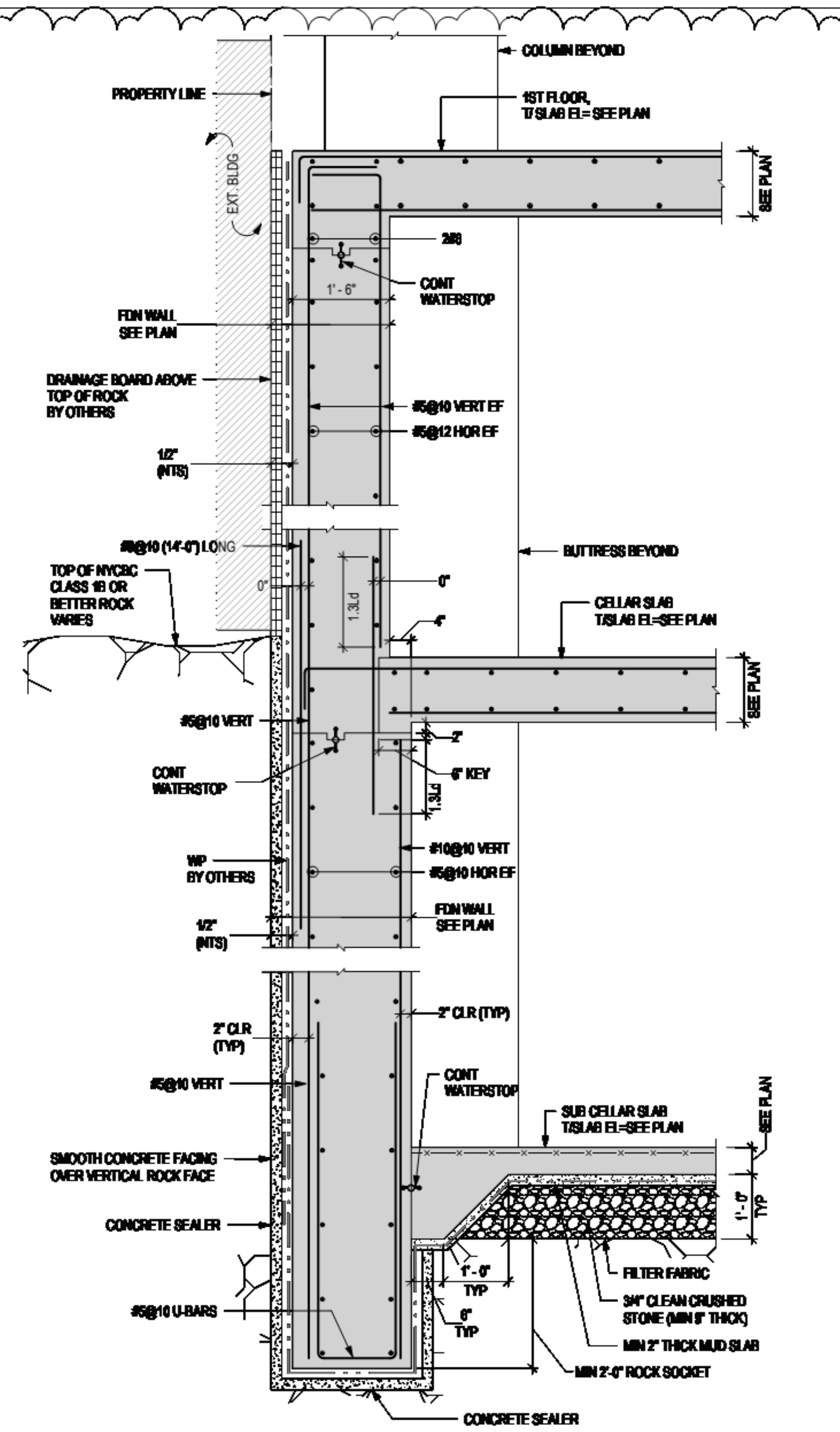

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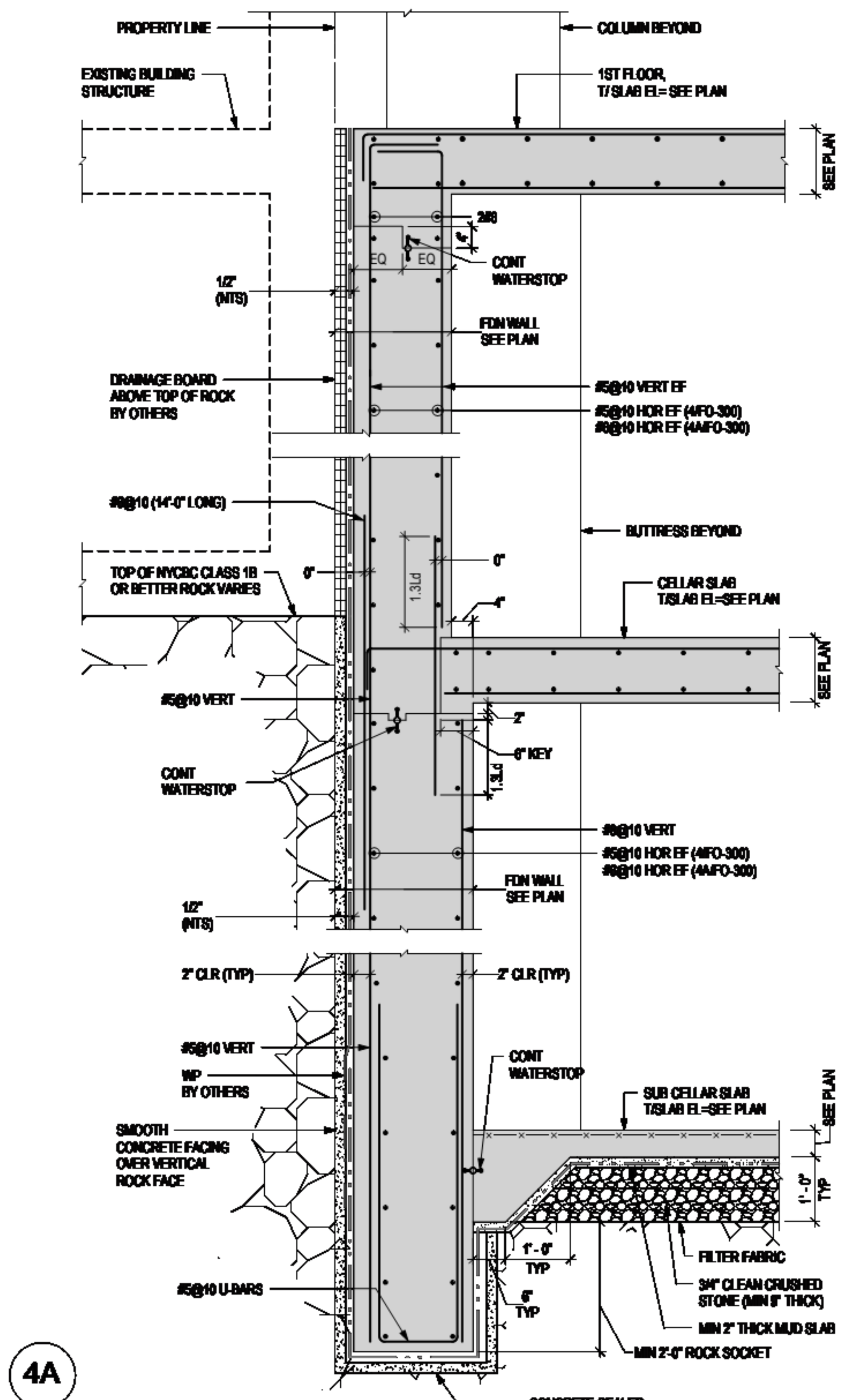

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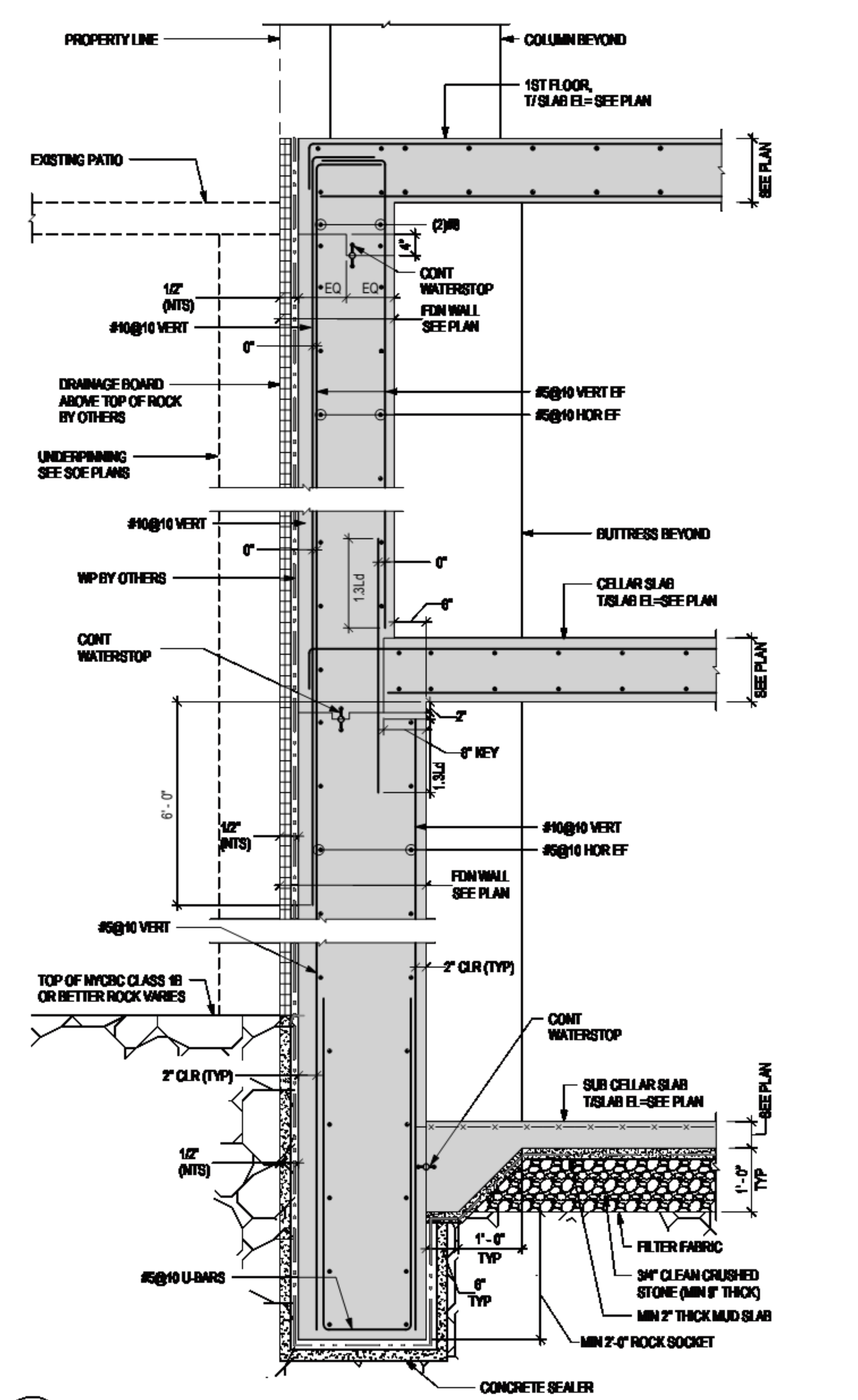

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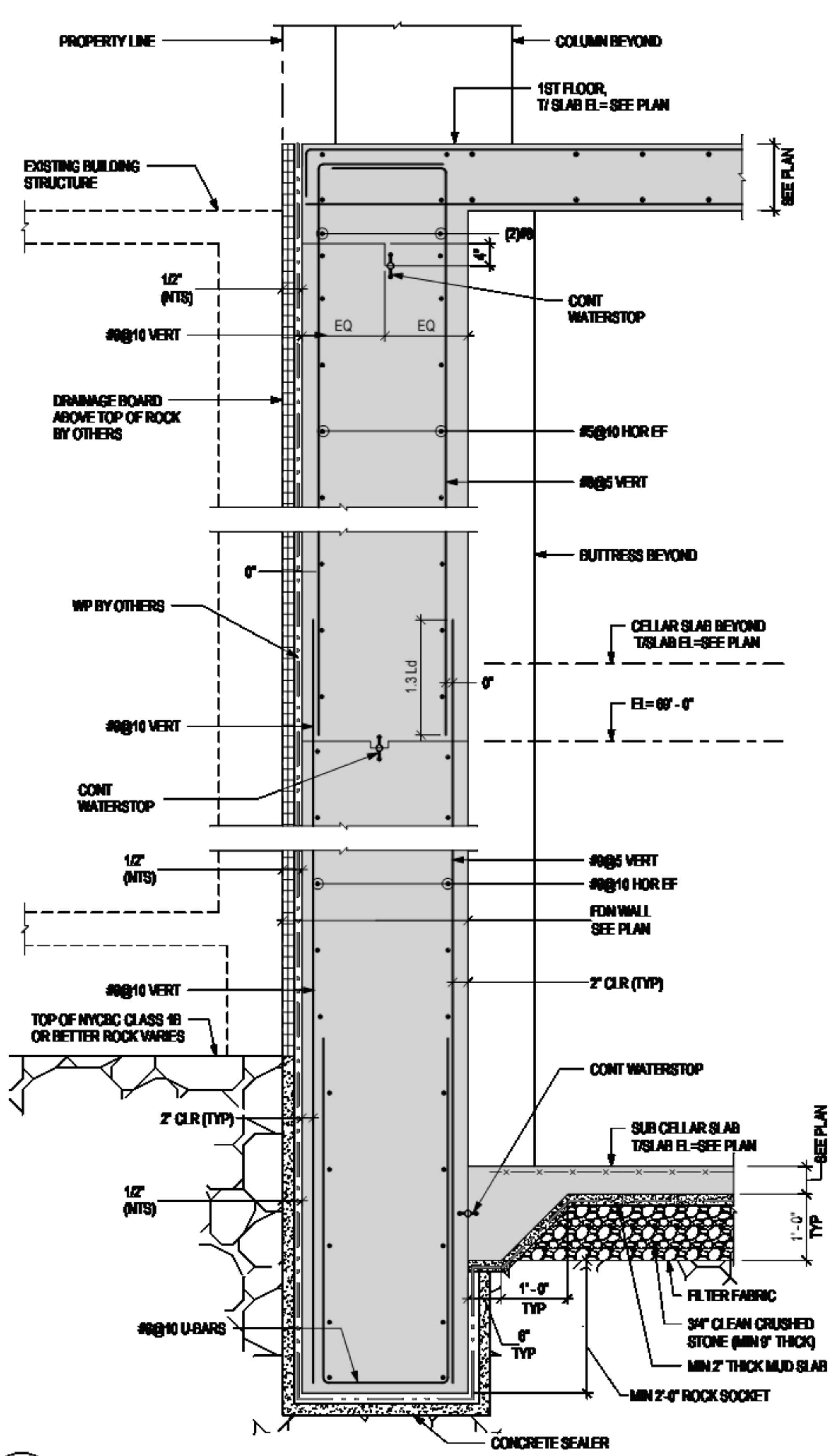

6 SECTION
SCALE: 3/4" = 1'-0"

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

OWNER/DEVELOPER:
West 66th Investor, LLC
c/o Paul Hastings, LLP
75 EAST 55TH STREET
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221 West 16th Street
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FILAMENT33 INC
9190 GERMANTOWN AVE
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No:	Date:	Revision:
	07/13/18	ISSUED TO DOB
	06/04/18	CD PROGRESS SET
	05/04/18	50% CD SET
	04/19/18	REVISED FDN SECTIONS
	04/12/18	FOUNDATION AND 16TH FL UPDATE
	03/19/18	CD PROGRESS SET
	11/15/17	DOB FILING
	11/14/17	100% DD
	11/03/17	FOUNDATION UPDATE
	09/21/17	PRICING SET
	09/06/17	PROGRESS CHECK SET
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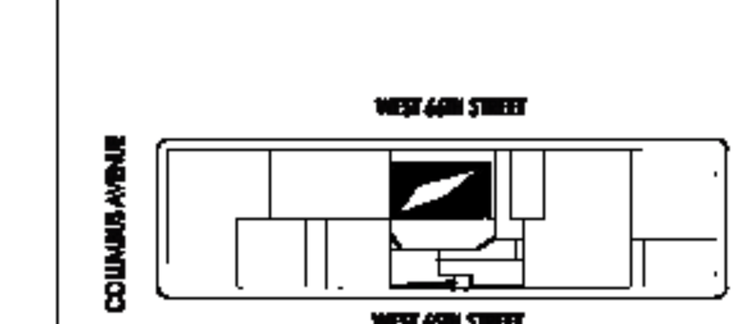
	02/14/17	90% SCHEMATIC DESIGN

B.O.B. NUMBER
NB#

NORTH ARROW
Scale:

KEY PLAN:



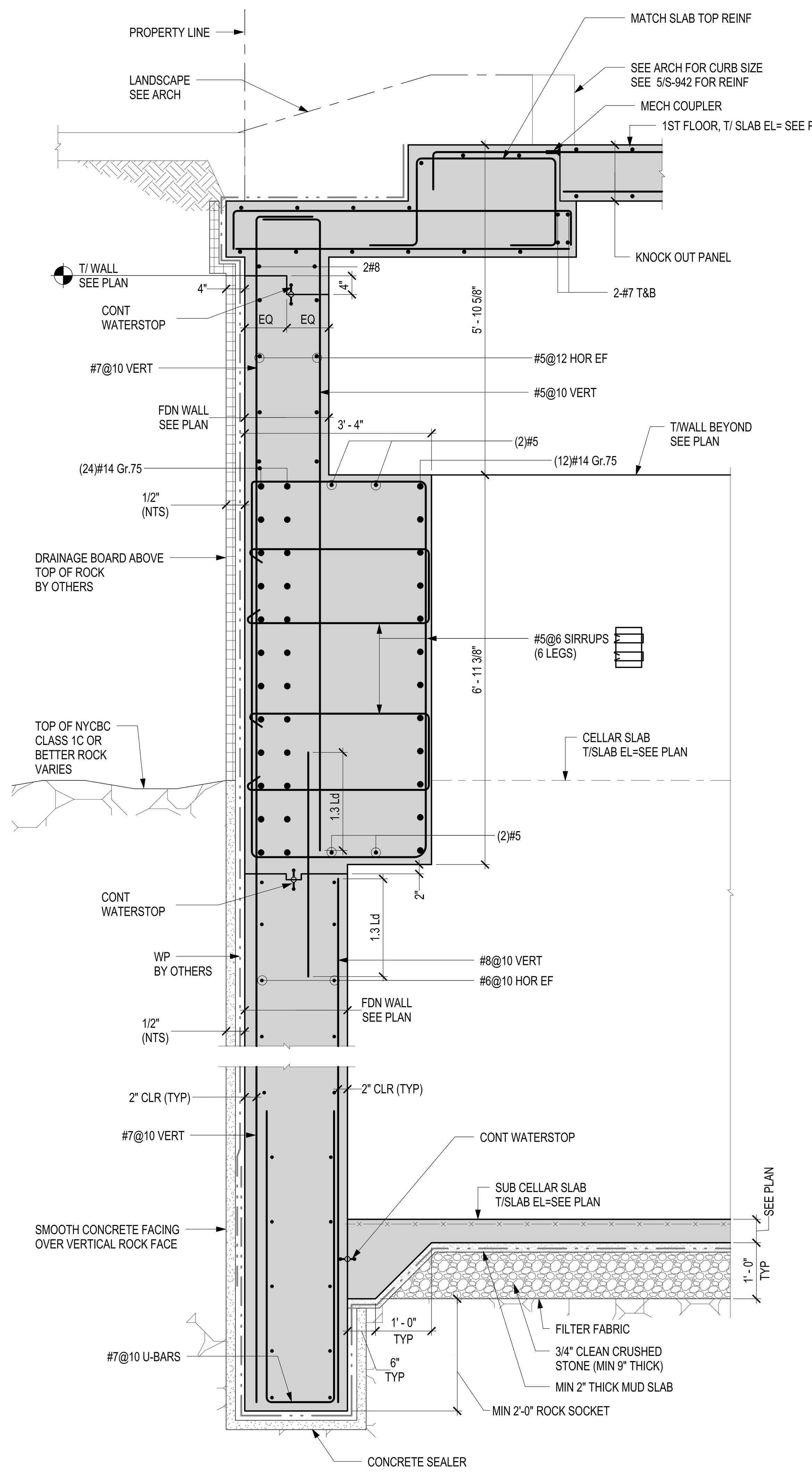
PROJECT:

DRAWING TITLE:
FOUNDATION SECTIONS

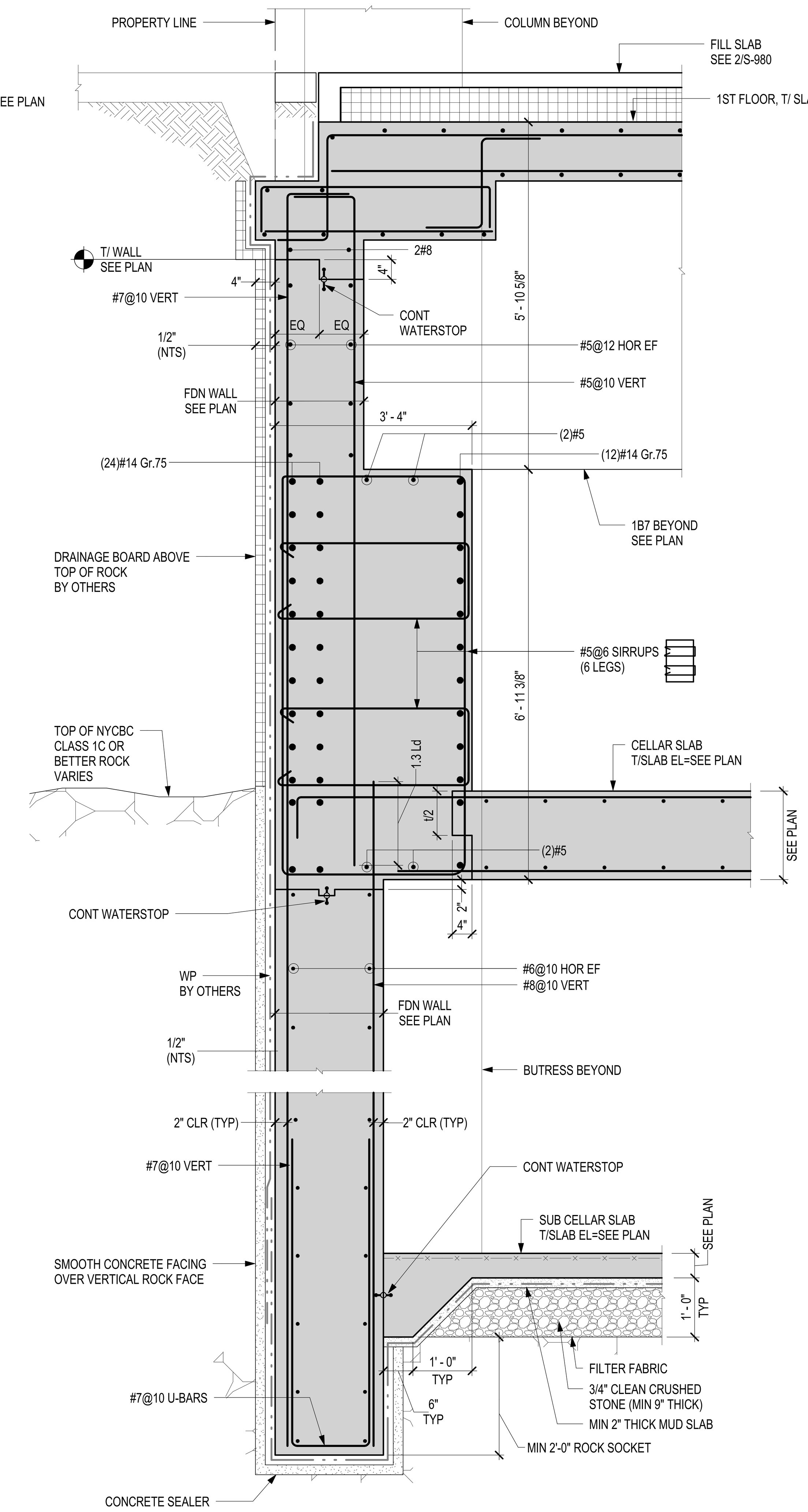
SEAL & SIGNATURE:
STATE OF NEW YORK
BART A. SULLIVAN
093540
LICENSED PROFESSIONAL ENGINEER

DATE:	01/17/2017
PROJECT No:	15047.00
DRAWN BY:	JPM
CHECKED BY:	VS
DRAWING No:	FO-300.03
DOB NO.	

NYC Buildings
AMENDED APPLICATION
NYC Development Hub



7 SECTION
SCALE: 3/4" = 1'-0"



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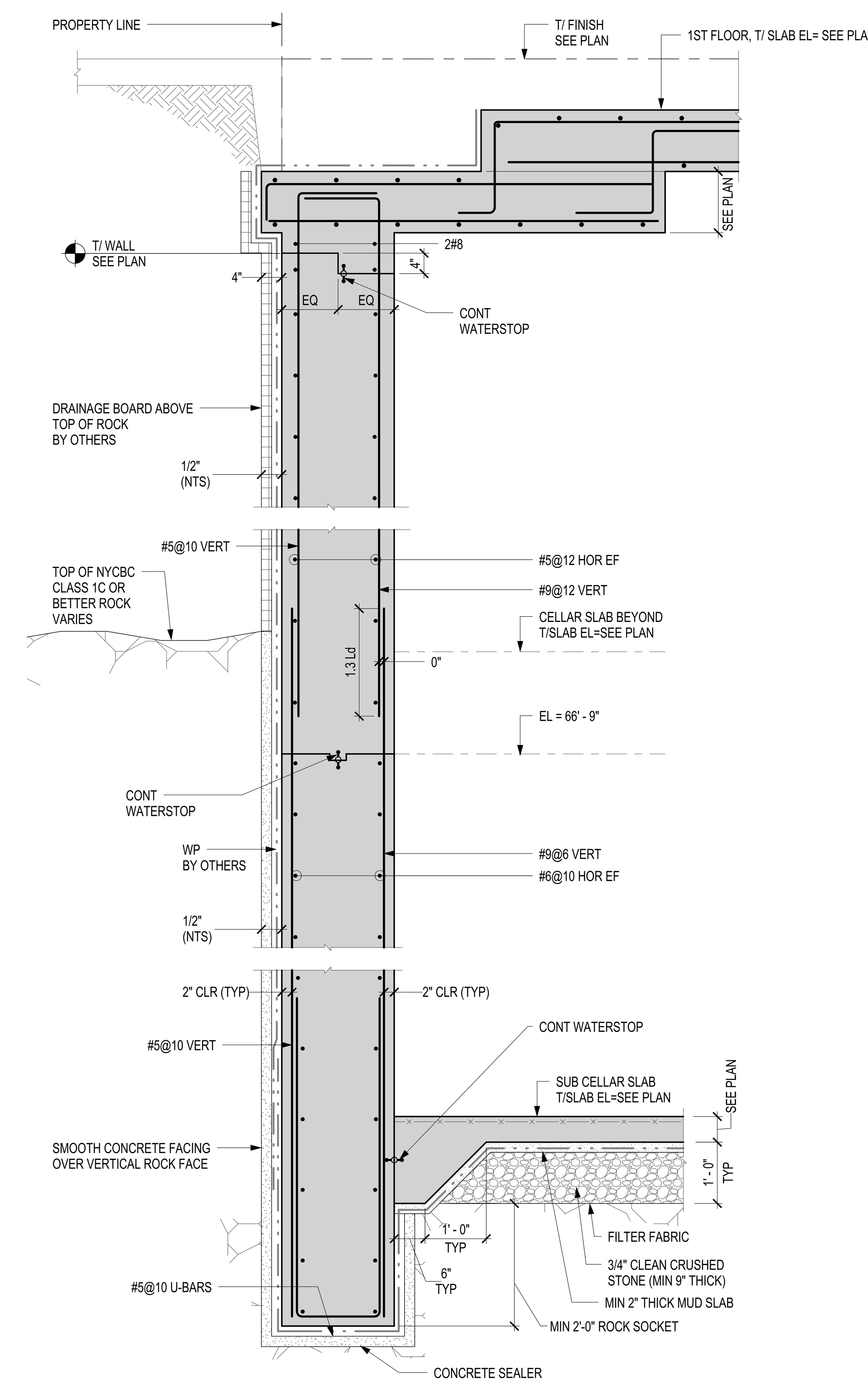

8 SECTION
SCALE: 3/4" = 1'-0"

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	11/14/17	100% DD
	11/03/17	FOUNDATION UPDATE
	09/21/17	PRICING SET

D.O.B. NUMBER:
NB#

NORTH ARROW
Scale:

KEY PLAN:
WEST 66TH STREET
WEST 65TH STREET
COLUMBUS AVENUE
CENTRAL PARK WEST

PROJECT:

DRAWING TITLE:
FOUNDATION SECTIONS

SEAL & SIGNATURE:

Roxane Tarigotis, RA
APPROVED
NYC Development Hub

DATE:	01/17/2017
PROJECT No:	15049.00
DRAWN BY:	Checker
CHECKED BY:	Author

DRAWING No:
FO-301.01
DOB NO.

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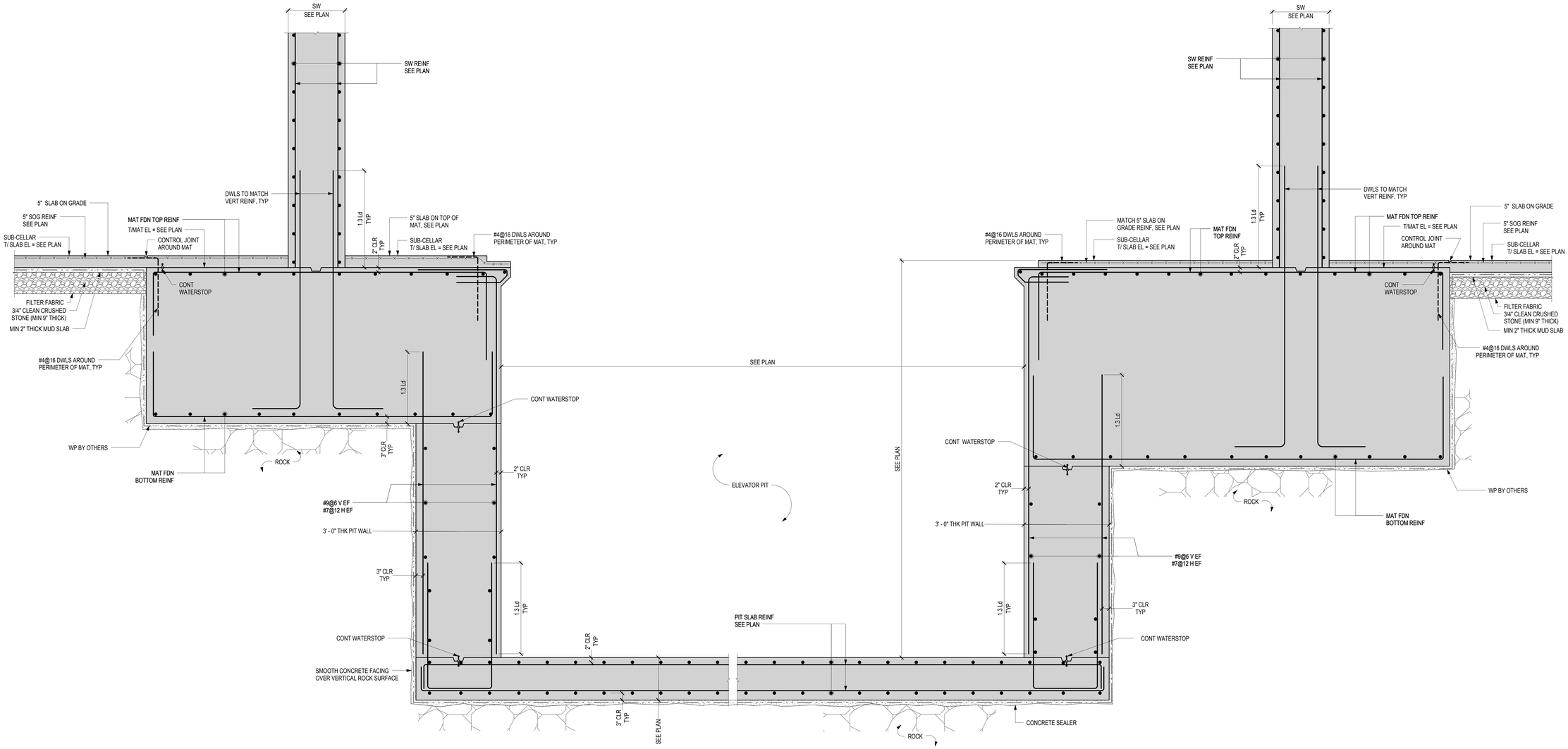

9 SECTION

SCALE: 3/4" = 1'-0"

WEST 66TH STREET

36 WEST 66TH STREET, NEW YORK, NY

OWNER/DEVELOPER:
West 66th Investor, LLC
c/o Paul Hastings, LLP
75 EAST 55TH STREET
NEW YORK, NY 10022
T. 212 . 318 . 6618
F. 212 . 318 . 6000

EXECUTIVE ARCHITECT:
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1359 BROADWAY NEW
YORK, NY 10018 TEL.:
(212) 979-8400 FAX.:
(212) 979-8387

DESIGN ARCHITECT:
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New York, NY 10005
TEL.: (646) 383-4762

STRUCTURAL ENGINEER:
McNAMARA . SALVIA
62 West 45th Street, 11th Floor
New York, NY 10036
Tel (212) 246.9800

MEP ENGINEER:
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ENGINEERS
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ISELIN, NJ 08830
TEL.: 908 . 272 . 3300
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e-mail: eng@vdaassoc.com
120 Eagle Rock Avenue, Suite 310
East Hanover, NJ 07936

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TEL.: (212) 274-7576

INERIOR DESIGNER:
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06/04/18	CD PROGRESS SET
05/04/18	50% CD SET
03/19/18	CD PROGRESS SET
11/15/17	DOB FILING
11/14/17	100% DD
11/03/17	FOUNDATION UPDATE

No:	Date:	Revision:

D.O.B. NUMBER:
NB#

NORTH ARROW | Scale:

KEY PLAN:

PROJECT:

DRAWING TITLE:
FOUNDATION SECTIONS

Roxane Tsirigotis, RA
APPROVED
Under Directive 14 of 2975
Date: 10/30/2018
NYC Development Hub

SEAL & SIGNATURE:

DATE:	01/17/2017
PROJECT No:	13049.00
DRAWN BY:	Checker
CHECKED BY:	Author
DRAWING No:	FO-302.00
DOB NO:	

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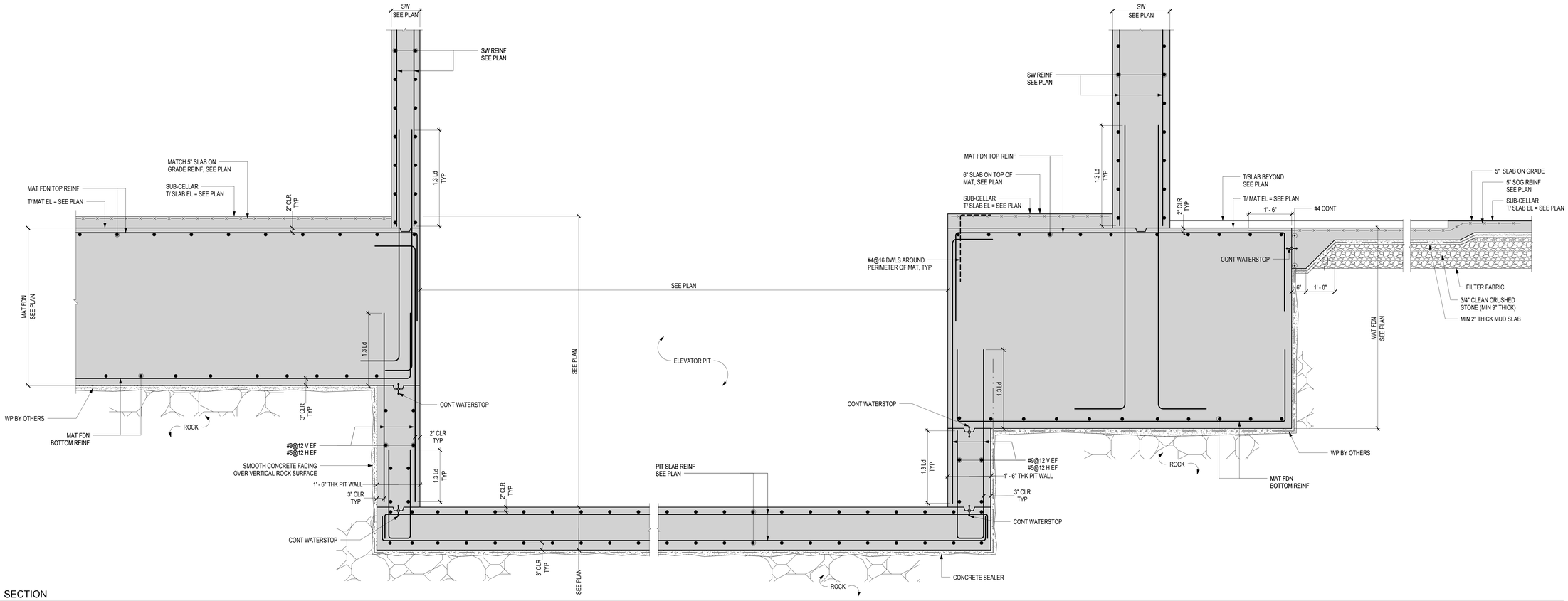
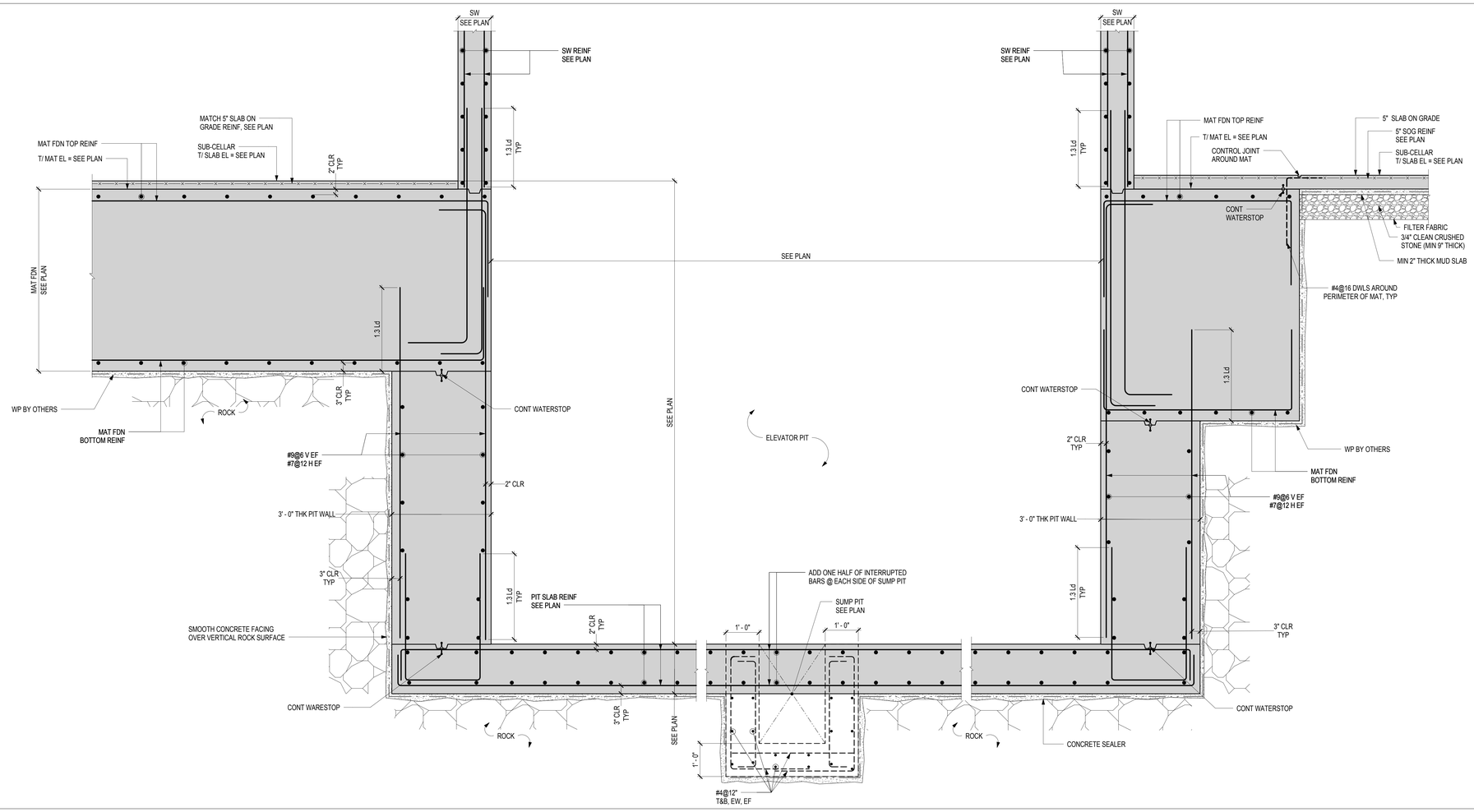


10 SECTION

SCALE: 3/4" = 1'-0"



11 SECTION

SCALE: 3/4" = 1'-0"

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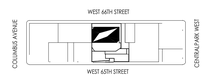
KEY PLAN:



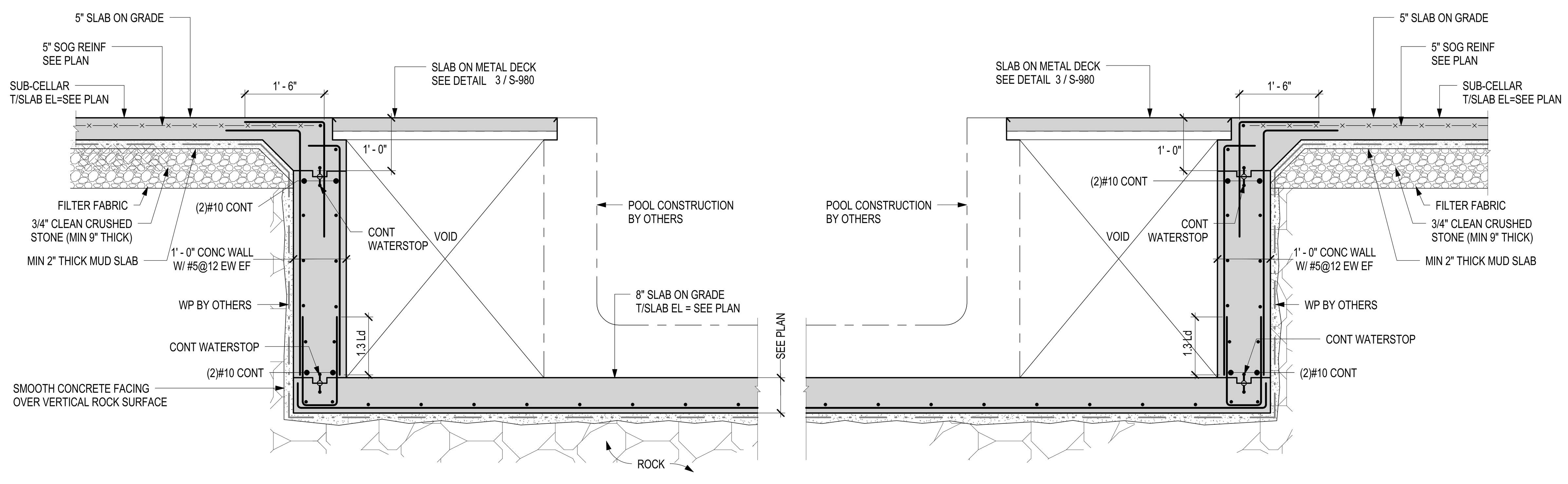
PROJECT:

DRAWING TITLE:
FOUNDATION SECTIONS

Roxane Tsirigotis, RA
APPROVED
Under Direction of LPC
Date: 10/29/2018
NYC Development Hub

DATE:	01/17/2017
PROJECT No:	15049.00
DRAWN BY:	Checker
CHECKED BY:	Author
DRAWING No:	FO-303.00
DOB NO.	

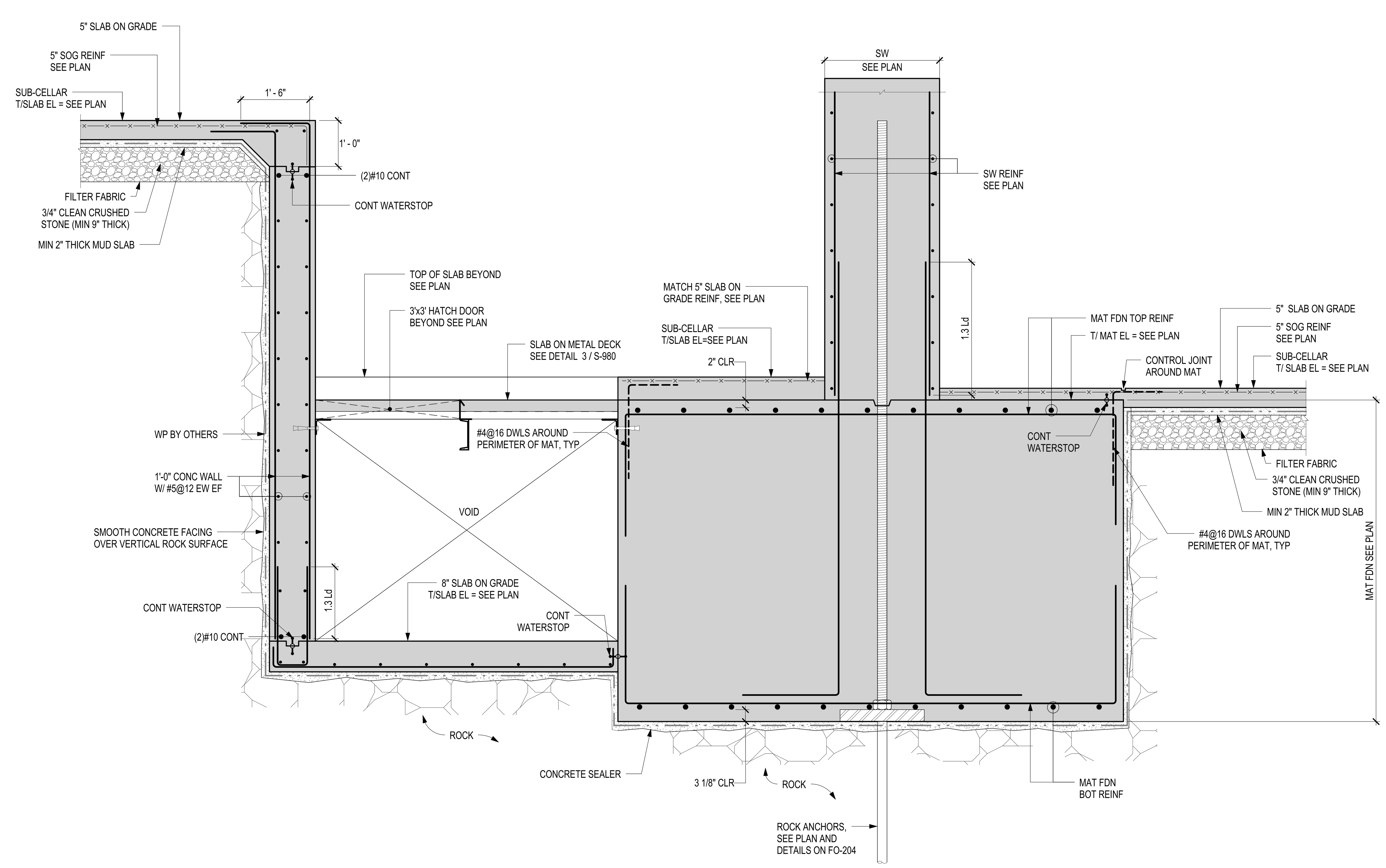
R: 001630
48 X 36



NOTES:

1. AFTER ROCK EXCAVATION FOR THE POOL, THE VERTICAL ROCK FACES AROUND THE POOL EXCAVATION SHALL BE PROPERLY CLEANED WITH COMPRESSED AIR AND THE GAP BETWEEN THE POOL WALLS AND THE ADJACENT ROCK FACE SHOULD BE COMPLETELY FILLED WITH GROUT OR CONCRETE.
2. THE ROCK SUBGRADE AT THE BOTTOM OF POOL EXCAVATION SHALL BE THOROUGHLY CLEANED WITH COMPRESSED AIR AND ANY WATER-BEARING SEEMS SHALL BE SUFFICIENT GAUGED OUT AND GROUTED USING HYDRAULIC GROUT PRIOR TO PLACING CONCRETE SEALER.

12 SECTION
SCALE: 3/4" = 1'-0"



13 SECTION
SCALE: 3/4" = 1'-0"

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	11/03/17	FOUNDATION UPDATE

D.O.B. NUMBER:
NB#

NORTH ARROW: Scale:

KEY PLAN:

PROJECT:

DRAWING TITLE:
FOUNDATION SECTIONS

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DATE:	01/17/2017
PROJECT No:	15049.00
DRAWN BY:	Checker
CHECKED BY:	Author
DRAWING No:	FO-304.00
DOB NO.	

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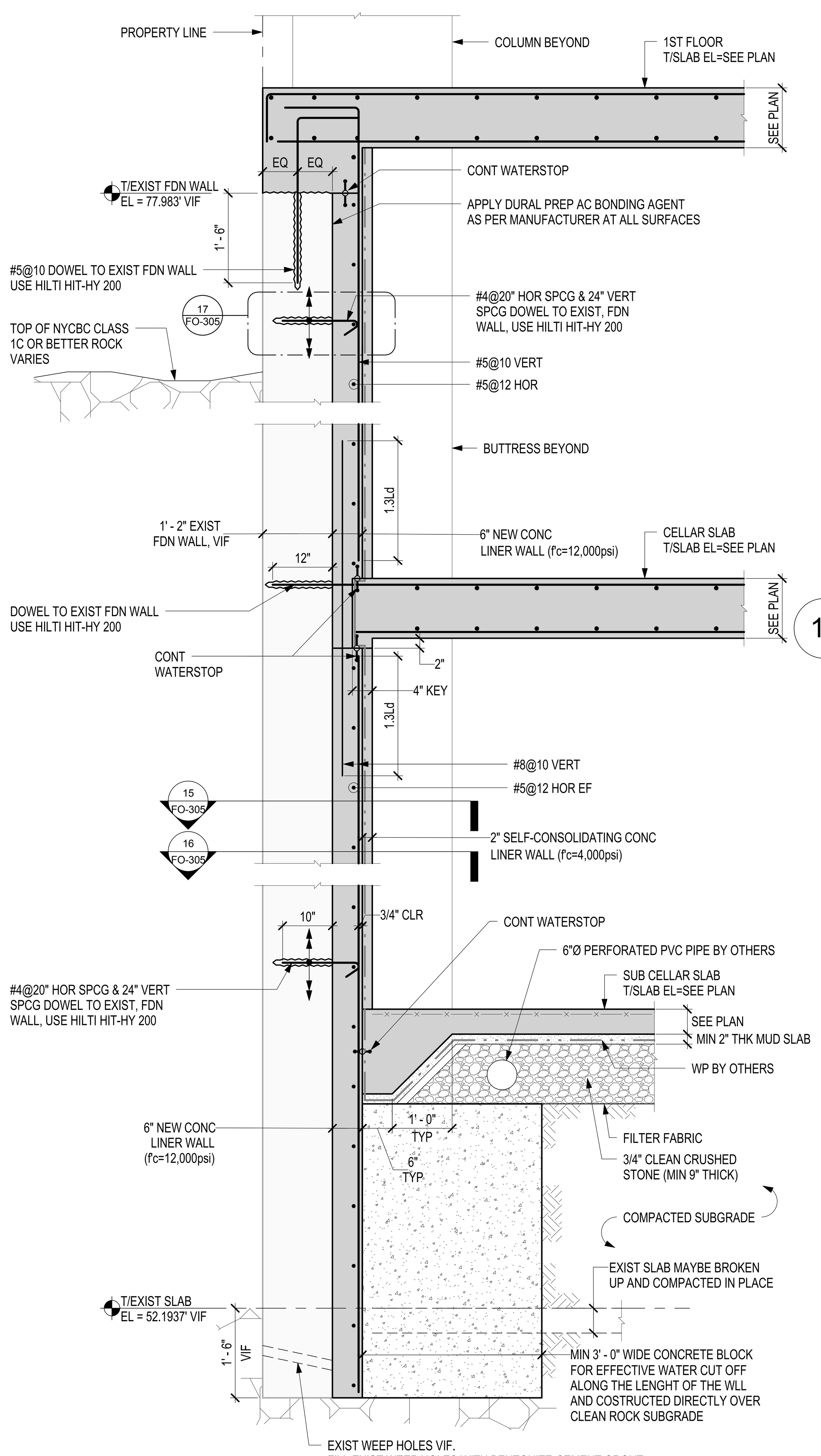

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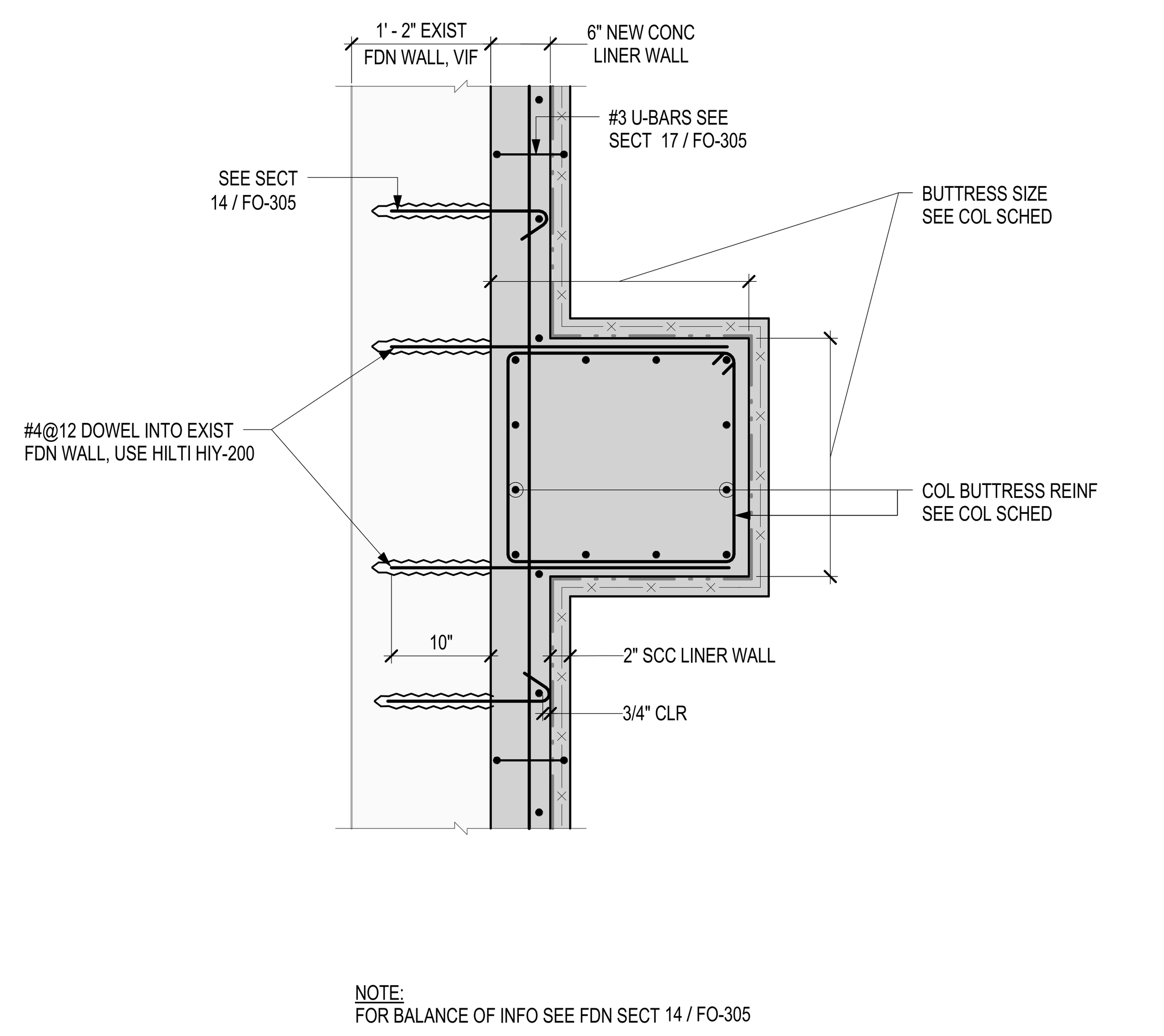
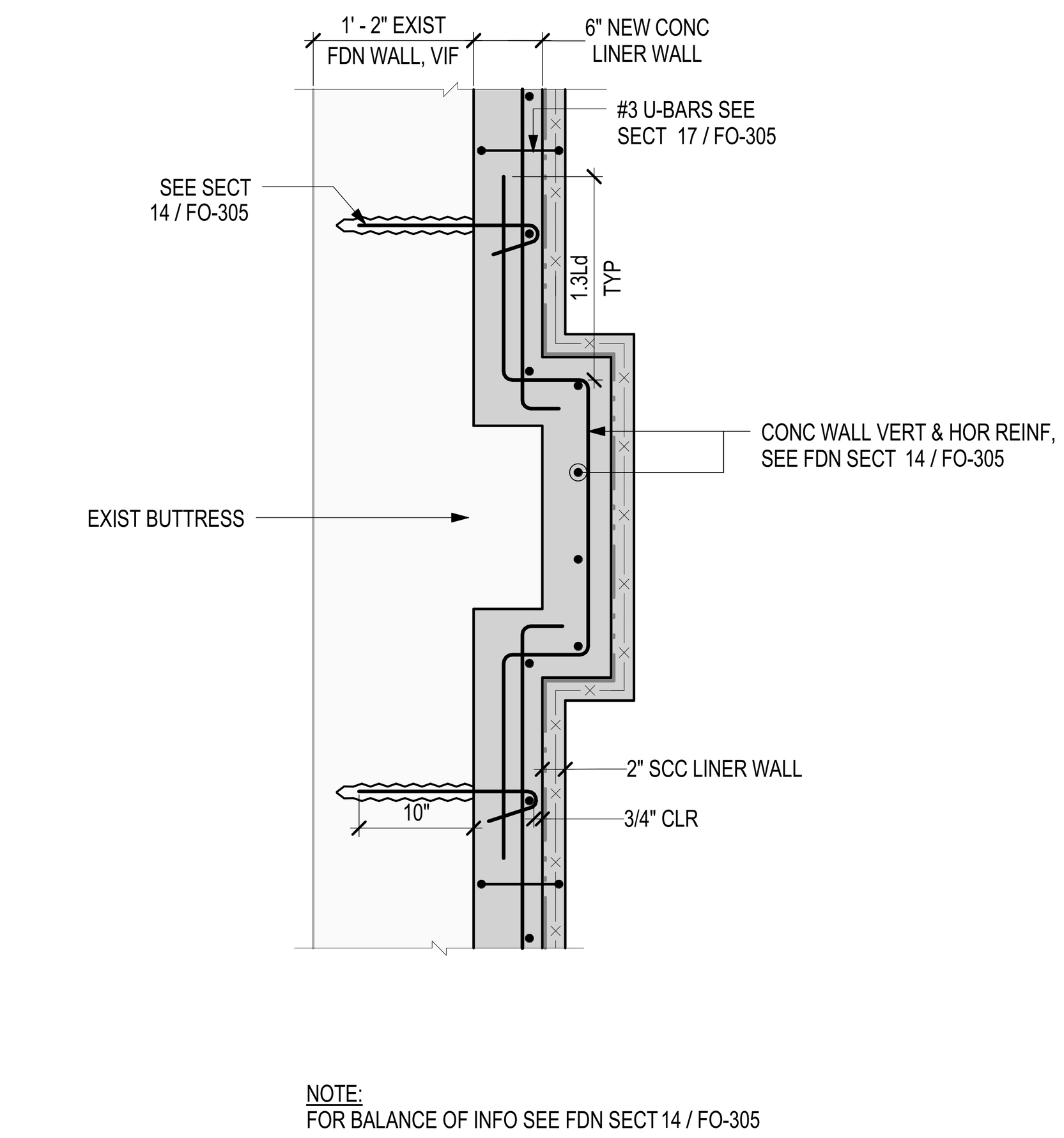


15 SECTION ALTERNATE @ NEW BUTTRESS LOCATION
SCALE: 1" = 1'-0"



16 SECTION ALTERNATE @ EXIST BUTTRESS (NO NEW COL ABOVE)
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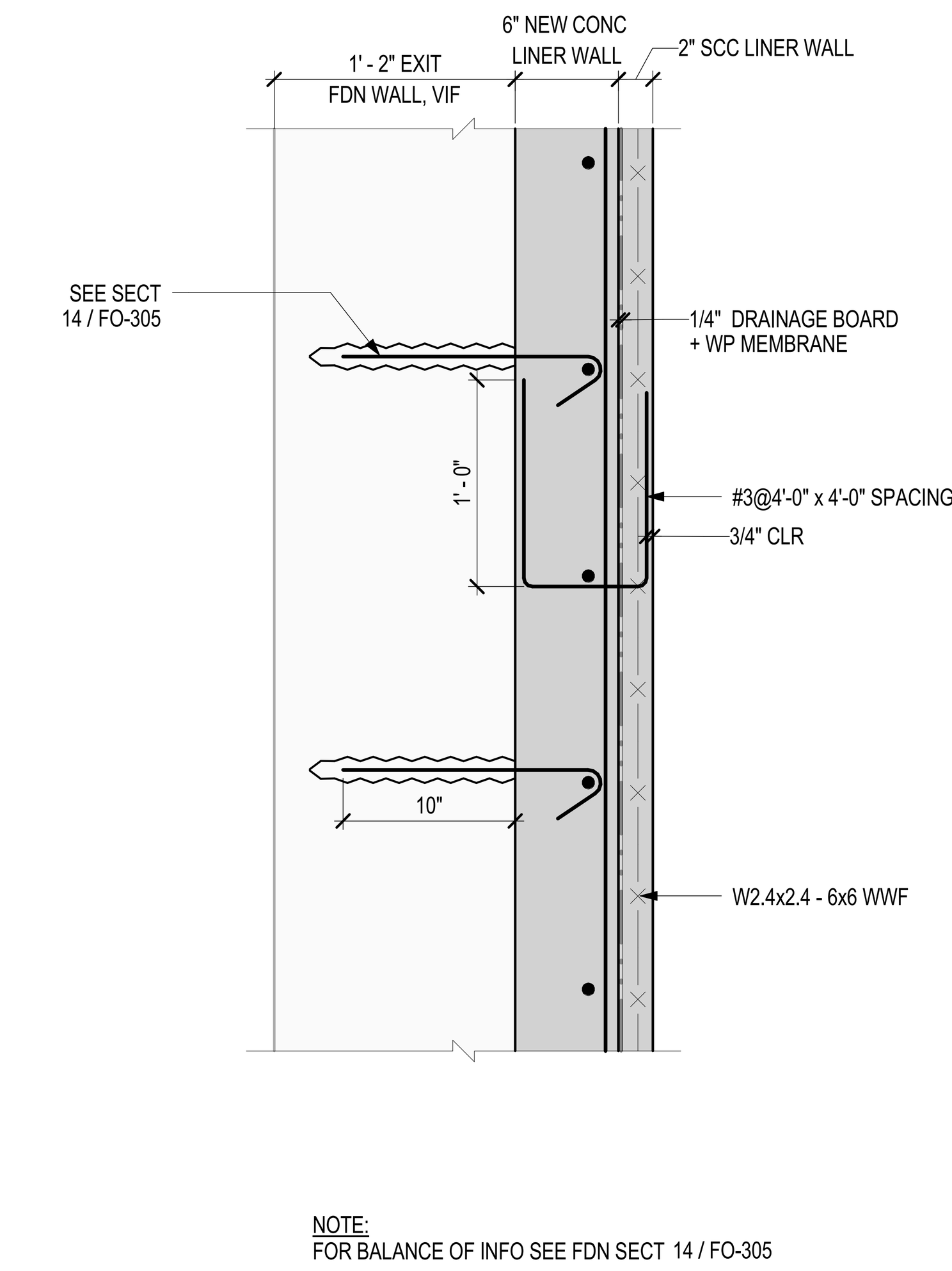
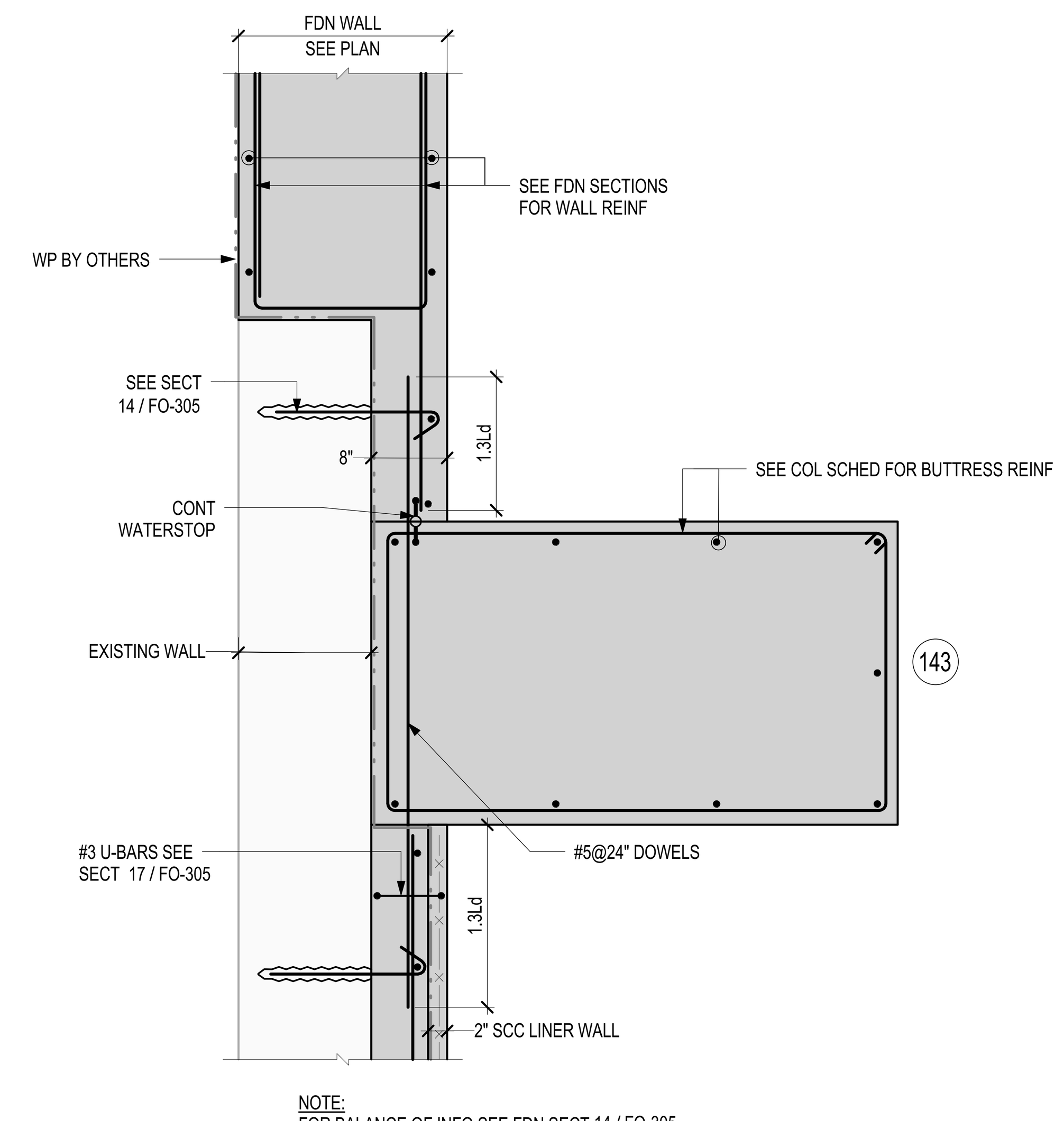


17 SECTION ALTERNATE
SCALE: 1 1/2" = 1'-0"



18 SECTION ALTERNATE
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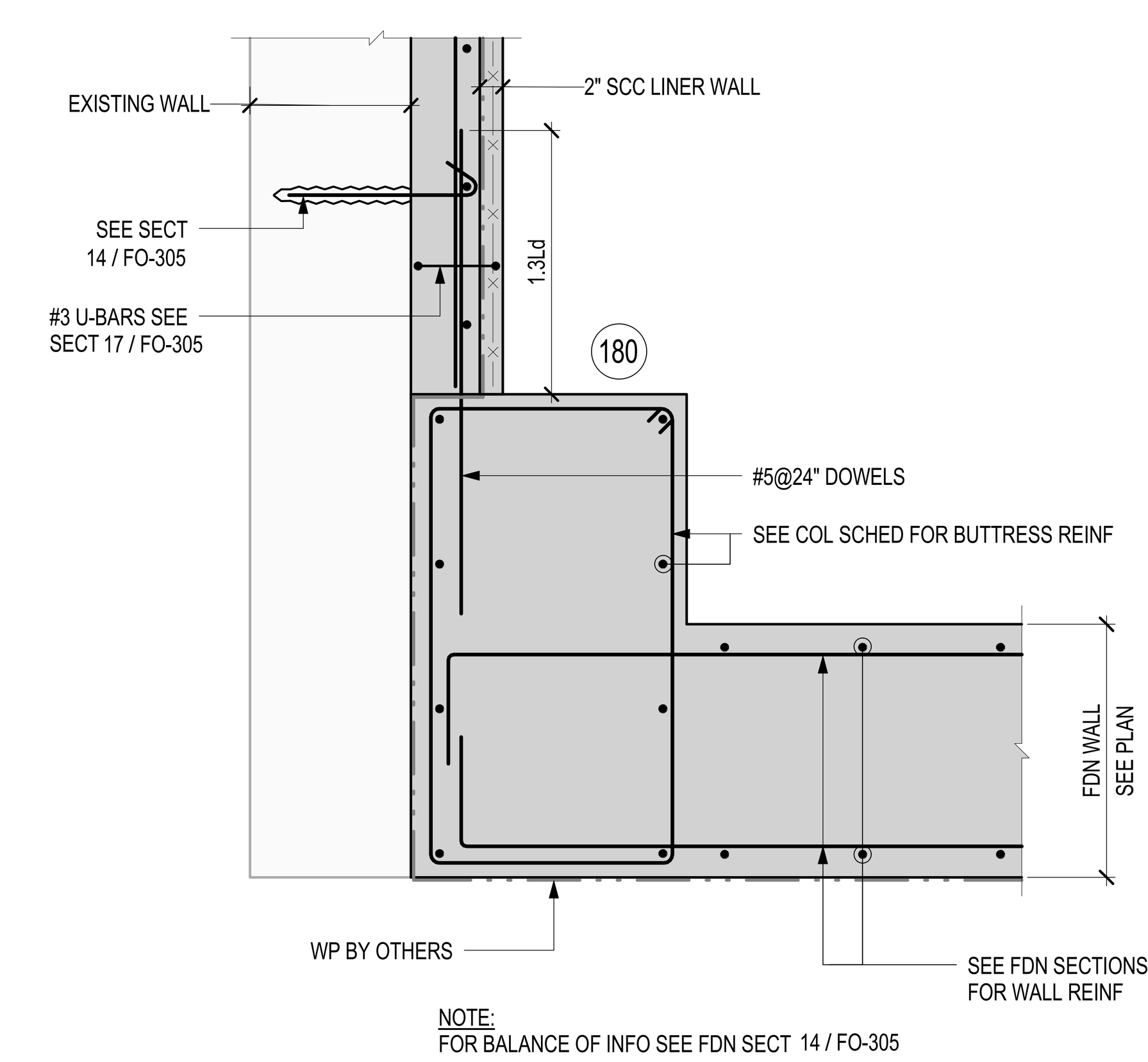

19 SECTION ALTERNATE
SCALE: 1" = 1'-0"

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	05/04/18	50% CD SET
	03/19/18	CD PROGRESS SET

D.O.B. NUMBER:
NB#

NORTH ARROW: Scale:

KEY PLAN:

WEST 66TH STREET
WEST 65TH STREET

PROJECT:

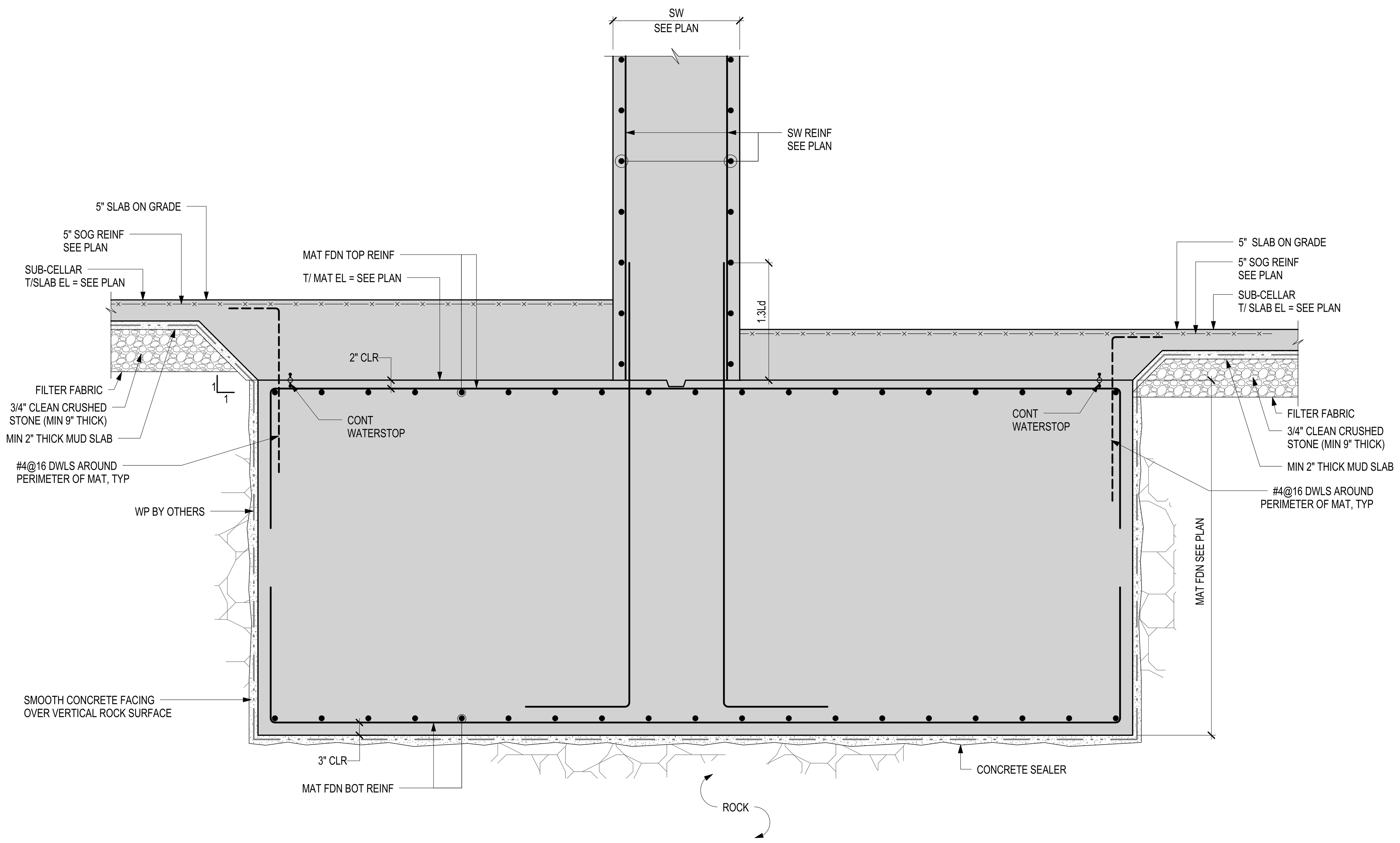
DRAWING TITLE:
FOUNDATION SECTIONS (E) WALL ALTERNATE

SEAL & SIGNATURE:

DATE:	01/17/2017
PROJECT No:	15049.00
DRAWN BY:	Checker
CHECKED BY:	Author
DRAWING No:	FO-305.00
DOB NO.	

Roxane Tarigotis, RA
APPROVED
NYC Development Hub

48 X 36



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D.O.B. NUMBER:
NB#

NORTH ARROW
Scale:

KEY PLAN:
WEST 66TH STREET
WEST 65TH STREET
COLUMBUS AVENUE
CENTRAL PARK WEST

PROJECT:

DRAWING TITLE:
FOUNDATION SECTIONS

SEAL & SIGNATURE:
Roxane Tarigotis, RA
APPROVED
NYC Development Hub

DATE: 01/17/2017
PROJECT No: 15049.00
DRAWN BY: Checker
CHECKED BY: Author
DRAWING No:
FO-306.00
DOB NO.

48 X 36

EXHIBIT T

NEW YORK CITY BOARD OF STANDARDS AND APPEALS

----------x

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

Appellants,

Appeal from Building Permit issued April 11, 2019

Concerning Block 1118, Lot 45

----------x

AFFIRMATION OF CHARLES N. WEINSTOCK

BSA Cal. No. 2019-

CHARLES N. WEINSTOCK, an attorney duly admitted to practice before the courts of the State of New York, affirms under penalty of perjury:

1. Together with John R. Low-Beer, I represent the appellants in the above matter as well as a related court case concerning 36 West 66th Street, *City Club of New York v. Extell Development Co.,* Index No. 154205/2019 (Jaffe, J.). In that case, defendant Extell was represented by the law firm of Kramer Levin Naftalis & Frankel LLP, with its partner Jeffrey L. Braun appearing on its behalf.

2. Mr. Braun and his law firm also represent the developer in a lawsuit relating to another Upper West Side tower, 200 Amsterdam Avenue, in which, together with Emery Celli Brinckerhoff & Abady LLP, I represent the plaintiffs-petitioners. On May 9, 2018, while negotiating a stipulation among the parties, Mr. Braun and his firm conceded to me that a foundation is not completed until the first-floor slab has been poured.

3. That stipulation, dated May 9, 2018 and attached hereto, provided for the postponement of the plaintiffs-petitioners' motion for a temporary restraining order and preliminary injunction until "the completion of the foundation," and required the developer to

"notify Plaintiffs' counsel of the expected completion of the foundation no later than ten days before the completion of the foundation."

4. During the negotiation of the stipulation, I asked Mr. Braun's law partner, Paul Selver, to define when the foundation would be "complete." He responded that it would be complete with the pouring of the first-floor slab. Mr. Braun was sitting next to Mr. Selver at that time. A representative of their client was also in the room and confirmed Mr. Selver's interpretation.

5. At the time of the stipulation, the subcellar floor and walls were nearing completion. But Mr. Braun did not give the required notice until almost four months later, on August 31, 2018, estimating that the foundation would be completed by September 10, 2018. Attached hereto is a photograph taken on September 23, 2018, which makes clear that the relevant milestone was the first-floor slab. At that point, the developer was just preparing to pour it.

6. The May 9, 2018 stipulation, the August 31, 2018 notification, and the above-described photograph are attached.

Dated: Brooklyn, New York
August 1, 2019

/s/
CHARLES N. WEINSTOCK

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

The Committee for Env Sound Dev. and the Municipal Art Society of New York
Plaintiff(s)

- against -

Amsterdam Avenue Redevelopment Associates LLC
Defendant(s)

INDEX NO. 153819/2018

IAS PART 23

Justice Perry

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between or among the attorneys named below as follows:

The attached document set forth the agreement of the Parties.

Attorney for Plaintiff(s)

Attorney for Defendant

Attorney for Defendant

Attorney for Defendant

Dated: May 9, 2018

SO ORDERED:

ENTER:

HON. W. FRANC PERRY, J.S.C.

3/14/17

WHEREAS, on April 25, 2018, Plaintiffs the Committee for Environmentally Sound Development and the Municipal Art Society of New York commenced this action by filing a complaint and moved by Order to Show Cause for a temporary restraining order and preliminary injunction;

WHEREAS, on May 3, 2018, Defendant Amsterdam Avenue Redevelopment Associates LLC ("the Owner") submitted an opposition to Plaintiffs' motion for a temporary restraining order and preliminary injunction, and cross-moved to dismiss the Complaint;

WHEREAS, on May 8, 2018, Plaintiffs submitted a reply in further support of Plaintiffs' motion for a temporary restraining order and preliminary injunction, and opposed the motion to dismiss the Complaint;

WHEREAS, on May 9, 2018, the parties appeared before the Honorable W. Franc Perry III;

IT IS HEREBY AGREED AND ORDERED:

1. The "Time Period" is defined as the period between May 1, 2018 and either (a) ten days after the filing by the Board of Standards and Appeals (the "BSA") in its office of the resolution setting forth the BSA's decision disposing of Case No. 2017-285-A or (b) the completion of the foundation at 200 Amsterdam Avenue (the "Site"), whichever of (a) or (b) is earlier.

2. Plaintiffs' motion for a temporary restraining order and preliminary injunction and the Owner's motion to dismiss shall be held in abeyance until the expiration of the Time Period.

3. The Owner agrees that it will not rely on any progress in construction or development at the Site during the Time Period, or on any expenditures it makes in connection with the Site during the Time Period, to support any argument that the the Owner is entitled to continue or complete construction at the Site. This would include any arguments the Owner may assert relating to retroactivity, vested rights (whether under common law or Z.R. ¶ 11-331 or other statutes), estoppel, mootness, laches, or other equitable defenses.

4. Paragraph 3 above is limited to any actions or other proceedings challenging the legality of either the zoning lot or the open space on the lot in which either or both of the Plaintiffs are parties. The provisions of Paragraph 3 shall also not apply to any application or claim that the Owner may make pursuant to ZR ¶¶ 11-331 or 11-332 in the event of a legislative amendment to the Zoning Resolution affecting the Site or the zoning lot of which it is then a part.

5. The Owner shall notify Plaintiffs' counsel of the expected completion of the foundation no later than ten days before the completion of the foundation.

KR

From: "Braun, Jeffrey L." <jbraun@KRAMERLEVIN.com>
Date: 8/31/18 10:19 AM (GMT-05:00)
To: "Richard D. Emery" <remery@ecbalaw.com>, Katie Rosenfeld <Krosenfeld@ecbalaw.com>
Cc: "Scott E. Mollen" <smollen@herrick.com>
Subject: 200 Amsterdam Avenue

Counsel:

This is to notify you, in compliance with our stipulation, that our client anticipates that its project's foundations will be completed on September 10, 2018.

Sent from my iPhone

Jeffrey L. Braun
Counsel
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Matter of Angiolillo v. Town of Greenburgh

Supreme Court of New York, Appellate Division, Second Department

September 26, 2005, Decided

2004-07381

Reporter
21 A.D.3d 1101 *; 801 N.Y.S.2d 629 **; 2005 N.Y. App. Div. LEXIS 9486 ***; 2005 NY Slip Op 6926 ****

[**1]** In the Matter of Dominick Angiolillo, Jr., et al., Respondents, v Town of Greenburgh et al., Respondents, and WBRC Corporation et al., Appellants. (Index No. 4830/00)

Prior History: [*1]** *Angiolillo v. Town of Greenburgh, 290 AD2d 1, 735 NYS2d 66, 2001 N.Y. App. Div. LEXIS 11829 (N.Y. App. Div. 2d Dep't, 2001)*

Counsel: Bleakley, Platt & Schmidt, LLP, White Plains, N.Y. (William P. Harrington, Kenneth C. Brown, and Robert Meade of counsel), for appellants.

Thomas J. Abinanti, White Plains, N.Y., for petitioners/plaintiffs-respondents.

Judges: THOMAS A. ADAMS, J.P., STEPHEN G. CRANE, GLORIA GOLDSTEIN, PETER B. SKELOS, JJ. ADAMS, J.P., CRANE, GOLDSTEIN and SKELOS, JJ., concur.

Opinion

[*1102] [630]** In a hybrid proceeding pursuant to *CPLR article 78* challenging the issuance of building permits to construct five single-family homes on the subject property, and action for a permanent injunction and judgment declaring that the subject property is inalienable parkland which must be restored to its natural condition, WBRC Corporation and Baker Roofing appeal, as limited by their brief, from so much of an order of the Supreme Court, Westchester County (LaCava, J.), entered July 23, 2004, as granted the petitioners-plaintiffs' motion, denominated by the court as one for leave to reargue the petition, **[***2]** but which was, in effect, a new motion for a mandatory permanent injunction, and directed WBRC Corporation and Baker Roofing to demolish five partially-constructed, single-family homes and restore the underlying property to its natural condition.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and the motion is denied.

In 2000 the petitioners-plaintiffs (hereinafter the petitioners) commenced this hybrid proceeding, pursuant to *CPLR article 78* challenging the issuance of building permits to construct five single-family homes on the subject property, and action for a permanent injunction and judgment **[****2]** declaring that the

subject property is inalienable parkland which must be restored to its natural condition against the appellants as landowners and the Town of Greenburgh and its Building Inspector. The hybrid petition and complaint alleged that the subject property constituted parkland for which "[n]o subdivision exists," and sought, inter alia, a mandatory injunction to "restore the parklands to their natural condition as they existed prior to the start of construction."

In a judgment dated July 11, 2000, the Supreme Court, Westchester County **[***3]** (Leavitt, J.), determined that the subject property was not "dedicated to use, as a 'park.' " The Supreme Court nevertheless concluded that the building permits were null and void on the ground that "[t]he lots for which buildings **[*1103]** permits were issued did not exist on the subdivision plat which had been approved in 1929." Subsequent to the filing of the original subdivision map in 1929, the Town of Greenburgh amended its zoning ordinance to increase the minimum lot size for the construction of a single family home from 2,500 to 7,500 square feet. The appellants had combined whole or continguous portions of substandard lots to form conforming lots. The Supreme Court held that redrawing the lot lines required subdivision approval from the Planning Board of the Town of Greenburgh (hereinafter the Planning Board).

The petitioners' request for injunctive relief was denied. However, the Supreme Court granted "leave to reargue" if the developers did not apply to the Planning Board for approval of the new subdivision plat on or before September 18, 2000, or their application was not approved by the Planning Board and new building permits were not issued on or before January 8, 2001. The Supreme **[***4]** Court stated that "[i]n the event that an application for approval of a new subdivision plat is denied by the Planning Board before January 8, 2001, petitioners may move for reargument immediately upon the occurrence thereof."

In compliance with that determination, the appellants filed an application for approval of a new subdivision plat with the **[**631]** Planning Board on September 14, 2000. The municipality deferred consideration of the application and related applications pending this Court's resolution of the appeal and cross appeal from the judgment dated July 11, 2000. This court affirmed that determination insofar as appealed and cross-appealed from by opinion and order dated December 3, 2001 (*see* *Matter of Angiolillo v Town of Greenburgh, 290 AD2d 1, 735 NYS2d 66 [2001]*).

After the determination of this Court on December 3, 2001, the Planning Board issued a conditional negative declaration pursuant to *ECL article 8*. By letter to the Planning Board dated May 30, 2002, the petitioners' attorney, who resides on the same street as the subject property, who is a member of the Westchester County Legislature and who is a former member of the Town Board of the Town of Greenburgh, stated that **[***5]** the subject property was in a "critical environmental area" created by a resolution of the Town Board passed on September 30, 1987, for hilltops with a natural elevation of 400 or more feet above sea level; therefore "[t]he Planning Board must, as a matter of law, declare the proposed development a Type I action." This allegation was not raised in the petitioners' original hybrid petition and complaint.

[*1104] On July 24, 2002, the Planning Board rescinded the negative declaration on the ground that the subdivision was in a "critical environmental area" created by a resolution of the Town Board passed on September 30, 1987, for hilltops with a natural elevation of 400 or more feet above sea level. A dispute arose between the appellants and the Planning Board as to whether the resolution was enforceable or applicable to the subject property. The Planning Board did not grant or deny the application for approval of the new subdivision plat.

[**3]** By notice of motion dated March 19, 2004, the petitioners moved for renewal and reargument on the ground that the Planning Board still had not ruled on the application. In the order and judgment appealed from, the Supreme Court, Westchester County **[***6]** (LaCava, J.), granted the petitioners "reargument," and upon reargument, directed the appellants to demolish the five partially-constructed houses and restore the underlying property to its natural condition. Justice LaCava held that the petitioners were entitled to the requested relief on the ground that former Justice Leavitt had established that January 8, 2001, was an "unconditional and firm" deadline.

Contrary to this denomination, the petitioners' motion for renewal and reargument, which was made nearly four years after judgment was entered in the hybrid proceeding and action, was not a motion for "reargument" (*see* CPLR 2221 [d]). Nor should the motion be treated as one for renewal because it was based on additional material facts that developed during a period of nearly four years (*see* CPLR 2221 [e]). Under these circumstances, the motion is a new and independent motion for a mandatory injunction (*see* Weinstein-Korn-Miller, NY Civ Prac ¶ 5701.24).

As a general rule, a mandatory injunction to remove or destroy a building is a drastic remedy which will only be granted if the benefit **[***7]** to the movant if the injunction were granted and the irreparable harm to the movant if the injunction were not granted substantially outweighs the injury to the party against whom the injunction is sought (*see Forstmann v Joray Holding Co., 244 NY 22, 154 NE 652 [1926]*; *Sunrise Plaza Assoc. v International Summit Equities Corp., 288 AD2d 300, 733 NYS2d 443 [2001]*; *Medvin v Grauer, 46 AD2d 912, 363 NYS2d 330 [1974]*). The petitioners **[**632]** failed to establish grounds for a mandatory injunction.

Further, under the circumstances, the petitioners would be unable to establish grounds for a mandatory injunction since their motion is premature. The original basis asserted in the hybrid petition and complaint for restoring the property to its natural condition, to wit, that the subject property constituted **[*1105]** parkland, was previously rejected by this Court (*see Matter of Angiolillo v Town of Greenburgh, supra*). The question of whether the construction of all or some of the structures will be approved by the appropriate municipal entities has not been resolved.

The prior judgment dated July 11, 2000, granted the petitioners leave to make a further motion "[i]n the event that an application for **[***8]** approval of a new subdivision plat is denied by the Planning Board before January 8, 2001." However, the Planning Board still has not acted on the application.

Since the Planning Board is not a party to this hybrid proceeding and action, to suggest that the judgment dated July 11, 2000, mandated action by the nonparty Planning Board by a date certain would be illogical. Rather, that judgment required the appellants to file their application with the Planning Board on or before September 18, 2000, which they in fact did, and proceed in good faith with the objective of attaining a resolution of the issue by January 8, 2001.

When no resolution was achieved by January 8, 2001, the petitioners took no action and fully participated in the subdivision review process. In so doing, they waived their right to any further action until a determination is reached by the Planning Board. **[****4]** Adams, J.P., Crane, Goldstein and Skelos, JJ., concur.

End of Document

Application of Barry Equity Corp.

Supreme Court of New York, Appellate Division First Department

April 25, 1950

No Number in Original

Reporter
276 A.D. 685 *; 96 N.Y.S.2d 808 **; 1950 N.Y. App. Div. LEXIS 4944 ***

In the Matter of BARRY EQUITY CORP., Petitioner, Appellant-Respondent [Landlord]. MARCIA HAT CO., INC., Respondent-Appellant [Tenant].

Prior History: [*1]** CROSS APPEALS (1) by tenant from an order of the Supreme Court at Special Term (AURELIO, J.), entered October 20, 1949, in New York County, which granted a motion by the landlord to fix the rent of space occupied by tenant, and (2) by landlord from so much of said order as fixed the rent as of October 11, 1949, instead of April 23, 1950, the date of the commencement of the proceeding.

Core Terms

rent, space, tenant, landlord, rental, per square foot, retroactive, statutes, fair rental value, occupied, floor space, emergency rent, fair return, proceedings, effective, date of application, commercial space, reasonable rent, rental value, of the Commercial Rent Law, provides, rentable, formula, paying

Counsel: *Emanuel Silverman* of counsel (*Isidore Weckstein* and *Emanuel Silverman* on the brief; *Weckstein & Weckstein,* attorneys), for respondent-appellant.

Stanley Bogart of counsel (*Murray I. Sommer* with him on the brief; *Bogart & Lonergan,* attorneys), for appellant-respondent.

Opinion by: VAN VOORHIS

Opinion

[*686] [810]** VAN VOORHIS, J. These are cross appeals by landlord and tenant from an order made under section 4 of the Commercial Rent Law (L. 1945, ch. 3, as amd.) directing the payment of a reasonable rent in excess of the emergency rent. Only one tenant of the building at 715-727 Broadway, in the borough of Manhattan, city of New York, is a party to this proceeding. This tenant occupies loft space upon the eighth floor.

This is an "alternative proceeding" instituted under a portion of section 4 of the Commercial Rent Law added by chapter **[*687]** 534 of the Laws of 1949. Prior to this amendment, it was held that a landlord could not obtain a reasonable rent in excess of the emergency rent from statutory tenants paying less than

the allowable rental values of their spaces, **[***5]** if the landlord received a reasonable return (as defined in section 4) from the building as a whole (*Matter of Relmar Operating Corp;* 297 N.Y. 609). That deprived the landlord of the benefit of favorable leases, and gave it to statutory tenants in the same building paying less than the statute contemplated that their spaces were worth. It also meant that other landlords could not succeed in obtaining as much as the statute recognized as a fair return from the entire building, notwithstanding that some tenants might be paying less than they should pay as a reasonable rent under the statutory formula, if other spaces in the building had been rented to tenants under unexpired leases for less than a reasonable rent as defined in the statute. This was due to the construction placed by the courts on the clause in section 4 that rent for a statutory tenant must be fixed "in such a manner that it shall not exceed a fair and reasonable proportion of the gross rentals from all the commercial space in the entire building or other rental area". **[**811]** (*Matter of Court Square Bldg. v. City of New York, 298 N.Y. 380*, modfg. *273 App. Div. 441*; *Matter of Cedar-Temple Realty Corp.* **[***6]** [*Astor*], *276 App. Div. 139*.)

Chapter 534 of the Laws of 1949 was apparently adopted to require statutory tenants to pay the reasonable rental values of the floor spaces occupied by them (computed under the statutory formula), regardless of what the landlord receives from the rest of the building. This purpose is disclosed not only by the 1949 amendment itself, but also by the Report of the New York State Temporary Commission to Study Rents and Rental Conditions (N.Y. Legis. Doc., 1949, No. 52), which recommended its enactment. At page 18 of this report the commission stated: "Under the proposed amendment a landlord of either commercial or business property would be afforded an additional remedy by petitioning the Supreme Court to require a statutory tenant whose emergency rent for the proportionate space occupied by him is less than would yield a fair return to the landlord, to pay a rental which will give the landlord a fair return for the space so occupied."

The commission also stated (p. 18): "A survey by the Commission and its predecessor Commission has shown a considerable number of instances where the rent paid by certain tenants is less than would yield a fair return **[***7]** to the owner on the proportionate space occupied. In many cases the owner is without a **[*688]** remedy, because the rents received from the entire property preclude relief."

In accomplishing this object, the Legislature used language which, if construed literally, might be deemed to require that in applying the statutory formula in the new alternative proceeding, the floor space throughout the entire building shall be appraised at an equal rental value per square foot, regardless of whether it be choice showroom area on the ground floor, or much less desirable loft space in the eighth story.

Such a result is not necessary to the accomplishment of the purpose intended by the Legislature. To evaluate all of the floor space in the same building at the same figure per square foot, would require the occupants of the poorest spaces to pay the rent for the most valuable. The Legislature did not intend that result. "If a construction sought to be placed on a statute produces an absurdity it is, as a general rule, to be discarded" (McKinney's Cons. Laws of N.Y., Book 1, Statutes [1942 ed.], § 145 [citing numerous cases]; cf. *Curtis v. Leavitt, 15 N.Y. 9*, and *Matter* **[***8]** *of Dowling, 219 N.Y. 44*). In *Olson v. Jordan (181 Misc. 942)* it was well said that, to avoid an absurd construction of a statute, courts will reject the literal meaning of words to conserve the spirit and intent of an act over the mere letter.

That is especially true where, as here, a literal construction would be likely to result in unconstitutionality (McKinney's Book 1, § 150; *Tauza [**812] v. Susquehanna Coal Co., 220 N.Y. 259*). "Restriction is

implicit in police power however exercised" (*People v. Arlen Service Stations, 284 N.Y. 340, 345)*, and the constitutional guaranty of the equal protection of the laws requires that even statutes which are related to the promotion of the public health, safety, morals and general welfare "must not be unreasonable nor must they make unjust discrimination against individuals or classes (Black's Constitutional Law, sec. 371.)". (*People ex rel. Duryea v. Wilber, 198 N.Y. 1, 9*; *Aerated Products Co. v. Godfrey, 290 N.Y. 92*.) In both of those cases, statutes adopted in the exercise of the police power were held to be unconstitutional as denying the equal protection of the laws. Here there is even **[***9]** less basis for classification than in either of the statutes involved in those decisions.

Other provisions in the emergency rent laws proceed upon the basis that commercial or business space in buildings in New York City is frequently of unequal value, which is so clearly true that there is no basis in reason on which the Legislature could classify all of the square footage in the same buildings as necessarily of equal value.

[*689] That might have invalidated the 1949 amendment if it had been the object of the Legislature to accomplish this result, but the clear purpose of the bill is to do something else. The courts are to give effect to the intention of the Legislature, and if the purpose of a statute can be discerned from its language in the light of the mischief to be remedied, such intent should not be thwarted due to verbal inadvertence. Here, as in *Riggs v. Palmer (115 N.Y. 506, 509)* "a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers. The writers of laws do not always express their intention perfectly, but either exceed it or fall short of it, so that judges are to collect it from **[***10]** probable or rational conjectures only, and this is called rational interpretation".

The language of this addition to section 4 of the Commercial Rent Law by chapter 534 of the Laws of 1949 is as follows: "A rent, exceeding the amount of the emergency rent, may likewise be fixed by the supreme court as provided in this paragraph. In any such alternative proceeding to so fix rents in a building or other rental area, the court shall first determine the basic return on the property as in this section prescribed. A net annual return of six per centum on the fair value of the entire property plus two per centum of the value of the land and buildings shall be deemed to be the basic return. When the amount of such basic return has been determined, the court shall then determine the fair rental value per square foot of the rentable commercial space in such building or **[**813]** other rental area by dividing the amount of the total net rentable space into the total of the basic return found as aforesaid. Thereafter the landlord shall be entitled to receive rent at the rate per square foot so determined and the court shall fix at such rate the rent of any tenant occupying commercial space **[***11]** in such building or other rental area and who is paying rent at a rate per square foot less than the fair rental value so fixed. Nothing in this paragraph contained shall operate to affect any rent payable under any unexpired lease or agreement. Upon the expiration of any lease or agreement the rent payable thereunder shall be the emergency rent if such rent be equal to or in excess of the fair rental value per square foot as in this paragraph determined and fixed."

In the hypothetical case of a building in which all of the rentable commercial space is of equal value, the effect of permitting the landlord to recover rent from each of the statutory tenants at the rate per square foot determined by dividing the amount of the total net rentable space in the building into the total of **[*690]** the allowable basic return, would correctly require each tenant to pay a fair return to the owner upon the space occupied by him, regardless of the rents received by the owner from the entire property. That is what the commission stated was the object of the bill when it recommended it to the Legislature. When this formula was put into words, its draftsman evidently did not consider how **[***12]** it would

operate in cases where the floor space in a building is of unequal value. Providing for all of the floor space in the same building as of equal value, was a fortuitous and unintended consequence. This obvious mistake should not be permitted to defeat the object of the amendment.

The 1949 amendment does not set forth the entire procedure for the alternative proceeding which it authorizes, and so much of the section as previously enacted as is relevant to the alternative proceeding, should be deemed to apply thereto.

It is held that the total basic return for the building should be divided by the total of the weighted net rental space. The quantity of square footage in the respective rental spaces in the building should be weighted or adjusted in proportion to their relative rental values, under a procedure similar in principle to that whereby the number of unit lots in a single parcel of land is varied in tax certiorari proceedings, irrespective of the numerical square footage involved, so as to adjust to differences in value due to their location in the plot, by the application of such factors as are commonly known as plottage, key, corner and so forth. After that **[***13]** has been done, the landlord is entitled to recover from each statutory tenant the amount of rent so apportioned to him, regardless of how much income is received from the rest of the building. In *Schack v. Handel (271 App. Div. 1)* this court construed the requirement, absolute in form, of a 6% return with 2% for amortization **[**814]** of mortgage indebtedness, as presumptive only of what constitutes a fair return, but not binding upon the court. Otherwise, "its constitutionality might be rendered questionable." (P. 8.) By the same token, this alternative formula added to section 4 by chapter 534 of the Laws of 1949, should be applied in conformity with the relative rental values of floor space in a building, as above stated.

Inasmuch as evidence was not taken on the trial of relative values of floor space, a new trial is ordered.The reasonable rent in this alternative proceeding should be determined, as provided by the second sentence in section 4, "as of the date of the application to the supreme court".

The order appealed from should be reversed, with costs to the respondent-appellant, and a new trial should be ordered.

[*691] PECK, P.J., and SHIENTAG, J. (concurring). **[***14]** We concur on the ground that the Legislature intended that the statute should be construed to have the court take into account the character and location of space in fixing rent under the alternative proceeding added to section 4 of the Commercial Rent Law by chapter 534 of the Laws of 1949. This view is confirmed by what we regard to be the clarifying amendment made to section 4 by chapter 327 of the Laws of 1950, by which it is specifically provided that the court shall determine the fair rental value per square foot of rentable space by taking into account the character and location of such space. Likewise, we are of the opinion that consistent with the pattern of section 4 as a whole, it was intended that the rent fixed by the court under the alternative proceeding was to be determined as of the date of the application to the Supreme Court, as provided by the second sentence of section 4. This is also specifically provided by the clarifying amendment made by chapter 327 of the Laws of 1950, providing that after the fixation of rent by the alternative proceeding the landlord shall be entitled to receive rent "dating from the time the application is made." Treating these amendments **[***15]** as clarifying and interpretive of existing law is in line with **[**815]** applicable rules of construction. "The force to be given subsequent legislation as affecting prior legislation also depends somewhat upon the time of the enactment and the surrounding circumstances, including the history of the various enactments. If it follows soon after controversies have arisen as to the interpretation

of the original act, it may well be construed as explanatory of the ambiguities over which such controversies arose." (McKinney's Cons. Laws of N.Y., Book 1, Statutes [1942 ed.], § 193.)

PECK, P.J., and SHIENTAG, J., concur with VAN VOORHIS, J., in result in an opinion; DORE, J., concurs except as to setting effective date of rental increase at time of application to Supreme Court, as to which he dissents and votes, in an opinion in which COHN, J., concurs, to construe the statute as amended by chapter 534 of the Laws of 1949, so as to make the increase effective as of the date of the decision.

Order reversed, with costs to the respondent-appellant and a new trial ordered.

Dissent by: DORE (In Part)

Dissent

DORE, J. (dissenting in part). This proceeding is brought under the so-called alternative **[***16]** method of fixing rent contained in a 1949 amendment adding a paragraph to section 4 of the Commercial Rent Law (L. 1945, ch. 3, as amd. by L. 1949, ch. 534). That amendment incorporates by reference the provisions in the prior first paragraph of the section that the rent to be fixed shall be based on the fair rental value of the space "as of the date of the application to the supreme court". Obviously some date must be fixed in advance of trial, otherwise during trial the date would vary as of the day when the particular witness was testifying; and, as the date of decision cannot be forecast, that date could not be taken as a basis for testimony of fair rental value. The quoted clause, accordingly, **[*692]** merely fixes in advance a date on which the testimony of fair rental value shall be based; but it does not go further, as the Federal regulations do, and provide that the rent so fixed shall be retroactive. Our State statute in this respect is unlike the Federal regulations. Thus, the Controlled Housing Rent Regulation for the New York City Defense-Rental Area (§ 825.2, subd. 13; 13 Federal Register 1866) provides that the adjustment in the maximum rent shall be effective **[***17]** as of the date of the landlord's petition (*Wasservogel v. Meyerowitz, 300 N.Y. 125*; cf. *Bowles v. Willingham, 321 U.S. 503, 512)*.

The 1949 amendment to the statute providing for the alternative method also further expressly provides that, *when* the court has determined the fair rental value: "*Thereafter* the landlord shall be entitled to receive rent at the rate per square foot so determined and the court *shall fix* at such rate the rent of any tenant occupying commercial space * * * who *is* paying rent at a rate per square foot less than the fair rental value so fixed." (Italics ours.) Accordingly, at least in an alternative proceeding such as this, the rent fixed should be effective only as of the time of decision and not as of the date of application. The hardships are obvious that are involved in imposing on tenants increases in rent that may go back retroactively for six or eight or more months. Such hardships should not be imposed unless the mandate of the statute clearly and unmistakably directs such imposition. The most reasonable and plausible interpretation is to the contrary, i.e., the rent fixed should not be made effective until the decision. **[***18]** Except as to the date when the rent fixed becomes effective, we concur in the majority opinion.

[816]** The amendment enacted by chapter 327 of the Laws of 1950 in effect on March 31, 1950, referred to in the concurrent opinion herein, was not in effect at the time this proceeding was commenced and the specific amendment in question is not made applicable to pending proceedings. That new amendment now expressly provides that after fixation of rent by the alternative method the landlord shall be entitled to rent "*dating from the time the application was made.*" (Matter in italics new.) If the

Legislature considered that such express amendment to the law was necessary to provide for retroactive payment, it is a fair inference that the law prior to such amendment had no such mandatory requirement. The rules of statutory construction regarding amendatory statutes is settled in New York. Thus the authoritative and comprehensive report of the Board of Statutory Construction (McKinney's Cons. Laws of N.Y., **[*693]** Book 1, Statutes [1942 ed.], § 52) discussing amendatory statutes says: "But in New York this rule has been disregarded for a long time, and it is now settled **[***19]** that an amendatory statute has no more retroactive effect than an original independent statute upon the same subject framed in the same language would have. Thus, it is the general rule that an amendment will have prospective application only, unless its language clearly indicates that it shall receive a contrary interpretation." Citations too numerous to mention are appended to sustain that settled rule.

Furthermore, the 1950 law provides that it "shall take effect immediately" and such provision in an amendatory statute excludes the idea that it should be retroactive. New provisions normally apply only from the date of enactment.

Finally, the amendment relied on for retroactivity of the rent is not made applicable to pending proceedings. In subdivision 2 of section 4 the new law provides that in no event shall the tenant's rent be fixed in excess of 15% and expressly adds "and such limitation shall apply * * * to such additional alternative proceedings pending at the time this subdivision as hereby amended takes effect". The applicability of the law to pending proceedings was thus by the express terms of the act made applicable to pending proceedings so far as the 15% limitation **[***20]** is concerned, but there is no such provision as to the retroactive payments. This is as it should be because retroactive operation of statutes is not favored (*Feiber Realty Corp. v. Abel, 265 N.Y. 94*; *People ex rel. Beck v. Graves, 280 N.Y. 405*). All statutes are presumed to furnish a rule for future action and a law will not receive a retroactive construction unless its language either expressly or by necessary implication requires such construction.

Accordingly, we dissent in part as to the retroactive effect of the rental increase and vote to construe the applicable statute so as to make the increase effective as of decision date and not date of application.

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Matter of Avella v City of New York

Court of Appeals of New York

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

No. 54

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

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

Prior History: Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered July 2, 2015. The Appellate Division (1) reversed, on the law, a judgment of the Supreme Court, New York County (Manuel J. Mendez, J.), entered in a hybrid CPLR article 78 proceeding and declaratory judgment action, which had denied the petition for a judgment pursuant to CPLR article 78 and for declaratory and injunctive relief in connection with the construction of Willets West, a retail entertainment center, on City parkland, and dismissed the proceeding; and (2) granted the petition to the extent of declaring that construction of Willets West on City parkland without the authorization of the state legislature violates the public trust doctrine, and enjoining any further steps toward its construction.

Matter of Avella v City of New York, 131 AD3d 77, 13 NYS3d 358, 2015 N.Y. App. Div. LEXIS 5643, 2015 NY Slip Op 5790 (July 2, 2015), affirmed.

Disposition: Order affirmed, with costs.

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

of New York, 95 NY2d 623, 750 NE2d 1050, 727 NYS2d 2; Zaldin v Concord Hotel, 48 NY2d 107, 397 NE2d 370, 421 NYS2d 858; Jones v Bill, 10 NY3d 550, 890 NE2d 884, 860 NYS2d 769; Rivers v Sauter, 26 NY2d 260, 258 NE2d 191, 309 NYS2d 897; People v English, 242 AD2d 940, 662 NYS2d 890; Squadrito v Griebsch, 1 NY2d 471, 136 NE2d 504, 154 NYS2d 37; City of New York v Stringfellow's of N.Y., 253 AD2d 110, 684 NYS2d 544; People v Cintron, 13 Misc 3d 833, 827 NYS2d 445.)

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

John R. Low-Beer, Brooklyn and *Law Office of Lorna Goodman*, New York City (*Lorna B. Goodman* of counsel), for Tony Avella and others, respondents. I. The Court below correctly held that Administrative Code of the City of New York § 18-118 did not authorize construction of a shopping mall in the park. (Friends of Van Cortlandt Park v City of New York, 95 NY2d 623, 750 NE2d 1050, 727 NYS2d 2; Aldrich v City of New York, 208 Misc 930, 145 NYS2d 732; People v New York & Staten Is. Ferry Co., 68 NY 71; People ex rel. Swan v Doxsee, 136 App Div 400, 120 NYS 962, *198 NY 605, 92 NE 1098*; Idaho v Coeur d'Alene Tribe of Idaho, 521 US 261, 17 S Ct 2028, 138 L Ed 2d 438; Williams v Gallatin, 229 NY 248, 128 NE 121; Martin v Lessee of Waddell, 41 US 367, 10 L Ed 997; Matter of New York County Lawyers' Assn. v Bloomberg, 19 NY3d 712, 979 NE2d 1162, 955 NYS2d 835; Council of City of N.Y. v Giuliani, 93 NY2d 60, 710 NE2d 255, 687 NYS2d 609; People v English, 242 AD2d 940, 662 NYS2d 890.) II. Administrative Code of the City of New York § 18-118 does not exempt the City of New York and the developers from the uniform land use review process and zoning. (Parochial Bus Sys. v Board of Educ. of City of N.Y., 60 NY2d 539, 458 NE2d 1241, 470 NYS2d 564; New York Tel. Co. v Nassau County, 1 NY3d 485, 808 NE2d 340, 776 NYS2d 205; *Matter of P.M.S. Assets v Zoning Bd. of Appeals of Vil. of Pleasantville, 98 NY2d 683, 774 NE2d 204, 746 NYS2d 440*; Bluebird Partners v First Fid. Bank, 97 NY2d 456, 767 NE2d 672, 741 NYS2d 181; Walton v New York State Dept. of Correctional Servs., 8 NY3d 186, 863 NE2d 1001, 831 NYS2d 749; Schiavone v City of New York, 92 NY2d 308, 703 NE2d 256, 680 NYS2d 445; Matter of Waybro Corp. v Board of Estimate of City of N.Y., 67 NY2d 349, 493 NE2d 931, 502 NYS2d 707; Besser v Squibb & Sons, 146 AD2d 107, 539 NYS2d 734; Board of Estimate of City of New York v Morris, 489 US 688, 109 S Ct 1433, 103 L Ed 2d 717; Council of City of N.Y. v Giuliani, 172 Misc 2d 893, 664 NYS2d 197.)

Eric T. Schneiderman, Attorney General, New York City (*Anisha S. Dasgupta, Barbara D. Underwood* and *Andrew Rhys Davies* of counsel), for Attorney General of the State of New York, amicus curiae. I. The City of New York's proposed development fits within the public purposes that the legislature has authorized for Willets West. (Union Sq. Park Community Coalition, Inc. v New York City Dept. of Parks & Recreation, 22 NY3d 648, 985 NYS2d 422,8 NE3d 797; Friends of Van Cortlandt Park v City of New York, 95 NY2d 623, 750 NE2d 1050, 727 NYS2d 2; Matter of New York County Lawyers' Assn. v Bloomberg, 19 NY3d 712, 979 NE2d 1162, 955 NYS2d 835; People v Marquan M., 24 NY3d 1, 994 NYS2d 554, 19 NE3d 480; Bates v Holbrook, 171 NY 460, 64 NE 181; Brooklyn Park

Commrs. v Armstrong, 45 NY 234; *Ministers & Missionaries Benefit Bd. v Snow, 26 NY3d 466, 25 NYS3d 21, 45 NE3d 917*; *Leader v Maroney, Ponzini & Spencer, 97 NY2d 95, 761 NE2d 1018, 736 NYS2d 291*; *Matter of Westchester Joint Water Works v Assessor of the City of Rye, 27 NY3d 566, 36 NYS3d 415, 56 NE3d 197*; *Matter of Walker, 64 NY2d 354, 476 NE2d 298, 486 NYS2d 899*.) II. The proposed development will also help to advance the statutory public purposes in other ways.

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

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

Opinion by: WILSON

Opinion

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

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

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

To the east of the parkland is an area known as Willets Point. As the Appellate Division noted, and as the parties agree, "Willets Point is a 61-acre area that has long been considered by the City to be blighted. Indeed, Willets Point has no sewers, sidewalks or streetlights, is replete with potholed and rutted streets, and is prone to flooding" *(131 AD3d 77, 78, 13 NYS3d 358 [1st Dept 2015])*. Prior proposals to remediate and develop Willets Point have foundered.

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

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

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

I.

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

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

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

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

The approval of the legislature in alienating parkland must be "plainly conferred" through the "direct and specific approval of the State Legislature" (*Friends of Van Cortlandt Park, 95 NY2d at 632* [internal quotation marks and citation omitted]; *see Capruso v Village of Kings Point, 23 NY3d 631, 639, 992 NYS2d 469, 16 NE3d 527 [2014]*; *Williams v Gallatin, 229 NY 248, 253, 128 NE 121 [1920])*. Although we have often articulated that principle in the context of an initial alienation of lands held in the public trust (*see e.g. Friends of Van Cortlandt Park, 95 NY2d at 631*), the principle also **[*432]** requires that a proposed use of parkland falls within the *scope* of legislative authorization once granted. For example, in *Potter v Collis*, we held that, although the legislature's General Railroad Act of 1850 authorized municipalities to assent to the construction of railroads, that legislative authorization was not "sufficient to authorize a city street railroad," and the City's resolution granting a third party authorization to construct a railroad on public streets was therefore invalid under the public trust doctrine (*156 NY at 30*). As we held in **[****7]** *Matter of City of New York,* which involved New York City's right to alienate piers and wharves held in the public trust, "[w]hen there is a fair, reasonable and substantial doubt concerning the existence of an alleged power in a municipality, the power should be denied" *(228 NY 140, 152, 126 NE 809, [1920])*. We reiterated that rule in *Lake George Steamboat Co. v Blais **[**986] [***240]*** , in which we said, "legislative sanction must be clear and certain to permit a municipality to lease public property for private purposes" *(30 NY2d 48, 52, 281 NE2d 147, 330 NYS2d 336 [1972])*.

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

II.

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

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

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

> "b. Any contract, lease, rental agreement, license, permit, concession or other authorization referred to in *subdivision a* of this section may grant to the person or persons contracting with the city thereunder, the right to use, occupy or carry on activities in, the whole or any part of such stadium, grounds, parking areas and other facilities, (1) for any purpose or purposes which is of such a nature as to furnish to, or foster or promote among,

> or provide for the benefit of, the people of the city, recreation, entertainment, amusement, education, enlightenment, cultural development or betterment, and improvement of trade and commerce, including professional, amateur and scholastic sports and athletic events, theatrical, musical or other entertainment presentations, and meetings, assemblages, conventions and exhibitions for any purpose, including meetings, assemblages, conventions and exhibitions held for business or trade **[****10]** purposes, and **[*434]** other events of **[**987]** **[***241]** civic, community and general public interest, and/or (2) for any business or commercial purpose which aids in the financing of the construction and operation of such stadium, grounds, parking areas and facilities, and any additions, alterations or improvements thereto, or to the equipment thereof, and which does not interfere with the accomplishment of the purposes referred to in paragraph one of this subdivision. It is hereby declared that all of the purposes referred to in this subdivision are for the benefit of the people of the city and for the improvement of their health, welfare, recreation and prosperity, **[6]** for the promotion of competitive sports for youth and the prevention of juvenile delinquency, and for the improvement of trade and commerce, and are hereby declared to be public purposes."

When interpreting a statute, "our primary consideration is to discern and give effect to the Legislature's intention" (*Matter of Albany Law School v New York State Off. of Mental Retardation & Dev. Disabilities, 19 NY3d 106, 120, 968 NE2d 967, 945 NYS2d 613 [2012]*). The text of a statute is the "clearest indicator" of such legislative intent and "courts should construe unambiguous language to give effect to its plain meaning" (*Matter of DaimlerChrysler Corp. v Spitzer, 7 NY3d 653, 660, 860 NE2d 705, 827 NYS2d 88 [2006]*). We have also previously instructed that "[i]t is an accepted rule that all parts **[****11]** of a statute are intended to be given effect and that a statutory construction which renders one part meaningless should be avoided" (*Rocovich v Consolidated Edison Co., 78 NY2d 509, 515, 583 NE2d 932, 577 NYS2d 219 [1991]*). Furthermore, "a statute . . . must be construed as a whole and . . . its various sections must be considered together and with reference to each other" (*Matter of New York County Lawyers' Assn. v Bloomberg, 19 NY3d 712, 721, 979 NE2d 1162, 955 NYS2d 835 [2012]*). Defendants' argument disregards these fundamental rules of statutory interpretation.

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

Defendants point to the last sentence of *subdivision (a)*, authorizing "the city, in accordance with the requirements and conditions of this subdivision and *subdivision b* of this section, [to] . . . enter into amended, new, additional or further contracts, leases or rental agreements . . . for any purpose or purposes referred to in *subdivision b* of this section," arguing that *subdivision (b)* specifically authorizes this type of development on the parkland because one of the enumerated uses allowed is the "improvement of trade and commerce" (*Administrative Code of the City of New*

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

York § 18-118 [b] [1]). That argument is also unpersuasive.[4] The purposes enumerated in the legislation are consistent with typical uses of a park and/or stadium, including "scholastic sports and athletic events," "theatrical, **[*436]** musical or other entertainment presentations," and "meetings, assemblages, conventions and exhibitions."

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

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

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

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

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

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

which in fact housed the New York Jets football team from 1964-1983) (L 2005, ch 238 §2 (a)-(b)] [emphasis in defendants' brief]).

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

III.

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

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

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

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

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

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

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

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

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

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

The budget report on the **[****19]** bill stated that "[t]he bill grants statutory authority for the City to lease or rent the stadium **[*440]** which could not otherwise be leased or rented because of its location on inalienable park lands" (Bill Jacket, L 1961, ch 729 at 27). A report on the bill from the Department of Audit and Control, addressed to the Governor, describes each subsection of the bill: paragraph (a), it says, "authorizes the Commissioner of Parks, with the approval of the Board of Estimate, to enter into contracts, leases or rental agreements . . . , or grant licenses, permits, concessions or other authorizations for the use of the whole or any part of the new stadium" (Bill Jacket, L 1961, ch 729 at 28). The report then writes that "Paragraph b describes the purposes for which such use may be granted" (*id.*).

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

IV.

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

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

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

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

[7] The other legislative approval required by the City, captured in ***subdivision (e)***, related to the City's need for an exemption from the down-payment requirement of ***section 107.00 of the Local Finance Law***, "[b]ecause of the impracticability of issuing 15-year bonds, and because of the indicated minor deficits preventing operation of the stadium on a fully self-sustaining basis initially" (Off of Mayor, Supp Mem in Support, Bill Jacket, L 1961, ch 729 at 40; *see generally id.* at 38-40).

Dissent by: DiFIORE

Dissent

DiFIORE, Chief Judge (dissenting):

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

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

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

[*442] I.

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

Immediately to the east of the alienated parkland lies Willets Point, a blighted and contaminated tract of land in Queens. This toxic wasteland of sixty-one acres is known as the "Iron Triangle" or, as F. Scott Fitzgerald described it 92 years ago in The Great Gatsby, the "Valley of Ashes."[1] Willets Point is not parkland. Beginning in the 1960s,

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

the decade when *Administrative Code § 18-118* was enacted and Shea Stadium was built, City officials tried and failed to redevelop the area. Recent environmental studies show likely contamination in nearly every part of Willets Point and the groundwater beneath it. The risks to public health from this contamination **[**993]** **[***247]** are exacerbated by Willets Point's proximity to the Flushing River, in an area susceptible to constant flooding that lacks basic infrastructure, including **[****23]** sewers and storm drains.

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

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

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

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

II.

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

"[T]he starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning **[*444]** thereof" (*Majewski v Broadalbin-Perth Cent. School Dist., 91 NY2d 577, 583, 696 NE2d 978, 673 NYS2d 966 [1998]*). A plain reading of *Administrative Code § 18-118* shows that the legislature alienated the parkland at issue and authorized the City to enter into leases and other agreements with third **[****26]** parties for a variety of

specific purposes, each of which it expressly declared to be a public purpose. Subdivision (a) of Administrative Code § 18-118 sets forth the City's authority to enter into agreements for use of the alienated parkland and specifies that the alienated parkland includes not only the stadium but appurtenant grounds, parking areas and other facilities. Subdivision (b) lists the purposes for which that alienated property may be used. Nowhere does the statute limit authorized uses to those that "relate to the stadium itself and the naturally expected uses of a stadium," as the Appellate Division held (131 AD3d at 86).

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

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

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

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

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

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

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

Subdivision (b) (1) also sets out, as another authorized purpose, "the improvement of trade and commerce"—something that a shopping center in this blighted area would promote. Indeed, although the legislature could have omitted the purpose of "improvement of trade and commerce" from the list of specifically authorized purposes in favor of loftier intellectual or cultural purposes, it did not. The notion that the specific reference **[****30]** to "improvement of trade and commerce" nonetheless excludes a shopping center is as unsupportable as the notion that "entertainment" excludes a movie theater or that "cultural development" excludes exhibition or meeting spaces. Indeed, the development plan at issue would promote all of these specific statutorily authorized purposes.[3]

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

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

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

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

(2) does not alter or qualify the purpose in (b) (1) that permits uses of the alienated property that will improve trade and commerce.

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

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

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

III.

While the text of a statute is always of prime importance, its legislative history may inform the analysis (*see* Nostrom v A.W. Chesterton Co. **[**998]**, **[***252]** 15 NY3d 502, 507, 940 NE2d 551, 914 NYS2d 725 [2010]). Here, the

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

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

legislation's bill jacket shows that the immediate context of the law concerned the construction and use of the stadium. Nonetheless, while the legislature's primary objective in enacting the law was to authorize construction of Shea Stadium, the legislature chose to craft that authorization in broad terms: not only to allow use of the parkland for Shea Stadium, but to permit the City to enter into agreements and any other "authorizations" that would use the alienated parkland for several broad purposes. Thus, while the legislative history emphasizes the immediate objective of the statute, it is the plain meaning of the statutory language that should guide our interpretation today and it unequivocally permits further development to promote the listed purposes.

IV.

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

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

V.

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

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

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

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

Accordingly, I dissent.

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

Order affirmed, with costs.

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Burlington Ins. Co. v NYC Tr. Auth.

Court of Appeals of New York

April 26, 2017, Argued ; June 6, 2017, Decided

No. 57

Reporter
29 N.Y.3d 313 *; 79 N.E.3d 477 **; 57 N.Y.S.3d 85 ***; 2017 N.Y. LEXIS 1404 ****; 2017 NY Slip Op 04384; 2017 WL 2427300

[1] The Burlington Insurance Company, Appellant, v NYC Transit Authority et al., Respondents.

Subsequent History: On remand at *Burlington Ins. Co. v NYC Tr. Auth., 153 AD3d 438, 60 NYS3d 146, 2017 N.Y. App. Div. LEXIS 6199 (N.Y. App. Div. 1st Dep't, Aug. 22, 2017)*

Prior History: Appeal, by permission of the Court of Appeals, from a judgment of the Supreme Court, New York County (Michael D. Stallman, J.), entered January 8, 2016. The Supreme Court (1) upon an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered August 11, 2015, declared that defendants New York City Transit Authority (NYCTA) and MTA New York City Transit were entitled to coverage in the underlying personal injury action as additional insureds under plaintiff's policy number HGL0019305 issued to Breaking Solutions, Inc. (BSI) and dismissed the complaint; and (2) pursuant to a "so-ordered" stipulation of the parties, awarded defendants attorney's fees in a sum certain. The appeal brings up for review the prior nonfinal order of the Appellate Division. The Appellate Division (1) reversed, on the law, an order and judgment (one paper) of the Supreme Court, New York County (Michael D. Stallman, J.; op *38 Misc 3d 1205[A], 969 NYS2d 801, 2012 NY Slip Op 52370[U] [2012]*), which had granted plaintiff summary judgment on its first cause of action declaring that it owes defendants no coverage in the underlying personal injury action, granted plaintiff leave to amend its complaint to assert a second cause of action against defendant NYCTA for contractual indemnification as equitable subrogee of the City of New York, and denied defendants' cross motion for summary judgment on the first cause of action; (2) reversed, on the law, insofar as appealed from, an order of that court (op *2013 NY Slip Op 33271[U] [2013]*), which had granted plaintiff's motion for summary judgment for contractual indemnification against defendant NYCTA and directed judgment in plaintiff's favor in the amount of $950,000 plus interest; (3) denied plaintiff's motions for summary judgment and to amend the complaint; and (4) granted defendants' cross motion for summary judgment on the first cause of action to the extent of declaring that defendants were entitled to coverage in the underlying personal injury action as additional insured under plaintiff's policy number HGL0019305 issued to BSI.

Burlington Ins. Co. v NYC Tr. Auth., 132 AD3d 127, 14 NYS3d 377, 2015 N.Y. App. Div. LEXIS 6349 (Aug. 11, 2015), reversed.

29 N.Y.3d 313, *313; 79 N.E.3d 477, **477; 57 N.Y.S.3d 85, ***85; 2017 N.Y. LEXIS 1404, ****1404; 2017 NY Slip Op 04384, *****04384

Disposition: Judgment appealed from and order of the Appellate Division brought up for review reversed, with costs, plaintiff's motion for summary judgment on the first cause of action granted, defendants' cross motion for summary judgment on the first cause of action denied, and case remitted to the Appellate Division, First Department, for further proceedings in accordance with the opinion herein.

Core Terms

endorsement, additional insured, coverage, insured's, omissions, MTA, proximate cause, parties, cable, Dictionary, named insured, ambiguity, drafter, causation, explosion, Lease, bodily injury liability, summary judgment, terms, entitled to coverage, insurance policy, ordinary meaning, policy language, proximate causation, machine, fault, proximately cause, defendants', electrical, excavation

Counsel: **[****1]** *Ford Marrin Esposito Witmeyer & Gleser, L.L.P.*, New York City (*Joseph D'Ambrosio, Andrew I. Mandelbaum, John A. Mattoon, Jr.* and *Gregory R. Bruno* of counsel), and *Adrian-Cassidy & Associates, LLC*, New York City (*James M. Adrian* of counsel), for appellant. I. The decision conflicts with the endorsement's plain meaning, ordinary principles of contract interpretation, and the drafters' intent. (*W & W Glass Sys., Inc. v Admiral Ins. Co., 91 AD3d 530, 937 NYS2d 28*; *Schwartz v Merola Bros. Constr. Corp., 290 NY 145, 48 NE2d 299*; *Red Ball Motor Frgt., Inc. v Employers Mut. Liab. Ins. Co. of Wis., 189 F2d 374*; *Gilbane Bldg. Co. v Admiral Ins. Co., 664 F3d 589*; *Cragg v Allstate Indem. Corp., 17 NY3d 118, 950 NE2d 500, 926 NYS2d 867*; *Westview Assoc. v Guaranty Natl. Ins. Co., 95 NY2d 334, 740 NE2d 220, 717 NYS2d 75*; *Olin Corp. v American Home Assur. Co., 704 F3d 89*; *Argentina v Emery World Wide Delivery Corp., 93 NY2d 554, 715 NE2d 495, 693 NYS2d 493*; *Union Carbide Corp. v Affiliated FM Ins. Co., 68 AD3d 534, 891 NYS2d 347*; *Nomura Holding Am., Inc. v Federal Ins. Co., 45 F Supp 3d 354*.) II. The First Department's interpretation of this narrowly-worded endorsement provides more extensive coverage than this Court found under the broader endorsements interpreted in *Worth Constr. Co., Inc. v Admiral Ins. Co. (10 NY3d 411, 888 NE2d 1043, 859 NYS2d 101 [2008])* and *Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA (15 NY3d 34, 930 NE2d 259, 904 NYS2d 338 [2010])*. (*Maroney v New York Cent. Mut. Fire Ins. Co., 5 NY3d 467, 839 NE2d 886, 805 NYS2d 533*.) III. The First Department's interpretation of this endorsement is contrary to the interpretation of virtually all other courts. (*Underwriters at Lloyd's of London v Cordova Airlines, Inc., 283 F2d 659*; *American Guar. & Liab. Ins. Co. v CNA Reins. Co., 16 AD3d 154, 791 NYS2d 525*; *Crespo v City of New York, 303 AD2d 166, 756 NYS2d 183*; *Aetna Cas. & Sur. Co. v Liberty Mut. Ins. Co., 91 AD2d 317, 459 NYS2d 158*; *Strauss Painting, Inc. v Mt. Hawley Ins. Co., 105 AD3d 512, 963 NYS2d 197*; *W & W Glass Sys., Inc. v Admiral Ins. Co., 91 AD3d 530, 937 NYS2d 28*; *Maroney v New York Cent. Mut. Fire Ins. Co., 5 NY3d 467, 839 NE2d 886, 805 NYS2d 533*.) IV. The trial court properly rejected the primary arguments raised by New York City Transit Authority below, which arguments were not addressed by the Appellate Division. (*BP A.C. Corp. v One Beacon Ins. Group, 8 NY3d 708, 871 NE2d 1128, 840 NYS2d 302*; *Broadway Houston Mack Dev., LLC v Kohl, 71 AD3d 937, 897 NYS2d 505*; *NYP Holdings, Inc. v McClier Corp., 65 AD3d 186, 881 NYS2d 407*; *Federal Ins. Co. v Arthur Andersen & Co., 75 NY2d 366, 552 NE2d 870, 553 NYS2d 291*; *Hamlet at Willow Cr. Dev. Co., LLC v Northeast Land Dev. Corp., 64 AD3d 85, 878 NYS2d 97*; *Continental Cas. Co. v Fifth/Third Bank, 418 F Supp 2d 964*; *Jorge v Travelers Indem. Co., 947 F Supp 150*; *North Star Reins. Corp. v Continental Ins. Co., 82 NY2d 281, 624 NE2d 647, 604 NYS2d 510*; *Pierce v Syracuse Univ., 236 AD2d 870, 653 NYS2d 753*; *Markevics v Liberty Mut. Ins. Co., 97 NY2d 646, 761 NE2d 557, 735 NYS2d 865*.)

29 N.Y.3d 313, *313; 79 N.E.3d 477, **477; 57 N.Y.S.3d 85, ***85; 2017 N.Y. LEXIS 1404, ****1; 2017 NY Slip Op 04384, *****04384

Shein & Associates, P.C., Syosset (*Charles R. Strugatz* of counsel), for respondents. I. The anti-subrogation rule bars an insurer, as subrogee of the City of New York, from seeking contractual indemnity from the New York City Transit Authority for the amounts the insurer paid to settle and defend the underlying action on behalf of the subrogor, where the New York City Transit Authority, and both the Metropolitan Transportation Authority and the City of New York, were afforded coverage by that insurer's endorsement as additional insureds for liability for bodily injury, caused, in whole or in part, by the named insured's acts or omissions in the performance of the named insured's ongoing operations, where the named insured's employee's operation of his employer's machine resulted in an electrical explosion that provided the requisite factual nexus to the injury in the underlying action. (*Schwartz v Merola Bros. Constr. Corp., 290 NY 145, 48 NE2d 299*; *Red Ball Motor Frgt., Inc. v Employers Mut. Liab. Ins. Co. of Wis., 189 F2d 374*; *Gilbane Bldg. Co. v Admiral Ins. Co., 664 F3d 589*; *Cragg v Allstate Indem. Corp., 17 NY3d 118, 950 NE2d 500, 926 NYS2d 867*; *Westview Assoc. v Guaranty Natl. Ins. Co., 95 NY2d 334, 740 NE2d 220, 717 NYS2d 75*; *Olin Corp. v American Home Assur. Co., 704 F3d 89*; *Union Carbide Corp. v Affiliated FM Ins. Co., 68 AD3d 534, 891 NYS2d 347*; *Nomura Holding Am., Inc. v Federal Ins. Co., 45 F Supp 3d 354*; *Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280, 803 NE2d 757, 771 NYS2d 484*; *W & W Glass Sys., Inc. v Admiral Ins. Co., 91 AD3d 530, 937 NYS2d 28*.) II. Assuming, arguendo, that the anti-subrogation rule does not bar the contractual indemnity claim, the insurer cannot subrogate based on payments it voluntarily made as part of its improper claims handling practices intended to shift liability to the New York City Transit Authority. (*East Asiatic Co. v Corash, 34 AD2d 432, 312 NYS2d 311*; *G.K. Alan Assoc., Inc. v Lazzari, 44 AD3d 95, 840 NYS2d 378*; *Bolanowski v Trustees of Columbia Univ. in City of N.Y., 21 AD3d 340, 800 NYS2d 560*; *Norman v Ferrara, 107 AD2d 739, 484 NYS2d 600*; *Chubb Natl. Ins. Co. v Platinum Customcraft Corp., 38 AD3d 244, 831 NYS2d 382*; *Broadway Houston Mack Dev., LLC v Kohl, 71 AD3d 937, 897 NYS2d 505*; *Bermuda Trust Co. v Ameropan Oil Corp., 266 AD2d 251, 698 NYS2d 691*; *Cohn v Rothman-Goodman Mgt. Corp., 155 AD2d 579, 547 NYS2d 881*; *Pecker Iron Works of N.Y. v Traveler's Ins. Co., 99 NY2d 391, 786 NE2d 863, 756 NYS2d 822*; *Kassis v Ohio Cas. Ins. Co., 12 NY3d 595, 913 NE2d 933, 885 NYS2d 241*.)

Saxe Doernberger & Vita, P.C., Trumbull, Connecticut (*Gregory D. Podolak, Tracy Alan Saxe* and *Geoffrey J. Miller* of counsel), and *Ochs & Goldberg, LLP,* New York City, for Turner Construction Company, amicus curiae. I. Any act or failure to act by the named insured that contributes, even in part, to producing a covered loss triggers the additional insured endorsement. (*People v Stewart, 40 NY2d 692, 358 NE2d 487, 389 NYS2d 804*; *United States Fid. & Guar. Co. v Annunziata, 67 NY2d 229, 492 NE2d 1206, 501 NYS2d 790*; *Gilbane Bldg. Co./TDX Constr. Corp. v St. Paul Fire & Mar. Ins. Co., 143 AD3d 146, 38 NYS3d 1*; *Essex Ins. Co. v Laruccia Constr., Inc., 71 AD3d 818, 898 NYS2d 558*; *Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co., 89 NY2d 786, 680 NE2d 1200, 658 NYS2d 903*.) II. Negligence is not required. (*Harbor Ins. Co. v Lewis, 562 F Supp 800*; *Palsgraf v Long Is. R.R. Co., 248 NY 339, 162 NE 99*; *Dillon Cos., Inc. v Royal Indem. Co., 369 F Supp 2d 1277*; *Gilbane Bldg. Co./TDX Constr. Corp. v St. Paul Fire & Mar. Ins. Co., 143 AD3d 146, 38 NYS3d 1*.) III. New York jurisprudence on "arising out of" does not mandate a different result. (*W & W Glass Sys., Inc. v Admiral Ins. Co., 91 AD3d 530, 937 NYS2d 28*; *Maroney v New York Cent. Mut. Fire Ins. Co., 5 NY3d 467, 839 NE2d 886, 805 NYS2d 533*; *Worth Constr. Co., Inc. v Admiral Ins. Co., 10 NY3d 411, 888 NE2d 1043, 859 NYS2d 101*.)

Judges: Opinion by Judge Rivera. Chief Judge DiFiore and Judges Garcia and Wilson concur. Judge Fahey dissents and votes to affirm in an opinion in which Judge Stein concurs.

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Opinion by: RIVERA

Opinion

[478] [*317] [***86]** Rivera, J.

We conclude that where an insurance policy is restricted to liability for any bodily injury "caused, in whole or in part," by the "acts or omissions" of the named insured, the coverage applies to injury proximately caused by the named insured. The Appellate Division erroneously interpreted this policy language as extending coverage broadly to any injury causally linked to the **[2]** named insured, and wrongly concluded that an additional insured may collect for an injury caused solely by its own negligence, even where the named insured bears no legal fault for the underlying harm. We reject this "but for" causation formulation of the policy and, on this appeal, reverse the Appellate Division's denial of summary judgment in favor of the insurance company on the issue of coverage.

I.

Plaintiff, the Burlington Insurance Company, issued an insurance policy to nonparty Breaking Solutions, Inc. **[****2]** (BSI) listing as additional insureds defendants, the New York City Transit Authority (NYCTA) and MTA New York City Transit (MTA). Burlington denied coverage to NYCTA and MTA on the grounds that defendants were not additional insureds within the meaning of the policy because NYCTA was solely responsible for the accident that **[**479] [***87]** caused the injury. This appeal requires that we interpret whether the additional insured language of the policy provides coverage where the named insured is not negligent.

According to the undisputed facts, NYCTA contracted with BSI to provide equipment and personnel and for BSI to perform tunnel excavation work on a New York City subway construction project. To comply with NYCTA's insurance requirements, BSI purchased commercial general liability insurance from Burlington with an endorsement that listed NYCTA, MTA, and **[*318]** New York City as "additional insureds."[1] As specified by NYCTA, BSI agreed to use language in the endorsement adopted from the latest form issued by a trade organization known as the Insurance Services Office (ISO), and which provides, in relevant part, that NYCTA, MTA, and the City are additional insureds:

> "only with respect to liability **[****3]** for 'bodily injury', 'property damage' or 'personal and advertising injury' caused, in whole or in part, by:
>
> "1. Your acts or omissions; or
>
> "2. The acts or omissions of those acting on your behalf."

During the coverage period, an NYCTA employee fell off an elevated platform as he tried to avoid an explosion after a BSI machine touched a live electrical cable buried in concrete at the excavation site. The

[1] The record contains two separate documents referred to as "endorsements" to the Burlington policy. Although only one lists NYCTA, MTA, and the City as additional insureds, on this appeal the parties treat all three as listed under an "endorsement." Since the disputed causation language is identical in both documents, we adopt the parties' reference to the source of coverage as a single "endorsement."

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employee and his spouse brought an action against the City **[3]** and BSI in federal court, asserting Labor Law claims, negligence, and loss of consortium (*Kenny v City of N.Y., 2011 U.S. Dist. LEXIS 109057, 2011 WL 4460598 [ED NY, Sept. 26, 2011]*).

Pursuant to BSI's policy, the City tendered its defense in the federal action to Burlington, which Burlington accepted subject to a reservation of rights based on the City's qualification as an additional insured. Burlington withdrew its reservation, however, after receiving NYCTA's letter to BSI that it would not make payments under the contract unless Burlington agreed to provide coverage for the City's defense and indemnification without reservation.

Meanwhile, the City impleaded NYCTA and MTA in the employee's action and asserted third-party claims for indemnification and contribution, based on a lease between NYCTA and the City as a property **[****4]** owner of certain transit facilities. Under article VI, § 6.8 of that lease agreement, NYCTA agreed to indemnify the City for liability "arising out of or in connection **[*319]** with the operation, management[,] and control by the [NYCTA]" of the leased property.[2]

NYCTA tendered its defense of these claims to Burlington, also as an additional insured under the BSI policy. Burlington accepted the defense, subject to the same reservation that NYCTA qualify as an additional insured under the policy endorsement. **[**480] [***88]** NYCTA did not demand, and Burlington did not submit, a withdrawal of this reservation.

Discovery in the employee's federal lawsuit revealed that NYCTA failed to identify, mark, or protect the electric cable, and that it also failed to turn off the cable power. Documents further established that the BSI machine operator could not have known about the location of the cable or the fact that it was electrified. For example, in two internal memoranda, NYCTA acknowledged its sole responsibility for the accident. In the first, the NYCTA superintendent explained that the excavation equipment operators "were operating the equipment properly and had no way of knowing that the cables were submerged in the **[****5]** invert." The second memorandum concluded that "this accident was primarily due to an inadequate/ineffective inspection process for identifying job-site hazards involving buried energized cables." Based on these revelations, Burlington disclaimed coverage of NYCTA and MTA, asserting that BSI was **[16]** not at fault for the injuries and therefore NYCTA and MTA were not additional insureds under the policy.

The district court dismissed the employee's claims against BSI with prejudice, and the City's third-party claims against NYCTA without prejudice. Burlington thereafter settled the lawsuit for $950,000 and paid the City's defense costs.

Burlington commenced the instant action in state court after disclaiming coverage for NYCTA and MTA. Initially, Burlington sought a declaratory judgment that it did not owe NYCTA and MTA coverage as additional insureds under BSI's policy. After settling the employee's action against the City, Burlington moved to amend its complaint to add a claim for contractual indemnification as the City's subrogee under the lease with NYCTA.

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[2] MTA is not a named party to the lease because that entity did not exist at the time NYCTA and the City entered the agreement. However, NYCTA is an affiliate of MTA pursuant to *section 1263 of the Public Authorities Law*, added in 1965, which renders MTA the "parent agency" of NYCTA (*see* Metropolitan Transit Authority, New York City Transit—History and Chronology, http://web.mta.info/nyct/facts/ffhist.htm [last visited May 2, 2017]; *Public Authorities Law § 1263*).

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[*320] Supreme Court granted Burlington's motion for summary judgment, concluding that NYCTA and MTA were not additional insureds because **[****6]** the policy limited liability to instances where BSI, as the named insured, was negligent. The court also granted Burlington's motion to amend the complaint, finding that the anti-subrogation rule did not bar Burlington's claim as the City's subrogee. Burlington then moved for partial summary judgment on its contractual indemnification claim against NYCTA, which the court granted and subsequently entered judgment for Burlington for the $950,000 settlement amount, along with prejudgment interest, fees, and costs.

The Appellate Division reversed, denying plaintiff's motions for summary judgment and to amend the complaint, and granting defendants' cross motion for summary judgment on the first cause of action to the extent of declaring that defendants were entitled to coverage as additional insureds under the Burlington policy *(132 AD3d 127, 14 NYS3d 377 [1st Dept 2015])*. The Court concluded that the named insured was not negligent, but "the act of triggering the explosion . . . was a cause of [the employee's] injury" within the meaning of the policy (*132 AD3d at 134-135*). The Court also determined that as a consequence, it "necessarily follows that the anti-subrogation rule bars Burlington from recovering, as the City's subrogee" (*id. at 138*). We granted Burlington **[****7]** leave to appeal *(27 NY3d 905, 36 NYS3d 618, 56 NE3d 898 [2016])*.

II.

Burlington argues that under the plain meaning of the endorsement NYCTA and MTA are not additional insureds because the acts or omissions of the named insured, BSI, were not a proximate cause of **[**481]** **[***89]** the injury. Put another way, Burlington maintains that the coverage does not apply where, as here, the additional insured was the sole proximate cause of the injury.

In response, NYCTA and MTA also rely on the policy language, but claim that by its express terms the endorsement applies to *any* act or omission by BSI that resulted in injury, regardless of the additional insured's negligence. They further argue that the Appellate Division properly concluded that BSI's operation of its excavation machine provided the requisite causal **[17]** nexus between injury and act to trigger coverage under the policy.

Burlington has the better argument. Applying the relevant legal principles to the policy language, we conclude that there **[*321]** is no coverage because, by its terms, the policy endorsement is limited to those injuries proximately caused by BSI.

A.

"An insurance agreement is subject to principles of contract interpretation" (*Universal Am. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa., 25 NY3d 675, 680, 16 NYS3d 21, 37 NE3d 78 [2015]*). Therefore, "[a]s with the construction of contracts generally, 'unambiguous **[****8]** provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court' " (*Vigilant Ins. Co. v Bear Stearns Cos., Inc., 10 NY3d 170, 177, 884 NE2d 1044, 855 NYS2d 45 [2008]* [citation omitted], quoting *White v Continental Cas. Co., 9 NY3d 264, 267, 878 NE2d 1019, 848 NYS2d 603 [2007]*]).

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The policy here states, in relevant part, that an entity is "an additional insured only with respect to liability for 'bodily injury' . . . caused, in whole or in part, by . . . [BSI's] acts or omissions." The defendants argue that the endorsement does not limit liability to cases in which an insured's acts or omissions are negligent or otherwise legally actionable. Essentially, they advocate that "caused, in whole or in part" means "but for" causation. Under their reading of the policy, all that is necessary for an additional insured to be covered is that the insured's conduct be a causal link to the injury. This is an incorrect interpretation of the policy language, which, by its terms, describes proximate causation and legal liability based on the insured's negligence or other actionable deed.

B.

It is well established in our law that "but for" causation, or causation in fact, is "[t]he cause without which the event could not have occurred" (Black's Law Dictionary [10th ed 2014], but-for cause; Dan B. Dobbs **[****9]** et al., Torts § 186 [2d ed 2011 & June 2017 Update]; *see also* *Koehler v Schwartz, 48 NY2d 807, 808-809, 399 NE2d 1140, 424 NYS2d 119 [1979]*; Lee S. Kreindler et al., New York Law of Torts § 8:3 [14 West's NY Prac Series Aug. 2016 Update]). The term refers to a link in the chain leading to an outcome, and in the abstract does no more than state the obvious, that "[a]ny given event, including an injury, is always the result of many causes" (Dobbs § 189). However, not all "but for" causes result in liability and "[m]ost causes can be ignored in tort litigation" (*id.*). In contrast, "proximate cause" refers to a "legal cause" to which the Court has assigned liability (*Derdiarian v Felix Contr [*322] Corp., 51 NY2d 308, 314, 414 NE2d 666, 434 NYS2d 166 [1980]*; *see* *Hain v Jamison, 28 NY3d 524, 528-529, 46 NYS3d 502, 68 NE3d 1233 [2016]* ["the determination of proximate cause involves, among other things, policy-laden considerations; that is, **[**482]** **[***90]** the chain of causation must have an endpoint in order 'to place manageable limits upon the liability that flows from negligent conduct' "]). The dissent suggests that "proximate cause" and "but-for cause" may be equivalent concepts (dissenting op at 335), but the law is clear that the two are not synonymous **[18]** (*see* Dobbs § 189). As the Court has explained, " 'because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point' " (*Ventricelli v Kinney Sys. Rent A Car., 45 NY2d 950, 952, 383 NE2d 1149, 411 NYS2d 555 [1978]*, *amended 46 NY2d 770, 386 NE2d 263, 413 NYS2d 655 [1978]*, quoting *Palsgraf v Long Is. R.R. Co., 248 NY 339, 352, 162 NE 99 [1928*, Andrews, J., dissenting]).

Here, the Burlington **[****10]** policy endorsement states that the injury must be "caused, in whole or in part," by BSI. These words require proximate causation since "but for" causation cannot be partial. An event may not be wholly or partially connected to a result, it either is or it is not connected. Stated differently, although there may be more than one proximate cause, all "but for" causes bear some connection to the outcome even if all do not lead to legal liability. Thus, these words—"in whole or in part"—can only modify "proximate cause" (*see* Dobbs § 189; Black's Law Dictionary [10th ed 2014], proximate cause; *Hain v Jamison, 28 NY3d at 529*). Defendants' interpretation would render this modification superfluous, in contravention of the rule that requires us to interpret the language "in a manner that gives full force and effect to the policy language and does not render a portion of the provision meaningless" (*Cragg v Allstate Indem. Corp., 17 NY3d 118, 122, 950 NE2d 500, 926 NYS2d 867 [2011]* [citation omitted]).

NYCTA and MTA argue that the language "in whole or in part" was necessary in order to make clear that the parties did not mean "solely caused by." Without the additional language, they contend, the

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endorsement would provide NYCTA and MTA coverage only if BSI's acts or omissions were solely responsible for the loss. **[****11]** We find this argument is unpersuasive because the phrases "caused, in whole or in part, by" and "solely caused by" are not synonymous, either by their plain meaning or legal effect (*see* *Argentina v Emery World Wide Delivery Corp., 93 NY2d 554, 560 n 2, 715 NE2d 495, 693 NYS2d 493 [1999]* [the Court considered "the proximate cause" to mean "a proximate cause" since "there may be more than **[*323]** one proximate cause of an injury"]; *see also* NY PJI 2:70, Comment, Caveat 1).

The endorsement's reference to "liability" caused by BSI's acts or omissions further confirms that coverage for additional insureds is limited to situations where the insured is the proximate cause of the injury. Liability exists precisely where there is fault (Dobbs § 2 ["torts are traditionally associated with wrongdoing" and "(i)n the great majority of cases today, tort liability is grounded in the conclusion that the wrongdoer was at fault in a legally recognizable way"]). That the policy extends coverage to an additional insured "only with respect to liability" establishes that the "caused, in whole or in part, by" language limits coverage for damages resulting from BSI's negligence or some other actionable "acts or omissions."

Since the endorsement language stands on its own, we reject the parties' and the dissent's central premise **[****12]** that if the parties meant "proximate causation," they would have **[9]** included those words in **[**483]** **[***91]** the endorsement.[3] This argument ignores the import of the endorsement's actual language and the rule that we must interpret that language "in a manner that gives [it] full force and effect . . . and does not render a portion of the provision meaningless" (*Cragg, 17 NY3d at 122*). As our law makes clear, it is enough that the parties used words that convey the legal doctrine of proximate causation. The fact that the parties could have used different language to communicate that legal concept is not fatal to Burlington's argument. Giving the words chosen by the parties their plain and ordinary meaning, the endorsement describes proximate cause (*see* *Vigilant Ins., 10 NY3d at 177*). Contrary to the dissent's view, our reference to legal terminology does not signal a departure from the rule that we apply a "plain and ordinary meaning" to the policy language (dissenting op at 334, 338-339). The endorsement expresses in lay terms what the courts have long defined as "proximate causation." Our conclusion as to the legal import of the parties' chosen words does not subject the policy to some heightened standard of contract interpretation.

We similarly reject defendants' **[****13]** invitation to adopt the First Department's conclusion, based on its prior decisions, that the phrase " 'caused by' 'does not materially differ from the . . . **[*324]** phrase, "arising out of" ' " and results in coverage even in the absence of the insured's negligence (*Burlington Ins. Co. v NYC Tr. Auth., 132 AD3d at 135*, citing *W & W Glass Sys., Inc. v Admiral Ins. Co., 91 AD3d 530, 937 NYS2d 28 [1st Dept 2012]*; *National Union Fire Ins. Co. of Pittsburgh, PA v Greenwich Ins. Co., 103 AD3d 473, 962 NYS2d 9 [1st Dept 2013]*). Since the parties did not use the phrase "arising out of," the First Department's analogy is inapt. All that matters is the language adopted by the parties to the insurance policy at issue in this appeal. For the reasons we have explained, "caused, in whole or in part," as used in the endorsement, requires the insured to be the proximate cause of the injury giving rise to liability, not merely the "but for" cause. Furthermore, "arising out of" is not the functional equivalent of "proximately caused by" (*see* *Maroney v New York Cent. Mut. Fire Ins. Co., 5 NY3d 467, 472, 839 NE2d 886, 805 NYS2d 533 [2005]*, citing *Aetna Cas. & Sur. Co. v Liberty Mut. Ins. Co., 91 AD2d 317, 320-321, 459*

[3] We find the dissent's assertion of this argument especially perplexing given that the dissent claims our analysis is flawed for applying legal meaning to the plain words contained in the endorsement (dissenting op at 334).

29 N.Y.3d 313, *324; 79 N.E.3d 477, **483; 57 N.Y.S.3d 85, ***91; 2017 N.Y. LEXIS 1404, ****13; 2017 NY Slip Op 04384, *****04384

NYS2d 158 [4th Dept 1983] [reasoning that the phrase "arising out of" is "ordinarily understood to mean originating from, incident to, or having connection with"]; *see also* Worth Constr. Co., Inc. v Admiral Ins. Co., 10 NY3d 411, 415, 888 NE2d 1043, 859 NYS2d 101 [2008], quoting Maroney, 5 NY3d at 472; Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA, 15 NY3d 34, 38, 930 NE2d 259, 904 NYS2d 338 [2010], quoting Maroney, 5 NY3d at 472).

While we agree with the dissent that interpreting the phrases differently does not compel the conclusion that the endorsement incorporates a negligence requirement (dissenting op **[4]** at 337 n 11), it does compel us to interpret "caused, in whole or **[****14]** in part" to mean more than "but for" causation (*see* Maroney, 5 NY3d **[**484]** **[***92]** at 472; Regal Constr., 15 NY3d at 39). That interpretation, coupled with the endorsement's application to acts or omissions that result in liability, supports our conclusion that proximate cause is required here.

Case law from other jurisdictions makes a similar distinction. The Texas Supreme Court, for example, has held that " 'arise out of' means that there is simply a 'causal connection or relation,' which is interpreted to mean that there is but for causation, though not necessarily direct or proximate causation" (Utica Natl. Ins. Co. of Texas v American Indem. Co., 141 SW3d 198, 203 [Tex Sup Ct 2004] [citation omitted]). Similarly, the Pennsylvania Supreme Court has explained that, " 'arising out of' means causally connected with, not proximately caused by" (Manufacturers Cas. Ins. Co. v Goodville Mut. Cas. Co., 403 Pa 603, 607-608, 170 A2d 571, 573 [Sup Ct 1961]). Furthermore, **[*325]** federal courts have rejected the interpretation espoused by the First Department. For example, in National Union Fire Ins. Co. of Pittsburgh, PA v XL Ins. Am., Inc., the Southern District of New York expressly disapproved the First Department's approach, and held that " 'caused by' requires a showing that [the named insured]'s operations proximately caused the bodily injury for which" indemnity was sought (2013 US Dist LEXIS 68467, *21, 2013 WL 1944468, *7 [SD NY, May 7, 2013, No. 12 Civ 5007(JSR)]; *see also* Wausau Underwriters Ins. Co. v Old Republic Gen. Ins. Co., 122 F Supp 3d 44, 52 [SD NY 2015] ["whether an injury was legally caused by a party's actions is a much more demanding **[****15]** question than whether the injury arose out of those actions"]). The Eastern District of Pennsylvania, when presented with the same additional insured endorsement language at issue in this appeal, held that "caused by" required "proximate cause" in order to trigger coverage (Dale Corp. v Cumberland Mut. Fire Ins. Co., 2010 US Dist LEXIS 127126, *21, 2010 WL 4909600, *7 [ED Pa, Nov. 30, 2010, No. 09-1115]).

Here, BSI was not at fault. The employee's injury was due to NYCTA's sole negligence in failing to identify, mark, or deenergize the cable. Although but for BSI's machine coming into contact with the live cable, the explosion would not have occurred and the employee would not have fallen or been injured, that triggering act was not the proximate cause of the employee's injuries since BSI was not at fault in operating the machine in the manner that led it to touch the live cable.[4]

III.

[4] The dissent argues that "the policy contains coverage for defendants with respect to the underlying matter inasmuch as the accident was produced by and would not have occurred absent BSI's operation of its excavation equipment" (dissenting op at 336-337 [citations, internal quotation marks and brackets omitted]). This interpretation would extend coverage to any and all but-for causes, including turning on and checking the machine the morning of the accident. Certainly the plain meaning of the phrase "caused by" does not ordinarily extend so far, nor could the dissent mean for coverage to extend to such remote circumstances.

29 N.Y.3d 313, *325; 79 N.E.3d 477, **484; 57 N.Y.S.3d 85, ***92; 2017 N.Y. LEXIS 1404, ****15; 2017 NY Slip Op 04384, *****04384

The dissent's concern that our "approach could threaten the stability and sureness of our bedrock rules of insurance policy interpretation" (dissenting op at 338) is unwarranted. Our opinion adheres to contract principles that the plain and ordinary meaning applies and that the parties may freely negotiate the terms of the policy. There is also no basis for the dissent's **[**485]** **[***93]** speculation that our decision may have a "destructive" **[*326]** impact on **[****16]** liability insurance coverage (dissenting op at 339). Our analysis should come as no surprise to the industry because the drafters of the language used here intended it to mean proximate causation.

In crafting the additional insured endorsement, NYCTA required that the policy include additional insured coverage using the latest ISO "Form CG 20 10 or equivalent." In 2004—four years before the parties entered the construction contract and BSI purchased insurance from Burlington—the version of this ISO form was amended to replace the language "arising out of" with "caused, in whole or in part." The change was intended to provide coverage for an additional insured's vicarious or contributory negligence, and to prevent coverage for the additional insured's sole negligence (*see* *Dale, 2010 US Dist LEXIS 127126, *15, 2010 WL 4909600, *5* ["The ISO introduced this revised version of its widely used additional insured endorsements as a response to courts' interpretations of its prior version"]). In describing its motivation for the 2004 amendment, ISO explained that it had "monitored various court decisions and found that courts in many disputes between insurers and insureds have construed broadly the phrase arising out of," and further that "[s]ome **[****17]** courts have ruled that . . . the current additional insured endorsements do respond to injury or damage arising from the additional insured's sole negligence" (Randy J. Maniloff, *Coverage for Additional Insured-Vendors: Recent Markdowns by ISO and New York's High Court*, 19-36 Mealey's Litig Rep Ins 11 [2005]). This, the ISO explained was "contrary to the original intent of the additional insured endorsements" (*id.*). At the heart of the amendment, therefore, was "the preclusion of coverage for an additional insured's sole negligence" (*id.*).

It is therefore defendant's interpretation that would lead to unanticipated results. The purpose of additional insured coverage is to "apportion . . . risks" (Trisha Strode, *From the Bottom of the Food Chain Looking Up: Subcontractors and the Full Costs of Additional Insured Endorsements*, *25 Constr Law* [No. 3] 21, 21-22 [Summer 2005]). "By hiring a subcontractor, a general contractor exposes itself to . . . liability risks, including vicarious responsibility for its subcontractor's negligence" and "[a]dditional insured endorsements represent a way to apportion contractually these risks" (*id.* at 22). The rationale is to "make the party with the most control over the **[5]** risk responsible for suffering the financial loss should it fail to prevent the loss" **[*327]** (*id.*). Therefore, to extend coverage to the additional insureds under the circumstances **[****18]** of this case may frustrate the clear purpose of obtaining additional insured insurance in the first place (*see* 3 Couch on Insurance § 40:26 [June 2017 Update] ["coverage for an additional insured is typically limited to liability arising out of the named insured's work or operations" and "additional insured status does not provide coverage to an additional insured for the additional insured's own work or operations"]). It would allow NYCTA to compel a subcontractor to pay for injuries to its employee which NYCTA proximately caused—an outcome not intended by the parties and contrary to the plain language of the endorsement.

Of course, if the parties desire a different allocation of risk, they are free to negotiate language that serves their interests. Our decision should not be interpreted to limit the venerable right to contract on terms agreed to by the parties (*see* *Chimart Assoc. v Paul, 66 NY2d 570, 574, 489 NE2d 231, 498 NYS2d 344 [1986])*.

29 N.Y.3d 313, *327; 79 N.E.3d 477, **485; 57 N.Y.S.3d 85, ***93; 2017 N.Y. LEXIS 1404, ****18; 2017 NY Slip Op 04384, *****04384

IV.

[**19]** Accordingly, the judgment appealed from and order of the Appellate Division brought up for review should be reversed, with costs, plaintiff's motion for summary judgment on the first cause of action is granted, defendants' cross motion for summary judgment on the first cause of action is denied, and the case remitted to the Appellate Division for further proceedings in accordance with this opinion.

Dissent by: FAHEY

Dissent

Fahey, J.(dissenting).

I respectfully dissent. Bedrock principles of insurance contract interpretation demand that we conclude that defendants are entitled to coverage with respect to the underlying matter as additional insureds under the policy of insurance issued to nonparty Breaking Solutions, Inc. (BSI) by plaintiff.

Facts

This declaratory judgment action overlies a personal injury action that had its genesis in the excavation of a subway tunnel in Brooklyn. In July 2008, defendant New York City Transit Authority (NYCTA) contracted with BSI for the supply of "concrete breakers" and related labor in connection with the project. Pursuant to the contract's insurance requirements, BSI was to obtain, among other things, $2 million in general liability insurance, with respect to which NYCTA, defendant **[*328]** MTA New York City Transit (MTA), and the City of New York were to be named as additional insureds.

BSI honored that commitment and obtained from plaintiff a policy of insurance that, as relevant here, provided an aggregate of $2 million in general liability coverage and contained an endorsement naming defendants as additional **[****20]** insureds thereunder. The subject endorsement (which bears form No. IFG-I-0160 1100) provides, in pertinent part, that defendants **[6]** are additional insureds under the policy "with respect to liability for 'bodily injury' . . . *caused, in whole or in part, by . . . [BSI's] acts or omissions* . . . ." (emphasis added).[1]

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[1] This dispute actually implicates multiple additional insured endorsements. The endorsement on which defendants (and the majority [*see* majority op at 317-318]) rely bears form No. IFG-I-0160 1100 and confers additional insured status upon entities with respect to which BSI had "agreed in writing in a contract . . . [would] be added as an additional insured on [the] policy." As noted, this conferral of coverage is a qualified one; pursuant to this endorsement, such entities are entitled to coverage as additional insureds "with respect to liability for 'bodily injury' . . . *caused, in whole or in part, by . . . [BSI's] acts or omissions*" (emphasis added).

Plaintiff relies on a different endorsement, which bears form No. CG 20 26 07 04 and which designates NYCTA as an additional insured. Similar to the "other" endorsement, this amendment provides coverage with respect to liability for bodily injury "caused, in whole or in part, by [BSI's] acts or omissions." Inasmuch as the coverage afforded under each such endorsement essentially is the same, for the purposes of my analysis it is of no moment that the parties rely on different amendments in seeking to establish what, if any, coverage plaintiff may owe defendants with respect to the underlying action (*cf.* majority op at 326).

29 N.Y.3d 313, *328; 79 N.E.3d 477, **485; 57 N.Y.S.3d 85, ***93; 2017 N.Y. LEXIS 1404, ****20; 2017 NY Slip Op 04384, *****04384

In February 2009, nonparty Thomas P. Kenny was employed by MTA in furtherance of the subject construction project. During the course of that work, an explosion and fire occurred when the drill of one of the machines supplied by BSI contacted a live electrical cable. At the time of the explosion, Kenny was perched on a benchwall, and he fell from that elevated work **[**487]** **[***95]** location while trying to evacuate the tunnel following that incident.

Kenny and his wife subsequently commenced the underlying action (in which they asserted causes of action for common-law negligence and violation of *Labor Law §§ 200*, *240 [1]*, and *241 [6]*, as well as for loss of consortium) in the United States District Court for the Eastern District of New York. BSI tendered the claims in that action to plaintiff under the policy, and plaintiff agreed to defend and indemnify BSI in **[****21]** that matter. Although it did not immediately accept the City's separate **[*329]** tender of coverage with respect to the underlying action, plaintiff initially agreed to provide the City with a defense in that matter subject to a reservation of rights.

Afterwards, the City commenced a third-party action against defendants seeking **[7]** contractual indemnification with respect to the claims asserted against the City in the underlying action. Defendants, in turn, tendered coverage for the claims asserted against them in the third-party action to plaintiff, which agreed to defend defendants with respect thereto subject to a reservation of rights. The reservation of rights was based on plaintiff's theory that "it ha[d] not been determined whether liability was caused by acts or omissions of [BSI]."

The reservation of rights also reflected a temporary coverage position. According to plaintiff, discovery in the underlying action revealed that MTA neither disconnected the electrical cable from a power supply nor warned BSI of that cable, and that the machines supplied by BSI were operated properly at the time of the explosion. Said another way, discovery showed that the series of events giving rise to the Kennys' **[****22]** injuries began with defendants' failure to alert BSI to the "live" electrical cable, which allowed BSI to strike that cable, which, in turn, precipitated the explosion that injured Kenny.

Based on that evidence, plaintiff withdrew its defense and "disclaim[ed]" coverage for defendants in the underlying matter (*cf. Matter of Worcester Ins. Co. v Bettenhauser, 95 NY2d 185, 188, 734 NE2d 745, 712 NYS2d 433 [2000]* ["Disclaimer . . . is unnecessary when a claim falls outside the scope of the policy's coverage portion"]), reasoning that "the uncontroverted evidence establishes that the accident was solely caused by [defendants]." In the meantime, however, plaintiff continued to defend the City in the underlying action, and the claims against the City eventually were settled through a payment plaintiff made to the Kennys on the City's behalf.[2]

By then, plaintiff had commenced this overlying coverage action seeking judgment declaring that defendants are not entitled to coverage under the policy with respect to the underlying matter. Following motion practice, Supreme Court, among other things, entered an order and judgment granting plaintiff summary judgment and making a declaration to that effect.

[*330] On appeal, the Appellate Division reversed the order and judgment and declared "that defendants were entitled **[****23]** to coverage in the underlying personal injury action as additional insured[s] under [the] policy" *(132 AD3d 127, 139, 14 NYS3d 377 [1st Dept 2015]*; *see id. at 134-138*). The Appellate Division noted that "[i]t is undisputed that Kenny's injury was causally connected to an 'act[]' of [BSI]"

[2] The Kennys' claims against BSI were dismissed with prejudice on the Kennys' own motion.

inasmuch as it was BSI's "disturbance **[**488]** **[***96]** of [a] buried electrical cable . . . [that] triggered the explosion that led to Kenny's fall" (*id. at 134*). The Appellate Division added that

> "[w]hile it is true that, because [defendants] had not warned the [BSI] operator of the cable's presence, [BSI's] 'act[ ]' did not constitute negligence, this does not change the fact that the act of triggering the explosion, faultless though it was on [BSI's] part, was a cause of Kenny's injury. **[8]** The language of the relevant endorsement, on its face, defines the additional insured coverage afforded in terms of whether the loss was 'caused by' [BSI's] 'acts or omissions,' without regard to whether those 'acts or omissions' constituted negligence or were otherwise actionable" (*id. at 134-135*).

Given what apparently was the concern with the finality of the Appellate Division order—it left pending the counterclaim defendants asserted for attorneys' fees pursuant to the *Mighty Midgets* rule[3]—Supreme Court entered a final judgment that **[****24]** resolved the fee question and declared that defendants "were entitled to coverage in the underlying personal injury action as additional insureds under [the] policy." We granted plaintiff leave to appeal from that judgment *(27 NY3d 905, 36 NYS3d 618, 56 NE3d 898 [2016])*.

Law

" 'In determining a dispute over insurance coverage, we first look to the language of the policy' " (*Lend Lease [US] Constr. LMB Inc. v Zurich Am. Ins. Co., 28 NY3d 675, 681, 49 NYS3d 65, 71 NE3d 556 [2017]*, quoting *Consolidated Edison Co. of N.Y. v Allstate Ins. Co., 98 NY2d 208, 221, 774 NE2d 687, 746 NYS2d 622 [2002])*. "An insurance agreement," as the majority **[*331]** notes, "is subject to principles of contract interpretation" (*Universal Am. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa., 25 NY3d 675, 680, 16 NYS3d 21, 37 NE3d 78 [2015]*; *see* majority op at 321). It also is true that, " '[a]s with the construction of contracts generally, unambiguous provisions of an insurance contract must be given their *plain and ordinary meaning*, and [that] the interpretation of such provisions is a question of law for the court' " (*Lend Lease, 28 NY3d at 681-682* [emphasis added], quoting *Vigilant Ins. Co. v Bear Stearns Cos., Inc., 10 NY3d 170, 177, 884 NE2d 1044, 855 NYS2d 45 [2008]*; *see Universal Am. Corp., 25 NY3d at 680*, quoting *Cragg v Allstate Indem. Corp., 17 NY3d 118, 122, 950 NE2d 500, 926 NYS2d 867 [2011]* [for the proposition that "(i)nsurance contracts must be interpreted according to common speech and consistent with the reasonable expectations of the average insured"]; *see also* majority op at 321).

These core principles of insurance policy construction are not the only bedrock rules relevant to this analysis (*cf.* majority op at 320-321). We recently reiterated that where a " 'policy may be reasonably interpreted in two conflicting manners, **[****25]** its terms are ambiguous' " (*Lend Lease, 28 NY3d at 682*, **[9]** quoting *Matter of Mostow v State [**489] [***97] Farm Ins. Cos., 88 NY2d 321, 326, 668 NE2d 392, 645 NYS2d 421 [1996]*; *see Chimart Assoc. v Paul, 66 NY2d 570, 573, 489 NE2d 231, 498 NYS2d 344 [1986]* ["The initial question . . . (in determining whether there is any ambiguity in the language) is whether the agreement on its face is reasonably susceptible of more than one interpretation"]). More specifically, we have said that "[a]mbiguity in a contract arises when the contract,

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[3] Under that rule, an insured "cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations" may recover attorneys' fees and expenses incurred in defending against the insurer's "affirmative action . . . to settle its rights" where the insured prevails in that action (*Mighty Midgets v Centennial Ins. Co., 47 NY2d 12, 21, 389 NE2d 1080, 416 NYS2d 559 [1979]*).

29 N.Y.3d 313, *331; 79 N.E.3d 477, **489; 57 N.Y.S.3d 85, ***97; 2017 N.Y. LEXIS 1404, ****25; 2017 NY Slip Op 04384, *****04384

read as a whole, fails to disclose its purpose and the parties' intent, *or* where its terms are subject to more than one reasonable interpretation" (*Universal Am. Corp., 25 NY3d at 680* [emphasis added and internal quotation marks and citations omitted]).

To be sure, "parties cannot create ambiguity from whole cloth where none exists, because provisions 'are not ambiguous merely because the parties interpret them differently' " (*Universal Am. Corp., 25 NY3d at 680*, quoting *Mount Vernon Fire Ins. Co. v Creative Hous., 88 NY2d 347, 352, 668 NE2d 404, 645 NYS2d 433 [1996]*; *see Selective Ins. Co. of Am. v County of Rensselaer, 26 NY3d 649, 655-656, 27 NYS3d 92, 47 NE3d 458 [2016]* ["A contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the (agreement) itself, and concerning which there is no reasonable basis for a difference of opinion" (internal quotation marks omitted)]). "Rather, 'the test to determine whether an insurance contract is ambiguous **[*332]** focuses on the reasonable expectations of the *average insured* upon reading the policy and employing *common* ***[****26]*** *speech*' " (*Universal Am. Corp., 25 NY3d at 680* [emphases added], quoting *Mostow, 88 NY2d at 326-327*; *see Cragg, 17 NY3d at 122*). Of course, " 'any ambiguity must be construed in favor of the insured and *against the insurer*' " (*Lend Lease, 28 NY3d at 682* [emphasis added], quoting *White v Continental Cas. Co., 9 NY3d 264, 267, 878 NE2d 1019, 848 NYS2d 603 [2007]*).

Analysis The Coverage Question

The application of these canons to the subject endorsement[4] demands that we conclude that defendants are entitled to coverage with respect to the underlying matter as additional insureds under the policy. The fact that the explosion and fire were sparked by an action of BSI (the named insured on the policy) means that BSI caused the explosion, and the fact that the explosion knocked Kenny from his elevated work area means that such blast caused **[10]** the underlying accident[5]. To that end, inasmuch as BSI contacted the live wire with one of its devices, it necessarily follows that BSI caused the injuries the Kennys sustained as a result of that incident. Based on that series of events, it **[**490]** **[***98]** also necessarily follows that defendants are additional insureds under the plain and obvious meaning of the endorsement in question.

Indeed, "the existence of coverage [for defendants as additional insureds] does not depend upon a showing that **[****27]** [BSI's] causal conduct was negligent or otherwise at fault" (*132 AD3d at 135*). The endorsement confers additional insured status where the mere *acts* of the named insured cause the bodily injury complained of. If the drafter meant for such status to be contingent upon a *negligent act or acts* of the named insured, **[*333]** then the policy easily could have said as much. That is, the policy could have afforded additional insured status "only with respect to liability for 'bodily injury' . . . caused, in whole or in part, by . . . [the named insured's *negligent*] acts or omissions."

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[4] As noted, the endorsement on which defendants (and the majority) rely provides, in relevant part, that defendants are additional insureds under the policy "with respect to liability for 'bodily injury' . . . *caused, in whole or in part, by . . . [BSI's] acts or omissions*" (emphasis added).

[5] Of course, there may be more than one cause of an accident (*see generally Mazella v Beals, 27 NY3d 694, 706, 37 NYS3d 46, 57 NE3d 1083 [2016]*, citing *Argentina v Emery World Wide Delivery Corp., 93 NY2d 554, 560 n 2, 715 NE2d 495, 693 NYS2d 493 [1999]*). Based on their failure to alert BSI to the "live" electrical cable, defendants surely contributed to the happening of the accident. That fault, however, does not mean that BSI's actions in contacting the wire were not a (non-negligent) cause of that incident.

Similarly, if the drafter intended that coverage under the endorsement be contingent upon a showing of proximate cause, as the majority defines that phrase (*see* majority op at 321-322; *see also infra* at 335), then the policy easily could have been written to contain that condition. Specifically, the policy could have conferred additional insured status "only with respect to liability for 'bodily injury' . . . [*proximately*] caused, in whole or in part, by . . . [the] acts or omissions [of the named insured]." Inasmuch as the endorsement contains none of the aforementioned qualifications, the cardinal rules of policy interpretation require that we conclude that defendants **[****28]** are entitled to coverage with respect to the underlying matter as additional insureds under the policy.[6]

[491] [*334] [***99]** *The Majority's Conclusion*

The majority, of course, has a different interpretation of the policy (*see* majority op at 321). I will address each of what I perceive to be the three main flaws in its analysis in turn.

First, the majority credits plaintiff's obscurative contention with respect to the relevance of the distinction between "but-for causation" and "proximate cause" to this interpretive exercise (*see* majority op at 321-322). As the theory begins, the phrase "caused . . . by" has a *legal meaning* and must refer to either "proximate cause" or "but-for" causation (*see id.*). As the theory continues, the policy language "caused, in whole *or in part*, by . . . [BSI's] acts or omissions" (emphasis added) must refer to "proximate cause" because " 'but for' causation cannot be partial" (*id.* at 10).

In my view, however, there is no basis to apply a *legal meaning*, rather than a *plain and ordinary meaning*, to the word "cause" in this context (*see* Lend Lease, 28 NY3d at 684; Universal Am. Corp., 25 NY3d at 680; *cf.* majority op at 323 [concluding the "plain and **[11]** ordinary meaning" of **[****29]** the endorsement communicates a "legal concept"]). In fact, in ascertaining the plain and ordinary meaning of a provision of an insurance policy, this Court has "regarded dictionary definitions as useful guideposts" (Yaniveth R. v LTD Realty Co., 27 NY3d 186, 192, 32 NYS3d 10, 51 NE3d 521 [2016] [considering a question of statutory interpretation]; *see* Universal Am. Corp., 25 NY3d at 681 [relying on a dictionary to determine "the common definition(s)" of various terms contained in a rider central to the coverage

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[6] Although not determinative of this coverage question, this analysis is consistent with Appellate Division case law (*see e.g.* Aspen Specialty Ins. Co. v Ironshore Indem. Inc., 144 AD3d 606, 607, 42 NYS3d 121 [1st Dept 2016]; *Kel-Mar Designs, Inc. v Harleysville Ins. Co. of N.Y.*, 127 AD3d 662, 663, 8 NYS3d 304 [1st Dept 2015]; Strauss Painting, Inc. v Mt. Hawley Ins. Co., 105 AD3d 512, 513, 963 NYS2d 197 [1st Dept 2013], *mod on other grounds* 24 NY3d 578, 595-596, 2 NYS3d 390, 26 NE3d 218 [2014], *rearg denied* 24 NY3d 1217, 4 NYS3d 599, 28 NE3d 34 [2015]; National Union Fire Ins. Co. of Pittsburgh, PA v Greenwich Ins. Co., 103 AD3d 473, 474, 962 NYS2d 9 [1st Dept 2013]; W & W Glass Sys., Inc. v Admiral Ins. Co., 91 AD3d 530, 937 NYS2d 28 [1st Dept 2012]).

Moreover, the inconsistency of this analysis with National Union Fire Ins. Co. of Pittsburgh, PA v XL Ins. Am., Inc. (2013 US Dist LEXIS 68467, 2013 WL 1944468 [SD NY, May 7, 2013, No. 12 Civ 5007 (JSR)]) and Dale Corp. v Cumberland Mut. Fire Ins. Co. (2010 US Dist LEXIS 127126, 2010 WL 4909600 [ED Pa, Nov. 30, 2010, No. 09-1115]) is of no moment (*cf.* majority op at 324-325). In *National Union Fire Ins. Co.*, the Southern District acknowledged that "the phrase 'caused by' does not obviously disclose a singular meaning" (2013 US Dist LEXIS 68467, *20, 2013 WL 1944468, *6)—thereby hinting at an ambiguity in the endorsement—before "adopt[ing] the reasoning of *Dale* . . . and hold[ing] that 'caused by' requires a showing that [the acts or] operations [of the named insured] proximately caused the bodily injury [at issue]" (2013 US Dist LEXIS 68467, *21, 2013 WL 1944468, *7). *Dale*, however, projected the "proximately caused" language into an endorsement substantively identical to that at issue here (*see* Dale, 2010 US Dist LEXIS 127126, *3-4, 2010 WL 4909600, *1) based on the "drafter's history" (2010 US Dist LEXIS 127126, *21, 2010 WL 4909600, *7)—specifically, the "hope[ ]" of the drafter for a "narrow[ ] coverage interpretation" (*see* 2010 US Dist LEXIS 127126, *16, 2010 WL 4909600, *5). Based on our rules of policy interpretation, it is the policy's language (*see* Lend Lease, 28 NY3d at 681; Consolidated Edison Co., 98 NY2d at 221), not the drafter's explanation of that language, that drives a coverage analysis.

29 N.Y.3d 313, *334; 79 N.E.3d 477, **491; 57 N.Y.S.3d 85, ***99; 2017 N.Y. LEXIS 1404, ****29; 2017 NY Slip Op 04384, *****04384

question in that case]). The term "cause" refers to, among other things, "something that brings about an effect or a result" (Merriam-Webster Collegiate Dictionary 196 [11th ed 2004]; *see* Webster's Third New International Dictionary 356 [2002] [defining cause as, among other things, a "thing . . . that brings about an effect"]; Oxford English Dictionary, http://www.oed.com [accessed May 19, 2017] [defining cause as, among other things, "(t)hat which produces an effect; that which gives rise to any action, phenomenon, or condition"]; Oxford Living Dictionaries, https://en.oxforddictionaries.com/definition/cause [accessed May 16, 2017] [cause is "(a) person or thing that gives rise to an action, phenomenon, or condition"]; Cambridge Dictionary, http://dictionary.cambridge.org/us/dictionary/english/cause [accessed **[*335]** May 16, 2017] [cause is "something without which **[****30]** something else would not happen"]). The application of the plain and ordinary meaning of "cause" to the subject endorsement compels the conclusion that BSI caused the bodily injuries that Kenny sustained as a result of the accident (*see supra* at 332-333), and that defendants therefore are additional insureds under that amendment.[7]

[492]** **[***100]** *Second*, even if legal jargon is relevant to the meaning of "cause," as the word is used in the subject endorsement (*cf.* Universal Am. Corp., 25 NY3d at 680 ["the test to determine whether an insurance contract is ambiguous focuses on the reasonable expectations of the average insured upon reading the policy and employing common speech" (internal quotation marks omitted)]; Cragg, 17 NY3d at 122 ["(i)nsurance contracts must be interpreted according to common speech"]), defendants still would qualify as additional insureds under the policy. To the extent "cause" somehow could be seen to mean "proximate cause" (*cf.* Royal Indem. Co. v Providence Washington Ins. Co., 92 NY2d 653, 659, 707 NE2d 425, 684 NYS2d 470 [1998] [refusing to read into an insurance policy a condition that does not exist therein]), a reasonable mind could define it as something "that is legally sufficient to result in liability" (Black's Law Dictionary 265 [10th ed 2014] [defining "proximate cause"]; *see* majority op at 321-322). This is not, **[****31]** however, to say that "proximate cause" has only one meaning; it also has been defined as "[a] cause that directly produces an event and without which the event would not have occurred" (Black's Law Dictionary 265 [10th ed 2014]).

In view of those competing definitions, projecting the phrase "proximate cause" into the subject endorsement merely would **[*336]** give rise to an ambiguity with respect to the scope of that endorsement (*see generally* Universal Am. Corp., 25 NY3d at 680) that still would result in coverage for defendants. The majority subtly suggests that any ambiguity should be construed in favor of plaintiff because NYCTA "craft[ed] the additional insured endorsement" and "required that the policy include [the subject] additional insured coverage" (majority op at 326; *see generally* State of New York v Home Indem. Co., 66 NY2d 669, 671, 486 NE2d 827, 495 NYS2d 969 [1985]). The same suggestion is buttressed by reference to the post hoc plea of the drafter of at least one of the subject endorsements that such amendment intended to " 'preclu[de] . . . coverage for an additional insured's sole negligence' " (majority

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[7] Two additional points are relevant here.

First, in lieu of acknowledging and addressing the litany of dictionary definitions that compel the conclusion that defendants are entitled to coverage with respect to the underlying matter as additional insureds under the policy (*see supra* at 334-335), the majority advances an unavailing argumentum ad absurdum (*see* majority op at 325 n 4).

Second, the majority's point that its "analysis [to the contrary] should come as no surprise to the industry because the drafters of the language used here intended it to mean proximate causation" (majority op at 326; *see id.*, citing Randy J. Maniloff, *Coverage for Additional Insured-Vendors: Recent Markdowns by ISO and New York's High Court*, 19-36 Mealey's Litig Rep Ins 11 [2005]) is of no moment. Irrespective of whether the reference to "industry" pertains to the insurance industry or to the construction industry, the point remains that the intent of the drafter is immaterial to this analysis. It is what the drafter *said*, not what the drafter may have *meant to say*, that guides our review of this coverage question.

op at 326, quoting Randy J. Maniloff, *Coverage for Additional Insured-Vendors: Recent Markdowns by ISO and New York's High Court*, 19-36 Mealey's Litig Rep Ins 11 [2005])[8]. The rule, however, remains that **[**493]** **[***101]** ambiguous policy language is interpreted in favor of **[12]** the insured (*see* *Lend Lease, 28 NY3d at 682*; *White, 9 NY3d at 267*; *Breed v Insurance Co. of N. Am., 46 NY2d 351, 353, 385 NE2d 1280, 413 NYS2d 352 [1978]*)[9]. To that end, even assuming that "cause," as it is used in the subject endorsement, is ambiguous, **[****32]** we still must conclude that the policy contains coverage for defendants with respect to the underlying **[*337]** matter inasmuch as the accident was "produce[d]" by and "would not have occurred" (Black's Law Dictionary 265 [10th ed 2014] [defining "proximate cause"]) absent BSI's operation of its excavation equipment (*cf.* *Derdiarian v Felix Contr. Corp., 51 NY2d 308, 315, 414 NE2d 666, 434 NYS2d 166 [1980]* ["There are certain instances . . . where only one conclusion may be drawn from the established facts and where the question of legal cause may be decided as a matter of law"], *rearg denied 52 NY2d 784, 417 NE2d 1010, 436 NYS2d 622 [1980]*).

Third, and finally, the majority misses the mark with its conclusion that the reference to "liability" in the subject endorsement modifies the "caused . . . by" language of that amendment (*see* majority op at 323)[10]. Under the plain language of the subject endorsement, **[13]** the phrase "liability for 'bodily injury' " articulates one of the classes of risks covered by that part of the policy, whereas the phrase "caused . . . by . . . [BSI's] acts or omissions" speaks to the circumstances that trigger that coverage (*see* *Worth Constr. Co., Inc. v Admiral Ins. Co., 10 NY3d 411, 415-416, 888 NE2d 1043, 859 NYS2d 101 [2008]*). If plaintiff wanted the endorsement to limit coverage to circumstances in which the named insured (here, BSI) was negligent, then it should have written the policy to say as much. To **[****33]** the extent the endorsement does not unambiguously confer additional insured status upon defendants in this instance (*cf. supra* at 332-333), the majority's analysis ignoring what at "worst" (from the prospective of the putative additional insureds) is an ambiguity in that language overlooks our teachings that, when there is doubt with respect to the meaning of an insurance policy, an insurer should revise the policy so as to leave no doubt as to the meaning of that contract.[11]

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[8] As noted (*see supra* at 328 n 1), two endorsements are relevant to this matter. One such endorsement, on which plaintiff relies, bears both form No. CG 20 26 07 04 and an Insurance Services Office (ISO) copyright. The other such endorsement, on which defendants (and the majority) rely, bears form No. IFG-I-0160 1100, but has no ISO copyright.

The point remains that the intent of the drafter is immaterial to this coverage analysis (*see supra* at 335 n 7). The majority's reference to extrinsic evidence of what apparently was ISO's intent to " 'preclu[de] coverage for an additional insured's sole negligence' " (majority op at 326, quoting Randy J. Maniloff, *Coverage for Additional Insured-Vendors: Recent Markdowns by ISO and New York's High Court*, 19-36 Mealey's Litig Rep Ins 11 [2005]) in form No. CG 20 26 07 04, however, is misplaced for an additional reason: such evidence does not apply to the endorsement on which defendants and the majority rely. That amendment does not bear an ISO copyright, meaning that it apparently was prepared by a different drafter and therefore may have been based on intent different from that underlying the "CG" form in question.

[9] There is no contention that the rule that an ambiguity in the policy should be construed against the insurer that drafted that compact does not apply on the ground that "the basic concept and terms [of the endorsement] originated with [defendants], that [defendants are] sophisticated and [were] instrumental in crafting various parts of the agreement, and that [defendants], while not an insurance company, had equal bargaining power and acted like an insurance company by maintaining a self-insured retention" (*Cummins, Inc. v Atlantic Mut. Ins. Co., 56 AD3d 288, 290, 867 NYS2d 81 [1st Dept 2008]*).

[10] As (twice previously) noted, the endorsement on which defendants (and the majority) rely provides, in relevant part, that defendants are additional insureds under the policy "with respect to liability for 'bodily injury' . . . *caused, in whole or in part, by . . . [BSI's] acts or omissions*" (emphasis added).

[11] There are two notable (and intentional) omissions from my review of this coverage question. First, I have not compared the phrase "arising out of"—which this Court has treated in, among other cases, *Maroney v New York Cent. Mut. Fire Ins. Co. (5 NY3d 467, 472, 839 NE2d 886,*

29 N.Y.3d 313, *337; 79 N.E.3d 477, **493; 57 N.Y.S.3d 85, ***101; 2017 N.Y. LEXIS 1404, ****33; 2017 NY Slip Op 04384, *****04384

[494] [*338] [***102] [14]** *The Effect of the Majority's Ruling*

In multi-jurisdictional commercial transactions, New York law frequently is chosen as the governing law based on its stability and predictability. Insurance coverage matters of this nature perhaps are a small subset of the expansive field of commercial litigation.

Similar to "typical" commercial litigation, however, insurance coverage disputes should be resolved through law that is certain and clear. The majority's approach could threaten the stability and sureness of our bedrock rules of insurance policy interpretation. Indeed, it is the benefit of certainty in our rules of interpretation, not concern with the occasionally **[****34]** "unanticipated result[ ]" (majority op at 326) to which the application of those rules may lead, that should be of paramount importance here.

By extension, that approach could also threaten the likely millions of consumers of insurance in this state by providing a rationale to read into insurance contracts language that is not there. "[I]nsurance in modern society affects an overwhelming part of the population" (*68 NY Jur 2d, Insurance § 1*). To that end, in furtherance of the public interest (*see generally Curiale v Ardra Ins. Co., 88 NY2d 268, 276, 667 NE2d 313, 644 NYS2d 663 [1996]*), the legislature has, either of its own accord or through latitude afforded the current and former incarnations of the State Insurance Department (*see Insurance Law § 301*), protected consumers who purchase insurance—such as "auto," "home," and "life" policies—for everyday needs. Indeed, that deliberative body has either enacted or countenanced numerous protective rules with respect to minimum standards and mandatory policy language (*see e.g. Insurance Law art 34*; 11 NYCRR parts 52, 60).

For its part, this Court has long promoted certainty and safeguard in crafting its rules of policy interpretation. Insurance contracts are to be viewed through the eyes of the average consumer and deciphered not through "legalese," but by **[*339]** means of plain and common speech. Moreover, where there **[****35]** is uncertainty with respect to the existence of coverage, we fall on the side of the insured and conclude that coverage exists.

The majority's decision obviously impacts the subject endorsement and similar policy language. We hope, however, that **[**495] [***103]** its reach will not extend more broadly and that its effect will not be destructive. At best, the decision reflects a departure from, but not a disavowal of, long-held precepts of policy construction.

Chief Judge DiFiore and Judges Garcia and **[15]** Wilson concur; Judge Fahey dissents and votes to affirm in an opinion in which Judge Stein concurs.

Judgment appealed from and order of the Appellate Division brought up for review reversed, with costs, plaintiff's motion for summary judgment on the first cause of action granted, defendants' cross motion for

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805 NYS2d 533 [2005]—to the phrase "caused . . . by." This case turns on our interpretation of the instant "caused . . . by" language, not on the question whether the "caused . . . by" phrase should or should not have the same meaning as the "arising out of" language we addressed in *Maroney* and in other cases. It suffices to say that interpreting the phrases "arising out of" and "caused . . . by" differently does not compel the conclusion that the latter phrase incorporates a negligence requirement.

Second, I also have not treated plaintiff's contention that the volunteer doctrine does not apply here (*see Dillon v U-A Columbia Cablevision of Westchester, 100 NY2d 525, 526, 790 NE2d 1155, 760 NYS2d 726 [2003]*; *National Union Fire Ins. Co. v Ranger Ins. Co., 190 AD2d 395, 397, 599 NYS2d 347 [4th Dept 1993]*; *cf. 132 AD3d at 133-134* [addressing the cause of action for subrogation that plaintiff asserted against NYCTA, which has no bearing on this case to the extent defendants are covered under the policy]). I agree with the majority's implicit conclusion (*see* majority op at 327) that the question whether to apply the volunteer doctrine here is best left to the Appellate Division.

29 N.Y.3d 313, *339; 79 N.E.3d 477, **495; 57 N.Y.S.3d 85, ***103; 2017 N.Y. LEXIS 1404, ****35; 2017 NY Slip Op 04384, *****04384

summary judgment on the first cause of action denied, and case remitted to the Appellate Division, First Department, for further proceedings in accordance with the opinion herein.

End of Document

City Club of N.Y. v Extell Dev. Co.

Supreme Court of New York, New York County

June 11, 2019, Decided

154205/2019

Reporter
2019 N.Y. Misc. LEXIS 3111 *; 2019 NY Slip Op 31645(U) **

[1]** THE CITY CLUB OF NEW YORK, 10 WEST 66TH STREET CORPORATION, JAMES BERRY, JAN CONSTANTINE, VICTOR KOVNER, AGNES MCKEON, ARLENE SIMON, RICHARD GOT TFRIED, Plaintiffs, - v - EXTELL DEVELOPMENT COMPANY, WEST 66TH SPONSOR LLC, Defendants. INDEX NO. 154205/2019

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

Core Terms

zoning, tower, height, building's, feet, defendants', spaces, mechanical, moot, plaintiffs', regulations, split, bulk, administrative remedy, provisions, percent, exhaust, futile, site, floor area, calculation, violates, exhaustion of administrative remedies, cross motion, appeals, smaller, taller, floor, preliminary injunction, irreparable injury

Judges: [*1] HON. BARBARA JAFFE, J.S.C.

Opinion by: BARBARA JAFFE

Opinion

DECISION AND ORDER

HON. BARBARA JAFFE:

BARBARA JAFFE, J.:

In this action, plaintiffs seek declaratory judgments and injunctive relief with respect to defendant Extell's construction of a building at 36 West 66th Street which is within the Special Lincoln Square District. They assert that Extell's calculation of the height of the building's tower violates several zoning regulations.

I. BACKGROUND

In May 1993, the Department of City Planning undertook the Special Lincoln Square District Zoning Review, and proposed, as pertinent here, regulations that "combined would result in building heights in the range of the mid-20 to 30 stories tall, which would complement the district's existing neighborhood character." (NYSCEF 7). And, "to foster a positive relationship **[**2]** between [a building's] tower and base and a more successful massing of a development's bulk, and to avoid excessive height," the Department also proposed controls to govern the massing and height of new buildings throughout the district. The proposed regulations would require a minimum of 60 percent of a development's total floor area to be located below an elevation of 150 feet and result in a **[*2]** better relationship between the base and tower portions of buildings, producing building heights ranging from the mid-20 to 30 stories.

On December 20, 1993, the regulations were enacted. They, *inter alia*, limit the amount of floor area that may be built on a lot and prescribe how the floor area is to be distributed within a building. (Special District rules ZR §§ 82-34 ["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"]; and 82-36 ["At any level at or above a height of 85 feet above curb level, a tower shall occupy in the aggregate: (1) not more than 40 percent of the lot area of a zoning lot; and (2) not less than 30 percent of the lot area of a zoning lot"]).

I. AMENDED VERIFIED COMPLAINT (NYSCEF 51)

In April 2015, Extell, owner of a site of four lots in the Special District, completed a plan for the construction of a 775-foot tall building, premised on the anticipated acquisition of two additional lots. The plan includes a 160-foot high mechanical space and a tower of a height based on the bulk of all of the lots within the site even though the **[*3]** site straddles two zoning districts, one of which does not permit towers. (NYSCEF 6).

Instead of seeking a permit for the 775-foot building, Extell applied to the New York City Department of Buildings (DOB) on November 24, 2015 for a permit to build a smaller, 292-foot tall building.

In June 2016, the New York State Attorney General approved Extell's 2016 acquisition **[**3]** of another lot.

On June 7, 2017, the DOB granted Extell's application to build the smaller building, upon which construction commenced.

On December 13, 2017, Extell filed with the DOB the April 2015 plan for the taller building in issue here.

In February 2018, the City Planning Department considered a proposal to eliminate, as pertinent here, the exemption from a building's allowable floor area of mechanical spaces taller than 25 feet.

On July 26, 2018, the DOB approved Extell's plan for the 775-foot tall building. On September 9, 2018, plaintiff 10 West 66th Street Corporation and non-party Landmarks West! (LW) challenged the plan on the grounds that (1) the 160-foot high mechanical space violates the intent of the ZR, and (2) the calculation of the height of the tower is based on the entire lot including those portions lying **[*4]** within the zoning district that prohibits towers, thereby violating the split lot regulations (ZR §§ 33-48 ["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 to not apply, the provisions set forth in Article II, Chapter 7 shall apply"] and 77-02 ["Whenever a zoning lot is divided by a boundary between two or more districts . .

. each portion of such zoning lot shall be regulated by all the provisions applicable to the district in which such portion of the zoning lot is located"]). Construction pursuant to the June 7, 2017 permit for the smaller building continued.

On November 19, 2018, the DOB rejected 10 West's and LW's challenge to Extell's plan, finding that the ZR prescribes no height limit for building floors and that the split lot rules do not apply to the calculation of the bulk package because the Special District rule applies to **[**4]** "all portions of a zoning lot located within the Special District regardless of the zoning district designations." Thus, as the R8 and C4-7/R10 portions of the lot are "within the Special District," the bulk packing calculation must be based on both **[*5]** portions, notwithstanding the split lot rules. LW appealed the DOB's rejection to the Board of Standards and Appeals (BSA).

On January 14, 2019, the DOB issued a notice that it intended, within 15 days, to revoke its approval of the plan, absent information demonstrating that the approval should not be revoked. It stated only that the proposed mechanical space "does not meet the definition of 'accessory use' of § 12-10 of the [ZR]," and that a floor height of 160 feet is "not customarily found in connection with residential uses." (NYSCEF 12). The DOB thereupon rescinded its denial of LW's challenge, and "[a]s a result," LW's appeal to the BSA "ground to a halt." Construction continued and Extell revised the plan to include a single 160-foot void with three smaller voids totaling 176 feet, thereby bringing the height of the mechanical space alone to 196 feet.

On April 4, 2019, the DOB withdrew its notice of intent to revoke based on a letter timely filed by Extell's land use counsel.

On April 9, 2019, the Planning Commission approved the proposal limiting the height of mechanical spaces although it raised the exemption from the proposed 25 feet to 30 feet.

On April 11, 2019, the DOB issued a **[*6]** permit for the 775-foot tower.

Based on the foregoing, Extell's proposed building violates ZR § 82-34, the bulk packing regulation. If completed, the building will be the tallest building on Manhattan's Upper West Side, hundreds of feet taller than allowed in the Special Lincoln Square District, some 95 percent of which is zoned C4-7/R10 which permits "the highest level of residential density in the City" and towers. Towers are not permitted within two blocks comprising 5.3 percent of the district, **[**5]** which is zoned R8. The site in issue is split between the two districts: 64.2 percent of the site is within the C4-7/R10 district and 35.8 percent is within the R8 district.

While Extell properly calculated the total allowable floor area and tower coverage based on the portion of the lot where the tower is allowed, in calculating the required bulk below 150 feet, contrary to the rationale of the regulation and Zoning Resolution (ZR), it included within the floor area the portion of the site where a tower is not allowed, thereby adding to the base and resulting in greater height to the tower and a ratio of the base to the tower of 48 to 52, instead of 60 to 40.

Additionally, the requirement that the **[*7]** total square footage of the tower and base not exceed the total allowable square footage is not met as the total square footage of the tower and base (548,535) "adds up to 30 percent more than the allowed 421,269." Thus, "[t]he excess tower square footage (50,899) increases the height of the tower, while the excess base square footage is in a district where towers are not allowed."

Extell also violated the ZR by including four "cavernous volumes" totaling 196 feet in height, purportedly for mechanical equipment. Two of the voids are each 64 feet high (floors 17 and 18), one is 48 feet high

(floor 19), and another is 20 feet high (floor 15). These spaces are "'not customarily found in connection with residential uses,' as the [ZR] requires for an 'accessory use.' Nor are they 'space[s] used for mechanical equipment,' as defined by ZR § 12-10." And on floor 16 is a 42-foot high "residential amenity space."

Plaintiffs allege that Extell deceptively submitted to the DOB its plan for the smaller building notwithstanding its intent to build the taller building, thereby obtaining an opportunity to commence building on the site with the hope of reaching a stage of construction that will effectively **[*8]** moot any violation of the applicable rules by the time of a final agency determination.

[6]** II. PROCEDURAL BACKGROUND

This case commenced on April 25, 2019, with the filing of the pleadings with a proposed order that would require defendants to show cause as to why they should not be enjoined and temporarily restrained from proceeding with the construction pending a final resolution of the action. (NYSCEF 2). Oral argument was held, after which the request for a temporary restraining order was denied based on defendants' guarantee that no significant construction would be performed that would render any ultimate determination moot by May 28, 2019, the date then set for oral argument on plaintiffs' application for a preliminary injunction.

On May 7, 2019, six of the seven plaintiffs sought from the BSA an expedited appeal of the DOB's determination and on May 13, 2019, LW filed its own appeal. (NYSCEF 30, 31).

On May 21, 2019, defendants filed a cross motion to dismiss the complaint. (NYSCEF 28). On May 26, 2019, plaintiffs filed their opposition to the cross motion to dismiss. (NYSCEF 53).

After oral argument on the cross motion to dismiss and the motion for the preliminary injunction, decision **[*9]** was reserved. (NYSCEF 54). The appeals before the BSA pend. (*Id.*).

In light of the potentially dispositive nature of defendants' cross motion, it is first addressed.

III. DEFENDANTS' CROSS MOTION TO DISMISS

A. Contentions

1. Defendants (NYSCEF 28-50)

Defendants argue that as a threshold matter, plaintiffs' failure to exhaust their administrative remedies mandates the dismissal of the complaint in its entirety, and maintain that an adjudication by me as to whether defendants' plan violates the ZR would "usurp the BSA's **[**7]** role as the expert agency with exclusive jurisdiction to decide appeals from DOB determinations."

In reliance on *Watergate II Apartments v Buffalo Sewer Authority, 46 NY2d 52, 57, 385 N.E.2d 560, 412 N.Y.S.2d 821 (1978)*, defendants maintain that although plaintiffs need not exhaust administrative remedies when "resort to an administrative remedy would be futile" or where pursuing the administrative remedy "would cause irreparable injury," plaintiffs show neither. They moreover deny that a failure to exhaust is excused where the claim presents a purely legal interpretation of statutory terms, and assert that, in any

event, no purely legal interpretation of statutory terms is presented here. Rather, they observe, an adjudication of this case would require "a careful analysis of **[*10]** multiple [ZR] provisions, the interplay of those provisions with each other, and their application to the Project Site," and that "plaintiffs' reliance on legislative history to support their interpretation of the statute belies their claim that the relevant provisions are straightforward."

Defendants also claim a further restriction on the right to seek judicial relief, namely, where the Legislature has, as here, specifically delineated exclusive steps for seeking it. They assert that as the City Charter provides that the DOB has the "exclusive" power, subject to review only by the BSA to "examine and approve or disapprove plans for the construction or alteration of any building or structure" and to "require that the construction or alteration of any building or structure . . . shall be in accordance with the provisions of law" (*Charter § 645(b)*, plaintiffs are foreclosed from seeking an adjudication here without first appealing to the BSA.

Defendants also argue that pursuant to *CPLR 3211(a) (10)*, plaintiffs' failure to join the DOB or the City of New York as a party defendant is fatal "because the complaint seeks to annul a DOB determination," and that the DOB must have an opportunity to defend its issuance **[*11]** of the permit sought to be annulled.

[8]** 2. Plaintiffs (NYSCEF 53)

Plaintiffs claim that they are excused from exhausting administrative remedies due to the futility of doing so, relying on *Lehigh Portland Cement Co. v NYS Dept. of Envtl. Conservation, 87 NY2d 136, 141, 661 N.E.2d 961, 638 N.Y.S.2d 388 (1995)*, and defendants' statement in its memorandum of law that the DOB and BSA have "recognized on multiple occasions that nothing in the [ZR] regulates or limits the height of a building's mechanical spaces." They distinguish *Bankers Trust* as an inapposite tax case.

Irreparable injury also remains viable as an exception to the exhaustion requirement, plaintiffs assert, relying on *Watergate II Apartments, 46 NY2d at 57*, and *Haddad v Salzman, 188 AD2d 515, 516, 591 N.Y.S.2d 193 (2d Dept 1992)*, among other decisions. They maintain that their claim "could well become moot before it could be adjudicated in this Court, let alone on appeal," and that defendants do not dispute that appeals to the BSA can take a year or more.

Plaintiffs also cite authority for their contention that pure questions of law are exempt from the exhaustion requirement where the facts are not in dispute.

In response to defendants' claim that their complaint must be dismissed for failure to join the DOB, plaintiffs maintain that absent any relief sought from the DOB, it is not a necessary party.

Alternatively, plaintiffs ask that if it is determined **[*12]** that they must exhaust their administrative remedies before proceeding here, this action should be stayed instead of dismissed, pending the BSA's decision and an adjudication on the merits here.

B. Oral argument (NYSCEF 54)

Plaintiff's counsel observed that defendants' argument that the split lot rules do not apply in calculating the bulk packing rule is solely based on the rule's initial words, "[w]ithin the **[**9]** Special District" which,

according to defendants, mandates that the rule apply "everywhere" in the Special District, thereby superseding the split lot rules. He argued that such an interpretation is inconsistent with the legislative history and that the phrase "within the Special District" was intended to distinguish the Special District versions of the bulk packing rule from others.

It was also argued by plaintiff's counsel that notwithstanding defendants' position that the case will not be moot given the request for a preliminary injunction, to his knowledge, no private party has succeeded in obtaining even the partial demolition of a completed building for a zoning violation, and he distinguished *Matter of Parkview Assocs. v City of New York, 71 N.Y.2d 274, 519 N.E.2d 1372, 525 N.Y.S.2d 176 (1988)*, for the City's having issued a stop work order on the suspicion that a building **[*13]** inspector had been bribed.

Defendants' counsel explained that for properties within a Special District, "the underlying zoning remains in effect." Thus, the split lot rules are superseded.

C. Analysis

While it is well-settled that available administrative remedies must be exhausted before litigating the propriety of an administrative determination, the rule is not absolute, such as where, as here, it is alleged that resort to an administrative remedy would be futile or when its pursuit would cause irreparable injury (*Watergate II Apartments, 46 NY2d at 57*), or when the zoning rule in issue is so clear and unambiguous that deference to administrative expertise is not warranted (*Matter of Raritan Dev. Corp. v Silva, 91 NY2d 98, 689 N.E.2d 1373, 667 N.Y.S.2d 327 [1997]*).

1. Futility

In *Lehigh Portland Cement Co.*, the Court excused the plaintiff from exhausting administrative remedies, finding that "[u]nder the particular circumstances" of the case, "any resort by plaintiff to administrative remedies would have been futile." (*87 NY2d at 141*). There, **[**10]** the plaintiff had demonstrated that the administrative agency had "clearly and unequivocally stated its long-established position" in issue, "both in correspondence with plaintiff and through the affidavit of the Chief Permit Administrator" who consulted with his counterparts and with **[*14]** his Division of Legal Affairs, and thereby "affirmed" the agency's "longstanding position." Moreover, the Court observed, the agency had "arrived at a definitive position which concretely affected the status" of the plaintiff's petitions which was communicated to the plaintiff (*Id.*).

Since *Lehigh*, other courts have found futility in attempting to exhaust an administrative remedy when the agency has "dug in its heels and made clear that all such applications will be denied." (*Murphy v New Milford Zoning Comm'n, 402 F.3d 342, 349 [2d Cir 2005]*; *Matter of Cornwall Commons, LLC v Town of Cornwall, 163 AD3d 810, 814, 82 N.Y.S.3d 428 [2d Dept 2018]*; *East End Resources, LLC v Town of Southold Planning Bd., 135 AD3d 899, 900-901, 26 N.Y.S.3d 79 [2d Dept 2016]*).

Here, the DOB's notice of intent to revoke its approval of the plan signals that it had been open to plaintiffs' position with respect to the mechanical spaces, notwithstanding the subsequent success of defendants' land use counsel in persuading it otherwise. That the DOB and BSA have recognized "on multiple occasions that nothing in the Zoning Resolution regulates or limits the height of a building's mechanical spaces" constitutes

a simple statement of fact which falls short of a clear and unequivocal statement of a long-established position that concretely affects plaintiffs' challenge. Rather, it remains possible that the BSA will agree with plaintiffs that an aggregation of mechanical spaces, where one **[*15]** or all are used solely as voids to increase the building's height, violates at least the spirit of the ZR.

Moreover, plaintiffs do not assert that the BSA has clearly and equivocally stated a position concerning the interplay among the bulk package rule, the split lot rules, and any other **[**11]** provision in the ZR limiting a building's height. Thus, it is not demonstrated that the DOB or BSA has dug in its heels.

For these reasons, plaintiffs do not demonstrate that an appeal to the BSA would be futile.

2. Irreparable injury

Plaintiffs' assertion that they will be irreparably injured should they be required to exhaust their administrative remedies before seeking judicial relief relies on an anticipation that ongoing construction by defendants will render their challenge moot should a point be reached where demolition would not be ordered.

In revisiting the issue of mootness as it relates to the substantial completion of construction, the Court in *Matter of Citineighbors Coalition of Historic Carnegie Hill v New York City Landmarks Preserv. Commn., 2 NY3d 727, 729, 811 N.E.2d 2, 778 N.Y.S.2d 740 (2004)*, reiterated its observations in *Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach, 98 NY2d 165, 172, 774 N.E.2d 193, 746 N.Y.S.2d 429 (2002)*, that while the progress of construction must be considered in determining mootness, a 'race to completion [of a building] cannot be determinative . . ." Other factors to be considered as to mootness in the construction **[*16]** context is whether a plaintiff had sought injunctive relief "to prevent construction from commencing or continuing during the pendency of the litigation," "whether work was undertaken without authority or in bad faith, and whether substantially completed work is 'readily undone, without undue hardship." (*Matter of Citineighbors, 2 NY3d at 729*).

Although there is apparently an astonishing possibility that the BSA will take more time to render a decision than it would take to build a 775-foot building notwithstanding the parties' joint request for an expedited ruling, it is by no means assured that, given the variety of factors **[**12]** that can stall construction, the building's height will reach a point where a finding by the BSA would become moot.

In any event, having sought an injunction, plaintiffs preserved their right to seek demolition of the building should the BSA uphold their challenge to the plan. (*See e.g., Matter of Parkview Assocs. v City of New York, 71 N.Y.2d 274, 519 N.E.2d 1372, 525 N.Y.S.2d 176 [1988]* [city not estopped from revoking building permit even though owner engaged in substantial construction in reliance thereon]; *Matter of Micklas v Town of Halfmoon Planning Bd., 170 AD3d 1483, 97 N.Y.S.3d 339 [3d Dept 2019]* [substantial completion of building addition did not render appeal moot as addition could be razed]; *Town of N. Elba v Grimditch, 131 AD3d 150, 13 N.Y.S.3d 601 [3d Dept 2015]*, *lv denied 26 N.Y.3d 903, 17 N.Y.S.3d 84, 38 N.E.3d 830 [2015]* [given defendants' violations of zoning code, requiring them to dismantle and **[*17]** remove offending buildings provident exercise of court's discretion]; *Matter of Massa v City of Kingston, 284 AD2d 836, 728 N.Y.S.2d 533 [3d Dept 2001]*, *lv denied 97 N.Y.2d 603, 760 N.E.2d 1288, 735 N.Y.S.2d 492 [2001]* [affirming court-ordered demolition of illegally constructed addition]).

That defendants intended from the outset to build the 775-foot building does not prove that they did so in bad faith as it is undisputed that the plan for the taller building was contingent upon the acquisition of the other two lots, and plaintiffs cite no authority for the proposition that Extell was foreclosed from seeking a permit for the smaller building in order to commence building what it hoped would become a taller building. Nor is it disputed that defendants were not obliged to disclose their ambition in that regard. The jump on construction that defendants had thereby obtained is insufficient justification for halting the project based on the possibility that the building will reach a point of no return by the time the BSA rules on plaintiffs' challenge.

Plaintiffs are not alone in facing a risk. If defendants complete or substantially complete **[**13]** the building before the BSA renders a determination, they assume the risk that they will be obliged to demolish it. (*See* Matter of Micklas, 170 AD3d at 1485 [Supreme Court made clear that injunctive relief remained **[*18]** possible if petitioners prevailed; thus respondent had "every incentive to limit its construction activity" and was "on notice that completion was undertaken at its own risk"]; Shumaker v Town of Cortlandt, 143 AD2d 999, 1001, 533 N.Y.S.2d 886 [2d Dept 1988] [order requiring defendant to remove building if adverse decision issued against him under amended zoning ordinance proper, as "hardship was self-imposed in that he engaged in a reckless effort to complete" building before decision rendered]; *Queens Neighborhood United v New York City Dept. of Bldgs., 62 Misc 3d 1210[A], 2019 NY Slip Op 50082[U] [Sup Ct, NY County 2019]* [as respondents contended that completion not equivalent to mootness, they cannot later argue mootness once building finished which would be "disingenuous" and "dishonest abuse of court system").

3. Need for BSA's expertise

The parties disagree as to the meaning of the words "[w]ithin the Special District" in the bulk packing rule set forth in ZR § 82-34 and its interplay with the split lot rules set forth in ZR §§ 77-01 and 77-02. Plaintiffs insist both that defendants' reading of the rules is wrong and that their meaning is so clear and unambiguous that the expert input of the BSA is unnecessary. Defendants deny that their interpretation of the rules is wrong and otherwise insist that their meaning is sufficiently ambiguous to require the BSA's expert input.

Whether the words "[w]ithin the **[*19]** Special District" render the split lot rules inapplicable depends on an interplay of other rules. Thus, the provision is not so clear and unambiguous that deference to the BSA is not needed. (*See* Beekman Hill Assn. v Chin, 274 A.D.2d 161, 166-167, 712 N.Y.S.2d 471 [1st Dept 2000], *lv denied 95 N.Y.2d 767, 742 N.E.2d 123, 719 N.Y.S.2d 647* [provision of ZR not clear and unambiguous, thus **[**14]** deference to administrative expertise warranted on CPLR article 78 proceeding]; *cf* Matter of Raritan Dev. Corp. v Silva, 91 NY2d 98, 103, 689 N.E.2d 1373, 667 N.Y.S.2d 327 [1997] [statutory language "could not be clearer"]). Thus, the issue should be first presented to the BSA, which has been described as having "primary jurisdiction" in resolving zoning issues. (*See* Matter of Weissman v City of New York, 96 AD2d 454, 457, 464 N.Y.S.2d 764 [1st Dept 1983], *lv dismissed 60 N.Y.2d 815, 457 N.E.2d 796, 457 N.E.2d 807, 469 N.Y.S.2d 700 [1983]* [whether building subject to restrictive provisions of Special Clinton District is within BSA's primary jurisdiction, particularly where issue complex and involving interpretation of zoning resolutions; petitioners should have exhausted administrative remedies before commencing CPLR article 78 proceeding]). Consequently, the BSA's alleged exclusive authority to rule on plaintiffs' challenge need not be addressed.

4. Finding

Absent findings of futility and irreparable injury, and given the need for the BSA's expertise, plaintiffs have not demonstrated that they should be excused from exhausting their administrative remedies. Thus, there is no need to consider their application **[*20]** for a preliminary injunction. (*See* *Koultukis v Phillips, 285 AD2d 433, 435, 728 N.Y.S.2d 440 [1st Dept 2001]* [injunction denied as parties failed to exhaust administrative remedies, where DOB's "determination will not be based on pure questions of law alone"]; *Haddad v Salzman, 188 AD2d 515, 517, 591 N.Y.S.2d 193 [2d Dept 1992]* [as plaintiffs' claim for declaratory judgment required finding as to legality of construction, matter should be first addressed by BSA, as application of zoning ordinance to facts peculiarly within specialized knowledge and experience of "administrative bodies authorized to administer and enforce the ordinance"]). In any event, they do not allege special damages. (*See* *Little Joseph Realty v Town of Babylon, 41 NY2d 738, 741-742, 363 N.E.2d 1163, 395 N.Y.S.2d 428 [1977]* [although private property owner may seek to enjoin a continuing zoning violation, it may do so if it has suffered special damages]). **[**15]** There is also no need to address defendants' motion to dismiss for the failure to name a necessary party.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' cross motion to dismiss is granted, the complaint is dismissed in its entirety, and the clerk is directed to enter judgment accordingly; and it is further

ORDERED, that plaintiffs' motion for a preliminary injunction is denied as academic.

6/11/2019

DATE

/s/ Barbara Jaffe

BARBARA JAFFE, J.S.C.

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Council of the City of New York v. Giuliani

Court of Appeals of New York

February 16, 1999, Argued ; March 30, 1999, Decided

No. 42, No. 43

Reporter
93 N.Y.2d 60 *; 710 N.E.2d 255 **; 687 N.Y.S.2d 609 ***; 1999 N.Y. LEXIS 226 ****

Council of the City of New York et al., Respondents-Appellants, v. Rudolph W. Giuliani, as Mayor of the City of New York, et al., Appellants-Respondents. Campaign To Save Our Public Hospitals--Queens Coalition, by Its Member, William Malloy, et al., Respondents-Appellants, v. Rudolph W. Giuliani, as Mayor of the City of New York, et al., Appellants-Respondents.

Prior History: [****1] Cross appeals, in the first above-entitled action, by permission of the Court of Appeals, from a judgment (stipulation treated as final judgment) of the Supreme Court (Herbert A. Posner, J.), entered in Queens County, withdrawing demands D and E of the second amended complaint. The cross appeals bring up for review a prior, nonfinal order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered September 8, 1997, which (1) modified, on the law, and, as modified, affirmed an order and judgment (one paper) of the Supreme Court (Herbert A. Posner, J.; opn *172 Misc 2d 893*), entered in Queens County, denying a motion by defendants for summary judgment, and granting a cross motion by plaintiffs for summary judgment to the extent of declaring that the subleasing of facilities of the New York City Health and Hospitals Corporation (HHC) requires the approval of the Mayor of the City of New York and the Council of the City of New York, that the subleasing of HHC facilities requires the application of the New York City Uniform Land Use Review Procedure, and that a proposed sublease of Coney Island Hospital to a private corporation constitutes an [****2] ultra vires act and violates the New York City Health and Hospitals Corporation Act, and (2) remitted the matter to the Supreme Court, Queens County, for a determination of those branches of the plaintiffs' motion which were for summary judgment as to demands D and E of the second amended complaint. The modification consisted of deleting the provisions of the order and judgment which declared that any sublease of an HHC facility requires the approval of the Mayor and the Council of the City of New York, and that any sublease of an HHC facility is subject to the Uniform Land Use Review Procedure, and substituting therefor a provision dismissing the causes of action which sought those declarations.

Cross appeals, in the second above-entitled action, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered September 8, 1997, which modified, on the law, and, as modified, affirmed an order and judgment (one paper) of the Supreme Court (Herbert A. Posner, J.; opn *172 Misc 2d 893*), entered in Queens County, denying a motion by defendants for summary judgment, and granting a cross motion [****3] by plaintiffs for summary judgment to the extent of declaring that the subleasing of facilities of the New York City Health and Hospitals Corporation (HHC) requires the approval of the Mayor of the City of New York and the Council of the City of New York, that the subleasing of HHC facilities requires the application of the New

York City Uniform Land Use Review Procedure, and that a proposed sublease of Coney Island Hospital to a private corporation constitutes an ultra vires act and violates the New York City Health and Hospitals Corporation Act. The modification consisted of deleting the provisions of the order and judgment which declared that any sublease of an HHC facility requires the approval of the Mayor and the Council of the City of New York, and that any sublease of an HHC facility is subject to the Uniform Land Use Review Procedure, and substituting therefor a provision dismissing the plaintiffs' first and second causes of action.

Council of City of N. Y. v Giuliani, 231 AD2d 178, affirmed.

Campaign To Save Our Pub. Hosps.--Queens Coalition v Giuliani, 242 AD2d 518, affirmed.

Disposition: No. 42:Judgment of Supreme Court appealed from and order of the [****4] Appellate Division brought up for review affirmed, with costs to plaintiffs. No. 43: Order affirmed, with costs to plaintiffs.

Counsel: *Michael D. Hess, Corporation Counsel* of New York City (*Elizabeth Dvorkin, Jeffrey D. Friedlander* and *Stephen Louis* of counsel), for appellants-respondents in the first and second above-entitled actions. I. The Health and Hospitals Corporation Act (HHC Act) authorizes the sublease of Coney Island Hospital to a private company. (*Giuliani v Hevesi, 90 NY2d 27*; *Matter of Lloyd v Grella, 83 NY2d 537*; *Matter of State of New York v Ford Motor Co., 74 NY2d 495*; *Matter of Long v Adirondack Park Agency, 76 NY2d 416*; *Bryan v Koch, 492 F Supp 212, 627 F2d 612*; *Jackson v New York City Health & Hosps. Corp., 419 F Supp 809*.) II. Uniform Land Use Review Procedure (ULURP) does not apply to the sublease of *Coney Island Hospital. (Mauldin v New York City Tr. Auth., 64 AD2d 114*; *Matter of Davis v Dinkins, 206 AD2d 365, 85 NY2d 804*; *Matter of Dodgertown Homeowners Assn. v City of New York, 235 AD2d 538, 89 NY2d 809*; [****5] *Rowe v Great Atl. & Pac. Tea Co., 46 NY2d 62*; *Great Atl. & Pac. Tea Co. v State of New York, 22 NY2d 75*; *Matter of Waybro Corp. v Board of Estimate, 67 NY2d 349*.) III. The Mayor is the successor to the Board of Estimate's role in approving dispositions of Health and Hospitals Corporation (HHC) property under the *HHC Act. (New York City Bd. of Estimate v Morris, 489 US 688*; *Matter of New York Pub. Interest Research Group v Dinkins, 83 NY2d 377*.)

Tenzer Greenblatt, L. L. P., New York City (*Ira A. Finkelstein, Edward L. Sadowsky* and *Gail R. Zweig* of counsel), and *Richard M. Weinberg* for respondents-appellants in the first above-entitled action. I. The HHC Act does not authorize the divestiture of the HHC's statutory obligations to private companies. (*New York City Health & Hosps. Corp. Goldwater Mem. Hosp. v Gorman, 113 Misc 2d 33*; *Giuliani v Hevesi, 90 NY2d 27*; *Ferres v City of New Rochelle, 68 NY2d 446*; *People v Ryan, 274 NY 149*; *Matter of Long v Adirondack Park Agency, 76 NY2d 416*; *Matter of Gallagher v Regan, 42 NY2d 230*.) [****6] II. Assuming the sublease is authorized under State law, the consent of the City Council is required. III. Assuming the sublease is authorized by State law, the proposed sublease is subject to *New York City's ULURP. (Matter of Waybro Corp. v Board of Estimate, 67 NY2d 349*.)

Barbara J. Olshansky, New York City, *Robert T. Perry, Elaine R. Jones, Norman J. Chachkin* and *Olatunde C.A. Johnson* for respondents-appellants in the second above-entitled action. I. The HHC Act does not authorize HHC to delegate its administrative, management and operational duties regarding the public hospitals through a sale or long-term sublease to a private, for-profit corporation. (*Matter of Long v Adirondack Park Agency, 76 NY2d 416*; *Majewski v Broadalbin-Perth Cent. School Dist., 91 NY2d 577*;

Patrolmen's Benevolent Assn. v City of New York, 41 NY2d 205; *Giuliani v Hevesi, 90 NY2d 27*; *Miller v City of New York, 15 NY2d 34*; *Matter of OnBank & Trust Co., 90 NY2d 725*; *Matter of Rodriguez v Perales, 86 NY2d 361*; *Matter of Branford House v Michetti, 81 NY2d 681*; [****7] *Matter of Ellington Constr. Co. v Zoning Bd. of Appeals, 77 NY2d 114*; *Pajak v Pajak, 56 NY2d 394*.) II. Even if HHC were authorized to sublease Coney Island Hospital to PHS New York, Inc. (PHS-NY) under the HHC Act, the proposed sublease would require a ULURP review and approval by the *City Council. (Morris v Board of Estimate, 592 F Supp 1462, 831 F2d 384*, *affd sub nom. New York City Bd. of Estimate v Morris, 489 US 688*; *Ferrer v Dinkins, 218 AD2d 89, 88 NY2d 801*; *Lai Chun Chan Jin v Board of Estimate, 92 AD2d 218*.)

Sipser, Weinstock, Harper & Dorn, L. L. P., New York City (*Richard Dorn* and *I. Philip Sipser* of counsel) and *Richard Ferreri* for District Council 37, AFSCME, AFL-CIO and others, *amici curiae.* The proposal of the City and HHC to privatize certain facilities through a sale or long-term sublease to a private for-profit corporation is inconsistent with civil service principles and a merit system mandated by State law. (*United Pub. Workers v Mitchell, 330 US 75*; *People ex rel. McClelland v Roberts, 148 NY 360*; *Matter of Montero v Lum, 68 NY2d 253*; [****8] *Matter of Weinstein v New York City Tr. Auth., 49 Misc 2d 170*; *Matter of Sloat v Board of Examiners of Bd. of Educ., 274 NY 367*; *Giordano v Henry, 44 AD2d 835*; *People ex rel. Seib v Redfield, 86 App Div 367*; *Matter of Selover v Civil Serv. Commn., 61 Misc 2d 688*; *Matter of Turel v Delaney, 285 NY 16*; *Wood v City of New York, 274 NY 155*.)

Arnold S. Cohen, Long Island City, *Arthur A. Baer, Allison Busch, Lourdes I. Reyes,* New York City, and *Raymond Brescia* for Progressive Rainbow Independents for Developing Empowerment (PRIDE) and others, *amici curiae.* I. Coney Island Hospital's status as a public hospital serves the purposes intended under New York State Constitution and the New York City HHC Act. II. Coney Island Hospital's status as a HHC hospital protects the public's interest through the New York City HHC--a public benefit corporation.

Juan Cartagena, New York City, *Arlene Kohn Gilbert* and *Harry Franklin* for Community Service Society of New York and others, *amici curiae.* I. The State's constitutional duty to care for [****9] the needy is reflected in the HHC enabling statute and the Legislature clearly delegates this public function to the HHC public benefit corporation. II. In approving the proposed 99-year sublease with PHS-NY, HHC has abdicated its duty to operate a public health care system that provides services to the needy. III. The transfer of the complete operation, management and administration of Coney Island Hospital to PHS-NY raises additional, complex, public policy issues that only the Legislature can decide.

Dorsey & Whitney, L. L. P., New York City (*John J. Lee* of counsel), for Fernando Ferrer and others, *amici curiae.* ULURP is applicable to the sublease. (*Matter of Village of Bronxville v Francis, 206 Misc 339, 1 AD2d 236, 1 NY2d 839*.)

Judges: Chief Judge Kaye and Judges Bellacosa, Smith, Levine, Ciparick and Rosenblatt concur.

Opinion by: WESLEY

Opinion

[*65] [***610] [**256] Wesley, J.

These related appeals challenge the validity of a sublease of a hospital operated by the New York City Health and Hospitals Corporation (HHC) to a for-profit entity pursuant to the Health and Hospitals Corporation Act (Act). Although several issues are raised, [****10] the threshold question is: does the Act permit the City to sublease Coney Island Hospital and turn over its operations and service obligations to PHS New York, Inc., a private entity? Like the courts below, we conclude that the statute precludes the proposed transaction.

Historical Context

In 1929 New York City established a municipal Hospitals Department to provide health care to all residents who were unable to obtain care from private providers because [***611] [**257] of poverty, location or discrimination. This Department, which administered the municipal health system, operated fairly well during the Great Depression and the years preceding World War II.

The decades following World War II, however, witnessed a steady decline in the municipal health system, and by the 1960s it was in chronic crisis. This crisis was born of bureaucratic sclerosis, archaic management practices, inefficiency and a shortage of funds. New York City hospitals suffered from obsolete facilities, long clinic waits and little or no primary care. The hospitals were under public attack for making second-class citizens of those New Yorkers who were dependent on them for their care ([****11] *see generally,* Commission on the Delivery of Personal Health Services, *Comprehensive Community Health Services for New York City* [Dec. 1967]).

In 1969 the Legislature enacted the New York City Health and Hospitals Corporation Act, establishing HHC (McKinney's Uncons Laws of NY § 7381 [HHC Act § 1 *et seq.*]; L 1969, ch 1016, as amended). HHC was the perceived antidote for the ills that plagued the City's health care system. The Act [*66] authorizes HHC to manage and operate the City's municipal hospital system (McKinney's Uncons Laws of NY § 7386 [1] [a] [HHC Act § 6 (1) (a)]). The mission of HHC is to provide efficient, comprehensive health and medical resources to protect and promote the safety and welfare of New York City residents (McKinney's Uncons Laws of NY § 7382 [HHC Act § 2]). According to the Act, the provision of health and medical services and "the exercise by such corporation of the functions, powers and duties as hereinafter provided constitutes the performance of an essential public and governmental function" (McKinney's Uncons Laws of NY § 7382).

In conjunction with providing quality care to those in need, HHC was established [****12] to permit independent financing of municipal hospital construction and improvements and to facilitate professional management of the hospital system. It was intended to overcome the "myriad … complex and often deleterious constraints" which inhibited the provision of care by the City in its own operation of the municipal health system (McKinney's Uncons Laws of NY § 7382). The Act authorized the City to lease the City-owned hospitals to HHC to fulfill its corporate purposes, "for so long as [HHC] shall be in existence" (McKinney's Uncons Laws of NY § 7387 [1] [HHC Act § 7 (1)]). The property, plant and equipment associated with these facilities are owned by the City and leased to HHC for an annual rent of $ 1 in accordance with these provisions.

HHC has evolved into the largest municipal hospital system in the country, handling more than 6.5 million patient visits and 230,000 admissions per year. The municipal health care system consists of 11 acute care facilities (including major teaching facilities), five certified home health care agencies, five long-term care facilities, six diagnostic and treatment centers, a network of more than 20 satellite clinics and a prepaid [****13] health plan.

The Contemporary Context and Present Litigation

Today New York City is experiencing a deja vu regarding the provision of health care to the needy. Although different forces are at work in the contemporary health care industry, once again spiraling costs and a shortage of funds are the hallmarks of New York City's health care system (*see,* Report of State Comptroller H. Carl McCall, *Challenges Facing New York City's Public Hospital System,* at 4-99 [Aug. 5, 1998]). The current administration, like its predecessor 30 years ago, began considering various ways to revive and redefine the provision of health care services to the needy.

[*67] In 1994 the City explored the possibility of transferring the operation of three public hospitals under the auspices of HHC--Coney Island Hospital, Elmhurst Hospital Center and Queens Hospital Center--to private entities. In October 1995, the City, through the New York City Economic Development Corporation, and HHC issued an Offering Memorandum requesting proposals from health care providers for the operation and management of Coney Island Hospital under a long-term sublease of the hospital.

[***612] [**258] [****14] In an effort to obtain broader public review of the privatization plan, the City Council in March 1996 commenced this declaratory judgment action against the Mayor and HHC. The City Council alleged that the privatization of the target hospitals by means of subleases with private entities required City Council approval and was subject to the Uniform Land Use Review Procedure ([ULURP] *NY City Charter § 197-c*). A second declaratory judgment action, raising the same issues, was commenced in May 1996 by two unincorporated associations whose members live and work in the communities served by Coney Island Hospital and the targeted hospitals in Queens (*see, Campaign To Save Our Pub. Hosps.--Queens Coalition v Giuliani, 242 AD2d 518*). All parties moved for summary judgment.

While the motions and cross motions were pending, the City and PHS New York, Inc. (PHS-NY), a private entity, executed a letter of intent on June 26, 1996 calling for negotiations to achieve a long-term sublease of the property, plant and equipment of Coney Island Hospital to PHS-NY. A contract for PHS-NY to operate Coney Island Hospital as a community-based, acute care inpatient hospital during [****15] the term of the sublease was executed as well.

Following a public hearing, on November 8, 1996 the HHC Board of Directors authorized and approved the sublease of Coney Island Hospital to PHS-NY for an initial term of 99 years, with a renewal option for an additional 99 years. The sublease requires PHS-NY, as the tenant under the proposed sublease of Coney Island Hospital, to make a commitment to HHC, as the landlord, to operate Coney Island Hospital as an acute care inpatient hospital during the term of the sublease and to provide a range of inpatient, outpatient and emergency health care services to the Coney Island community, including indigent members of that community. Thus, the proposed sublease would obligate PHS-NY to provide specified essential health care services "to substantially the same degree" as [*68] Coney Island Hospital currently provides. The sublease further provides that the City and HHC would enter into a separate agreement

with PHS-NY in which they would agree not to compete with PHS-NY by operating a hospital within the "catchment area" of Coney Island Hospital.

The sublease also includes several significant terms that would benefit the City and [****16] the communities served by the hospital. For example, there is a "charity care" provision in the sublease, providing that for the life of the lease PHS-NY would offer care without regard to ability to pay, up to a level 115% greater than the charity care expense currently carried by Coney Island Hospital. * Another provision requires PHS-NY to spend at least $ 25 million in the first five years of the sublease on capital projects, in addition to assuming all routine maintenance costs. PHS-NY also is obligated to assume the outstanding HHC and City bonds associated with Coney Island Hospital and all liability for using and operating the hospital.

[****17] The plaintiffs in both actions amended their complaints to allege that the sublease of Coney Island Hospital constituted an ultra vires act; the motion papers were amended to address this issue. Supreme Court granted summary judgment to plaintiffs and declared that the subleasing of HHC facilities was subject to ULURP, that the sublease required the approval of the Mayor and City Council, and that HHC did not have the statutory authority to sublease Coney Island Hospital. The Appellate Division affirmed, holding that the Coney Island Hospital sublease is not authorized by HHC's governing statute.

We granted leave from the Appellate Division order of modification in *Campaign* and a stipulation withdrawing certain pending claims in *Council,* treated as a final judgment, to bring up for review the prior Appellate Division order in that case. Concluding that the proposed lease is not authorized by [***613] [**259] the controlling statute, we now affirm and therefore do not need to consider the remaining issues.

Analysis

Does the Act authorize the proposed sublease of Coney Island Hospital to PHS-NY? We begin with the plain meaning of the [*69] words used [****18] in the statute (*see,* *Giuliani v Hevesi, 90 NY2d 27, 39)*. In giving effect to these words, "the spirit and purpose of the act and the objects to be accomplished must be considered. 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)*.

The statute clearly indicates that the municipal hospitals would remain a governmental responsibility and would be operated by HHC as long as HHC remained in existence. In the "[d]eclaration of policy and statement of purposes" (McKinney's Uncons Laws of NY § 7382), the Legislature declared that the provision of health care and the operation of the City's health facilities were of "vital and paramount concern." As indicated above, the Legislature was deeply disturbed by the fact that the City's health facilities were inadequate and that the administrative system then in place obstructed and impaired the efficient operation of health and medical resources (McKinney's Uncons Laws of NY § 7382). The Legislature noted:

* The purported benefits of this "charity care" provision are hotly contested by plaintiffs. In a comprehensive analysis of the proposed sublease, Comptroller Alan Hevesi concluded that the terms of the sublease protect PHS-NY by limiting its liability and do not guarantee that the hospital will continue to serve indigent patients (*see,* Hevesi, *Analysis of Fundamental Issues That Have Yet to be Resolved* [Nov. 7, 1996], at 1-2).

"It is found, [****19] declared and determined that in order to accomplish the purposes herein recited, to provide the needed health and medical services and health facilities, a public benefit corporation … should be created to provide such health and medical services and health facilities and to otherwise carry out such purposes; that the creation and operation of the [HHC] … is in all respects for the benefit of the people of the state of New York and of the city of New York, and is a state, city and public purpose; and that the exercise by such corporation of the functions, powers and duties as hereinafter provided constitutes the performance of an essential public and governmental function" (McKinney's Uncons Laws of NY § 7382).

The statute requires HHC and the City to enter into an agreement by July 1, 1970, "whereby the corporation shall operate the hospitals then being operated by the city for the treatment of acute and chronic diseases" (McKinney's Uncons Laws of NY § 7386 [1] [a]). Coney Island Hospital was among the hospitals that the City leased to HHC "for its corporate purposes, for so long as [HHC] shall be in existence" (McKinney's Uncons Laws of NY § 7387 [1]). The statutory [****20] mandate is manifest and self-evident.

[*70] The statute's history is replete with similar expressions of the Legislature's intent. There is no indication that the Legislature intended to authorize HHC to operate City hospitals only to later transfer that authority to a private entity. For example, the Governor in his Approval Memorandum emphasized that HHC was established to "operate and maintain the [City's] municipal hospitals" (Governor's Mem approving L 1969, ch 1016, reprinted in 1969 McKinney's Session Laws of NY, at 2569). The legislative intent was perhaps best captured in a letter written by Mayor Lindsay: "[I]n establishing a public benefit corporation, the City is not getting out of the hospital business. Rather it is establishing a mechanism to aid it in better managing that business for the benefit not only of the public serviced by the hospitals but the entire City health service system" (*see,* Letter dated May 8, 1969, Bill Jacket, L 1969, ch 1016). This letter indicated that "the health care system will continue to be the City's responsibility" (*id.*).

In urging this Court to reverse the Appellate Division decision, defendants argue that section [****21] 5 (6) of the Act (McKinney's Uncons Laws of NY § 7385 [6]) authorizes HHC to sublease the hospital. This section grants HHC the power to

"dispose of by sale, lease or sublease, real or personal property, including but not limited to a health facility, or any interest therein *for its corporate purposes*" (emphasis added).

[***614] [**260] Defendants also contend that section 5 (8) of the Act (McKinney's Uncons Laws of NY § 7385 [8]) authorizes the transfer because it grants HHC the authority

"[t]o provide health and medical services for the public directly or by lease with any person, firm or private or public corporation or association, *through and in the health facilities of the corporation* and to make rules and regulations governing admissions and health and medical services" (emphasis added).

To adopt defendants' arguments would frustrate the clear and well-defined statutory purposes and legislative intent, and would transfer "the performance of an essential public and governmental function" (McKinney's Uncons Laws of NY § 7382) to the private sector. To this end the Legislature mandated the City to enter into an agreement with the newly created [****22] HHC "whereby [HHC] shall operate the hospitals then being operated by the city for the treatment of acute and [*71] chronic diseases" (McKinney's Uncons Laws of NY § 7386 [1] [a]).

Both of the sections upon which defendants rely recognize that HHC's ability to divest itself of its assets or services is limited by HHC's corporate purpose. To read these sections to permit the wholesale transfer of administrative, operations and management control over Coney Island Hospital to a private for-profit entity would be incongruous with the statutory purpose and intent of the Legislature.

Defendants also contend that this transaction is merely a sublease of Coney Island Hospital, not a wholesale transfer, and should not be viewed as an attempt to privatize the hospital. There are, however, several aspects of the sublease that undercut defendants' argument. Most notably, the covenant by HHC not to compete in the catchment area surrounding Coney Island Hospital effectively takes HHC out of the hospital business altogether. This provision therefore prevents HHC from doing exactly what it is statutorily obligated to do--operate a public hospital for the benefit of New York City [****23] residents living in that area.

We are also troubled by the inherent conflict between HHC's statutory mission and the profit-maximizing goals of a private, for-profit corporation. This clash of missions precludes the transfer of total operational control over a public hospital to a for-profit entity. A public benefit corporation like HHC is "organized to construct or operate a public improvement wholly or partly within the state, the profits from which inure to the benefit of this or other states, or to the people thereof" (*General Construction Law § 66 [4]*). In contrast, a private, for-profit corporation exists to provide maximum economic returns to its shareholders. This inherent conflict between HHC's public purpose and the goals of a health care institution run by a private, for-profit entity was recognized by experts evaluating the public hospital system more than 30 years ago, and played a significant role in the Legislature's decision to create a public benefit corporation to run the municipal hospital system (*see,* 11th Annual Report of Temp St Commn of Investigation, 1969 NY Legis Doc No. 93, at 101).

Moreover, unlike for-profit corporations, [****24] public benefit corporations cannot dissolve themselves. Indeed, there is a glaring absence of a suicide provision in the Act, and section 7385 (6) and (8) cannot be read to allow HHC to divest itself of its assets and property. The only way for HHC to exit the [*72] hospital business is the way it entered: through an act of the Legislature (*see, e.g., City of Rye v Metropolitan Transp. Auth., 24 NY2d 627, 634*; *Matter of Gallagher v Regan, 42 NY2d 230, 234)*.

Thus, the statutory language, amply buttressed by the legislative history, supports the result reached by both the trial court and the Appellate Division: the proposed transaction is not authorized by the statute. HHC was created to fulfill a critical public mission--the provision of comprehensive, quality health care services to the poor and uninsured residents of the City. Although many of the provisions of the proposed sublease arguably would benefit the City and surrounding communities, and indeed, improve the provision of quality health care to the poor, this must be done within the context [***615] [**261] of the authorizing Act. Short of action by the Legislature, HHC must [****25] continue to fulfill its statutory mission within the confines of its powers and purposes as established by its enabling legislation.

Accordingly, in *Council,* the judgment of Supreme Court appealed from and the order of the Appellate Division brought up for review should be affirmed, with costs. In *Campaign,* the order of the Appellate Division should be affirmed, with costs.

Chief Judge Kaye and Judges Bellacosa, Smith, Levine, Ciparick and Rosenblatt concur.

In *Council of City of N. Y. v Giuliani:* Judgment of Supreme Court appealed from and order of the Appellate Division brought up for review affirmed, with costs to plaintiffs.

In *Campaign To Save Our Pub. Hosps.--Queens Coalition v Giuliani:* Order affirmed, with costs to plaintiffs.

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Dreikausen v. Zoning Bd. of Appeals

Court of Appeals of New York

April 30, 2002, Argued ; June 6, 2002, Decided

No. 73

Reporter
98 N.Y.2d 165 *; 774 N.E.2d 193 **; 746 N.Y.S.2d 429 ***; 2002 N.Y. LEXIS 1554 ****; 32 ELR 20763

In the Matter of Margret Dreikausen et al., Appellants, v. Zoning Board of Appeals of the City of Long Beach et al., Respondents.

Subsequent History: [****1] As Corrected August 27, 2002.

Prior History: Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered October 1, 2001, which affirmed a judgment of the Supreme Court (Bernard F. McCaffrey, J.), entered in Nassau County in a proceeding pursuant to CPLR article 78, dismissing a petition to review a determination of respondent Zoning Board of Appeals of the City of Long Beach which granted an application for a use variance.

Matter of Dreikausen v. Zoning Bd. of Appeals, 287 A.D.2d 453, 731 N.Y.S.2d 54, 2001 N.Y. App. Div. LEXIS 9208 (2d Dep't 2001), appeal dismissed.

Disposition: Appeal dismissed, without costs.

Counsel: *Charles S. Kovit,* Hewlett, for appellants. I. Bay Club's failure to prove unnecessary hardship is not moot. (*Matter of Imperial Improvements v Town of Wappinger Zoning Bd. of Appeals, 290 AD2d 507, 736 N.Y.S.2d 409*; *Matter of Caprari v Town of Colesville, 199 AD2d 705, 605 N.Y.S.2d 157*; [****2] *Matter of Gorman v Town Bd. of Town of E. Hampton, 273 AD2d 235, 709 N.Y.S.2d 433*; *Ughetta v Barile, 210 AD2d 562, 619 N.Y.S.2d 805*; *85 NY2d 805, 650 N.E.2d 415, 626 N.Y.S.2d 756*; *Matter of Watch Hill Homeowners Assn. v Town Bd. of Town of Greenburgh, 226 AD2d 1031, 641 N.Y.S.2d 443*, ; *88 NY2d 811, 672 N.E.2d 604, 649 N.Y.S.2d 378*; *Vitiello v City of Yonkers, 255 AD2d 506, 680 N.Y.S.2d 607*; *Shumaker v Town of Cortlandt, 124 AD2d 129, 511 N.Y.S.2d 351*; *70 NY2d 603, 512 N.E.2d 552, 518 N.Y.S.2d 1026*.) II. The grant of the use variance should be reversed because Bay Club failed to provide "dollars and cents proof" of an inability to develop the property with uses permitted in the *Business A District. (Matter of Village Bd. of Vil. of Fayetteville v Jarrold, 53 NY2d 254, 423 N.E.2d 385, 440 N.Y.S.2d 908*; *Matter of Crossroads Recreation v Broz, 4 NY2d 39, 149 N.E.2d 65, 172 N.Y.S.2d 129*; *Matter of Park Hill Residents' Assn. v Cianciulli, 234 AD2d 464, 651 N.Y.S.2d 159*; *Matter of SoHo Alliance v New York City Bd. of Stds. & Appeals, 264 AD2d 59, 703 N.Y.S.2d 150*; [****3] *95 NY2d 437, 741 N.E.2d 106, 718 N.Y.S.2d 261*.) III. The Board's grant of the use variance should be reversed because the Board is without authority to grant a use variance to relieve a self-created hardship. (*Matter of Clark v Board of Zoning Appeals of Town of Hempstead, 301 NY 86, 92 N.E.2d 903*; *Matter of*

Long Is. Leasing Corp. v Casey, 138 AD2d 596, 526 N.Y.S.2d 768; *Matter of Ferrugia v Zoning Bd. of Appeals of Town of Warwick, 233 AD2d 505, 649 N.Y.S.2d 946*; *Matter of RVC Assoc. v Zoning Bd. of Appeals of Vil. of Rockville Ctr., 240 AD2d 672, 659 N.Y.S.2d 89*; *Matter of Carriage Works Enters. v Siegel, 118 AD2d 568, 499 N.Y.S.2d 439*; *Matter of Citizens Sav. Bank v Board of Zoning Appeals of Vil. of Lansing, 238 AD2d 874, 657 N.Y.S.2d 108*.)

William G. Holst, Corporation Counsel, Long Beach (*Corey E. Klein* and *Noreen O. Costello* of counsel), for Zoning Board of Appeals of City of Long Beach, respondent. I. The Bay Club of Long Beach, Inc. established its right to a use variance and the Zoning Board of Appeals properly granted said variance based [****4] upon the record herein. (*Matter of SoHo Alliance v New York City Bd. of Stds. & Appeals, 264 AD2d 59, 703 N.Y.S.2d 150*; *95 NY2d 437*; *Matter of Fuhst v Foley, 45 NY2d 441, 382 N.E.2d 756, 410 N.Y.S.2d 56*; *Matter of Cowan v Kern, 41 NY2d 591, 363 N.E.2d 305, 394 N.Y.S.2d 579*; *Conley v Town of Brookhaven Zoning Bd. of Appeals, 40 NY2d 309, 353 N.E.2d 594, 386 N.Y.S.2d 681*; *Matter of Consolidated Edison Co. of N.Y. v New York State Div. of Human Rights, 77 NY2d 411, 570 N.E.2d 217, 568 N.Y.S.2d 569*; *300 Gramatan Ave. Assoc. v State Div. of Human Rights, 45 NY2d 176, 379 N.E.2d 1183, 408 N.Y.S.2d 54*; *Matter of Sasso v Osgood, 86 NY2d 374, 657 N.E.2d 254, 633 N.Y.S.2d 259*; *Matter of Toys "R" Us v Silva, 89 NY2d 411, 676 N.E.2d 862, 654 N.Y.S.2d 100*; *Matter of Consolidated Edison Co. of N.Y. v Hoffman, 43 NY2d 598, 374 N.E.2d 105, 403 N.Y.S.2d 193*; *Matter of Village Bd. of Vil. of Fayetteville v Jarrold, 53 NY2d 254, 423 N.E.2d 385, 440 N.Y.S.2d 908*.) II. The appeal should be dismissed as moot. (*Matter of Hearst Corp. v Clyne, 50 NY2d 707, 409 N.E.2d 876, 431 N.Y.S.2d 400*; [****5] *Matter of Save the Pine Bush v City of Albany, 281 AD2d 832, 722 N.Y.S.2d 310*; *Matter of Center Sq. Assn. v Board of Bldg., Zoning & Hous. Appeals of City of Albany, 195 AD2d 684, 599 N.Y.S.2d 897*; *Ughetta v Barile, 210 AD2d 562, 619 N.Y.S.2d 805*; *85 NY2d 805*; *Matter of Watch Hill Homeowners Assn. v Town Bd. of Town of Greenburgh, 226 AD2d 1031, 641 N.Y.S.2d 443*, ; *88 NY2d 811*; *Vitiello v City of Yonkers, 255 AD2d 506, 680 N.Y.S.2d 607*; *Matter of Caprari v Town of Colesville, 199 AD2d 705, 605 N.Y.S.2d 157*; *Matter of Burns Pharm. of Rensselaer v Conley, 146 AD2d 842, 536 N.Y.S.2d 248*; *Matter of Serafin v Wallace, 117 AD2d 926, 499 N.Y.S.2d 20*; *Matter of Many v Village of Sharon Springs Bd. of Trustees, 234 AD2d 643, 650 N.Y.S.2d 486*; *89 NY2d 811*.) III. Appellants' failure to challenge the Building Commissioner's decision granting Bay Club building permits precludes judicial review. (*Matter of Association of Friends of Sagaponack v Zoning Bd. of Appeals of Town of Southampton, 287 AD2d 620, 731 N.Y.S.2d 851*; [****6] *Matter of Hays v Walrath, 271 AD2d 744, 705 N.Y.S.2d 441*; *Matter of Parisella v Zoning Bd. of Appeals of Town of Fishkill, 188 AD2d 712, 590 N.Y.S.2d 599*; *82 NY2d 653*; *Matter of Jonas v Town of Colonie, 110 AD2d 945, 488 N.Y.S.2d 263*; *Engert v Phillips, 150 AD2d 752, 542 N.Y.S.2d 202*; *Young Men's Christian Assn. v Rochester Pure Waters Dist., 37 NY2d 371, 334 N.E.2d 586, 372 N.Y.S.2d 633*; *Radano v Town of Huntington, 281 App Div 682, 117 N.Y.S.2d 94*; *305 NY 911*.)

Zapson & Galanter, New York City (*Michael G. Zapson* of counsel), for Bay Club of Long Beach, Inc., respondent. I. Local zoning board determination should not be set aside unless there is a showing of illegality, arbitrariness, or abuse of discretion. (*Matter of Fuhst v Foley, 45 NY2d 441, 382 N.E.2d 756, 410 N.Y.S.2d 56*; *Matter of Cowan v Kern, 41 NY2d 591, 363 N.E.2d 305, 394 N.Y.S.2d 579*; *Conley v Town of Brookhaven Zoning Bd. of Appeals, 40 NY2d 309, 353 N.E.2d 594, 386 N.Y.S.2d 681*; *Matter of Bella Vista Apt. Co. v Bennett, 89 NY2d 465, 678 N.E.2d 198, 655 N.Y.S.2d 742*; [****7] *Matter of Consolidated Edison Co. of N.Y. v New York State Div. of Human Rights, 77 NY2d 411, 570 N.E.2d 217, 568 N.Y.S.2d 569*; *300 Gramatan Ave. Assoc. v State Div. of Human Rights, 45 NY2d 176, 379 N.E.2d 1183, 408 N.Y.S.2d 54*; *Matter of SoHo Alliance v New York City Bd. of Stds. & Appeals, 95 NY2d 437,*

741 N.E.2d 106, 718 N.Y.S.2d 261; Matter of Khan v Zoning Bd. of Appeals of Vil. of Irvington, 87 NY2d 344, 662 N.E.2d 782, 639 N.Y.S.2d 302; Matter of Consolidated Edison Co. v Hoffman, 43 NY2d 598, 374 N.E.2d 105, 403 N.Y.S.2d 193; *Matter of Toys "R" Us v Silva, 89 NY2d 411, 676 N.E.2d 862, 654 N.Y.S.2d 100*.) II. The procedure for obtaining a zoning variance and for regulatory taking cases is not the same. (Matter of Salierno v Briggs, 141 AD2d 547, 529 N.Y.S.2d 159; Spears v Berle, 48 NY2d 254, 397 N.E.2d 1304, 422 N.Y.S.2d 636; Matter of Fuhst v Foley, 45 NY2d 441, 382 N.E.2d 756, 410 N.Y.S.2d 56; Matter of Cowan v Kern, 41 NY2d 591, 363 N.E.2d 305, 394 N.Y.S.2d 579; Matter of Charles v Diamond, 41 NY2d 318, 360 N.E.2d 1295, 392 N.Y.S.2d 594; [****8] Matter of Lemir Realty Corp. v Larkin, 11 NY2d 20, 181 N.E.2d 407, 226 N.Y.S.2d 374; Matter of Von Kohorn v Morrell, 9 NY2d 27, 172 N.E.2d 287, 210 N.Y.S.2d 525.) III. The findings of fact of respondent Zoning Board of Appeals are consistent with the requirements of General City Law § 81-b (3). (Matter of Supkis v Town of Sand Lake Zoning Bd. of Appeals, 227 AD2d 779, 642 N.Y.S.2d 374; Matter of Kingsley v Bennett, 185 AD2d 814, 586 N.Y.S.2d 640; *Matter of Ryan v Miller, 164 AD2d 968, 559 N.Y.S.2d 414*; Matter of Mt. Lyell Enters. v DeRooy, 159 AD2d 1015, 552 N.Y.S.2d 728; Matter of Fuhst v Foley, 45 NY2d 441, 382 N.E.2d 756, 410 N.Y.S.2d 56; Conley v Town of Brookhaven Zoning Bd. of Appeals, 40 NY2d 309, 353 N.E.2d 594, 386 N.Y.S.2d 681; Matter of SoHo Alliance v New York City Bd. of Stds. & Appeals, 264 AD2d 59, 703 N.Y.S.2d 150; Matter of Clark v Board of Zoning Appeals of Town of Hempstead, 301 NY 86, 92 N.E.2d 903; *Matter of Carriage Works Enters. v Siegel, 118 AD2d 568, 499 N.Y.S.2d 439*; [****9] Matter of Bella Vista Apt. Co. v Bennett, 89 NY2d 465, 678 N.E.2d 198, 655 N.Y.S.2d 742.) IV. The appeal should be dismissed as moot. (Matter of Hearst Corp. v Clyne, 50 NY2d 707, 409 N.E.2d 876, 431 N.Y.S.2d 400; Matter of Lyon Co. v Morris, 261 NY 497, 185 N.E. 711; *Heights 75 Owners Corp. v Smith, 135 AD2d 680, 522 N.Y.S.2d 580*; Matter of Concerned Residents of New Lebanon v Zoning Bd. of Appeals of Town of New Lebanon, 226 AD2d 997, 641 N.Y.S.2d 199; *Matter of Robison Oil Corp. v County of Westchester, 236 AD2d 542, 653 N.Y.S.2d 674*; Matter of New Scotland Ave. Neighborhood Assn. v Planning Bd. of City of Albany, 142 AD2d 257, 535 N.Y.S.2d 645; Matter of Caprari v Town of Colesville, 199 AD2d 705, 605 N.Y.S.2d 157; *Matter of Center Sq. Assn. v Board of Bldg., Zoning & Hous. Appeals of City of Albany, 195 AD2d 684, 599 N.Y.S.2d 897*; Matter of Stockdale v Hughes, 189 AD2d 1065, 592 N.Y.S.2d 897; Matter of Friends of Pine Bush v Planning Bd. of City of Albany, 86 AD2d 246, 450 N.Y.S.2d 966; 59 NY2d 849.)

[****10] *Eliot Spitzer, Attorney General,* Albany (*Caitlin J. Halligan, Daniel Smirlock, Lisa M. Burianek, John J. Sipos, Joseph Perretta* and *Denise A. Hartman* of counsel), for State of New York, amicus curiae. I. A rigorous evidentiary standard for obtaining zoning and other land use variances is necessary to safeguard the public interest in sound land use planning. (Palazzolo v Rhode Island, 533 US 606, 150 L. Ed. 2d 592, 121 S. Ct. 2448; Matter of Gazza v New York State Dept. of Envtl. Conservation, 89 NY2d 603, 679 N.E.2d 1035, 657 N.Y.S.2d 555; *522 US 813, 139 L. Ed. 2d 22, 118 S. Ct. 58*; Matter of Village Bd. of Vil. of Fayetteville v Jarrold, 53 NY2d 254, 423 N.E.2d 385, 440 N.Y.S.2d 908; Matter of Otto v Steinhilber, 282 NY 71, 24 N.E.2d 851; People ex rel. Fordham Manor Refm. Church v Walsh, 244 NY 280, 155 N.E. 575; Matter of Crossroads Recreation v Broz, 4 NY2d 39, 149 N.E.2d 65, 172 N.Y.S.2d 129; Matter of Clark v Board of Zoning Appeals of Town of Hempstead, 301 NY 86, 92 N.E.2d 903; Matter of Forrest v Evershed, 7 NY2d 256, 164 N.E.2d 841, 196 N.Y.S.2d 958; [****11] Matter of Bella Vista Apt. Co. v Bennett, 89 NY2d 465, 678 N.E.2d 198, 655 N.Y.S.2d 742; Matter of SoHo Alliance v New York City Bd. of Stds. & Appeals, 95 NY2d 437, 741 N.E.2d 106, 718 N.Y.S.2d 261.) II. This Court's reaffirmance of the "dollars and cents proof" rule in variance cases is critical in takings cases. (Matter of Village Bd. of Vil. of Fayetteville v Jarrold, 53 NY2d 254, 423 N.E.2d 385, 440 N.Y.S.2d 908; Williams v Town of Oyster Bay, 32 NY2d 78, 295 N.E.2d 788, 343 N.Y.S.2d 118; Dauernheim, Inc. v Town Bd. of Town of Hempstead, 33 NY2d 468, 310 N.E.2d 516, 354 N.Y.S.2d 909; Spears v Berle, 48 NY2d 254, 397

N.E.2d 1304, 422 N.Y.S.2d 636; *de St. Aubin v Flacke, 68 NY2d 66, 496 N.E.2d 879, 505 N.Y.S.2d 859*; *Northern Westchester Professional Park Assoc. v Town of Bedford, 60 NY2d 492, 458 N.E.2d 809, 470 N.Y.S.2d 350*; *Briarcliff Assoc. v Town of Cortlandt, 272 AD2d 488, 708 N.Y.S.2d 421*; *95 NY2d 886, 738 N.E.2d 780, 715 N.Y.S.2d 376*; *96 NY2d 704, 746 N.E.2d 185, 723 N.Y.S.2d 130*; *Matter of City of New York [Shorefront High School-Rudnick], 25 NY2d 146, 250 N.E.2d 333, 303 N.Y.S.2d 47*; [****12] *Masten v State of New York, 11 AD2d 370, 206 N.Y.S.2d 672*; *9 NY2d 796, 175 N.E.2d 166, 215 N.Y.S.2d 508*; *Ingber v State of New York, 187 AD2d 826, 590 N.Y.S.2d 145*.)

Judges: Opinion by Chief Judge Kaye. Judges Smith, Levine, Ciparick, Wesley, Rosenblatt and Graffeo concur.

Opinion by: KAYE

Opinion

[**194] [***430] [*169] Chief Judge Kaye.

As this zoning dispute has made its way through the courts to us, the question has become one of mootness. We now dismiss the appeal as moot.

The case centers on a 56,000 square foot commercially zoned waterfront property located on Reynolds Channel in Long Beach. [1] The site was used as a marina, which after decades of financial difficulty, in 1991 ultimately went into bankruptcy. The property, located in an otherwise residentially zoned neighborhood, is bounded by single- and two-family homes, a youth center, and a veterinarian and pet center (the only other business in the immediate area).

[****13] In 1999, Keystone Design and Construction Corporation entered into a contract to purchase the site for $ 2,400,000, with the intention of developing condominiums. Keystone applied to respondent Zoning Board of Appeals of the City of Long Beach (the Board) for a use variance, proposing to build 23 semi-attached condominium units and 35 boat slips on the property. That application was denied, setting in motion the events leading to this appeal.

Keystone reapplied for a use variance, reducing the proposed number of condominiums to 20. At a February 24, 2000 Board hearing, Keystone's counsel supported the application with traffic and environmental studies, testimony from a real estate appraiser, and estimates of expected costs and profits associated with the construction. Petitioners--four owners of neighboring single-family homes--and several other local residents present at the hearing spoke in favor of a residential use of the property, but opposed construction of a "wall" of [*170] condominiums. That very day [Feb. 24, 2000], Keystone's owner formed a related corporation, Bay Club of Long Beach, Inc., which purchased the property. On May 26, 2000, the Board for a second time denied the [****14] use variance, based on a failure to submit sufficient financial proof of need for the variance, and concern that the extra boat slips could lead to overcommercialization of the property.

[1] Zoned as a Business A District, the property may be used as a "market, restaurant, store or other retail business or service, bank, office, place of assembly," but not as a public garage or a gasoline filling station (City of Long Beach Zoning Code § 9-105.15 [a] [1]).

Following the Board's decision, Bay Club again sought a use variance, this time based on a scaled-back proposal of 20 condominiums and 20 boat slips. At a June 22, 2000 hearing on the application, Bay Club introduced *first,* a brief letter from Pam-Tom Realty, Inc., the prior owner, reciting without specifics its financial difficulties over the previous 25 years in operating the marina and its unsuccessful efforts to sell the property; *second,* a letter from a potential purchaser stating with minimal financial detail its reasons for not pursuing the acquisition; and *third,* documents from Pam-Tom's 1991 bankruptcy case, including unsupported valuation figures for the property. Several local residents in attendance at the June hearing again spoke both in favor of residential use for the site and against the condominium proposal. Petitioner Edward Arata asked that Bay Club be required to cease excavation and remove the heavy equipment from the site until the Board [****15] rendered its decision.

On July 27, 2000, the Board voted unanimously to grant the use variance and additionally granted a rear yard area variance, which petitioners do not challenge. That same night, unknown at the time to the Board, the Nassau County Planning Commission separately recommended denial of a use variance on the ground that the property could and should be put to permitted uses. Shortly thereafter, the Board issued a negative declaration under the State Environmental Quality Review Act (SEQRA).

On August 28, 2000, the Board adopted a resolution effectuating its grant of the variance. The Board found that Bay Club had introduced sufficient evidence of its need for a use variance in that the proposed project would bring the site more into harmony with the essential residential character of the neighborhood; Bay Club is unable to realize a reasonable return from commercial uses of the property, as evidenced by the prior owner's bankruptcy and difficulty selling the property; Bay Club's hardship--as the owner of the only commercially-zoned property in the area--is unique; and Bay Club's hardship is [*171] not self-created because, regardless of ownership, the site [****16] cannot be used for commercial purposes.

Petitioners on September 6, 2000 filed an article 78 proceeding in Supreme Court, challenging the Board's grant of the variance as illegal, arbitrary, capricious and unsupported by substantial evidence in the record, and further contending that Bay Club failed to prove any of the statutory factors required for a use variance. [2] Petitioners requested no preliminary injunctive relief. On February 13, 2001, Supreme Court dismissed the petition, finding the Board had acted within its discretion in granting the variance based on Bay Club's unchallenged proof of need. By this time, work at the site was underway, with the marina torn down, the bulkhead repaired, utilities reconfigured, foundation permits issued and pouring of foundations for the condominiums begun.

[****17] Petitioners first sought injunctive relief on February 22, 2001, in conjunction with their appeal to the Appellate Division, after learning that the City was about to issue building permits for the condominiums. In their order to show cause, petitioners observed that Bay Club had already begun pouring the foundations pursuant to previously granted permits, and that further building permits would be issued imminently. Petitioners resisted posting any undertaking, arguing that Bay Club should have included the

[2] *Section 81-b(3)(b) of the General City Law* permits the zoning board of appeals to grant a use variance upon a showing of unnecessary hardship, as evidenced by proof that "for each and every permitted use" under the applicable zoning regulations:

"(i) the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence;

"(ii) the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood;

"(iii) the requested use variance, if granted, will not alter the essential character of the neighborhood; and

"(iv) the alleged hardship has not been self-created."

foreseeable costs of delay in its purchase price, and that they should not have to bear large undertaking costs both because of the merit of their position and because "it is not at all clear whether they could or would do it" if required by the court. Accordingly, they requested that the undertaking, if imposed at all, be "as low as possible." The Appellate Division denied petitioners' requests for a temporary [*172] restraining order and preliminary injunction, and subsequently denied both their request for a calendar preference and Bay Club's cross motion to dismiss the appeal as moot.

In October 2001, the Appellate Division affirmed dismissal of the petition on the ground that the record contained sufficient proof of Bay Club's unnecessary hardship to support the Board's decision to grant the variance (*287 A.D.2d 453, 731 N.Y.S.2d 54*). A dissenting Justice urged reversal and denial of a use variance on the ground that Bay Club failed to submit "competent financial evidence" of any of the applicable statutory factors, particularly noting that its proof of an inability to realize a reasonable return from permitted commercial uses fell short of the "dollars and cents" proof historically required by this Court (*see e.g. Matter of Vil. Board of Vil. of Fayetteville v Jarrold, 53 N.Y.2d 254, 440 N.Y.S.2d 908, 423 N.E.2d 385* [1981]). Neither Appellate Division writing addressed mootness.

Around the time this Court granted leave to appeal in January 2002 (*97 N.Y.2d 608, 765 N.E.2d 300, 739 N.Y.S.2d 97*), 12 of the units had been fully constructed with the remaining eight in various stages of completion, and the offering literature was on file with the Attorney General. [3]

[****19] Petitioners, who now seek demolition of the units, argue that their appeal remains justiciable given that they promptly filed an article 78 proceeding and sought preliminary relief from the Appellate Division prior to actual construction. Respondent Bay Club contends that the Board's decision to grant the variance--reviewable only for an abuse of discretion (*see e.g. Matter of Cowan v Kern, 41 N.Y.2d 591, 598, 394 N.Y.S.2d 579, 363 N.E.2d 305* [1977])--was supported by record evidence of undue hardship, and has been rendered unreviewable by substantial completion of the project.

Typically, the doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy (*see* Karger, Powers of the New York Court of Appeals § 71 [a], at 426-429 [3d ed]). Bay Club urges that the controversy is moot because, with substantial completion of the project, the use already is changed. In a challenge such as this, however, relief remains at least theoretically available even after completion of the project. Simply put, structures changing the use of property most often can be destroyed.

[****20] Recognizing that a race to completion cannot be determinative, and cannot frustrate appropriate administrative review, [*173] courts have found several factors significant [***433] [**197] in evaluating claims of mootness. Chief among them has been a challenger's failure to seek preliminary injunctive relief or otherwise preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation (*see e.g. Matter of Imperial Improvements v Town of Wappinger Zoning Board of Appeals, 290 A.D.2d 507, 736 N.Y.S.2d 409* [2d Dept 2002] [no injunction or stay sought]; *Matter of Fallati v Town of Colonie, 222 A.D.2d 811, 634 N.Y.S.2d 784* [3d Dept 1995] [no injunction sought before Appellate Division]; *Matter of Naselli v Gribuski, 206 A.D.2d 838, 616 N.Y.S.2d 302* [4th Dept 1994] [no injunction or stay sought]; *Matter of Stockdale v Hughes, 189 A.D.2d 1065, 592 N.Y.S.2d 897* [3d Dept 1993] [Levine, J.] [same]; *see also Ughetta v Barile, 210 A.D.2d 562, 619 N.Y.S.2d*

[3] This Court denied petitioners' request for a stay pending appeal but granted a calendar preference (*97 NY2d 722, 767 N.E.2d 148, 740 N.Y.S.2d 691*).

805 [3d Dept 1994], *lv denied 85 N.Y.2d 805* [1995] [****21] [proceeding commenced after construction completed]).

Factors weighing against mootness may include whether a party proceeded in bad faith and without authority (*see e.g.* *Matter of Parkview Assoc. v City of New York, 71 N.Y.2d 274, 519 N.E.2d 1372, 525 N.Y.S.2d 176*, *cert denied and appeal dismissed 488 U.S. 801, 102 L. Ed. 2d 9, 109 S. Ct. 30* [1988] [municipal equitable estoppel case, invalidity of building permit readily discoverable]; *Matter of Uciechowski v Ehrlich, 221 A.D.2d 866, 634 N.Y.S.2d 251* [3d Dept 1995] [earthen berms constructed in violation of town official's directive]). Courts also have retained jurisdiction notwithstanding substantial completion in instances where novel issues or public interests such as environmental concerns warrant continuing review (*Matter of Friends of Pine Bush v Planning Bd. of City of Albany, 86 A.D.2d 246, 450 N.Y.S.2d 966* [3d Dept 1982], *affd 59 N.Y.2d 849, 465 N.Y.S.2d 924, 452 N.E.2d 1252* [1983]; *Vitiello v City of Yonkers, 255 A.D.2d 506, 680 N.Y.S.2d 607* [2d Dept 1998] [SEQRA challenge, plaintiffs unsuccessfully sought preliminary relief]; *Matter of Watch Hill Homeowners Assn. v Town Bd. of Town of Greenburgh, 226 A.D.2d 1031, 641 N.Y.S.2d 443* [3d Dept], *lv denied 88 N.Y.2d 811* [1996] [same]), and *ee e.g.* *Matter of Michalak v Zoning Bd. of Appeals of Town of Pomfret, 286 A.D.2d 906, 731 N.Y.S.2d 129* [4th Dept 2001] [cellular tower antennas replaced]). As here, the determination of mootness may necessarily be fact-driven. [4]

In this case, the nature of the challenge does not extend [*174] beyond these parties and this proposed use. Petitioners failed to seek a temporary restraining order or preliminary injunctive relief at any time during which the matter was pending before Supreme Court. They did not contest the issuance of building permits, or a residential use, but protested that the proposed use was too intensive. Acting in accordance with the use variance and unchallenged building permits, Bay Club proceeded to demolish the marina and repair the bulkhead--to the benefit of local residents--and make other improvements to and arrangements for the property. Petitioners' half-hearted request for injunctive relief was made only after Supreme Court's decision upholding the variance and now there has been substantial completion of the project. Under these circumstances, we dismiss the appeal as moot.

Finally, we note that our decision today in no way signals a retreat from the well-established rule that a landowner seeking a variance must demonstrate by "dollars and cents" proof that it cannot obtain a reasonable return under existing permissible uses.

Accordingly, the appeal [****24] should be dismissed without costs.

Judges Smith, Levine, Ciparick, Wesley, Rosenblatt and Graffeo concur.

Appeal dismissed, without costs.

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[4] Two additional doctrines--neither before us--also bear mention. First, a claim asserted following unreasonable delay may be barred by the equitable doctrine of **laches** (*see e.g.* *Matter of Stockdale, 189 A.D.2d at 1067*; *Matter of Sheerin v New York Fire Dept. Arts. 1 & 1B Pension Funds*, 46 N.Y.2d 488, 496, *387 N.E.2d 217, 414 N.Y.S.2d 506* [1979]). Laches must be pleaded and proved by one who urges it (*see Simcuski v Saeli, 44 NY2d 442, 450, 377 N.E.2d 713, 406 N.Y.S.2d 259* [1978]). Second, the **doctrine of vested rights**, partly grounded in equitable estoppel principles, may entitle a landowner to continued nonconforming use where the owner made substantial expenditures prior to amendment of applicable zoning laws (*see Matter of Ellington Constr. Corp. v Zoning Bd. of Appeals of Inc. Vil. of New Hempstead, 77 N.Y.2d 114, 122, 564 N.Y.S.2d 1001, 566 N.E.2d 128* [1990]).

Garal Wholesalers Ltd. v. Miller Brewing Co.

Supreme Court of New York, Suffolk County

August 16, 2002, Decided

INDEX No. 01-25517

Reporter
193 Misc. 2d 630 *; 751 N.Y.S.2d 679 **; 2002 N.Y. Misc. LEXIS 1321 ***

Garal Wholesalers, Ltd., Plaintiff, v Miller Brewing Company et al., Defendants.

Subsequent History: [*1]** Counsel Amended November 5, 2002. Counsel and Opinion Amended November 27, 2002.

Disposition: Motion to dismiss and strike Miller's first affirmative defense granted.

Core Terms

amendments, termination, Beverage, Alcoholic, brewer, impairment, parties, distributorship, retroactively, wholesalers, consolidation, regulation, brand, distributor, remedial, beer, rights, expectations, Reserves, Memorandum, retroactive application, contractual obligation, substantial impairment, termination notice, written agreement, preexisting, procedures, provisions, contracts, statutes

Counsel: *Barry A. Wadler,* New York City, and *Delia M. Guazzo,* New York City, for plaintiff. *Pino & Associates, LLP,* White Plains (*Thomas E. Healy* of counsel), and *Quarles & Brady LLP,* Milwaukee, Wisconsin (*David R. Cross* of the Wisconsin Bar, admitted pro hac vice, of counsel), for Miller Brewing Company, defendant. *Eliot Spitzer, Attorney General,* Hauppauge (*Denis J. McElligott* of counsel), in his statutory capacity under *Executive Law § 71*.

Judges: THOMAS F. WHELAN, J.S.C.

Opinion by: THOMAS F. WHELAN

Opinion

[*631] [682]** Thomas F. Whelan, J.

This case examines the law governing the rights of the parties concerning the termination of Garal's beer distributorship. The court is called upon to determine whether certain recent amendments to the controlling statute, *Alcoholic Beverage Control Law § 55-c*, are unconstitutional as violative of the constitutional prohibition against impairing **[***2]** the obligations of contracts (*see US Const, art I, § 10 [1]*). Garal believes that the amendments advance the beneficial purpose of the statutory scheme for the regulation of the sale and marketing of beer within the state and that Miller is seeking to accomplish the very thing that the legislation was specifically designed to prevent. Miller believes that by applying the

amendments retroactively, the State Legislature had "chang[ed] the rules in the middle of the game" and substantially impaired "the rights that Miller reserved for itself in its distributor agreement with Garal and the rights that Miller had under New York law at the time that it sent its [termination] notice." Since the court finds that the distributor agreement anticipated future changes in state law requirements concerning "differing termination notice periods, procedures, or justifications," the Contract Clause claim must be dismissed.

This is an action by Garal, a licensed beer wholesaler, against Miller, a brewer, seeking to stop Miller from terminating Garal's beer distributorship rights. Garal seeks declaratory and injunctive relief under *Alcoholic Beverage Control Law § 55-c*. In its answer, Miller **[***3]** has raised, as its first affirmative defense, that "Garal's claims under *ABCL § 55-c* should be dismissed because they are based upon amendments that cannot, under the Contract Clause, be retroactively applied to the relationship between Miller and Garal." The parties have stipulated **[**683]** to an early determination of this issue by the court.

Garal is licensed by the New York State Liquor Authority to sell beer at wholesale pursuant to *Alcoholic Beverage Control Law § 53*. Garal purchases beer from different brewers which it resells to license beer retailers. In 1998, Garal purchased the distributorship rights for various brands of beer manufactured by the Pabst Brewing Company (Pabst). At that time, Garal **[*632]** entered into an exclusive distributorship agreement with Pabst. Garal's exclusive territory for the acquired Pabst brands is Nassau and Suffolk Counties. In 1999, Miller acquired from Pabst some of the brands previously sold by Pabst, including some of the brands sold by Garal under the Pabst distributorship agreement. By virtue of an April 21, 1999 letter, Miller acknowledged to Garal that their relationship "will be governed by the terms of the current **[***4]** agreement for these acquired brands and New York law."

By letter dated August 31, 2001, Miller notified Garal that it intended to transfer Garal's distributorship rights in the acquired Pabst brands to another distributor. The letter stated that Miller had "instituted a national consolidation policy" and that pursuant to that policy, it had determined to have the acquired Pabst brands distributed by the existing distributor that currently sells the Miller brand. The letter also terminated the distributor agreement as of November 30, 2001. [1] It is Garal's position that any attempt to terminate the distributorship agreement must comply with the provisions of *Alcoholic Beverage Control Law § 55-c*. *Alcoholic Beverage Control Law § 55-c*, enacted in 1996, and amended in 1997 and 2001, governs the rights of brewers and wholesalers in regard to distribution agreements within the State of New York. [2] Both the distributor agreement and *Alcoholic Beverage Control Law § 55-c* specify that *Alcoholic Beverage Control Law § 55-c* supercedes any conflicting provisions of the written agreement, particularly with regard to terminations. The distributor agreement states in pertinent **[***5]** part, at paragraph 15 (B): "To the extent applicable, if state or local laws require longer or otherwise differing termination notice periods, procedures, or justifications, then this Agreement is amended to incorporate such requirements."

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[1] The termination has been stayed by a temporary restraining order dated November 8, 2001 (Loughlin J.). By stipulation between the parties, the temporary restraining order remains in place.

[2] In the legislative memorandum of the Senate sponsor of the original legislation, as enacted in 1996, State Senator Ronald B. Stafford wrote: "[Beer] wholesalers expend considerable time, money and effort in building equity in the brands they sell. This legislation recognizes the value of that equity and protects them from arbitrary termination and denial of the appointment of their successors" (*see* 1996 NY Legis Ann, at 504).

Alcoholic Beverage Control Law § 55-c (3) states, in pertinent part: "Written agreement required. … [B]eer **[***6]** offered for sale in this state by a brewer to a beer wholesaler shall be sold and delivered pursuant to a written agreement which conforms to the provisions of this section …."

[*633] Alcoholic Beverage Control Law § 55-c (4) (a), which precludes terminations except in accordance with the statute, states, in pertinent part:

"No brewer may cancel, fail to renew, or terminate an agreement unless the party intending such action has good cause for such cancellation, failure to renew, or termination and in any case in which prior notification is required under this section, the party intending to act has furnished said prior notification as provided **[**684]** for in subdivision five of this section …."

Alcoholic Beverage Control Law § 55-c (11), which precludes superceding the law by written agreement, states: "The requirements of this section may not be altered, waived or modified by written or oral agreement in advance of a bona fide case and controversy arising under a written agreement complying with this section."

As originally enacted, in 1996, Alcoholic Beverage Control Law § 55-c did not specify any objective standards as to what constitutes the "national or regional policy of consolidation" and **[***7]** did not require the brewer to pay damages to the terminated wholesaler prior to termination. It has been claimed that such resulted in questionable consolidation plans supporting distributor termination contrary to the intention of the law (*see* Governor's Bill Jacket, L 2001, ch 346, at 8, 11, 14, 32). [3] Moreover, on January 12, 2001, the law, as originally drafted, led to a dismissal of a distributor's preliminary injunction action seeking to enjoin a brewer from terminating a distributor before the validity of an alleged consolidation policy was shown, since such was not authorized under the law (*see Oak Beverages, Inc. v Heineken USA, Inc.,* Sup Ct, Orange County, Index No. 7757/00, Owen, J.).

[*8]** On June 15, 2001, the New York State Legislature passed amendments to Alcoholic Beverage Control Law § 55-c, that is chapter 346 of the Laws of 2001. The legislation was not signed into law by Governor George E. Pataki until September 19, **[*634]** 2001; however, the amendments to the law were expressly made effective and retroactive to June 15, 2001. In fact, the actual language states: "[t]his act shall take effect immediately and shall be deemed to have been in full force and effect on and after June 15, 2001, and shall apply to agreements amended, cancelled, terminated, modified or not renewed on or after such date" (L 2001, ch 346, § 7).

The Senate sponsor, Owen H. Johnson, in his State Senate Introducer's Memorandum, offered the following rational for the amendments:

"Unfortunately, a recent court decision has brought about a result unintended by the legislature in its adoption of section 55-c by rejecting a wholesaler's request for preliminary injunctive relief without first requiring the supplier to meet the statutory burden of proof as to whether its putative consolidation policy

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[3] Before oral argument, the court requested that the parties provide the legislative Bill Jacket from the New York Legislative Service, Inc. concerning the statute and amendments at issue. The court was provided with the Governor's Bill Jacket, Laws of 2001 (ch 346 [64 pages]), the Assembly Debate Transcripts, Laws of 2001 (ch 346 [6 pages]), the Governor's Bill Jacket, Laws of 1997 (ch 612 [9 pages]), the Senate Debate Transcripts, Laws of 1997 (ch 612 [6 pages]), the Governor's Bill Jacket, Laws of 1996 (ch 679 [157 pages]), and the Senate Debate Transcripts, 1996 NY Senate Bill S 5410--B/A6458-C (5 pages). All have been added to the record of this motion.

qualified under the criteria established by the legislature. (see Oak Beverages. **[***9]** Inc. et. at [*sic*] v Heineken USA Inc. Supreme Court, Orange County, January 12, 2001)."

The memorandum also noted that "in order to qualify as good cause for the termination of a relationship under the statute, [the consolidation plan] must truly be multi-state in its implementation and contemporaneously pursued by a brewer as a matter of business necessity."

As noted above, Miller's termination letter of August 31, 2001 was after passage of the legislation by the State Senate and **[**685]** State Assembly, after the legislation's effective date, but before the Governor's signature. The retroactive nature of the legislation was commented upon in a September 5, 2001 letter, set forth in the legislative Bill Jacket (*see* Governor's Bill Jacket, L 2001, ch 346, at 8), from the Senate sponsor, Owen H. Johnson, to Governor Pataki ("This was done to preempt attempts by brewers to impose unilateral consolidations under their interpretations of the law during the period between its passage by the legislature and your anticipated signing"). Additionally, Assembly Majority Leader, Paul A. Tokasz, in a September 7, 2001 letter to the Governor's counsel, James McGuire, addressed the retroactivity of **[***10]** the legislation and the Legislature's desire to avoid "gap terminations" ("It is the Legislature's intent that any termination pursuant to an alleged plan of national or regional consolidation for which notices have been given pursuant to *Section 55-c(e)(i)* subsequent to June 15, 2001 shall be unlawful and enjoinable unless the **[*635]** same is determined to be in compliance with the amended law") (*see* Governor's Bill Jacket, L 2001, ch 346, at 4).

As now amended, *Alcoholic Beverage Control Law § 55-c* prohibits termination of a beer wholesaler's distributorship agreement except under very circumscribed occurrences (*see Alcoholic Beverage Control Law § 55-c [2] [e] [i]*). Under the statute, where a brewer relies upon a consolidation policy for termination, the brewer must prove that the consolidation policy complies with the requirements of the law (*see Alcoholic Beverage Control Law § 55-c [6]*) and the brewer must pay the wholesaler reasonable compensation for the loss of the distributorship rights prior to termination as a condition of termination (*see Alcoholic Beverage Control Law § 55-c [7] [a]*). *Alcoholic Beverage Control Law § 55-c* permits **[***11]** termination only for "good cause," as defined at *Alcoholic Beverage Control Law § 55-c (2)(e)*. Only two causes for termination are recognized. The one that is applicable is if a brewer is implementing a national or regional policy of consolidation of its distributorship network "which is reasonable, nondiscriminatory and essential. Such policy shall have been previously disclosed, in writing, in reasonable detail to the brewer's wholesalers, and shall result in a contemporaneous reduction in the number of a brewer's wholesalers not only for a brand in this state, but also for a brand in contiguous states or in a majority of the states in which the brewer sells the brand" (*Alcoholic Beverage Control Law § 55-c [2] [e] [i] [A]*).

A new provision adds that a brewer may not terminate a distributorship agreement unless the brewer provides the wholesaler with prior notification in writing by certified mail which contains, among other things, a statement of all the reasons for the termination stated "in reasonable detail" (*Alcoholic Beverage Control Law § 55-c [5] [a]*, *[c]*). As noted, the amendments mandate that a brewer must pay the wholesaler compensation for the loss **[***12]** of the distributorship rights prior to termination. Compensation is defined as "the fair market value of the distribution rights [as defined in *Alcoholic Beverage Control Law § 55-c (2) (i)*] which will be lost or diminished by reason of the implementation of such policy, together with fair and reasonable compensation for other damages sustained" (*Alcoholic Beverage Control Law § 55-c [7] [a]*). Finally, the amendments made clear that legal remedies are not

exclusively set forth in the law and that traditional commercial tort and common-law remedies are retained as well.

It is Garal's argument that the express intent of the amendments was to halt terminations of a wholesaler's distributorship **[*636]** under the guise of some undefined "consolidation policy." As shown above, the 2001 amendments require, among other things, the consolidation policy to be in writing, in reasonable detail, and the result of a reduction of wholesalers "not only for a brand in this state, but also for a brand in **[**686]** contiguous states or in a majority of the states in which the brewer sells the brand." Garal correctly states that Miller's August 31, 2001 termination letter fails to satisfy the new amendments to **[***13]** *Alcoholic Beverage Control Law § 55-c*, as to the requisite notice, as to the national consolidation policy, and as to the compensation required.

Miller claims that the amendments had the effect of retroactively impairing its contractual rights in violation of the constitutional prohibition against impairing the obligations of contracts (*see US Const, art I, § 10*). It also claims that when Miller assumed the distributorship agreement in 1999, *Alcoholic Beverage Control Law § 55-c* gave brewers broad discretion to consolidate their brand rights to reduce the number of distributors in New York. Miller claims that when it gave Garal notice of termination on August 31, 2001, it complied with the then-governing version of *Alcoholic Beverage Control Law § 55-c*. Miller further claims that the amendments added at least five new elements to *Alcoholic Beverage Control Law § 55-c* that were not present when Miller (through its predecessor) and Garal entered into their distributor agreement in 1998.

Notice of a challenge to the constitutionality of a state statute was provided to the Attorney General of the State of New York pursuant to *Executive Law § 71* **[***14]** and *CPLR 1012 (b)*. By letter dated April 29, 2002, a determination was made by the Attorney General's office not to participate, at this time.

Analysis begins with the axiom that enactments of the Legislature are presumed to be constitutional and the party asserting the unconstitutionality bears the heavy burden of demonstrating the unconstitutionality beyond a reasonable doubt (*see Matter* ***Saratoga Water Auth. Servs. v Saratoga Water Auth.,*** *83 N.Y.2d 205, 211, 608 N.Y.S.2d 952, 630 N.E.2d 648* [1994]). As noted in ***Matter of McGee v Korman*** *(70 N.Y.2d 225, 231, 519 N.Y.S.2d 350, 513 N.E.2d 236* [1987]), "[e]nactments of the Legislature--a coequal branch of government--may not casually be set aside by the judiciary." Moreover, as recognized by the United States Supreme Court, in ***Brown-Forman Distillers Corp. v New York State Liq. Auth.*** *(476 U.S. 573, 585, 106 S. Ct. 2080, 90 L. Ed. 2d 552* [1986]), "New York has a valid constitutional interest in regulating sales of liquor within the territory of New York." Of course, **[*637]** "the [21st] Amendment does not license the States to ignore their obligations under other provisions of the Constitution" **[***15]** (*Capital Cities Cable, Inc. v Crisp, 467 U.S. 691, 712, 104 S. Ct. 2694, 2707, 81 L. Ed. 2d 580* [1984]; *see Brown-Forman Distillers Corp., 476 U.S. at 584-585* . [Commerce Clause challenge]). Here, the claim is that retroactive application of the amendments to the preexisting contract between Miller and Garal violates the *Contract Clause of the United States Constitution*, which states, in pertinent part, "[n]o State shall … pass any … Law impairing the Obligation of Contracts …" (*US Const, art I, § 10 [a]*). The challenge is not a prospective one.

The court cannot agree with Miller's contention that "Miller and Garal did not contract for any of the new restrictions contained in the Amendments to *Section 55-c*."

As a matter of public policy, alcohol manufacture, sale, and distribution, including the termination of a beer distributorship, is an area that is comprehensively and pervasively regulated. The declared policy of New York is that it is necessary to regulate and control the manufacture, sale, and distribution of alcoholic beverages (*see* Alcoholic Beverage Control Law §§ 2, 101-b). Here, the challenged provisions implement **[***16]** that legislative determination. All parties acknowledge that the liquor industry is heavily regulated. Alcoholic Beverage Control Law § 55-c appears to be modeled after the **[**687]** Wisconsin Fair Dealership Law (Wis Stat Ann § 135.01 et seq.), "a remedial statute, intended to protect dealers whom the legislature recognizes as having an inferior bargaining position in negotiating dealership agreements with grantors (franchisors)" (***Ziegler Co., Inc. v Rexnord, Inc.,*** *147 Wis2d 308, 323, 433 N.W.2d 8, 14* [1988]).

Subdivision (10) (a) of section 55-c, as originally adopted, provided that the law "shall not apply to written agreements that were in effect prior to the effective date of this section." The effective date was September 25, 1996. The subdivision further stated: "[p]rovided, however, that this section shall apply to any agreement entered into, renewals, extensions, amendments or conduct constituting a material modification of an agreement on or after the effective date of this section." Therefore, section 55-c applies to this agreement, which was entered into in 1998.

Moreover, as set forth above, paragraph 15 (B) of the distributor agreement states: **[***17]** "if state or local laws require longer or otherwise differing termination notice periods, procedures, or justifications, then this Agreement is amended to incorporate such requirements."

[*638] It is an elementary principle of contract interpretation that, when parties to an agreement intend that their written agreement constitutes the entire understanding between the parties, the courts should enforce their agreement as written (*see e.g.,* ***Western Union Tel. Co. v American Communications Assn.,*** *299 NY 177, 86 N.E.2d 162* [1949]). This rule adds certainty to contract interpretation and enforcement (*see* ***R/S Assocs. v New York Job Dev. Auth.,*** *98 N.Y.2d 29 744 N.Y.S.2d 358, 771 N.E.2d 240* [2002]). In ***W.W.W. Assoc. v Giancontieri*** *(77 N.Y.2d 157, 565 N.Y.S.2d 440, 566 N.E.2d 639* [1990], the Court of Appeals had occasion to revisit and reaffirm this fundamental principle of contract law "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*77 N.Y.2d at 162*, *supra*). When the terms of a written contract are clear and unambiguous, the intent **[***18]** of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties reasonable expectations (*see* ***Slamow v Del Col,*** *174 A.D.2d 725, 726, 571 N.Y.S.2d 335* [2d Dept 1991], *affd 79 NY2d 1016, 584 NYS2d 424, 594 N.E.2d 918* [1992]; ***W.W.W. Assoc.,*** *77 NY2d 157, 565 N.Y.S.2d 440, 566 N.E.2d 639*, *supra*). Thus, "clear, complete writings should generally be enforced according to their terms" (*W.W.W. Assoc. at 160*). Interpretation of an unambiguous contract is a matter for the court (*see* ***Sunrise Mall Assocs. v Import Alley of Sunrise Mall,*** *211 A.D.2d 711, 621 N.Y.S.2d 662* [2d Dept 1995]; *Lake Constr. & Dev. Corp. v City of New York, 211 A.D.2d 514, 621 N.Y.S.2d 337* [1st Dept 1995]).

Here, the court is called upon to interpret the clear and unambiguous language of paragraph 15 (B) of the distributor agreement in light of the statutes that are incorporated into the agreement by virtue of that mutually agreed upon provision. Generally, statutes are construed as prospective in effect unless there is a clear **[***19]** legislative intent to make them operate retrospectively (*see* McKinney's Cons Laws of NY, Book 1, Statutes § 51 [b]; § 52; ***Western N.Y. & Pa. Ry. Co. v City of Buffalo,*** *296 NY 93, 98, 71 N.E.2d 108* [1947]). There is no doubt that the Legislature expressed its intention that the amendments should

apply to contracts previously made (*cf.* ***Gimbel Bros. v Brook Shopping Ctrs.,*** *118 A.D.2d 532, [**688] 499 N.Y.S.2d 435* [2d Dept 1986]). The amendments contain a clear statement concerning retroactivity.

Additionally, a court may not construe an agreement so that it is modified by a subsequent statutory enactment which changes the rights and obligations of the parties, absent a clear expression in the contract that such is the parties' intention (*see* ***Pioneer Transp. Corp. v Kaladjian,*** *105 A.D.2d 698, 481 N.Y.S.2d 136* **[*639]** [2d Dept 1984]). The court holds that such an intention is evinced by paragraph 15 (B) of the agreement in this case.

Moreover, "remedial" legislation or statutes governing procedural matters should be applied retroactively (*see* ***Majewski v Broadalbin-Perth Cent. School Dist.,*** *91 N.Y.2d 577, 673 N.Y.S.2d 966, 696 N.E.2d 978* **[***20]** [1998]), particularly to avoid undermining its remedial purpose (*see* ***Matter of OnBank & Trust Co.,*** *90 N.Y.2d 725, 665 N.Y.S.2d 389, 688 N.E.2d 245* [1997]; *see also* ***Matter of Gleason [****Vee,* *96 N.Y.2d 117, 122, 726 N.Y.S.2d 45, 749 N.E.2d 724* [2001] ["Other factors in the retroactivity analysis include whether the Legislature has made a specific pronouncement about retroactive effect or conveyed a sense of urgency; whether the statute was designed to rewrite an unintended judicial interpretation; and whether the enactment itself reaffirms a legislative judgment about what the law in question should be"]).

In reviewing the case law concerning statutory construction, the court is drawn to ***Jacobus v Colgate*** *(217 NY 235, 111 N.E. 837* [1916]), wherein Judge Cardozo wrote (*217 N.Y. at 240*) that "[t]he general rule is that statutes are to be construed as prospectively only. It takes a clear expression of the legislative purpose to justify a retroactive application. Changes of procedure, i.e., of the form of remedies, are said to constitute an exception, but that exception does **[***21]** not reach a case where before the statute there was no remedy whatever. To supply a remedy where previously there was none of any kind, is to create a right of action." (Citations omitted.)

In *Jacobus* (*id. at 244*), Judge Cardozo found "[t]he decisive consideration here is that until the statute was adopted, no remedy of any kind was available in any court." In the instant case, the amendments did not create a right which did not exist before, but merely created, or expanded upon, a remedy for an antecedent right (*cf. Matter of Deutsch v Catherwood, 31 N.Y.2d 487, 341 N.Y.S.2d 600, 294 N.E.2d 193* [1973]). The court concurs with the argument advanced by Garal that "[t]he Amendments did not add substantial new burdens on a brewer seeking to terminate for consolidation. The Amendments were largely clarifications of the existing law enacted to counter misinterpretations of the law" (*see* letter submission, dated June 19, 2002, Barry A. Wadler, Esq.).

Here, many aspects of the amendments are remedial in nature. As recognized by the Court of Appeals in ***Matter of Duell v Condon*** *(84 N.Y.2d 773, 783, 622 N.Y.S.2d 891, 647 N.E.2d 96* [1995]), a case where **[***22]** the Legislature did not expressly state that the statute was to be applied retroactively, "statutes that are remedial in nature may be applied retrospectively." (Citation omitted.) Notwithstanding **[*640]** Miller's claim (*see* letter submission, June 19, 2002, Thomas E. Healy, Esq.) that attempts, in out of state cases, to "level the playing field" or of "equalization of bargaining power," does not serve a broad public purpose, the Court in ***Matter of Duell*** (*84 N.Y.2d at 783*) applied the statute retroactively to leases executed prior to the effective date of the statute since "[t]he remedial **[**689]** nature of the Legislature's action to equalize the power of landlords and tenants is evident from both the language of the statute as well as historical documents (*see,* Bill Jacket, L 1966, ch 286)." Additionally, as held in ***Goldfarb v Goldfarb*** *(86 A.D.2d 459, 461, 450 N.Y.S.2d 212* [2d Dept 1982]), "a contract 'may be affected by subsequent legislation in the exercise of the police power, or by a subsequent statute announcing a new

public policy … or by repeal of a prohibitory act'." (Citations omitted.) Here, upon review of the legislative Bill Jacket, it certainly **[***23]** can be argued that the amendments represent a change in the public policy concerning termination of beer distributorships.

Apart from the above analysis regarding contract and statutory construction, in considering whether the amendments violate the Contract Clause, the threshold question is whether the state law has in fact operated as a substantial impairment of a contractual relationship (*see* ***Energy Reserves Group, Inc. v Kansas Power & Light Co.,*** *459 U.S. 400, 103 S. Ct. 697, 74 L. Ed. 2d 569* [1983]). An excellent examination of that Supreme Court holding, and explanation of the application of the Contract Clause, is found in *Schieffelin & Co. v Department of Liquor Control (194 Conn 165, 177-178, 479 A.2d 1191, 1199* [1984]):

"Factors to be weighed are the severity of the impairment, the extent to which it frustrates a party's reasonable contractual expectations and the extent to which the subject matter of the impairment has been regulated in the past. Id. If the impairment is minimal the inquiry may end at the embryonic stage. If, however, the impairment is severe, the legislation will be subjected to an increased level of scrutiny. **[***24]** Id. On the other hand, no matter how severe the impairment, a state regulation which does no more than restrict a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment within the meaning of the contract clause. Moreover, if one buys into an enterprise already regulated in the particular to which he now objects, he **[*641]** buys subject to further legislation upon the same topic." (Citations omitted.)

As part of this threshold inquiry, the party challenging the law as a substantial impairment of a contractual relationship bears the burden of demonstrating that it in fact possesses contractual rights or obligations altered by the law. Secondly, if a substantial impairment is found, a court must then determine whether the governmental entity had a "significant and legitimate public purpose behind the regulation … such as the remedying of a broad and general social or economic problem" (***Energy Reserves****, 459 US at 411-412*). In the third and final stage, the court must determine "whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions **[***25]** and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption'" (***Energy Reserves,*** *459 U.S. at 412*, quoting ***United States Trust Co. of N.Y. v New Jersey,*** *431 U.S. 1, 22, 97 S. Ct. 1505, 1518, 52 L. Ed. 2d 92* [1977]). When considering this last aspect, especially the economic and social regulations, courts properly defer in large measure to the legislative judgment as to the necessity and reasonableness of a particular measure (*see* ***Energy Reserves,*** *459 U.S. at 412-413*).

Garal argues that there is a complete absence of a contract right that is being impaired. The primary focus of the Contract Clause is "upon legislation … designed to repudiate or adjust pre-existing **[**690]** debtor-creditor relationships that obligors [are] unable to satisfy" (***Keystone Bituminous Coal Assn. v DeBenedictis,*** *480 U.S. 470, 503, 107 S. Ct. 1232, 1251, 94 L. Ed. 2d 472* [1987] [law affecting express private contracts]). Here, Miller is seeking to use the Contract Clause to strike down a law amending a preexisting law that is expressly incorporated into the contract. Miller's argument **[***26]** is not that contract rights or obligations are altered by the amendments, but that the amendments do what amendments are intended to do, that is, alter the preexisting law. As the Supreme Court observed in ***Exxon Corp. v Eagerton*** *(462 U.S. 176, 190, 103 S. Ct. 2296, 2305, 76 L. Ed. 2d 497* [1983]):

"The Contract Clause does not deprive the States of their 'broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result.'

United States Trust Co. v New Jersey, [431 U.S. 1, 22, 97 S. Ct. 1505, 1517, 52 L. Ed. 2d 92 (1977)]. As Justice Holmes put it: 'One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The **[*642]** contract will carry with it the infirmity of the subject matter.' ***Hudson Co. v McCarter,*** *209 U.S. 349, 357, 28 S. Ct. 529, 531, 52 L. Ed. 828 (1908)*."

As set forth above, only a substantial impairment will require further analysis. In ***United States Trust Co. v New Jersey*** *(431 U.S. 1, 20-21, n 17, 52 L. Ed. 2d 92, 97 S. Ct. 1505* [1977]), **[***27]** the Court explained the analysis as:

"a more particularized inquiry into the legitimate expectations of the contracting parties. The parties may rely on the continued existence of adequate statutory remedies for enforcing their agreement, but they are unlikely to expect the state law will remain entirely static. Thus, a reasonable modification of statutes governing contract remedies is much less likely to upset expectations than a law adjusting the express terms of an agreement."

Here, as noted, Miller contracted in a "heavily regulated" area, and could not justifiably rely on the continuity of the statutory scheme (*see* ***Troy, Ltd. v Renna,*** *727 F.2d 287, 297* [3d Cir 1984] [a statutory extension of a preexisting statutory tenancy was "probably not an impairment at all" since the landlord "'purchased into an enterprise already regulated in the particular to which he now objects'" and could not justifiably expect that no amendment would occur], quoting ***Veix v Sixth Ward Bldg. & Loan Assn. of Newark,*** *310 U.S. 32, 38, 60 S. Ct 792, 794, 84 L. Ed. 1061* [1940]; ***Energy Reserves,*** *459 U.S. at 416, 103 S. Ct. at 707* **[***28]** [when a statute changed already regulated natural gas prices, "reasonable expectations have not been impaired"]; *see also* ***Empire Distribs. of the Carolinas, Inc. v Heublein Wines,*** *1985 U.S. Dist. LEXIS 23799*, *12, *1985 WL 17505* [ED NC] ["although North Carolina's ABC laws did not contain a 'just cause' termination provision in 1975 when the contract was executed, it was foreseeable that the North Carolina General Assembly might pass such a provision as part of its ABC laws"]; *cf.* ***Peoples Savings Bank of Yonkers, N. Y. v County Dollar Corp.,*** *43 A.D.2d 327, 351 N.Y.S.2d 157* [2d Dept 1974] [attempted retroactive application of newly adopted legislation, where there was no prior statute, was unconstitutional]). The instant case is not one where a supplier's right to terminate at-will contracts with its wholesalers has been impaired by retroactive application of a new statute (*see* ***Heublein, Inc. v Department of Alcoholic Beverage Control of the Commonwealth of Virginia,*** *237 Va 192, 376 S.E.2d 77* [1989]). Here, as in *Veix,* (*310 U.S. at 38*), Miller "purchased **[**691]** subject to further legislation upon the same topic." The challenged **[*643]** legislatively **[***29]** created rights, set forth in *Alcoholic Beverage Control Law § 55-c*, are not protected by the Contract Clause.

In ***Schieffelin & Co.*** *(194 Conn 165, 479 A.2d 1191*), the severity of the impairment was more severe than that facing Miller in the instant case. In that case, the statute imposed a "just cause" requirement for termination of certain contractual relationships theretofore terminable at will, by reducing the durational period one holds a distributorship from 24 months to six months. Yet, the court (*194 Conn. at 181-182, 479 A.2d at 1201*) held "[i]t was therefore reasonably foreseeable that the twenty-four month distributorship as a requirement for just cause termination would not remain static and, in all likelihood, would be reduced."

From the above, the court finds that the Contract Clause protects only expectations of the parties to the contract arising from mutual assent. Here, the parties agreed to be bound to "differing termination notice periods, procedures, or justifications," set forth in state or local laws. This is simply not the kind of

expectation the Contract Clause was intended to protect. In New York, the termination procedures for beer distributorships **[***30]** is wholly a creature of statute, not contract (*see e.g.* ***Medical Malpractice Ins. Assn. v Cuomo,*** *74 N.Y.2d 651, 543 N.Y.S.2d 364, 541 N.E.2d 393* [1989]). Here, Miller nor the court is able to identify a contract right that is impaired by the challenged amendment. Certainly, at the time Miller sent its termination notice it expected the Legislature to amend the statute, which amendment was awaiting the Governor's signature. Moreover, even at time of assumption of the contract in 1999, the possibility that the statutory termination procedures would be modified was a real expectation. The court holds that the remedial amendment did not impair any contract-based expectation. In any event, whether or not the Contract Clause claim is disposed of by virtue of paragraph 15 (B) of the distributor agreement that expressly recognizes the existence of extensive regulation and incorporates same into the contract, it does suggest that Miller knew that its contractual rights were subject to alteration by state law (*see* ***Energy Reserves,*** *459 U.S. at 416*).

The cases relied upon by Miller, on pages 10 through 11 of its memorandum of law, involved situations where **[***31]** newly enacted legislation was sought to be applied to preexisting contracts that did not discuss the length of their relationship or the conditions for terminating same (*see e.g.* ***Birkenwald Distrib. & Co. v Heublein, Inc.,*** *55 Wash. App. 1, 7, 776 P.2d 721, 725* [1989] ["would not simply supplement their agreement, it **[*644]** would revise it; it would impose obligations without regard to the parties' intent"]).

Due to the preexisting regulation of the area at issue, Miller had reason to anticipate that the Legislature would make the rather modest remedial changes that do not rise to the level of drastic, unanticipated changes that would satisfy the analysis of a substantial impairment. Here, the impairment is minimal and the inquiry may end at the first stage of the Contract Clause inquiry (*see* ***Allied Structural Steel Co. v Spannaus,*** *438 U.S. 234, 245, 98 S. Ct. 2716, 2723, 57 L. Ed. 2d 727* [1978] ["Minimal alteration of contractual obligations may end the inquiry at its first stage"] ***Chrysler Corp. v Kolosso Auto Sales, Inc.,*** *148 F.3d 892, 897* [7th Cir 1998], *cert denied 525 US 1177* **[***32]** [1999] ["a contractual obligation is not impaired within the meaning that the modern cases impress **[**692]** upon the Constitution if at the time the contract was made the parties should have foreseen the new regulation challenged under the clause"]; *see also* Hockman, *The Supreme Court and the Constitutionality of Retroactive Legislation,*73 Harv L Rev 692 [1960]).

In light of the court's holding, there is no need to examine the remaining two stages of significant and legitimate public purpose behind the regulation and whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption. In any event, if the inquiry is framed as entailing an "overall determination of reasonableness" (***United States Trust Co.*** *431 U.S. at 22 n 19*), in light of the fact that courts are required to defer to the Legislature's judgment concerning the necessity and reasonableness of economic and social legislation, reasonableness is amply demonstrated in the legislative Bill Jacket of the challenged amendments. **[***33]**

Under this "reasonableness" inquiry, the courts have recognized a legislature's right to cure a court's erroneous interpretation of a statute retroactively to pending cases (*see* ***Canisius College v United States,*** *799 F.2d 18, 27* [2d Cir 1986]; ***Battaglia v General Motors Corp.,*** *169 F.2d 254, 259-261* [2d Cir]; *Rudewicz v Gagne, 22 Conn App 285, 288, 582 A.2d 463, 465* [1990] ["An act that has been passed to clarify an existing statute, that is, one that was passed shortly after controversies arose as to the judicial interpretation of the original act, is also to be applied retroactively"]). In this case, in light of the decision

of Justice Owen in *Oak Beverages, Inc. v Heineken USA, Inc.* in Supreme Court, Orange County, the retroactive curative **[*645]** amendments are supported by a public purpose and do not effect an unreasonable accommodation between the public interest and contractual expectations (*see* ***Matter of Gleason,*** 96 N.Y.2d at 122, *supra* [including in the retroactivity analysis "whether the statute was designed to rewrite an unintended judicial interpretation"]). Therefore, **[***34]** even if the amendments could be said to impair contract-based expectations, it did not do so in violation of the Contract Clause.

Miller's reliance upon the Sixth Circuit's holding ***Bob Tatone Ford, Inc. v Ford Motor Co.*** *(197 F.3d 787* [6th Cir 1999]), is misplaced. First, the "good cause" provisions of the Ohio Motor Vehicle Dealers Act (*Ohio Rev Code Ann § 4517.54 [A]*) were enacted well after the execution of the contract at issue, and those provisions impaired substantive rights. Secondly, the holding was based upon a violation of *article II, § 28 of the Ohio Constitution*, which states, in part, that "[t]he general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts[.]" No similar prohibition exists in the New York Constitution. Additionally, unlike the amendments before this court, in ***Landgraf v USI Film Products*** *(511 U.S. 244, 286, 114 S. Ct. 1483, 1508, 128 L. Ed. 2d 229* [1994]), another case relied upon by Miller, the Supreme Court "found no clear evidence of congressional intent that § 102 of the Civil Rights Act of 1991 should apply to **[***35]** cases arising before its enactment."

The court rejects the claim that the amendment constitutes special interest legislation (*see* ***Energy Reserves,*** *459 U.S. at 417 n 25, 103 S. Ct. at 708*, ["Given the nature of the industry … it is impossible for any regulation not to have a major effect on a small number of participants"]; *see e.g.* ***Lochner v New York,*** *198 U.S. 45, 68, 25 S. Ct. 539, 49 L. Ed. 937* [1905] [**[**693]** Harlan, White, and Day, JJ., dissenting] ["(i)f there be doubt as to validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation"]).

The court's determination is supported by an examination of the legislative Bill Jacket accompanying the Legislature's original enactment and the challenged amendments. Courts have often relied, cautiously, upon memoranda issued contemporaneously with the passing and signing of a statute in seeking to ascertain legislative intent (*see* ***Majewski v Broadalbin-Perth Cent. School Dist.,*** *91 N.Y.2d at 585* **[***36]** ["In an analysis of retroactive application, we have found it relevant when the [legislation] … is to clarify what the law was always meant to say and do"]; ***Matter of Knight-Ridder Broadcasting v Greenberg, [*646]*** *70 N.Y.2d 151, 158, 518 N.Y.S.2d 595, 511 N.E.2d 1116* [1987]; ***Matter of Greer v Wing,*** *95 N.Y.2d 676, 723 N.Y.S.2d 123, 746 N.E.2d 178* [2001]; ***Matter of OnBank & Trust Co.,*** *90 N.Y.2d 725, 665 N.Y.S.2d 389, 688 N.E.2d 245*, *supra; Matter of Duell, 84 N.Y.2d at 783-784*, *supra*). A review of the correspondence surrounding the 1996 enactment of *Alcoholic Beverage Control Law § 55-c* reveals that "[t]his legislation is designed to provide a more equitable framework for the business dealings between beer brewers and importers and their wholesalers" and designed to protect wholesalers "from arbitrary termination and denial of the appointment of their successors" (*see* Governor's Bill Jacket, L 1996, ch 679, at 4). The Governor's Executive Memorandum of Approval, dated September 25, 1996, expressly states that future amendments would be offered and he instructed "the State Liquor Authority **[***37]** to monitor closely the implementation of this legislation and to suggest statutory and regulatory modifications where necessary and appropriate" (*see* Governor's Bill Jacket, L 1996, ch 679, at 14). The correspondence shows that Miller favored the legislation, particularly "the concept of the adoption or implementation of a national or regional policy of consolidation" (*see* Governor's Bill Jacket, L 1996, ch 679, at 54; *see also* at 25, 33, 37, 57, 58, 64, 72). In fact, the defaulting defendant in this

action, Boening Bros., Inc., wrote the Governor in favor of the legislation to combat "unfair termination of a wholesaler by a supplier" (*see* Governor's Bill Jacket, L 1996, ch 679, at 131).

The 1997 correction amendment addressed some of the concerns raised by the Governor's Executive Memorandum in 1996 and the concerns of small brewers (*see* Governor's Bill Jacket, L 1997, ch 612, at 5).

As for the challenged amendments, the Governor's Executive Memorandum of Approval, dated September 19, 2001, acknowledges that "[t]he purpose of this bill is to address perceived ambiguities in current law concerning definitions of 'region' and 'reasonable compensation,' which have **[***38]** been highlighted in a recent court ruling (*Oak Beverages v Heineken USA, Inc.,* Index No. 7757/00, NYS Supreme Court, Orange Co.)" (*see* Governor's Bill Jacket, L 2001, ch 346, at 4). While offering that "the bill as written goes [too] far in shifting the balance of bargaining power into the hands of one party to a franchise agreement" the Governor does concede the intention of "clarifying ambiguities and closing apparent loopholes in the law" (*id.*).

As noted above, retroactivity was addressed in the September 7, 2001 letter of **[**694]** Assembly Majority Leader, Paul A. Tokasz, **[*647]** and the September 5, 2001 letter of the Senate sponsor, Owen H. Johnson. The concern and reaction to the*Oak Beverages, (supra),* decision is reflected throughout the Bill Jacket (*see* Governor's Bill Jacket, L 2001, ch 346, at 11 ["a recent court decision has brought about a result unintended by the legislature in its adoption of *section 55-c*"]; *see also* at 14, 32). While Miller, and other brewers, sought a veto of the amendments (*see* Governor's Bill Jacket, L 2001, ch 346, at 18-20, 49, 52-62), the Governor approved the amendments, with his expressed reservations.

[*39]** In all, the Bill Jacket supports the court's determination that the amendments are remedial in nature, that they constitute a minimal alteration of contractual obligations, that the possibility that the statutory termination procedures would be modified was a real expectation upon a review of the various Bill Jackets, that Miller could not justifiably expect that no amendment would occur in light of an unexpected judicial determination, that the amendments were designed to rewrite an unintended judicial interpretation, that the amendments reaffirm a legislative judgment about what the law in question should be, and that the amendments do not impair contract-based expectations in violation of the Contract Clause.

Retroactive application of the statute in this case would not substantially alter the vested contract rights of the parties or impose unanticipated consequences. The amendments do not abridge legitimate expectations which the parties reasonably relied upon in contracting. The court concludes that it "may not lightly alter this legitimate exercise of legislative prerogative" (***Castro v United Container Mach. Group, 96 N.Y.2d 398, 736 N.Y.S.2d 287, 761 N.E.2d 1014*** **[***40]** [2001]).

Finally, the pleadings raise an interesting issue of whether or not Miller is aggrieved by the retroactive application of the amendments. In footnote 4, on page 3 of its memorandum of law, Miller claims that it "has complied with the amended version of *Section 55-c*." Additionally, with denials in Miller's answer at paragraphs 25 through 28, refuting the allegations that Miller had failed to comply with the law as amended, it appears that Miller's position is that it complied with the amended law. As to the compensation requirement under the new amendments, Miller states that it has offered to pay Garal an amount of money sufficient to satisfy any financial obligations it may have to Garal pursuant to *Alcoholic Beverage Control Law § 55-c*, but that Garal has refused to accept such payment. However, in light of the

court's holding, this issue **[*648]** and the argument that the termination was not effective until well after the amendments were signed into law, need not be addressed at this time.

Accordingly, the motion dismissing and striking Miller's first affirmative defense is granted.

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Gray v. Ward

Supreme Court of New York, Special Term, Nassau County

May 14, 1973

No Number in Original

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

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

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

Core Terms

accessory use, Village, helipad, helicopter, zoning regulation, incidental, regulations, customarily, zoning, primary use, landing, aircraft, transportation, pad, principal use, authorization, executives, airport, of the General Business Law, takeoff, retail, legislative intent, zoning ordinance, establishment, installation, utilization, facilities, industrial, accessory, ordinance

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

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

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

Judges: Joseph A. Suozzi, J.

Opinion by: SUOZZI

Opinion

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

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

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

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

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

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

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

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

The two sections of the Valley Stream regulations dealing with accessory uses are part of the 1952 enactment. At that point in time the utilization of helicopters as a means of transportation had not advanced to such a stage that anyone can now reasonably claim, in retrospect, that the use of helicopters and facilities for their landing and takeoff was "clearly incidental to and customarily found in connection with" even the largest retail or commercial establishment, or the private residences of those who could afford this specialized means of transportation. Clearly, then, it cannot be held that a helipad was encompassed within the definition of an accessory use at the time that the regulations were adopted. The court must therefore consider whether in the intervening years since 1952 the use has become one which is clearly incidental **[***6]** to and customarily found in connection with a retail operation such as Alexander's.

A search of the New York authorities fails to disclose any case which had dealt directly with the question of whether a helipad is or is not a permitted accessory use as that phrase is usually defined in zoning ordinances. The only reference to the operation of a helicopter as an accessory use in this jurisdiction is

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

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

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

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

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

After reaching its conclusion in the *Town of Harvard* case, the Massachusetts court stated as follows (p. 352): "Even if we take notice of the increasing use of private aircraft as a means of business travel and

transportation and for pleasure purposes, such use has not become so prevalent in Massachusetts that it can now be held that it is one 'customarily incidental' **[***10]** to the residential use of property. See *Building Inspector of Falmouth v. Gingrass, 338 Mass. 274, 276, 154 N. E. 2d 896*."

It cannot be disputed that the use of helicopters in this area has increased in the past 20 years; that helicopters are being used for the convenient and expeditious movement of corporate executives; that the efficient supervision and management of business establishments with divisions or branches at widely dispersed locations may be enhanced by the swift shuttling between places that is possible with helicopters; and that modern merchandising methods can be assisted and the movement of merchandise can be facilitated by this mode of transportation. However, after taking notice of the increased use of helicopters in this area, this court cannot hold as a matter of law that the use has become so clearly incidental to and customarily found in connection with any principal use as to entitle it to be clothed with the permissive mantle of an accessory use.

In *Town of Harvard* v. *Maxant* (*supra, p. 351*) the court quotes a discussion which is contained in the case of *Lawrence v. Zoning Bd. of Appeals of Town of North Branford (158 Conn. 509, 512-513)* **[***11]** of the meaning of the words "customarily incidental" as they relate to accessory uses. This court deems this discussion pertinent and relevant to the issues presented here, and accordingly likewise sets forth this discussion:

"The word 'incidental' as employed in a definition of 'accessory use' incorporates two concepts. It means that the use must not be the primary use of the property but rather one which is subordinate and minor in significance. * * * But 'incidental,' when used to define an accessory use, must also **[*55]** incorporate the concept of reasonable relationship with the primary use. It is not enough that **[**754]** the use be subordinate; it must also be attendant or concomitant. To ignore this latter aspect of 'incidental' would be to permit any use which is not primary, no matter how unrelated it is to the primary use.

"The word 'customarily' is even more difficult to apply. Although it is used in this and many other ordinances as a modifier of 'incidental,' it should be applied as a separate and distinct test. Courts have often held that the use of the word 'customarily' places a duty on the board or court to determine whether it is usual to maintain **[***12]** the use in question in connection with the primary use of the land. * * * In examining the use in question, it is not enough to determine that it is incidental in the two meanings of that word as discussed above. The use must be further scrutinized to determine whether it has commonly, habitually and by long practice been established as reasonably associated with the primary use. * * *

"In applying the test of custom, we feel that some of the factors which should be taken into consideration are the size of the lot in question, the nature of the primary use, the use made of the adjacent lots by neighbors and the economic structure of the area. As for the actual incidence of similar uses on other properties, geographical differences should be taken into account, and the use should be more than unique or rare, even though it is not necessarily found on a majority of similarly situated properties."

Considering the proposed helipad against this discussion, the shuttling of corporate executives for which it is intended, does bear some relationship to the business of Alexander's in that it would provide a convenient and time-saving method of transportation between the branches of this **[***13]** chain of stores. However, the proposed use does not meet the test of the word "customarily". Although Alexander's has been utilizing a pad for this purpose since 1968 and a total of 66 flights have been made in this four-year period, averaging less than 17 per year, the court finds that this use hardly measures up to

the test of having "commonly, habitually and by long practice been established as reasonably associated with the primary use" of the premises as a retail store. This four-year use must also be evaluated in the light of the fact that it has not been affirmatively authorized by the village officials. Moreover, when considered in the light of the size of the lot in question, the nature of the primary use, the use made of the adjacent lots and the uniqueness of the use in this area, the proposed use does not **[*56]** meet any of the standards of the test of custom as set forth in the language quoted above.

This court holds as a matter of law that the proposed pad for the occasional flights of Alexander's corporate executives is not an accessory use within the purview of the Valley Stream zoning regulations, **[**755]** whether that definition is construed as of the **[***14]** time of the enactment of the regulations or as of the present.

In so holding this court believes it appropriate to raise the question of whether a use such as a helipad should ever be permitted as an accessory use unless such use is specifically included in the zoning regulations.

In considering any part of a zoning ordinance and the legislative intent underlying it, the ordinance must be considered as a whole as well. An examination of the zoning regulations of the Village of Valley Stream reveals that they make specific provision for such commonplace accessory uses as off-street parking spaces in all zoning districts; private garages, swimming pools, tool sheds, fallout shelters and playhouses in residential districts; and have expressly excluded automobile wrecking and junk yards as accessory uses in any district. Many zoning regulations follow this format in substance. This court finds it extremely difficult to logically and reasonably infer that legislators who had given such specific attention to such commonplace accessory uses intended to encompass a helipad within the definition of accessory uses.

This court suggests that the authorization of such uses as helipads under **[***15]** the guise of their being an accessory use is an unwarranted application of the accessory use device. In Bassett, Zoning (Russell Sage Foundation, 1936, p. 100), the basis for the custom of permitting accessory uses is explained as follows: "During the formative period of comprehensive zoning it became evident that districts could not be confined to principal uses only. It had always been customary for occupants of homes to carry on gainful employment as something accessory and incidental to the residence use * * * The earliest zoning ordinances took communities as they existed and did not try to prevent customary practices that met with no objection from the community."

The extension of the accessory use definition to such uses as helipads does not reflect a sound, realistic or reasonable construction of the legislative intent of those who enacted such regulations. Any land use which involves the operation of aircraft such as a helicopter bears heavily upon a community's health, safety and welfare. The introduction of such a facility into a **[*57]** community is accompanied with serious implications which mandate more direct regulation and control than the "accessory use" approach **[***16]** permits. Judicial approval of such an approach is a form of "zoning leniency" which should not be encouraged.

Assuming *arguendo* that the proposed helipad were a permitted accessory use, the permit herein challenged must be invalidated in any event. The Village Board was without authority to grant it or **[**756]** authorize it as an accessory use or a special permit. An examination of the return filed by the respondent village discloses the following events in connection with this application:

An application for a heliport dated November 17, 1970 was filed with the Village Building Inspector. By a letter dated November 18, 1970, addressed to the applicant, as well as by a memo to the Superintendent of Public Works dated September 7, 1971, the Building Inspector noted that the zoning regulations do not permit such a use, and that the application should be submitted to the Board of Trustees for a special permit.

Subsequently, by resolution dated January 17, 1972, the Village Board denied the application, citing the following objections:

"1. Insufficiency of submitted application.

"2. Hazard to the public (using this area in large numbers).

"3. Already burdened air space **[***17]** over the Village, especially in foul weather when the glide path for planes landing at J. F. Kennedy International Airport.

"4. Danger of collision with large structure in the area or with other aircraft thus causing peril to dense population of the area.

"5. Discomfort of additional noise for homes located in the immediate vicinity."

The original application was subsequently amended by a letter dated September 7, 1972, from an attorney for Alexander's, to limit it as follows: "The installation of a private executive helipad as an accessory use to its retail store, the use of which shall be limited to accommodate eight (8) Alexander Executives." By resolution dated November 16, 1972, the Village Board authorized the "Superintendent of Public Works to grant the permit, if required, permitting a helipad as an accessory use to Alexander's, Valley Stream."

It is a well-established building and zoning law procedure that upon the refusal of a permit by a building official, the proper procedure is to appeal that decision to the Board of Appeals, whose determination may thereafter be reviewed in an article 78 proceeding. Notwithstanding that the zoning regulations contain no provision **[***18]** for granting a special permit for a helipad **[*58]** or heliport by the Village Board, the Building Inspector in denying the permit on the grounds that the regulations did not permit such a use, referred the applicant to the Village Board for a special permit. The Village Board, after having first denied the original application and citing several serious objections, subsequently granted it in its amended form.

Among the powers entrusted to a Village Board is the power to rezone property and to amend the zoning regulations, after appropriate **[**757]** and mandated public notices and hearings. Property cannot be rezoned or zoning regulations amended without following a prescribed procedure. Most zoning regulations provide, as do Valley Stream's, for the delegation to a building official of the power to grant or deny permits, subject to review by the Board of Appeals after public notices and hearings, and subject to further review by a court by an appropriate procedure. Implicit in this delegation is the power to interpret the ordinance. No power of interpretation is vested in the Village Board. However, a Village Board may request an interpretation from the Board of Appeals. **[***19]** While a Village Board may express its own legislative intent by the granting or denial of a rezoning, or by amending the zoning regulations, it is not empowered to engage in quasi-judicial interpretation of the intent of other legislators who enacted the regulations as they exist at a particular moment.

By approving the permit, the Village Board has in effect (1) usurped the power of the building official by extending the definition of "accessory use" to the proposed helipad; and (2) bypassed the safeguards of review by a Board of Appeals, thus engaging in "back-door rezoning" without the benefit or safeguard of the required public notice and hearings.

Aside from the lack of any authority to grant the permit, the Village Board has, by devising a special procedure for this application, actually avoided a direct confrontation with the problem of regulating land uses as to such facilities. At the same time the board has, without explanation and without any apparent change of circumstances, completely disregarded the serious and valid objections raised when the application was initially denied. It is the operation of a helicopter that poses the hazard to safety, not the purpose for **[***20]** which the aircraft is operated. The hazard to safety exists whether the helicopter is taking off and landing from a heliport, as Alexander's originally proposed, or from a helipad for the shuttling of corporate executives.

By their action the Village Board has obviously neglected to consider the consequences and implication of its action if this **[*59]** permit is validated by this court. If a helipad is to be permitted as an accessory use for Alexander's, what is to prevent the installation of a similar facility, on the basis of such interpretation, at every major department store or any other commercial or industrial establishment, or at every residence whose owner could afford it, for any of the purposes for which this mode of transportation may be utilized? Moreover, by giving judicial sanction to a permit for a helipad as an accessory use, a municipality would in effect be permitted to abdicate its authority with respect to the regulation of these facilities as they relate to the use of land within a community, and by implication a local community's police powers in this regard would be pre-empted. **[**758]** It is readily apparent that the consequences of utilizing this **[***21]** approach for the introduction of helipads into a community are far more serious and far-reaching than the use of this approach reflects.

A further question must also be considered: Do the provisions of *article 14 of the General Business Law*, requiring village approval and hearing and determination by the State Commissioner of Transportation, apply to this limited-use helipad? Federal Aviation Administration approval was obtained in 1968. At that time *section 240 of the General Business Law*, a definitional section, provided:

"4. 'Landing area' means any locality either of land or water, including airports and intermediate landing fields, which is used or intended to be used for the landing and take-off of aircraft, whether or not facilities are provided for shelter, servicing or repair of aircraft or for receiving or discharging passengers or cargo.

"5. 'Airport' means any landing area used regularly by aircraft for receiving or discharging passengers or cargo; or for the landing and take-off of aircraft being used for personal or training purposes. * * *

"11. 'Helicopter' means an aircraft, the support of which in the air is normally derived from airfoils mechanically rotated **[***22]** about an approximately vertical axis."

Section 249 (subd. 1, par. [a]) of the General Business Law, in 1968, forbade the establishment of a privately owned airport except by authorization of the governing body of the village within which such airport was proposed to be established. Airports established prior to April 12, 1947, the effective date of this section, were excepted from this requirement.

In *Thomson Ind. v. Incorporated Vil. of Port Washington North (27 N Y 2d 537, 539* [1970], *supra*), the Court of Appeals **[*60]** held that a helipad used occasionally for the landing and takeoff of a business-owned helicopter, for purely business-connected use, operating with FAA approval, in effect since 1964, "comes within the definitions contained in *section 240 of the General Business Law* (subd. 4) and the requirements of *section 249* of that statute * * * must be met."

The Village Board of Trustees' authorization required by *section 249* of the statute has not been sought by Alexander's, and therefore never was granted. The inaction of the Village Board cannot be equated with approval, given the strong legislative policy in favor of regulation where public safety **[***23]** is involved. Illegal from its inception, the helipad can now be established, zoning considerations apart, only in accordance with the requirements of *section 249 of the [**759] General Business Law*, as amended in 1969, which require hearing and determination by the State Commissioner of Transportation prior to obtaining the Village Board of Trustees' authorization. (See *Thomson Ind. v. Incorporated Vil. of Port Washington North, supra.*)

This court does not intend to convey the impression that helipads should be foreclosed for business, industrial or private use in the Village of Valley Stream or elsewhere. Quite the contrary, the court recognizes that there is a demand for facilities for the taking off and landing of helicopters which should be met as expeditiously as possible, by reasonable and appropriate regulations.

The village has had knowledge of the existence of a helipad at Alexander's for some four years, and has had more than ample opportunity within which to deal with this problem in a direct manner by an amendment, after required public hearings, to the zoning regulations. The difficulties presented in the formulation of appropriate regulations neither **[***24]** warrant nor excuse the utilization of the "accessory use" device to permit the proposed facility. If the Village Board is in favor of a helipad at Alexander's, as it presumably is, they have the legislative power to permit the same by amending the zoning regulations to include a helipad as a special use or an accessory use, or even as a primary use. All that this court suggests is that the village act in accordance with established procedure, and not improvise for a particular use.

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

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Matter of Jamie J. (Michelle E.C.)

Court of Appeals of New York

November 20, 2017, Decided

No. 118

Reporter
30 N.Y.3d 275 *; 89 N.E.3d 468 **; 67 N.Y.S.3d 78 ***; 2017 N.Y. LEXIS 3279 ****; 2017 NY Slip Op 08161; 2017 WL 5557887

[1] In the Matter of Jamie J. Wayne County Department of Social Services, Respondent; Michelle E.C., Appellant.

Prior History: Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered November 10, 2016. The Appellate Division, with two Justices dissenting, affirmed an order of the Family Court of Wayne County (Daniel G. Barrett, J.), which, after a permanency hearing, among other things, continued the placement of the child until the next permanency hearing.

Matter of Jamie J. (Michelle E.C.), 145 AD3d 127, 41 NYS3d 810, 2016 N.Y. App. Div. LEXIS 7303, 2016 NY Slip Op 7424 (Nov. 10, 2016), reversed.

Disposition: Order reversed, without costs, and the January 26, 2016 permanency order vacated.

Counsel: [****1] *Legal Assistance of Western New York*, Geneva (*Katharine F. Woods* of counsel), *The Bronx Defenders*, Bronx (*Emma S. Ketteringham* and *Saul Zipkin* of counsel), *Paul, Weiss, Rifkind, Wharton &Garrison LLP*, New York City (*Roberto Finzi, Katriana G. Roh* and *Jennifer S. Garrett* of counsel), and *NYU Family Defense Clinic, Washington Square Legal Services*, New York City (*Martin Guggenheim* and *Christine Gottlieb* of counsel), for appellant. I. The legislature enacted the exclusive framework for the adjudication of abuse or neglect cases in article 10 of the Family Court Act. (Matter of Albany Law School v New York State Off. of Mental Retardation & Dev. Disabilities, 19 NY3d 106, 968 NE2d 967, 945 NYS2d 613; Matter of Wallach v Town of Dryden, 23 NY3d 728, 992 NYS2d 710, 16 NE3d 1188; Matter of Sutka v Conners, 73 NY2d 395, 538 NE2d 1012, 541 NYS2d 191; Lexecon Inc. v Milberg Weiss Bershad Hynes & Lerach, 523 US 26, 118 S Ct 956, 140 L Ed 2d 62; Matter of Michael B., 80 NY2d 299, 604 NE2d 122, 590 NYS2d 60; Matter of Jacob, 86 NY2d 651, 660 NE2d 397, 636 NYS2d 716; Matter of Tammie Z., 66 NY2d 1, 484 NE2d 1038, 494 NYS2d 686; Santosky v Kramer, 455 US 745, 102 S Ct 1388, 71 L Ed 2d 599; Matter of Sheena B. [Rory F.], 83 AD3d 1056, 922 NYS2d 176; Matter of Brandon C., 237 AD2d 821, 658 NYS2d 461.) II. The Court should construe the Family Court Act to avoid serious constitutional problems. (Matter of Jacob, 86 NY2d 651, 660 NE2d 397, 636 NYS2d 716; Edward J. DeBartolo Corp. v Florida Gulf Coast Building & Constr. Trades Council, 485 US 568, 108 S Ct 1392, 99 L Ed 2d 645; People v Correa, 15 NY3d 213, 933 NE2d 705, 907 NYS2d 106; Troxel v Granville, 530

US 57, 120 S Ct 2054, 147 L Ed 2d 49; Santosky v Kramer, 455 US 745, 102 S Ct 1388, 71 L Ed 2d 599; Matter of Marie B., 62 NY2d 352, 465 NE2d 807, 477 NYS2d 87.)

Gary Lee Bennett, Wayne County Department of Social Services, Lyons, for respondent. I. This appeal is now rendered moot due to the third permanency hearing order and should be dismissed. (*Matter of Anthony L. [Lisa P.], 144 AD3d 1690, 41 NYS3d 641*; Matter of Alexander M. [Michael M.], 83 AD3d 1400, 919 NYS2d 450; *Matter of Sysamouth D., 98 AD3d 1314, 951 NYS2d 424*; Matter of Marcus BB. [David BB.], 129 AD3d 1134, 15 NYS3d 477; Matter of Hearst Corp. v Clyne, 50 NY2d 707, 409 NE2d 876, 431 NYS2d 400; *Matter of Gannett Co., Inc. v Doran, 74 AD3d 1788, 903 NYS2d 634*.) II. Due process, other constitutional and Family Court Act article 10-A subject matter jurisdiction claims were not properly raised and preserved at Family Court. (People v Clarke, 81 NY2d 777, 609 NE2d 137, 593 NYS2d 784; *Matter of G. Children, 293 AD2d 470, 739 NYS2d 639*; People v Baumann & Sons Buses, Inc., 6 NY3d 404, 846 NE2d 457, 813 NYS2d 27; Melahn v Hearn, 60 NY2d 944, 459 NE2d 156, 471 NYS2d 47;People v Dozier, 52 NY2d 781, 417 NE2d 1008, 436 NYS2d 620; *Liffiton v Grossman, Levine & Civiletto, 100 AD2d 732, 473 NYS2d 646*; Matter of Mary R.F. [Angela I.], 144 AD3d 1493, 41 NYS3d 341; Merrill v Albany Med. Ctr. Hosp., 71 NY2d 990, 524 NE2d 873, 529 NYS2d 272; Hecker v State of New York, 20 NY3d 1087, 987 NE2d 636, 965 NYS2d 75; Matter of Daniel H., 15 NY3d 883, 938 NE2d 966, 912 NYS2d 533.) III. A finding of neglect is not required to continue the permanency hearing placement of a child previously placed under Family Court Act article 10-A. (Matter of Calm Lake Dev. v Town Bd. of Town of Farmington, 213 AD2d 979, 624 NYS2d 484; Matter of Christopher G. [Priscilla H.], 82 AD3d 1549, 919 NYS2d 244; Matter of Michael B., 80 NY2d 299, 604 NE2d 122, 590 NYS2d 60; Lacks v Lacks, 41 NY2d 71, 359 NE2d 384, 390 NYS2d 875; Matter of Sheena B. [Rory F.], 83 AD3d 1056, 922 NYS2d 176; Matter of Dashaun G. [Diana B.], 117 AD3d 1526, 985 NYS2d 802; Matter of Sullivan County Dept. of Social Servs. v Richard C., 260 AD2d 680, 687 NYS2d 470; Matter of Tatiana R., 17 Misc 3d 443, 841 NYS2d 834; Matter of Shinice H., 194 AD2d 444, 599 NYS2d 37; Matter of Jose R., 83 NY2d 388, 632 NE2d 1260, 610 NYS2d 937.) IV. Due process was provided by the Family Court Act article 10-A process below. (Eaton v New York City Conciliation & Appeals Bd., 56 NY2d 340, 437 NE2d 1115, 452 NYS2d 358; Matter of Marie B., 62 NY2d 352, 465 NE2d 807, 477 NYS2d 87; Matter of Anthony QQ., 48 AD3d 1014, 852 NYS2d 459; *Matter of Adney v Morton, 68 AD3d 1742, 890 NYS2d 864*; *Matter of Jerri D. v Jarrett H., 299 AD2d 863, 750 NYS2d 394*; Matter of Commissioner of Social Servs. v Philip De G., 59 NY2d 137, 450 NE2d 681, 463 NYS2d 761.)

James S. Hinman, P.C., Rochester (*James S. Hinman* of counsel), for James R. and another, interested parties. I. The Family Court had jurisdiction, and an obligation, to continue Jamie J. in foster care despite dismissal of the neglect petition against appellant. (Matter of Tammie Z., 66 NY2d 1, 484 NE2d 1038, 494 NYS2d 686; Matter of Brandon C., 237 AD2d 821, 658 NYS2d 461; Matter of Maria L., 152 AD2d 466, 543 NYS2d 674; Matter of Rasha B., 139 AD2d 962, 527 NYS2d 933; Matter of Sheena B. [Rory F.], 83 AD3d 1056, 922 NYS2d 176.) II. The only issue preserved for review was that of subject matter jurisdiction. III. Appellant was accorded due process.

Devalk, Power, Lair & Warner, P.C., Sodus (*Sean D. Lair* of counsel), Attorney for the Child. I. An adjudication of abuse or neglect is not required for the court's jurisdiction to continue pursuant to Family Court Act article 10-A. (Matter of Dashaun G. [Diana B.], 117 AD3d 1526, 985 NYS2d 802; Bender v

Jamaica Hosp., 40 NY2d 560, 356 NE2d 1228, 388 NYS2d 269; *People ex rel. New York Cent. & Hudson Riv. R.R. Co. v Woodbury, 208 NY 421, 102 N.E. 565*; *People v Golo, 26 NY3d 358, 23 NYS3d 110, 44 NE3d 185*; *Patrolmen's Benevolent Assn. of City of N.Y. v City of New York, 41 NY2d 205, 359 NE2d 1338, 391 NYS2d 544*.) II. It is not a violation of the appellant's constitutionally protected rights to due process to hold her child in foster care absent a finding of neglect. (*Matter of Adney v Morton, 68 AD3d 1742, 890 NYS2d 864*.)

Mayer Brown LLP, New York City (*Scott A. Chesin* and *Allison Levine Stillman* of counsel), for Lawyers for Children, Inc. and another, amici curiae. I. *Family Court Act article 10-A* permanency hearings do not afford the necessary procedural safeguards to avoid unconstitutional and inappropriate placement in care. (*Duchesne v Sugarman, 566 F2d 817*; *Troxel v Granville, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49*; *Santosky v Kramer, 455 US 745, 102 S Ct 1388, 71 L Ed 2d 599*; *Matter of Michael B., 80 NY2d 299, 604 NE2d 122, 590 NYS2d 60*; *Nicholson v Scoppetta, 3 NY3d 357, 820 NE2d 840, 787 NYS2d 196*.) II. Existing procedural mechanisms under *Family Court Act article 10* effectively protect children. III. Time spent in foster care has proven, deleterious effects on children. (*Matter of Michael B., 80 NY2d 299, 604 NE2d 122, 590 NYS2d 60*; *Matter of Dale P., 84 NY2d 72, 638 NE2d 506, 614 NYS2d 967*.)

Judges: WILSON, J. Opinion by Judge Wilson. Chief Judge DiFiore and Judges Rivera, Stein, Fahey, Garcia and Feinman concur.

Opinion by: WILSON

Opinion

[**469] [***79] [*279] Wilson, J.

This case presents the novel question of whether Family Court retains subject matter jurisdiction to conduct a permanency hearing pursuant to *Family Court Act article 10-A* once the underlying neglect petition brought under *article 10* of that statute has been dismissed for failure to prove neglect. We hold that it does not. Instead, the dismissal of a [2] neglect petition terminates Family Court's jurisdiction.

As then-Judge Kaye explained,

> "New York's foster care scheme is built around several fundamental social policy choices that have been explicitly declared by the Legislature and are binding on this Court . . .
>
> "A biological parent has a right to the care and custody of a child, superior to that of others, unless the parent has abandoned that right or is proven unfit to assume the duties and privileges of parenthood, even though the State perhaps could [****2] find 'better' parents. A child is not the parent's property, but neither is a child the property of the State. [***80] [**470] Looking to the child's rights as well as the parents' rights to bring up their own children, the Legislature has found and declared that a child's need to grow up with a normal family life in a permanent home is ordinarily best met in the

child's natural home" (*Matter of Michael B., 80 NY2d 299, 308-309, 604 NE2d 122, 590 NYS2d 60 [*280] [1992]* [internal quotation marks, citations and emphasis omitted]).[1]

Those rights are among our oldest and most fundamental and are not only provided by statute, but also guaranteed to parents and children by our State and Federal Constitutions (*Matter of Brooke S.B. v Elizabeth A.C.C., 28 NY3d 1, 26, 39 NYS3d 89, 61 NE3d 488 [2016]*; *Matter of Marie B., 62 NY2d 352, 358-359, 465, 465 NE2d 807, 477 NYS2d 87 [1984]*; *Santosky v Kramer, 455 US 745, 760, 102 S Ct 1388, 71 L Ed 2d 599 [1982]*; *Matter of Bennett v Jeffreys, 40 NY2d 543, 546, 356 NE2d 277, 387 NYS2d 821 [1976]*; *Stanley v Illinois, 405 US 645, 651, 92 S Ct 1208, 31 L Ed 2d 551 [1972]* [collecting cases]).

Here, the rights at issue are those of the subject child, Jamie J., and her mother, Michelle E.C. Jamie J. was born in November 2014. A week later, at the request of the Wayne County Department of Social Services (the Department), Family Court directed her temporary removal from Michelle E.C.'s custody pursuant to an ex parte pre-petition order under *Family Court Act § 1022*.[2] Four days after that, [****3] the Department filed its *Family Court Act article 10* neglect petition. More than a year later, on the eve of the fact-finding hearing held to determine whether it could carry its burden to prove neglect, the Department moved to amend its petition to conform the pleadings with the proof. Family Court denied that eleventh-hour motion as unfairly prejudicial to Michelle E.C. and to the attorney for Jamie J. After hearing evidence, Family Court found that the Department failed to prove neglect, and therefore dismissed the petition. The Department did not appeal that decision.

[*281] Family Court, however, did not release Jamie J. into her mother's custody when it dismissed the *article 10* neglect petition. Instead, at the Department's insistence and over Michelle E.C.'s objection, it held a second permanency hearing, which had been scheduled as a matter of course during the statutorily required first permanency hearing in the summer of 2015. Family Court and the Department contended that, even though the Department had failed to prove any legal basis to remove Jamie J. from her mother, *article 10-A of the Family Court Act* gave Family [***81] [**471] Court continuing jurisdiction over Jamie J. and entitled it to continue her placement in foster care.

Family Court held the second [****4] permanency hearing on January 19, 2016. There, Michelle E.C. argued, as she does here, that the dismissal of the neglect proceeding ended Family Court's subject matter jurisdiction and should have required her daughter's immediate return. Solely to expedite her appeal of that issue, Michelle E.C. consented to a second permanency hearing order denying her motion to dismiss the proceeding and continuing Jamie J.'s placement in foster care. The Appellate Division, with two Justices dissenting, affirmed the second permanency hearing order *(145 AD3d 127, 41 NYS3d 810 [4th Dept 2016])* and Michelle E.C. appealed that decision as of right under *CPLR 5601 (a)*. Her appeal

[1] According to amici, those legislative findings are further substantiated by amici's experience and by recent works of social science (*see e.g.* Kristin Turney & Christopher Wildeman, *Mental and Physical Health of Children in Foster Care*, 138 [No. 5] Pediatrics at 1, 3 [2016] [documenting "vast" differences between the physical and mental health of those children placed in foster care and those in general population, many of which persist even after adjusting for child and household characteristics]; Diane Mastin, Sania Metzger & Jane Golden, *Foster Care and Disconnected Youth: A Way Forward for New York* [Apr. 2013], available at http://www.fysany.org/sites/default/files/document/report_final_April_2_0.pdf [accessed Oct. 25, 2017] [finding young adults who age out of foster care face particularly poor chances of achieving educational objectives, gaining employment, or developing strong family relations and stable housing arrangements]; Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 [No. 5] Am Econ Rev 1583 [2007] [suggesting that children on the margin of placement tend to have better outcomes when they remain at home]).

[2] Jamie J.'s father's parental rights have subsequently been terminated upon consent.

presents a straightforward question of statutory interpretation: does *Family Court Act article 10-A* provide an independent grant of continuing jurisdiction that survives the dismissal of the underlying *article 10* neglect petition?

[1, 2] Before turning to that question, we first consider whether mootness and preservation issues prevent us from reaching it. During the pendency of this appeal, the second permanency hearing order was superseded by a third, a fourth permanency hearing was scheduled, a proceeding to terminate Michelle E.C.'s parental rights was commenced and stayed [3] pending the result of this appeal, and [****5] a second neglect petition was filed. The Department argues this appeal has been rendered moot by those occurrences. However, none of them resolved the conflict between the parties, and each permanency hearing—docketed under the first neglect petition—remains subject to the same jurisdictional objection as its predecessor (*see Matter of State of New York v Michael M., 24 NY3d 649, 657, 2 NYS3d 830, 26 NE3d 769 [2014]*). Moreover, even if the appeal were moot, the exception to that doctrine would plainly apply (*see generally Matter of Hearst Corp. v Clyne, 50 NY2d 707, 714-715, 409 NE2d 876, 431 NYS2d 400 [1980]*). As to [*282] preservation, the jurisdictional objection, which may be raised at any time and may not be waived (*Lacks v Lacks, 41 NY2d 71, 75, 359 NE2d 384, 390 NYS2d 875 [1976]*), was preserved in Michelle E.C.'s letter to Family Court, through her proposed order to show cause, and at the second permanency hearing. Her eventual consent to the second permanency order was expressly understood by all parties and by the court as a means of expediting appellate review, not a waiver of the alleged defect. Finally, her due process argument is properly apprehended not as a stand-alone challenge requiring notice to the Attorney General, but as an invocation, in service of her jurisdictional challenge, of the canon of constitutional avoidance: that is, we should construe the statute, if possible, to avoid the due process infirmity [****6] to which she points (*see Matter of Jacob, 86 NY2d 651, 668 n 5, 660 NE2d 397, 636 NYS2d 716 [1995]*). On that basis, we proceed to the heart of the parties' disagreement: the interplay between *Family Court Act articles 10* (*§§ 1011-1085*) and *10-A* (*§§ 1086-1090-a*).

Article 10, titled "Child Protective Proceedings," is designed to "establish procedures to help protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional well-being" and "to provide a due process of law for determining when the state, through its family court, may intervene against the wishes of a parent on behalf of a child so that his [or her] needs are properly met" (*Family Ct Act § 1011*). A child is "neglected" if that child's "physical, [***82] [**472] mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of [a] parent or other person legally responsible for his [or her] care to exercise a minimum degree of care" (*id. § 1012 [f] [i]*).

An *article 10* proceeding is commenced by the filing of a neglect and/or abuse petition by the relevant child protective agency or another person (*id. §§ 1031 [a]*; *1032*). However, even before a petition is filed, Family Court may temporarily remove a child who, inter alia, "appears so to suffer from the abuse or neglect of his or her parent or other person legally responsible [****7] for his or her care that his or her immediate removal is necessary to avoid imminent danger to the child's life or health" and if there is not enough time to hold a preliminary post-petition hearing (*id. § 1022 [a] [i]*). In making this determination, Family Court "shall consider and determine in its order whether continuation in the child's home would be contrary to the best interests of the child" (*id. § 1022 [a] [iii]*). It must also determine that "reasonable efforts were made prior to the date [*283] of application for the order directing such temporary removal to prevent or eliminate the need for removal" or that "the lack of such efforts was appropriate [4] under the circumstances" (*id.*). If a child is removed under this section, a neglect petition

must be filed within three court days, except for good cause shown, and a permanency hearing scheduled (*id.* §§ 1022 [b]; 1027 [h]).

For that neglect petition to be sustained, the child protective agency must prove neglect by a preponderance of the competent, material, and relevant evidence (*id.* §§ 1046 [b]; 1051 [a]). If the petition contains allegations that do not conform to the proof of neglect, Family Court may amend the petition provided the parent retains reasonable time to prepare an answer to [****8] the amended allegations (*id.* § 1051 [b]). If the agency carries its burden, Family Court must sustain the petition and hold a dispositional hearing, at the conclusion of which it may, inter alia, suspend judgment, release the child to parental custody under an order of supervision, enter an order of protection, or place the neglected child in foster care (*id.* §§ 1052-1057). If the agency fails to carry its burden, Family Court must dismiss the petition (*id.* § 1051 [c]).

Article 10-A, "Permanency Hearings for Children Placed Out of Their Homes," exists "to provide children placed out of their homes timely and effective judicial review that promotes permanency, safety and well-being in their lives" (*id.* § 1086). Enacted in 2005, it establishes a system of "permanency hearings" for children who have been removed from parental custody. Prior to each hearing, scheduled at six-month intervals beginning at the expiration of an initial eight-month window (*id.* § 1089 [a] [2]), the child protective agency proffers a sworn report that recommends a "permanency goal" for the child, which may be reunification with the parent, adoption, or another goal (*id.* §§ 1087 [e]; 1089 [c]). At the conclusion of each hearing, Family Court enters an order of disposition, schedules a subsequent hearing, and may also consider whether the permanency goal should be approved or modified (*id.* § 1089 [d]). Those determinations must be made "in accordance with the best interests and safety of the child, including whether the child would be at risk of abuse or neglect if returned to the parent" (*id.*). Regardless of the determination, once a child has been placed in foster care pursuant to certain sections of the Social Services Law or of Family Court Act articles 10 and 10-C ("Destitute Children"), "the case shall remain on the [*284] court's calendar and the court shall maintain jurisdiction over the case until the child is discharged from placement and all orders regarding supervision, protection or services have expired" (*id.* § 1088).

Here, the Department seizes on a hyperliteral reading of section 1088, divorced from all context, to argue that Family Court's pre-petition placement of Jamie J. under section 1022 triggered a continuing grant of jurisdiction that survives the eventual dismissal of the neglect petition. In other words, even if the Family Court removes a child who has not been neglected or abused, it has jurisdiction to continue that child's placement in foster care until and unless it decides otherwise. Section 1088's place in the overall [****10] statutory scheme, the legislative history of article 10-A, and the dictates of parents' and children's constitutional rights to remain together compel the opposite conclusion: Family Court's jurisdiction terminates upon dismissal [5] of the original neglect or abuse petition.

Section 1088 and article 10-A must be construed not in isolation, but (as the "-A" implies) together with the other provisions of the Family Court Act on which their triggering facially depends (*see id.*; Matter of Long v Adirondack Park Agency, 76 NY2d 416, 420, 559 NE2d 635, 559 NYS2d 941 [1990] [courts should not adopt "vacuum-like" readings of statutes in "isolation with absolute literalness" if such interpretation is "contrary to the purpose and intent of the underlying statutory scheme and would conflict with other operative features of the statute's core overview procedures"]). Article 10 erects a careful bulwark against "unwarranted state intervention into private family life," for which its drafters had a deep

concern (*Nicholson v Scoppetta, 3 NY3d 357, 368, 820 NE2d 840, 787 NYS2d 196 [2004]*; *see* *Family Ct Act § 1011*), and is particularly adamant that reasonable efforts be made to prevent the need for the removal of a child (*id.* *§ 1052 [b] [i] [A]*). Neglect findings cannot be casually issued, but require proof of actual or imminent harm to the child as a result of a parent's failure to exercise a minimum degree of care (*id.* *§ 1012 [f]*). "This [****11] prerequisite . . . ensures that the Family Court, in deciding whether to authorize state intervention, will focus on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior. 'Imminent danger' . . . must be near or impending, not merely possible" (*Nicholson, 3 NY3d at 369*).

As the dissenting Appellate Division Justices correctly noted, adopting the Department's interpretation of *section 1088* would permit a temporary order issued in an ex parte proceeding to [*285] provide an end-run around the protections of *article 10*. Permanency hearing determinations are based not on the elevated "imminent harm" standard of *article 10*, but "in accordance with the best interests and safety of the child" under *article 10-A* (*Family Ct Act § 1089 [d]*). Allowing a separate jurisdictional expressway for the placement of a child to substitute for the manner in which *article 10* expects that threshold determination to be reached would subvert the statutory scheme.[3]

[**474] [***84] As we held in *Matter of Tammie Z.*, "[i]f abuse or neglect is not proved, the court must dismiss the petition . . . at which time the child is returned to the parents" *(66 NY2d 1, 4-5, 484 NE2d 1038, 494 NYS2d 686 [1985])*. Nothing in the legislative history of *article 10-A* suggests that its drafters intended to overturn [****12] the long-established rule, promulgated by pre-2005 decisions of this Court and of the Appellate Division, that the dismissal of a neglect petition divests Family Court of jurisdiction to issue further orders or impose additional conditions on a child's release (*see id.*; *Matter of Edwin SS., 302 AD2d 754, 754 NYS2d 912 [3d Dept 2003]*; *Matter of Amanda SS., 284 AD2d 588, 725 NYS2d 747 [3d Dept 2001]*; *Matter of Brandon C., 237 AD2d 821, 658 NYS2d 461 [3d Dept 1997]*; *Matter of Melissa B., 225 AD2d 452, 639 NYS2d 348 [1st Dept 1996]*; *Matter of Anthony YY., 202 AD2d 740, 608 NYS2d 580 [3d Dept 1994]*; *Matter of Maria L., 152 AD2d 466, 543 NYS2d 674 [1st Dept 1989]*; *Matter of Rasha B., 139 AD2d 962, 527 NYS2d 933 [4th Dept 1988]*; *Matter of Dina V., 86 AD2d 875, 447 NYS2d 296 [2d Dept 1982]*; *see also* *Matter of Male Infant L., 61 NY2d 420, 427, 462 NE2d 1165, 474 NYS2d 447 [1984]* ["For once it is found that the parent is fit . . . the inquiry ends and the natural parent may not be deprived the custody of his or her child"]).

Instead, that history demonstrates that the drafters intended only to correct a technical issue that plagued *article 10* and [*286] threatened the State's continued access to federal funding under *title IV of the Social Security Act*: Family Court's need to constantly reassert jurisdiction *after* a child had been determined to be the victim of neglect or abuse. As the Sponsor's Memorandum noted, under then-current law,

[3] The Department's interpretation would create a further anomaly: according to the Department, Family Court's continuing jurisdiction under *article 10-A* turns on the fortuity of whether the neglect petition is adjudicated before or after the statutorily required first permanency hearing. Under that interpretation, Family Court has continuing jurisdiction here only because it failed to hold the fact-finding hearing for more than a year after removal; had it held that hearing during the first seven months following Jamie J.'s removal, the Department concedes no continuing jurisdiction would exist under its interpretation of *section 1088*. Having the court's jurisdiction and a family's welfare turn on the vagaries of a court's congested calendar would be not only arbitrary and unlikely to comport with legislative intent, but also out of step with our precedents (*see* *Matter of Sanjivini K., 47 NY2d 374, 381, 391 NE2d 1316, 418 NYS2d 339 [1979]* [holding a neglect finding could not be based on a prolonged separation when that separation was due to the slow pace of litigation commenced by the child protective agency]).

> "After the initial finding of abuse or neglect, even where the child is placed in foster care and orders are issued regarding the respondent parents, the Court's jurisdiction over the parties ends with the order of disposition. Any other action necessary to pursue return of the child home, including holding permanency hearings for court review [****13] of the permanency plan for the child, requires the filing of a new petition and delay occasioned by the calendaring of that petition . . . [S]ervice upon the respondents must be effected for each new petition before the Court may address the gravamen of the petition, although the Court previously established jurisdiction over those parties at the initiation of the original proceeding" (Senate Introducer's Mem in Support, Bill Jacket, L 2005, ch 3 at 12, 2005 NY Legis Ann at 4).

That technical fix served a practical goal: to "reduce by months the time a child spends in foster care" (*id.*). Far from accomplishing this goal, the Department's interpretation of *section 1088* would instead indefinitely prolong a child's placement outside the home.

Finally, the state intrusion into family matters licensed by the Department's interpretation of *section 1088* would infringe the constitutional rights of both parents and children. As Justice Marshall explained, [***85]

> [**475] "[w]e have little doubt that the *Due Process Clause* would be offended if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best [****14] interest" (*Quilloin v Walcott, 434 US 246, 255, 98 S Ct 549, 54 L Ed 2d 511 [1978]* [citations, internal quotation marks and brackets omitted]).

Sensitive to that concern, this Court has provided a list of the constitutionally permissible showings of "overriding necessity" [*287] that would justify the removal of a child from a parent or parents (*Matter of Marie B., 62 NY2d at 358*). That list includes "abandonment, surrender, persisting neglect, unfitness or other like behavior evincing utter indifference and irresponsibility to the child's well-being"—and excludes the child's best interests (*id.*). Here, application of the canon of constitutional avoidance leads us to reject the Department's interpretation of *section 1088* as providing Family Court jurisdiction when the Department has failed to prove neglect or abuse.

Taken together, those arguments from the statutory scheme, legislative history, and canon of constitutional avoidance demonstrate that Family Court cannot continue with an *article 10-A* permanency hearing once it has dismissed the underlying *article 10* neglect petition. Accordingly, we hold that the dismissal of a neglect petition operates to discharge a child from placement, terminate all orders regarding supervision, protection or services docketed thereunder, and extinguish the court's jurisdiction over the matter.

That result [****15] harms neither Jamie J. nor future children in equally tragic circumstances. As to Jamie J., the Department remains free to take steps to place her in foster care, if warranted, including pursuing a *section 1027* order under the second neglect petition. As to future children, the Department and those children's attorneys remain free to take all the steps the petitioners abjured or belatedly pursued here, including moving more quickly to conform the pleadings to the proof, appealing the petition's dismissal, or filing an additional petition.

Accordingly, the Appellate Division order should be reversed, without costs, and the January 26, 2016 permanency order vacated.

Chief Judge DiFiore and Judges Rivera, Stein, Fahey, Garcia and Feinman concur.

Order reversed, without costs, and the January 26, 2016 permanency order vacated.

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Long v. Adirondack Park Agency

Court of Appeals of New York

June 5, 1990, Argued ; July 2, 1990, Decided

No. 165

Reporter
76 N.Y.2d 416 *; 559 N.E.2d 635 **; 559 N.Y.S.2d 941 ***; 1990 N.Y. LEXIS 1467 ****

In the Matter of George Long et al., Appellants, v. Adirondack Park Agency, Respondent

Prior History: [****1] Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered November 27, 1989, which (1) reversed, on the law, a judgment of the Supreme Court (John G. Dier, J.), entered in Warren County in a proceeding pursuant to CPLR article 78, granting the petition and annulling determinations of respondent which reversed area variances granted to petitioners by the Town of Bolton Zoning Board of Appeals, (2) confirmed the determinations, and (3) dismissed the petition.

Matter of Long v Adirondack Park Agency, 151 AD2d 189, affirmed.

Disposition: Order affirmed, with costs.

Counsel: *Walter O. Rehm III* for appellants. I. The agency's attempted reversal of both the June 13, 1988 and September 12, 1988 variances were not timely and without legal effect. II. The 30-day time limit set forth in Executive Law § 808 (3) should be strictly construed in favor of appellants. (*Matter of* 440 E. 102nd St. Corp. v Murdock, 285 NY 298; Vail v Broadway R. R. Co., 147 NY 377; Waterloo Woolen Mfg. Co. v Shanahan, 128 NY 345; Republic of Honduras v Soto, 112 NY 310.) III. A literal interpretation [****2] of the time limitations set forth in Executive Law § 808 (3) does not impair the Adirondack Park Agency's ability to implement the purposes of the Adirondack Park Agency Act.

Robert Abrams, Attorney-General (Lawrence A. Rappoport, O. Peter Sherwood, Peter H. Schiff and *Douglas H. Ward* of counsel), for respondent. I. The court below properly held that appellants' proceeding to annul the agency's reversal of their June 13, 1988 variance was untimely. (Matter of Edmead v McGuire, 67 NY2d 714; Matter of Biondo v New York State Bd. of Parole, 60 NY2d 832; Carborundum Abrasives Co. v New York State Dept. of Envtl. Conservation, 129 Misc 2d 1093; Matter of Buck v Zoning Bd. of Appeals, 90 AD2d 582.) II. The agency's November 14, 1988 reversal of the September 12-October 17, 1988 variance decision was timely since it was within 30 days of receipt of notice of the October 17, 1988 variance reaffirmance decision. III. In any event, the court below properly held that the agency rationally interpreted the 30-day period of Executive Law § 808 (3) in which to review a variance as not commencing until it has received the record upon which the variance was granted. [****3] (Ferres v City of New Rochelle, 68 NY2d 446; Zappone v Home Ins. Co., 55 NY2d 131; Matter of Petterson v Daystrom Corp., 17 NY2d 32; *Dompkowski v Dompkowski, 154 AD2d 950*; Matter

of Edmead v McGuire, 67 NY2d 714; Matter of Biondo v New York State Bd. of Parole, 60 NY2d 832; Carborundum Abrasives Co. v New York State Dept. of Envtl. Conservation, 129 Misc 2d 1093; Matter of Knickerbocker Ins. Co. [Gilberg], 28 NY2d 57; Matter of Wilcox v Zoning Bd. of Appeals, 17 NY2d 249.)

Robert L. Beebe for Lake George Association and another, *amici curiae*. I. Appellants' original article 78 proceeding, in the nature of mandamus to review, did not demonstrate that the action of the Adirondack Park Agency was arbitrary and capricious. *(* Matter of Consolidated Edison Co. v Hoffman, 43 NY2d 598; Conley v Town of Brookhaven Zoning Bd. of Appeals, 40 NY2d 309; Matter of Crater Club v Adirondack Park Agency, 86 AD2d 714.) II. Appellants' technical challenge must fail, both because respondent's action was timely and because the article 78 proceeding was time barred. *(Matter of Gregory v Board of Appeals, 87 AD2d 1000*; Matter [****4] of Town of Clinton v Dumais, 69 AD2d 836; Matter of King v Chmielewski, 146 AD2d 102.) III. The Adirondack Park Agency review of locally granted variances is a fundamental precept of this statutory scheme, which is as important today as it was 20 years ago. This fundamental precept should not be thwarted by appellants' hypertechnical reading of the time within which the APA must act. *(* Wambat Realty Corp. v State of New York, 41 NY2d 490.)

Judges: Chief Judge Wachtler and Judge Simons, Kaye, Alexander and Hancock, Jr., concur with Judge Bellacosa; Judge Titone dissents and votes to reverse in a separate opinion.

Opinion by: BELLACOSA

Opinion

[*418] [**635] [***941] OPINION OF THE COURT

The Adirondack Park Agency (APA) has been granted a limited oversight responsibility and review power with respect to zoning variance determinations of local governments within its park land jurisdiction. In affirming the dismissal of the petition to annul the APA's reversal of the grant of a zoning variance, we hold that the 30-day period within which APA must rule under Executive Law § 808 (3) commences no later than upon APA's receipt of notice of the variance grant together [****5] with the hearing record and other pertinent materials on which it was made. This interpretation of the timing mechanism provision harmonizes interrelated parts of the over-all statutory design and insures that APA review is meaningful and in furtherance of the policies underlying the Adirondack Park Agency Act.

Petitioners own a seven-acre resort with frontage on Basin Bay, Lake George, in the Town of Bolton. They applied on May 19, 1988 for a variance to convert the resort into a 32-unit condominium development. The Bolton Town Zoning [*419] Board of Appeals (ZBA) sent APA notice of the application [**636] [***942] on May 19 (Executive Law § 808 [3]; 9 NYCRR 582.6 [b]) and granted it on June 13.

On June 16, the APA notified the ZBA that the application was subject to APA review and requested a copy of "the application materials". APA received notice on June 21 that the application had been granted, together with the following application materials: the first page of the application; an undated narrative description of the proposed development; the recommendation of the Town Planning Board; and two letters in opposition. Although the APA, as a matter of course, [****6] requests a copy of hearing

minutes from local ZBAs in every case it reviews, no transcript was provided in this case. The APA reversed the ZBA's variance on July 19, noting that the ZBA had not provided a complete record of the evidence before it. No timely review of the APA determination was sought. Thus, the article 78 proceeding now before us, insofar as it seeks relief with respect to that determination, must be rejected on the threshold ground of untimeliness of the judicial proceeding.

On September 7, the APA was notified that the ZBA would consider petitioners' revised variance application. The APA received further notice on September 26, without any accompanying materials, that the ZBA had again granted petitioners' application. After an unheeded oral request, the APA, by letter dated October 7, requested documents concerning the variance, including a site plan of the affected area. The materials were provided on October 24 and the APA then reversed the new ZBA determination on November 14.

Petitioners brought this article 78 proceeding to annul APA's overturnings of the June and September variances. Supreme Court granted the demanded relief, without opinion. A unanimous [****7] Appellate Division reversed and dismissed the petition, and we granted leave to appeal. Petitioners-appellants argue solely that the APA determinations are null as untimely under *Executive Law § 808 (3)* because they were rendered more than 30 days after the ZBA decisions were made. We are not persuaded and affirm the order of the Appellate Division.

Executive Law § 808 (3) provides: "3. Upon receipt of an application for a variance from any provision of an approved local land use program involving land in any land use area other than a hamlet, including any shoreline restriction, the [*420] local government body or officer having jurisdiction thereof shall give written notice thereof to the [Adirondack Park Agency] together with such pertinent information as the agency may deem necessary. If such variance is granted, it shall not take effect for thirty days after the granting thereof. If, within such thirty day period, the agency determines that such variance involves the provisions of the land use and development plan as approved in the local land use program including any shoreline restriction and was not based upon the appropriate statutory basis of practical difficulties or unnecessary hardships, the agency may reverse the local determination to permit the variance. If the agency so acts, the appropriate local government officer or body, as well as any other person aggrieved by such action, shall have standing to have such action reviewed under article seventy-eight of the civil practice law and rules."

Petitioners assert that, because a granted variance "shall not take effect for thirty days" and the exercise of APA's review power is keyed to a conditional "if" clause preceding the "within such thirty day period", it follows that the 30 days following the local government grant is strictly measured as the sole period of empowerment. Read in vacuum-like isolation with absolute literalness, the statute could be amenable to that construction. However, such a conclusion would be contrary to the purpose and intent of the underlying statutory scheme and would conflict with other operative features of the statute's core overview procedures, especially the threshold burden of notice and supply of necessary materials for review. Thus, we approach the statute's provisions sequentially and give the statute a sensible and practical [****9] over-all construction, which is consistent with and furthers its scheme and purpose and which harmonizes all its intervvlocking provisions. It is axiomatic that such an approach is preferred *(e.g., Patrolmen's Benevolent Assn. v City of New York, 41 NY2d 205, 208)*, especially when an opposite interpretation would lead to an absurd result that would frustrate the statutory purpose *(see, e.g., Matter of Schmidt v Roberts, 74 NY2d 513, 520*; *Matter of State of New York [Abrams] v Ford Motor Co., 74 NY2d*

495, 500; *Doctors Council v New York City Employees' Retirement Sys., 71 NY2d 669, 675*; *New York State Bankers Assn. v Albright, 38 NY2d 430, 437)*.

The statute begins with the imposition of a triggering burden on the local zoning board: "Upon receipt of an application for a variance * * * the local government body or officer [*421] having jurisdiction thereof shall give written notice thereof to the [APA] together with such pertinent information as the agency may deem necessary." Notification and necessary information for APA to perform its specific and unifying overview review are the principal aims of *Executive Law § 808 (3)*, as evidenced both by its [****10] textual primacy (McKinney's Cons Laws of NY, Book 1, Statutes § 130) and the Legislature's manifest intent in the Adirondack Park Agency Act (*Executive Law art 27*). When the statute is read contextually, we discern that the enactors of the statute contemplated and probably preferred that the APA would review local variance grants during the 30-day limbo period, *assuming APA has been properly notified and informed with the necessary materials to do the critical job entrusted to it*.

To "preserv[e] the priceless Adirondack Park through a comprehensive land use and development plan," the Adirondack Park Agency "serve[s] [this] supervening State concern transcending local interests" by "prevent[ing] localities within the Adirondack Park from freely exercising their zoning and planning powers" by reviewing and even undoing zoning variances granted by local governments *(Wambat Realty Corp. v State of New York, 41 NY2d 490, 494-495)*. The APA is charged with an awesome responsibility and the Legislature has granted it formidable powers to carry out its task *(see generally*, *Executive Law art 27*). A recent advisory report -- already the subject of vibrant debate -- concludes [****11] that the importance and urgency of the APA's mission may require even broader powers on its part *(see*, Report by Commission on Adirondack Park in Twenty-First Century, at 69 [Apr. 1990]). It is inconceivable that the drafters of the present statute, while lessening the customary finality of local government control of the use of land within their own borders, would at the same time deliver back to local regulatory units a frustrative tool to open and close the 30-day APA review "window" by unilateral action or inaction. Thus, despite the skewed and inartful interlock of the statute's several provisions, the threshold burden remains on the local boards to notify and supply necessary data to the APA. Otherwise, meaningful APA review could be prevented by failing to notify of a variance grant, for example, until the eve of the expiration of the 30-day period or until after it had passed. That would lead to absurd results and would sap the APA of its legislatively delegated authority *(see, e.g., Matter of Schmidt v Roberts*, 74 NY2d, *supra, at 520*; *Matter of State of New York [Abrams] v [*422] Ford Motor Co.*, 74 NY2d, *supra, at 500*; *Doctors Council v* [****12] *New York City Employees' Retirement Sys.*, 71 NY2d, *supra, at 675*; *New York State Bankers Assn. v Albright*, 38 NY2d, *supra, at 437*). Equally frustrative would be the withholding of the relevant record of proceedings upon which to make a meaningful and timely review. If the 30-day period is to be triggered automatically by a variance grant without the threshold, functional prerequisites having been satisfied, the locality's statutory and regulatory duties to promptly notify and promptly inform the APA would be rendered literally meaningless and useless (*Executive Law § 808 [3]*; *9 NYCRR 582.6 [b]*).

Petitioners argue that extending the 30-day period of review by a commencement date running from the date when the APA has notice and necessary materials creates uncertainty and swings the time pendulum too far in APA's favor, giving it an opportunity to indefinitely delay the effective date of a variance by merely requesting cumulative or unnecessary materials. Although these are not insignificant concerns and are complicated further by the plain language of the core part of the statute relied on by petitioners, a ready response is available. [****13] First of all, the record here shows the opposite. The APA acted

properly, promptly and persistently in accordance with its mandate. Moreover, the availability of CPLR article 78 review to challenge any potential manipulation or misuse of the trust reposed in the APA's vast review and enforcement responsibilities, as well as the advisory APA opinion mechanism for variance applicants *(see*, 9 NYCRR 582.6 [c]), provide counterbalancing, reasonable remedies and checks and balances. We note finally in this respect that the furnishing to APA of notice and full materials quickly in order to "start the clock" and fix the review period remains always with the local zoning body and property owners.

"'[I]n the interpretation of statutes, the spirit and purpose of the act and the objects to be accomplished must be considered. The legislative intent is the great and controlling principle.'" *(* Ferres v City of New Rochelle, 68 NY2d 446, 451, quoting People v Ryan, 274 NY 149, 152.) The purpose of preserving the Adirondack Park is served not only by a centralized process of review of zoning variances, but by procedural assurances that the reviews will be adequate and meaningfully [****14] consistent with statutory prescriptions and prerequisites designed to protect all parties and interests. We therefore read the statute in the progressive order the sentences [*423] were put together and as an integrated procedural package. By doing so, we construe the 30-day time limitation of Executive Law § 808 (3) as commencing no later than on the receipt by the APA of notice of a variance grant, along with necessary materials promptly and reasonably requested by the APA which are pertinent to meaningful review.

The Legislature -- on its own initiative or at the instance of the APA, local government units, property owners or other interested persons -- may find it appropriate and necessary to reexamine and fine tune the procedural mechanisms of this important land use oversight review protection, especially since the Legislature will no doubt be examining related and transcendent issues involving the Adirondack Park arising out of the recent, plenary report of the Commission on the Adirondack Park in the Twenty-First Century, dated April 1990.

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

Dissent by: TITONE

Dissent

Titone, J. (dissenting). [****15] While the judicial construction of legislative enactments includes consideration of their "spirit and purpose" and "'legislative intent is the great and controlling principle'" *(* Ferres v City of New Rochelle, 68 NY2d 446, 451), courts are not free to supplement statutory language with additional, judicially conceived requirements. Since that is precisely what the majority has done in this case and since, in my view, such judicial augmentation is not necessary for the rational implementation of the statutory scheme as it is written, I respectfully dissent.

As the majority acknowledges, the language in the statute at issue here is unambiguous. Locally issued variances affecting land use within the designated Adirondack Park area "shall not take effect for thirty days after the granting thereof" and "[i]f, within *such* thirty day period, the [Adirondack Park Agency (APA)] determines that such variance * * * was not [**639] [***945] based upon the appropriate statutory basis of practical difficulties or unnecessary hardships, the agency may reverse the local determination" (Executive Law § 808 [3] [emphasis supplied]).

The 30-day period in which the APA must [****16] act is thus not left undefined; rather, it is specifically made coextensive with the 30-day period during which the granted variance remains ineffective. Indeed, the Legislature's use of the term *"such* thirty day period" demonstrates a deliberate choice to use the same time span for determining the period within which both [*424] events must occur *(see*, McKinney's Cons Laws of NY, Book 1, Statutes § 254, at 418 ["the word 'such,' when used in a statute, must, in order to be intelligible, refer to some antecedent, and will generally be construed to refer to the last antecedent in the context"]). Accordingly, the "ambiguity" that ordinarily justifies a judicial construction supplementing or filling in the interstices of a legislative enactment is not present here.

Moreover, the court's own view of what method would best implement the underlying statutory policies cannot be cited as an alternative justification. "[R]ules of construction are invoked only when the language used leaves [the statutory] purpose and intent uncertain or questionable[;] [t]hey cannot be resorted to for the purpose of enabling the courts to enlarge or extend the legislative design or [****17] intent." *(People ex rel. New York Cent. & Hudson Riv. R. R. Co. v Woodbury, 208 NY 421, 425*; *accord, Eaton v New York City Conciliation & Appeals Bd., 56 NY2d 340*.) "[T]o interpret a statute where there is no need for interpretation, to conjecture about or add to * * * words having a definite meaning * * * are trespasses by a court upon the legislative domain" (McKinney's Statutes § 76, at 168). This is especially so where, as here, the judicially chosen method conflicts with the explicit legislative design.

The rules of construction mandating avoidance of absurd consequences and frustration of legislative purpose also cannot fairly be invoked here. It is true, as the majority observes, that the most natural reading of the statute as drafted *could* result in the impairment of meaningful agency review where a locality fails, by design or neglect, to notify the APA of a variance grant. However, such impairment is, at most, a mere weakness in the legislative design; it is certainly not the sort of "absurd consequence" or complete frustration of the legislative goal that is typically cited as a ground for judicial redrafting. Indeed, the problem the majority perceives [****18] may well be illusory, since the APA's statutory authority can easily be construed as entitling it to "reverse" a local variance grant as "not based upon * * * practical difficulties or unnecessary hardships" (*Executive Law § 808 [3]*) in cases where the absence of an adequate record prevents it from concluding otherwise. *

[*425] Further, there is no sound reason to assume that the legislative "gap" the majority perceives and rushes to fill was unintentional. The Legislature has itself provided for mandatory written notice to the agency and the provision of necessary "pertinent information" "[u]pon receipt of an application for a variance" (*Executive Law § 808 [3]*). Since the Legislature made explicit provision for notice at the initiation, but not the conclusion, of the local variance [****19] application process, it seems probable that the Legislature meant to create a system in which the APA, once having been notified of a particular application, would assume the responsibility of monitoring its progress. Such monitoring would ensure that an approval would not slip by unnoticed, even if the locality did not provide the APA with timely formal notice. Indeed, the absence of any legislative requirement that such postgrant formal notice be provided at all militates against a construction that relies on such notice as an event triggering the running of the agency's deadline.

[**640] [***946] Moreover, the Legislature has provided a vehicle for addressing any concerns the APA may have about the inclination of a specific locality to cooperate with that agency's Statelevel

* Apparently, that is precisely what the APA did in this case when on July 19th it reversed the local Zoning Board of Appeals initial decision on the ground that a complete record of the evidence had not been provided.

review of variance grants. The "variance grants" to be reviewed under Executive Law § 808 (3) are variances from *"approved* local land use program[s]" (emphasis supplied). Such programs must be "approved" by the APA and "administered and enforced as provided for" (Executive Law § 808 [1]; *see*, § 807). Thus, to the extent that there is concern about prompt notification to facilitate [****20] APA review, the matter can readily be resolved, *within the express legislative design*, by inclusion of appropriate regulations in the "local land use program" itself.

Finally, by superimposing a solution of its own devising, the majority has opened up several new anomalies and problems which will, no doubt, require further judicial tinkering in the future. For example, although the majority has squarely held that the 30-day period for the APA to act commences to run "on the receipt by the APA of notice of [the] variance grant, along with necessary materials promptly and reasonably requested by the APA" (majority opn, at 423), its opinion leaves unclear whether the same rule is to apply to the running of the 30-day waiting period during which the variance grant remains "ineffective" under Executive Law § 808 (3). Presumably, the time periods for these two occurrences must be [*426] coextensive, since there would otherwise exist a period of "limbo" for the property owner during which its variance would be legally "effective" but would remain subject to reversal by the State administrative agency.

Regardless of its ultimate resolution of the above-mentioned question, the [****21] majority's holding has paved the way for a whole new class of litigation to resolve what constitutes a "prompt" and "reasonable" agency request for "material" that is "necessary" and "pertinent to meaningful review." Such a result is particularly objectionable in this context, since it will lead to a degree of uncertainty that is unacceptable in the area of land use decisions. Landowners who have succeeded in obtaining variances from local governments will be required either to comply indefinitely with the APA's requests for further information or to commence article 78 proceedings to compel the agency to decide the matter before it on the basis of the information it already has. The courts will then have to determine, on a case-by-case basis, whether the additional agency request was "reasonable" and, if not, when the agency's time for taking action, in fact, began to run. This is an unrealistic and overly burdensome approach to the problem of assuring "meaningful" APA review.

The majority's interpretation of Executive Law § 808 (3) also gives the APA, anomalously, more discretion to delay in the approval of individual variances from local land use programs than it has in the [****22] far more environmentally significant area of approving class A and B regional projects. The agency's discretion to request additional information in the latter area, which is governed by Executive Law § 809, is limited by the detailed rules and deadlines set forth in that section. Executive Law § 809 (2) (b), for example, provides that "[o]n or before fifteen calendar days after the receipt of [an] application" the agency must notify the project sponsor whether it deems the application complete. If additional information is needed, the statute provides that "[t]he submission * * * of the requested additional information shall commence a new fifteen calendar day period for agency review * * * for the purposes of determining completeness" *(id.)*. On the other hand, if the agency fails to mail a notice of incompleteness within 15 days of its receipt of the application, "the application shall be deemed complete" *(id; see also*, Executive Law § 809 [6] [c] [agency request for additional information during [*427] review of application by permit holder for renewal or modification "shall not extend any time period for agency action contained in this section"]).

[****23] The existence of such detailed rules governing the postponement of the deadlines for the agency to act under Executive Law § 809 when it perceives a need for more information suggests to me

that the omission of similar provisions in *Executive Law [***947] § 808 (3)* [**641] was not a mere legislative oversight. Furthermore, the minutely detailed provisions in *Executive Law § 809* suggest that if there are to be such postponements under *section 808 (3)*, they ought to be governed by legislatively designed rules, and not by such imprecise standards as the "reasonableness" or "promptness" tests the majority has devised.

There is no dispute that the goal of the APA Act to "preserv[e] the priceless Adirondack Park through a comprehensive land use and development plan" and the legislatively chosen method of accomplishing that goal by "prevent[ing] localities within the Adirondack Park from freely exercising their zoning and planning powers" *(Wambat Realty Corp. v State of New York, 41 NY2d 490, 494-495*; *see*, majority opn, at 421) are both laudable and deserving of judicial support. The precise issue presented here, however, is not whether the Legislature's goals [****24] are to be advanced as a general matter, but rather whether the Legislature has established procedures for handling variance applications that are workable and sufficiently clear to permit their implementation. Since I conclude that it has, I cannot concur in my colleagues' analysis. If, upon further review, the Legislature deems its own scheme to be as deficient as the majority believes, it remains free to make the necessary statutory alterations.

In sum, I would hold that the APA's November 14th reversal of the Zoning Board of Appeals decision was untimely and was therefore ineffective. Accordingly, I vote to reverse the Appellate Division order and grant the petition.

Order affirmed, with costs.

End of Document

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

Supreme Court of New York, New York County

June 11, 2012, Decided

650193/09

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

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

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

PUBLISHED IN TABLE FORMAT IN THE NEW YORK SUPPLEMENT.

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

Counsel: [***1] For Plaintiff: Jeffrey E. Glen, Dennis J. Nolan and Lawrence J. Bartelemucci, Esqs., ANDERSON KILL & OLICK, P.C., New York, New York.

For Defendant: Randy M. Mastro, Jennifer H. Rearden and Gabriel Hermann, Esqs., GIBSON, DUNN & CRUTCHER LLP, New York, New York.

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

Opinion by: BARBARA R. KAPNICK

Opinion

Barbara R. Kapnick, J.

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

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Directly adjacent to Lot 150 is Lot 100 which ECF owns; this is the site of the Murry Bergtraum High School for Business Careers (the "School Building"). Together, the lots comprise a single zoning lot (the "Combined Zoning Lot"). Under New York City zoning laws, the Combined Zoning Lot is considered a single zoning lot "for zoning calculation and limits", such as the amount of zoning floor area available for development in a particular lot.

*[****2] Background*

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

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

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

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

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

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

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On or about July 31, 2007, the Fund and Verizon entered into a third amendment to the 1972 Contract (the "Third Amendment"), which described the real property sold as "including 771,003 square feet of Floor Area, as defined in the Zoning Resolution." Third Amendment, Recital B.2. (which replaced Sec. 101 of the 1972 Contract).[2] At the same time, the parties also entered into a Zoning Lot and Easement Agreement [***6] (the "ZLDA") and a Bargain and Sale Deed, which transferred to Verizon title to the real property described in the 1972 Contract, as modified by the Third Amendment, and which provided for reciprocal easements. The ZLDA recites that the Verizon building and the school contain, respectively, 759,200 and 219,403 square feet of Floor Area and that there remain 38,807 square feet of unused Floor Area. The ZLDA further recites that the Parties desire to allocate the Excess Development Rights as follows: 27,004 square feet to the Fund Premises and 11,803 square feet to the [Verizon] Building Premises, so that the Fund Premises shall have a total of 246,407 square feet Floor Area (the "*Fund Development Rights*"), and the [Verizon] Building Premises shall have a total of 771,003 square feet of Floor Area (the "*Office Building Development Rights*"), for use and enjoyment by the Fund and the [Verizon] Building Owner, respectively.

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

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

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

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

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

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

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

Discussion

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

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

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

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

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

Verizon argues that the central premise of this case is that Verizon misrepresented the total amount of "zoning floor area" utilized in the Verizon Building by misstating the amount of "gross floor area" it deducted, pursuant to a "mechanical space" exemption, from the calculation of "zoning floor area". Specifically, ECF alleges that Telco obtained a reduced price by offering to reduce the size of the building that it would construct, but that instead of doing so, it simply "misclassif[ied] certain space . . . as mechanical space' under the Zoning Resolution in order to exclude such space from the calculation of Floor Area utilized by the Verizon Building." AC, ¶ 52.

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

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

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

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

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

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

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

in *Matter of Raritan*, "when applying its special expertise in a particular field rational construction is entitled to deference." 91 NY2d at 102.

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

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

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

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

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

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

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

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

36 Misc. 3d 1201(A), *1201(A); 957 N.Y.S.2d 265, **265; 2012 N.Y. Misc. LEXIS 2949, ***16; 2012 NY Slip Op 51142(U), ****6

Fraud and Negligent Misrepresentation Claims

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

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

Verizon argues that ECF cannot possibly meet its burden of establishing justifiable reliance on any alleged misrepresentation here, because its own pleading, as well as the governing transactional documents and relevant public records, demonstrate that ECF failed to make any independent efforts to investigate the relevant facts and discover the alleged [***18] fraud.

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

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

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

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

36 Misc. 3d 1201(A), *1201(A); 957 N.Y.S.2d 265, **265; 2012 N.Y. Misc. LEXIS 2949, ***19; 2012 NY Slip Op 51142(U), ****7

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

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

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

Moreover, ECF's allegations demonstrate not only that it "failed to make use of the means of verification that were available to it," *UST Private Equity Invs. Fund, 288 AD2d at 88*, but also that ECF clearly *could have* discovered the alleged fraud had it undertaken any such efforts at the time the alleged misrepresentations were made. When it finally took the time to examine the facts "more closely," ECF apparently discovered that Verizon had claimed a higher-than-average amount of "mechanical deductions" in calculating the zoning floor area contained in the building. Specifically, ECF's counsel complained in a letter dated April 23, 2008, that Verizon had deducted about 30% of the gross floor area in the building, even though, according to ECF, "mechanical deductions for this type of building are typically under five percent." That "discovery" by ECF ultimately led to the commencement of this action. But ECF certainly knew, or should have known from the outset, that the gross floor space in [***22] the building would be approximately one million square feet. The Development Agreement, Sec. 30.12 makes reference to the plans and specifications and indicates that Telco agreed to provide the plaintiff with a conformed copy of them. The Fund also knew from the 1972 Contract that the building was supposed to contain only 744,000 square feet of zoning floor area. *See*, Sec. 201.2. The difference between those two figures alone should have alerted ECF to the possibility that "the amount of zoning floor area which Verizon[] . . . contracted to purchase" differed from "what was actually built in the Building." *See*, April 17, 2008 letter from plaintiff's counsel to Verizon in connection with the Closing.

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

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

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

The *DDJ* Court further stated that where

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

15 NY3d at 154.

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

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

> " [a]s a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it'"
>
> (*Ventur Group, LLC v Finnerty, 68 AD3d 638, 639, 892 N.Y.S.2d 69 [2009]*, quoting *UST Private Equity Invs. Fund v Salomon Smith Barney. 288 AD2d 87,88, 733 N.Y.S.2d 385 [2001]*; *see also Global Mins & Metals Corp. v Holme, 35 AD3d 93, 100, 824 N.Y.S.2d 210 [2006]*, *lv denied 8 N.Y.3d 804, 863 N.E.2d 111, 831 N.Y.S.2d 106 [2007]* ["New York law imposes an affirmative duty on sophisticated investors to protect themselves from misrepresentations . . . by investigating the details of the transactions"]; *Stuart Silver Assoc. v Baco Dev. Corp., 245 AD2d 96, 98-99, 665 N.Y.S.2d 415 [1997]* [justifiable reliance cannot be shown "(w)here a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means"]; *Lampert v Mahoney, Cohen & Co., 218 AD2d 580, 582-583, 630 N.Y.S.2d 733 [1995]* [dismissing fraud claim where "plaintiff failed to undertake an independent appraisal of the risk he was [***26] assuming," and thereby "assumed the risk of loss that a proper investigation would have been likely to disclose"]).
>
> The principle that sophisticated parties have "a duty to exercise ordinary diligence and conduct an independent appraisal of the risk they [are] assuming" (*Abrahami v UPC Constr. Co., 224 AD2d 231, 234, 638 N.Y.S.2d 11 [1996]*; *see also Granite Partners, L.P. v Bear, Stearns & Co., 58 F. Supp. 2d 228, 259 [SDNY 1999]*) has particular application where, as here, the true nature of the risk being assumed could have been ascertained from reviewing market data or other publicly available information (*see Havell Capital Enhanced Mun. Income Fund, L.P. v Citibank, N.A., 84 AD3d 588, 589, 923 N.Y.S.2d 479 [2011]*.

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

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

> "If the facts represented are not matters peculiarly within the party's knowledge, [***27] and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentation" (*Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V., 17 N.Y.3d 269, 278-279, 952 N.E.2d 995, 929 N.Y.S.2d 3, [2011]* [internal

quotations marks and brackets omitted]; *see also* Danann Realty Corp. v. Harris, 5 N.Y.2d 317, 322, 157 N.E.2d 597, 184 N.Y.S.2d 599 [1959] [same]; Schumaker v Mather, 133 NY 590, 596, 30 N.E. 755, 4 Silv. A. 224 [1892] [same].

HSH, 941 NYS2d at 65-66.

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

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

Contract Claims

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

Further, while ECF argues that the 1972 Contract required construction of the telephone building, and that such a "collateral undertaking" may show an intent that it not be merged in the deed, collateral matters are those that "cannot be performed until after conveyance." *See* White v [****11] Long, 204 AD2d 892, 612 N.Y.S.2d 482 (3d Dep't 1994), *mod on other grnds* 85 NY2d 564, 650 N.E.2d 836, 626 N.Y.S.2d 989 (1995). The Verizon Building herein was completed decades before the Fund conveyed title to Verizon.

Unjust Enrichment Claims

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

Claims for Declaratory and Injunctive Relief

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

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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New York Botanical Garden v. Board of Stds. & Appeals

Court of Appeals of New York

February 18, 1998, Argued ; April 2, 1998, Decided

No. 29

Reporter
91 N.Y.2d 413 *; 694 N.E.2d 424 **; 671 N.Y.S.2d 423 ***; 1998 N.Y. LEXIS 605 ****

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

Prior History: [**1]** Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered April 15, 1997, which affirmed an order and judgment (one paper) of the Supreme Court (Sheila Abdus-Salaam, J.), entered in New York County in a proceeding pursuant to CPLR article 78, denying an application by petitioner to annul a determination of respondent Board of Standards and Appeals of the City of New York that a radio tower being built on the campus of intervenor-respondent Fordham University is an accessory use, and dismissing the petition.

Matter of New York Botanical Garden v Board of Stds. & Appeals, 238 AD2d 200, affirmed.

Disposition: Order affirmed, with costs.

Counsel: *Rosenman & Colin, L. L. P.,* New York City *(Jeffrey L. Braun, Kenneth Lowenstein* and *Rosemary Halligan* of counsel), for appellant. The Board of Standards and Appeals' determination that Fordham's radio tower is an "accessory" use is irrational and erroneous. *(300 Gramatan Ave. Assocs. v State Div. of Human Rights, 45 NY2d 176*; *Matter of Pell v Board of Educ., 34 NY2d 222*; *Matter of Moran Towing & Transp. Co. v New York State Tax Commn., **[****2]** 72 NY2d 166*; *Chinese Staff & Workers Assn. v City of New York, 68 NY2d 359*; *Matter of Trump-Equitable Fifth Ave. Co. v Gliedman, 62 NY2d 539*; *Matter of Toys "R" Us v Silva, 89 NY2d 411*; *Matter of Raritan Dev. Corp. v Silva, 91 NY2d 98*; *Kurcsics v Merchants Mut. Ins. Co., 49 NY2d 451*; *Matter of Teachers Ins. & Annuity Assn. v City of New York, 82 NY2d 35*; *Matter of 7-11 Tours v Board of Zoning Appeals, 90 NY2d 486*.)

Jeffrey D. Friedlander, Acting Corporation Counsel of New York City *(Deborah R. Douglas* and *Kristin M. Helmers* of counsel), for respondent. The determination by the Board of Standards and Appeals that Fordham University's proposed radio tower qualifies as an "accessory use" under the Zoning Resolution, thereby permitting construction of the tower as of right, has a rational basis and is supported by substantial evidence. *(Matter of Toys "R" Us v Silva, 89 NY2d 411*; *Appelbaum v Deutsch, 66 NY2d 975*; *Matter of Cowan v Kern, 41 NY2d 591*; *Matter of Teachers Ins. & Annuity Assn. v City of New York, 82 NY2d 35*; *Irwin v Kayser, 112 AD2d 192*; *Matter of Khan v Zoning Bd. of Appeals, 87 NY2d 344*; *Matter of Fuhst **[****3]** v Foley, 45 NY2d 441*; *Matter of Collins v Lonergan, 198 AD2d 349*; *Conley v Town of Brookhaven Zoning Bd. of Appeals, 40 NY2d 309*; *Matter of Raritan Dev. Corp. v Silva, 91 NY2d 98*.)

Kurzman Karelsen & Frank, L. L. P., New York City *(Deirdre A. Carson* and *Joanne Seminara Lehu* of counsel), for intervenor-respondent. I. The New York Botanical Garden failed to articulate to the Board of Standards and

Appeals, or present evidence on, its theory that the tower alone is the accessory use; because the new theory was not preserved, the appeal must be dismissed. *(Cooper v City of New York, 81 NY2d 584*; *Merrill v Albany Med. Ctr. Hosp., 71 NY2d 990*; *Matter of Levine v New York State Liq. Auth., 23 NY2d 863*; *Matter of Fanelli v New York City Conciliation & Appeals Bd., 90 AD2d 756, 58 NY2d 952*; *Matter of Mengoni v Division of Hous. & Community Renewal, 186 AD2d 385*; *Matter of Schodack Concerned Citizens v Town Bd., 148 AD2d 130*; *Matter of Celestial Food Corp. v New York State Liq. Auth., 99 AD2d 25*.) II. The Board of Standards and Appeals' determination that, whether viewed as a use by itself, or together with WFUV's studio as an element **[****4]** of a single use, the WFUV tower is accessory to Fordham University, is rational, text-based and supported by substantial evidence. *(Matter of Exxon Corp. v Board of Stds. & Appeals, 128 AD2d 289, 70 NY2d 614*; *Aim Rent A Car v Zoning Bd. of Appeals, 156 AD2d 323*; *Matter of Porianda v Amelkin, 115 AD2d 650*; *Matter of Presnell v Leslie, 3 NY2d 384*; *Matter of Toys "R" Us v Silva, 89 NY2d 411*; *Matter of Fuhst v Foley, 45 NY2d 441*; *Matter of Collins v Lonergan, 198 AD2d 349*; *Matter of Raritan Dev. Corp. v Silva, 91 NY2d 98*.)

Edward N. Costikyan, New York City, for Municipal Art Society of New York, Inc., *amicus curiae.* The decision of the Board of Standards and Appeals finding that a 480-foot radio tower qualifies as an accessory use is arbitrary and capricious because there is no evidence in the record that a tower of such size is "customarily found in connection with" a university campus in a residential district. *(Matter of Teachers Ins. & Annuity Assn. v City of New York, 82 NY2d 35*; *Matter of Presnell v Leslie, 3 NY2d 384*; *Gray v Ward, 74 Misc 2d 50, 44 AD2d 597*; *Aim Rent A Car v Zoning Bd. of Appeals, 156 AD2d 323*; **[****5]** *Matter of 7-11 Tours v Board of Zoning Appeals, 90 AD2d 486*; *Matter of Porianda v Amelkin, 115 AD2d 650*; *Matter of Baker v Polsinelli, 177 AD2d 844, 80 NY2d 752*; *Matter of Exxon Corp. v Board of Stds. & Appeals, 151 AD2d 438, 75 NY2d 703*.)

Judges: Chief Judge Kaye and Judges Titone, Bellacosa and Ciparick concur; Judges Smith and Levine taking no part.

Opinion by: WESLEY

Opinion

[*416] [425] [***424]** Wesley, J.

In 1993, Fordham University applied to the New York City Department of Buildings (DOB) for a permit to build a new broadcasting facility and attendant tower as an accessory use on its Rose Hill campus. The DOB issued Fordham a building permit. After construction began, the New York Botanical Garden objected to the issuance of the permit. The DOB Commissioner determined that the radio station and accompanying tower together were an accessory use within the meaning of section 12-10 of the New York City Zoning Resolution. The Botanical Garden appealed to the Board of Standards and Appeals (BSA) which, after reviewing numerous submissions from both parties and holding two public hearings, unanimously confirmed the Commissioner's determination. The issue before this **[****6]** Court is whether that determination was arbitrary or capricious; we agree with both lower courts that it was not.

Fordham University was founded in 1841, at the site of the current main campus, as St. John's College. Shortly thereafter, the Jesuits assumed administration of the institution; it took its current name in 1907. The main campus is situated on approximately 80 acres in the Rose Hill section of the North Bronx, directly adjacent along its eastern border to the Botanical Garden. The campus falls within an R6 zoning district (medium density residential). The University offers a wide variety **[*417]** of graduate and undergraduate studies, including degree programs in communications and media studies. As part of these programs, the University offers courses such as "Introduction to Radio," "Radio News Techniques," "Broadcast News Operations" and an internship at the University's radio station, WFUV.

Fordham has operated WFUV as an on-campus, noncommercial, educational radio station since 1947. WFUV is affiliated with National Public Radio and has operated at its current signal strength of 50,000 watts since 1969. The station's current antenna extends 190 feet above **[****7]** ground level and is situated atop the University's Keating Hall, which also houses WFUV's broadcast studio. In 1983, Fordham explored new sites for the antenna. On February 17, 1993, it filed an application with the DOB to construct a new one-story radio transmitting building and an accessory 480-foot (approximately 45-story) radio tower midway along the eastern border of the campus. The application correctly identified the University as a Use Group 3 facility, a permitted use within R6 zoning districts (*see,* NY City Zoning Resolution § 22-13), and described the tower and radio station as an accessory use to the principal use of the property as an educational institution. DOB approved the project and issued a building permit on March 1, 1994; construction began shortly after the permit was renewed on May 13, 1994.

By letter to the DOB Commissioner dated June 30, 1994, the Botanical Garden, which is located across a four-lane thoroughfare from the tower site, objected to the construction and its classification as an "accessory use" under the Zoning Resolution. By that time, construction of the tower was partially complete, at a cost to Fordham of $ 800,000. On July 1, **[****8]** 1994, the DOB Commissioner issued a stop work order pending resolution of the objection.

By letter of September 12, 1994, the Commissioner informed Fordham that the DOB had determined that the tower did in fact constitute an accessory use within the meaning of Zoning Resolution § 12-10. In response **[**426]** **[***425]** to the Botanical Garden's request, the Commissioner issued a final determination confirming the decision on November 7, 1994. The Botanical Garden filed an administrative appeal with the BSA on December 6, 1994. After reviewing substantial submissions, and holding two public hearings, the BSA affirmed the Commissioner's determination. The BSA found that Fordham's operation of a radio station of this size and power was "clearly **[*418]** incidental to the educational mission of the University," and that it was "commonplace" for universities to operate stations "at or near the same power level." The BSA expressly ruled that "the sole issue … is whether the proposed tower is 'incidental to' and 'customarily found' in connection with the University and not whether the tower could be smaller or relocated to another site."

The Botanical Garden then commenced this **[****9]** CPLR article 78 proceeding to annul the BSA's determination that the radio station and tower constituted an accessory use of Fordham's property. The trial court dismissed the petition, holding that the BSA's determination was rational and supported by substantial evidence. The court noted that aesthetics appeared to be at the heart of petitioner's concerns, and implicitly rejected this as a valid basis for labeling the BSA's determination arbitrary and capricious. The court further noted that the record was devoid of any proof that the Botanical Garden would suffer any economic harm, that the tower presented any sort of danger or that the tower would prompt an undesirable change in the character of the neighborhood. The court found it significant that Federal policy and Federal Communications Commission (FCC) regulations encourage local authorities to accommodate radio communications, and that FCC guidelines on radiation exposure levels made a new tower a practical necessity. The court noted that it would be "an arrogant abuse of judicial power" to annul the BSA's determination after its expert members had considered all the relevant factors and decided that the tower was a proper **[****10]** accessory use. Finally, the court noted that petitioner's application suffered from "a taint of laches," in that it had waited until the tower was half complete before taking action. The Botanical Garden appealed.

The Appellate Division unanimously affirmed. The Court held that:

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

We granted petitioner leave to appeal, and now affirm.

This Court has frequently recognized that the BSA is comprised of experts in land use and planning, and that its interpretation **[*419]** of the Zoning Resolution is entitled to deference. So long as its interpretation is neither

"irrational, unreasonable nor inconsistent with the governing statute," it will be upheld (*Matter of Trump-Equitable Fifth Ave. Co. v Gliedman, 62 NY2d 539, 545)*. Of course, this principle does not apply to purely legal determinations; where "the question is one of pure legal interpretation **[****11]** of statutory terms, deference to the BSA is not required" (*Matter of Toys "R" Us v Silva, 89 NY2d 411, 419)*. However, "when applying its special expertise in a particular field to interpret statutory language, an agency's rational construction is entitled to deference" (*Matter of Raritan Dev. Corp. v Silva, 91 NY2d 98, 102)*.

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

"(a) Is a *use* conducted on the same *zoning lot* as the principal *use* to which it is related (whether located within the same or an *accessory building or other structure,* or as an *accessory use* of land) … and

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

[427] [***426]** "(c) Is either in the same ownership as such principal *use,* or is operated and maintained on the same *zoning lot* substantially for the benefit or convenience of the owners, occupants, employees, customers, or visitors of the principal *use.*"

Thus, Zoning Resolution § 12-10 sets forth a **[****12]** three-prong test for determining whether a use qualifies as an accessory one: first, it must be conducted on the same zoning lot as the principal use; second, it must be "clearly incidental to, and customarily found in connection with" the principal use; and third, there must be unity of ownership, either legal or beneficial, between the principal and accessory uses. Petitioner acknowledges that the first and third prongs are satisfied here. It takes issue, however, with the BSA's determination that a tower of this size is clearly incidental to, and customarily found in connection with, the principal use of this land as a university campus. **Petitioner also maintains that this question, particularly the "customarily found" inquiry, presents an issue of pure [*420] statutory construction and therefore this Court should not give any deference to the BSA determination. We disagree.**

Whether a proposed accessory use is clearly incidental to and customarily found in connection with the principal use depends on an analysis of the nature and character of the principal use of the land in question in relation to the accessory use, taking into consideration the over-all character **[****13]** of the particular area in question (*see, Matter of Hassett v Horn, 23 NY2d 745*, *revg 29 AD2d 945 on the dissent below*). This analysis is, to a great extent, fact-based (*Matter of Exxon Corp. v Board of Stds. & Appeals, 128 AD2d 289, 298* ["the requirement that the proposed use be one customarily found in connection with, and incidental to, (the principal use) poses a factual issue for Board resolution"]). Moreover, such an analysis is one that will clearly benefit from the expertise of specialists in land use planning. Pursuant to *section 659 (b) of the New York City Charter*, the BSA includes a city planner, an engineer and an architect. These professionals unanimously determined that the radio station and the proposed tower are incidental to, and customarily found in connection with, an educational institution. This Court may not lightly disregard that determination.

The Botanical Garden nonetheless argues that the "customarily found" element of the definition of accessory use itself poses a purely legal question, relying on *Matter of Teachers Ins. & Annuity Assn. v City of New York (82 NY2d 35)*. We did hold in *Teachers* that, in an appropriate case, **[****14]** this Court will parse various sections of a statute or regulation, and identify certain sections as requiring deference to agency experts, while other sections present questions of pure legal interpretation. In *Teachers* we noted that whether a restaurant was of "special historical or aesthetic interest" (*Administrative Code of City of NY § 25-301 [b]*) to justify its designation as a landmark was an interpretation and application of the Landmarks Law better left to the expertise of the Landmarks Preservation Commission. However, the "jurisdictional predicate" that the restaurant would only be given landmark status if it was " 'customarily open or accessible to the public' " was a matter of pure legal interpretation (*id., at 41-42*). The Court in *Teachers* was not called upon to examine whether there was record support for deciding the "jurisdictional

predicate." The issue was a straightforward legal one: does a restaurant fall within the coverage of the statute--i.e., areas that are customarily open or accessible to the public.

[*421] In this case, there is no dispute that radio stations and their attendant towers are clearly incidental to and customarily found **[****15]** on college campuses in New York and all over the United States. The issue before the BSA was: is a station of this particular size and power, with a 480-foot tower, customarily found on a college campus or is there something inherently different in this radio station and tower that would justify treating it differently. This is clearly a fact-based determination substantially different from the law issue presented in *Teachers (supra).*

[428]** **[***427]** Granting the BSA's determination its appropriate weight, we cannot say that its classification of the tower as an accessory use is arbitrary or capricious, or not supported by substantial evidence. It must be noted that the Botanical Garden's initial objection was to the over-all size of Fordham's radio operations. Petitioner argued before the DOB Commissioner and the BSA that it was not customary, but rather highly unusual, for a university to operate a station which is affiliated with National Public Radio and which broadcasts at a signal strength of 50,000 watts. It argued that the "sheer extent of the operations," which reached "far beyond the immediate college community" showed that the station was not being operated as an **[****16]** adjunct to University programs, but that it was essentially a commercial enterprise.

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

The Botanical Garden nonetheless maintains that it is not customary for universities to build radio towers of this height in connection with their radio operations. This argument ignores the fact that the Zoning Resolution classification of accessory **[****17]** uses is based upon functional rather than structural specifics. The use found to be accessory here is the operation of **[*422]** a 50,000-watt university radio station. As set forth above, there was more than adequate evidence to support the conclusion that such a use is customarily found in connection with a college or university. In order to operate such a station, it is necessary to maintain an antenna at a sufficient height to properly radiate that signal. The FCC has determined that broadcasting WFUV's signal from its current antenna atop Keating Hall has resulted in ground radiation levels which "substantially exceed[] the Commission's Radio Frequency Protection Guidelines" (*In re: WFUV [FM], 12 FCCR 6774, 6777*; *see, 47 CFR 1.1307 [b]*; 1.1310). WFUV therefore cannot receive a license renewal unless and until it moves its antenna to a new location (*id*). *

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

* 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.

Separation of powers concerns also support the decision we reach today. Accepting the Botanical Garden's argument would result in the judicial enactment of a new restriction on accessory uses not found in the Zoning Resolution. Zoning Resolution § 12-10 (accessory use) (q) specifically lists "*[a]ccessory* radio or television towers" as examples **[****19]** of permissible accessory uses (provided, of course, that they comply with the requirements of Zoning Resolution § 12-10 [accessory use] [a], [b] and [c]). Notably, no **[**429]** **[***428]** height restriction is included in this example of a permissible accessory use. By contrast, other examples of accessory uses contain specific size restrictions. For instance, Zoning Resolution § 12-10 defines a "home occupation" as an accessory use which "[o]ccupies not more than **[*423]** 25 percent of the total *floor area* … and in no event more than 500 square feet of *floor area*" (§ 12-10 [home occupation] [c]) and the accessory use of "[l]iving or sleeping accommodations for caretakers" is limited to "1200 square feet of *floor area*" (§ 12-10 [accessory use] [b] [2]). The fact that the definition of accessory radio towers contains no such size restrictions supports the conclusion that the size and scope of these structures must be based upon an individualized assessment of need. The BSA is the body designated to make this determination, and courts may intervene only if its determination is arbitrary or capricious.

The Botanical Garden continues to press **[****20]** the argument that the BSA abrogated its obligation to consider the environmental impact of the tower on an adjoining property by designating the tower an accessory use. The statute has no reference to environmental considerations in defining an accessory use, although it does list radio antennas as one type of an accessory use. The Botanical Garden's real complaint is the impact of the tower on the unique nature of its buildings and grounds. The Botanical Garden has raised these same concerns with the FCC in the context of the National Historic Preservation Act (*16 USC § 470 et seq.*) and that matter is still pending (*see, In re: WFUV [FM], 12 FCCR 6774*, *supra*). While we are not unmindful of those concerns, they are simply not part of the legal equation before us.

Matter of Presnell v Leslie (3 NY2d 384), relied upon heavily by petitioner, does not dictate a contrary result. The petitioner in *Presnell,* an amateur radio operator, applied for a building permit to construct a 44-foot radio tower. He claimed that he was entitled to a permit as of right, because the tower was an accessory use to the principal use of the lot as his residence. The Village Board **[****21]** of Trustees denied the application, finding that the tower was neither an accessory building nor use customary to a residential dwelling. Presnell challenged this determination. The trial court dismissed the petition and the Appellate Division affirmed. This Court affirmed, holding that "it cannot be said as a matter of law that the erection of a 44-foot steel tower in a compact residential area of a suburban community, where dwellings are restricted in height to 35 feet … is a customarily incidental use of residential property, or one which might commonly be expected by neighboring property owners" (*id., at 388*).

Presnell (supra) is both factually and legally distinguishable from the case at bar. The homeowner in *Presnell* claimed the **[*424]** right to build his radio tower in the pursuit of a hobby. This Court ruled that the municipality could legitimately conclude that the scope of the proposed operation took it outside the realm of a simple pastime. As we stated in *Presnell,* "[i]t is clear that, in the conduct of a hobby, the scale of its operation may well carry it beyond what is customary or permissible" (*3 NY2d, at 387-388*). Here, we are concerned **[****22]** not with a personal hobby carried on as an incident to a residential premises, but with a legally recognized institutional use that is integral to the educational mission of this University. As noted at the outset, Fordham offers both bachelor's and master's degrees in communications and media studies, and WFUV is a key part of that curriculum. Fordham submitted ample evidence showing that the scope of its radio operations is not outside the norm for an educational institution and that the station has operated at its current power levels for almost 30 years.

In addition, *Presnell (supra)* is distinguishable because there, the municipality had denied the permit. Thus, we specifically limited our scope of review to whether that determination was unsupported "as a matter of law" (*3 NY2d, at 388*). We did not hold that the municipality could not have determined that the tower was a permissible accessory use. We afforded its determination the proper **[**430]** **[***429]** level of respect, reviewable only for clear legal error. While we did not articulate this as an arbitrary and capricious or substantial evidence question, this was the standard effectively employed. Here, the BSA determined **[****23]** that the station and tower did constitute an

accessory use. Thus, rather than mandating reversal, *Presnell* actually lends support to Fordham's position that the BSA's determination should be upheld as an appropriate and well-supported exercise of its power to decide what does or does not constitute an accessory use under the pertinent zoning ordinance.

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

Chief Judge Kaye and Judges Titone, Bellacosa and Ciparick concur; Judges Smith and Levine taking no part.

Order affirmed, with costs.

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New York State Bankers Ass'n v. Albright

Court of Appeals of New York

November 17, 1975, Argued ; December 29, 1975, Decided

No Number in Original

Reporter
38 N.Y.2d 430 *; 343 N.E.2d 735 **; 381 N.Y.S.2d 17 ***; 1975 N.Y. LEXIS 2362 ****

New York State Bankers Association by Kenneth E. Buhrmaster, as President, et al., Respondents, v. Harry W. Albright, Jr., as Superintendent of Banks, et al., Appellants

Prior History: [****1] New York State Bankers Assn. v Albright, 46 AD2d 269, affirmed.

Appeal, by permission of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from a judgment of said court, entered December 12, 1974, which in a controversy submitted upon an agreed statement of facts, unanimously determined the controversy in favor of plaintiffs.

Disposition: Judgment affirmed, etc.

Counsel: *Louis J. Lefkowitz, Attorney-General (Grace K. Banoff* and *Ruth Kessler Toch* of counsel), for Harry W. Albright, Jr., appellant. I. Since withdrawal orders of Now accounts do not differ from long-established banking practice except for the absence of passbooks, Banking Law (§ 238, subd 6), which permits issuance of savings accounts without passbooks, authorizes savings banks to offer NOW accounts. *(* Franklin Nat. Bank v New York, 347 U.S. 373.) II. Since Banking Law (§ 238, subd 6) is clear and unambiguous, [****4] the court below should not have used extrinsic facts to construe it. *(* Matter of Roosevelt Raceway v Monaghan, 9 NY2d 293, 368 U.S. 12; *Rome Sav. Bank v Kramer*, 39 Hun 270, affd *sub nom.* Rome Sav. Bank v Krug, 102 NY 331; Finger Lakes Racing Assn. v New York State Off-Track Pari-Mutuel Betting Comm., 30 NY2d 207; New York State Thruway Auth. v Ashley Motor Ct., 10 NY2d 151; Matter of Di Brizzi [Proskauer], 303 NY 206; City of Buffalo v Roadway Tr. Co., 303 NY 453; Wong Yang Sung v McGrath, 339 U.S. 33; Black v Magnolia Liq. Co., 355 U.S. 24; Zuber v Allen, 396 U.S. 168.) III. The Superintendent of Banks acted in the public interest in promulgating regulations (3 NYCRR 301.1) for NOW accounts.

Amalya L. Kearse, Martin E. Lowy, Philip A. Lacovara and *Howard F. Hart* for Erie County Savings Bank and another, appellants. I. The Banking Law empowers savings banks to offer NOW accounts. *(* Appleby v Erie County Sav. Bank, 62 NY 12; Brooks v Erie County Sav. Bank, 169 App Div 73, 224 NY 639; Campbell v Schenectady Sav. Bank, 114 App Div 337; Matter of Macy & Co. v Tyler, 21 Misc 2d 998; Matter of Roosevelt Raceway v Monaghan [****5] , 9 NY2d 293, 368 U.S. 12; Meltzer v Koenigsberg, 302 NY 523; City of Buffalo v Lawley, 6 AD2d 66; American Airlines v Remis Ind., 494 F2d 196; Matter of Di Brizzi [Proskauer], 303 NY 206.) II. The interpretation of the Superintendent of Banks that the Banking Law permits savings banks to offer NOW accounts should be upheld since it was a

reasonable interpretation. *(* Board v Hearst Pub., 322 U.S. 111; Matter of Howard v Wyman, 28 NY2d 434; Matter of Mounting & Finishing Co. v McGoldrick, 294 NY 104; Matter of Graziano [Levine], 43 AD2d 882; Matter of County of Ulster v CSEA Unit of Sheriff's Dept., Ulster County CSEA Chapter, 37 AD2d 437; Matter of County of Erie v Hoch, 26 AD2d 4, 19 NY2d 854; *Matter of Leathersich v Wade, 20 AD2d 963, 14 NY2d 875*; *Matter of Limousine Rental Serv. v Feinberg, 9 AD2d 986*; Matter of Lawrence-Cedarhurst Bank, 247 App Div 528, 272 NY 646.) III. Plaintiffs lack standing to assert a lack of power on the part of savings banks. *(*711 Kings Highway Corp. v F. I. M.'s Mar. Repair Serv., 51 Misc 2d 373; Jaffe Plumbing & Heating Co. v Brooklyn Union Gas Co., 51 Misc 2d 1083, 29 AD2d 1051, 26 NY2d [****6] 851.)

Stephen H. Kelly, George W. Myers, Jr., and *Christian G. Koelbl, III*, for respondents. I. Plaintiffs have standing to maintain this action. *(Columbia Gas of N. Y. v New York State Elec. & Gas Corp., 28 NY2d 117*; Bath Gas Light Co. v Claffy, 151 NY 24; Bissell v Michigan Southern & Northern Ind. R. R. Cos., 22 NY 258; Whitney Arms Co. v Barlow, 63 NY 62; 711 Kings Highway Corp. v F. I. M.'s Mar. Repair Serv., 51 Misc 2d 373; Jaffe Plumbing & Heating Co. v Brooklyn Union Gas Co., 51 Misc 2d 1083, 29 AD2d 1051, 26 NY2d 851.) II. NOW accounts are checking accounts, but savings banks have authority to offer only savings accounts. The use of savings accounts as checking accounts is an anomaly. III. Savings banks have only the powers granted by the Banking Law. These powers do not include the power to offer checking accounts. *(* O'Connor v Bankers Trust Co., 159 Misc 920, 253 App Div 714, 278 NY 649; First Nat. Bank v Missouri, 263 U.S. 640; California Bank v Kennedy, 167 U.S. 362; Huntington v Savings Bank, 96 U.S. 388; Investment Co. Inst. v Camp, 274 F Supp 624, revd on other grounds *sub nom.* National Assn. of Securities Dealers [****7] v Securities & Exch. Comm., 420 F2d 83, 401 U.S. 617.) IV. The history of savings banking in this State clearly indicates that the power to offer checking accounts is neither necessary nor appropriate to the business of savings banking. *(* Hun v Cary, 82 NY 65; People v Binghamton Trust Co., 139 NY 185; People v Franklin Nat. Bank of Franklin Sq., 305 NY 453; *Rome Sav. Bank v Kramer*, 39 Hun 270, affd *sub nom.* Rome Sav. Bank v Krug, 102 NY 331; People v Ulster County Sav. Inst., 64 Hun 434, 133 NY 689; Matter of Wilkins, 131 Misc 188.) V. The forms of withdrawal order used by savings banks do not support the conclusion that savings banks are empowered to offer checking accounts. *(* Irving Trust Co. v Leff, 253 NY 359; Campbell v Schenectady Sav. Bank, 114 App Div 337; Kelley v Buffalo Sav. Bank, 180 NY 171; Novak v Greater N. Y. Sav. Bank, 30 NY2d 136.) VI. Subdivision 6 of section 238 of the Banking Law cannot properly be construed to authorize savings banks to offer checking accounts. VII. Because the authority of banking institutions is determined by the statutory framework and the evolution of banking within each State, judicial decisions [****8] in other States relating to the offering of checking accounts by savings banks are not determinative of whether savings banks in this State have authority to offer checking accounts. VIII. Authorization for savings banks to offer checking accounts must come, if at all, by action of the Legislature.

Jacquelin A. Swords, Stuart D. Root and *Earl H. Nemser* for the Savings Banks Association of New York State, *amicus curiae*. Savings banks have a duty to honor third-party drafts on statement accounts. They, therefore, have a right to offer this service in whatever form they consider most desirable from the point of view of the banks and their depositors. *(* Smith v Brooklyn Sav. Bank, 101 NY 58.)

Judges: Chief Judge Breitel. Judges Jasen, Jones, Wachtler, Fuchsberg and Cooke concur; Judge Gabrielli taking no part.

Opinion by: BREITEL

Opinion

[*433] [**736] [***18] In this action representative commercial banks seek declaratory and injunctive relief against competing representative savings banks and the Superintendent of Banks. Plaintiff commercial banks challenge the legality under the State Banking Law of the so-called "NOW" (Negotiable Order of Withdrawal) [****9] account, a form of checking [*434] account service offered by many savings banks under regulations of defendant [**737] Superintendent of Banks. Upon an agreed statement of facts submitted directly to the Appellate Division (*CPLR 3222*), judgment was unanimously rendered in favor of the [***19] commercial banks declaring that savings banks had no power to offer NOW accounts and that the superintendent's regulations were null and void, and enjoining the savings banks from offering such accounts.

The issue is whether under the Banking Law, or otherwise, savings banks may offer to their customers so-called NOW accounts.

There should be an affirmance. Nothing in the Banking Law authorizes savings banks to provide checking account services. Indeed, the Legislature has repeatedly rejected proposed legislation to empower savings banks to offer checking account services. True, the Banking Law authorizes savings banks to provide passbook-less accounts and, by unquestioned practice, to permit depositors to make withdrawal orders payable to, or to the order of, third parties (*§ 238, subd 6*; *§ 234, subd 1*). While the statutes may appear literally "unambiguous" on their face, [****10] the absence of ambiguity facially is never conclusive. Sound principles of statutory interpretation generally require examination of a statute's legislative history and context to determine its meaning and scope.

The legislative history of the applicable statutes in context establishes that the Legislature did not intend to authorize savings banks to offer checking account services, a traditional function of commercial banks. Although now largely attenuated but still relevant, there have been public and banking policies separating the functions of commercial and savings banks. That savings banks ought to be permitted to offer checking account services, for which there is considerable local and national support, should be addressed to the Legislature and not to the courts.

The facts have been fully stated in the opinion by Mr. Justice Mahoney at the Appellate Division and therefore are restated only briefly.

Since 1974 New York savings banks have offered NOW accounts to their customers. A NOW account is a noninterest or nondividend bearing account in which the savings bank depositor, periodically and for that purpose, makes deposits against which the depositor draws negotiable [****11] drafts payable to a third party. No passbook is issued to the customer in [*435] connection with the NOW account (for a discussion of NOW accounts see Comment, The Negotiable Order of Withdrawal [NOW] Account: "Checking Accounts" for Savings Banks?, 14 Boston Coll Ind & Comm L Rev 471).

Manifestly and unabashedly, the NOW account is intended to be the savings bank equivalent of a commercial bank checking account. Indeed, widespread advertising by the savings banks enlarges on the similarity between NOW accounts and commercial checking accounts. There is, however, a difference which might in unusual financial circumstances be significant. Unlike a check drawn on a commercial

bank, which is unconditionally payable on demand, payment of a negotiable order of withdrawal, in form a draft payable on demand, may be delayed by a savings bank for 60 days (*Banking Law, § 238*, *subd 2*).

Negotiable orders of withdrawal are generally deposited for collection by the payee or transferee in his own bank, and are presented, through a commercial bank by arrangement with the drawee savings bank, to the drawee savings bank for payment. The savings bank then charges the depositor's NOW account [****12] to pay the order. A monthly statement, much like a commercial bank's checking account statement, is furnished to its NOW depositor by the savings bank.

Explicit detailed authorization for NOW accounts is found in the regulations of the [**738] Superintendent of Banking (3 NYCRR Part 301). Issued by the superintendent on May 29, 1974, these regulations govern the offering by savings institutions of "non-interest-bearing, no-pass book * * * 'NOW accounts'." (*3 NYCRR 301.1*.) Among other things, the regulations prescribe operational and check-clearing details, regulate [***20] advertising of the NOW account service, and impose reserve requirements equal to those imposed with respect to demand deposit checking accounts.

The commercial banks challenge the legality of the savings banks' NOW accounts and the validity of the superintendent's regulations, for lack of statutory authorization. In the absence of such authorization, the commercial banks contend that the historical purposes of and the functional distinctions between savings banks and commercial banks, closely preserved by statute, foreclose the savings banks from providing NOW accounts.

Subdivision 1 of *section 234 of [****13] the Banking Law* empowers a savings bank to "receive and pay deposits" and to exercise the [*436] incidental powers necessary to conduct its business. For many decades savings banks have permitted their depositors to make withdrawal orders payable to third parties or to bearer. The third party would, however, be required to present the depositor's passbook to collect the amount of the order. There were some exceptions, but they do not merit treatment in this discussion.

In 1965, subdivision 6 of *section 238* was added to the Banking Law (L 1965, ch 804, § 2). It provides: "Subject to any regulations and restrictions prescribed by the superintendent of banks, a savings bank may accept deposits without the issuance of a passbook in connection therewith, and may issue such other evidences of its obligation to repay such deposits as may be appropriate to safeguard the interests of the depositors and of the savings bank."

With the passage of subdivision 6 of *section 238*, the savings banks reason, the passbook requirement was eliminated and hence they could, subject to the superintendent's regulations, lawfully offer NOW accounts to their customers. Notably, the statutory change [****14] is hardly complete or embracive of its subject matter (compare the statute considered in *Matter of Sigety v Hynes, 38 NY2d 260*, and the standards of interpretation there applied).

It has been said often, but with less than meticulous analysis, that an "unambiguous" statute permits of no inquiry into legislative intention (see, e.g., *McCluskey v Cromwell, 11 NY 593, 601*; accord, e.g., *Matter of Roosevelt Raceway v Monaghan, 9 NY2d 293, 304*, app dsmd *368 U.S. 12*; see, generally, McKinney's Cons Laws of NY, Book 1, Statutes, § 120). Absence of facial ambiguity is, however, 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; what happens is that often the inquiry into intention results in the conclusion that either there is no ambiguity in the statute, or that for policy or other reasons the prior history will be

rejected in favor of the purportedly explicit statement of the statute (see, e.g., *Matter of Barton v Lavine, 38 NY2d 785*). Then it is often said with more [****15] pious solemnity than accuracy, that the clarity of the statute precludes inquiry into the antecedent legislative history. As the Supreme Court stated in *United States v American Trucking Assns. (310 U.S. 534, 543-544)*: [*437] "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine [**739] the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. 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 [***21] 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'. The interpretation of the meaning [****16] of statutes, as applied to justiciable controversies, is exclusively a judicial function. This duty requires one body of public servants, the judges, to construe the meaning of what another body, the legislators, has said. Obviously there is danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body. A lively appreciation of the danger is the best assurance of escape from its threat but hardly justifies an acceptance of a literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion." (See, e.g., *Le Drugstore Etats Unis v New York State Bd. of Pharmacy, 33 NY2d 298, 302*; *Matter of Astman v Kelly, 2 NY2d 567, 572*; McKinney's Cons Laws of NY, Book 1, Statutes, § 111; 82 CJS, Statutes, § 322, at pp 588-590.)

Subdivision 6 of *section 238* and *subdivision 1* of *section 234* do not directly empower savings banks to provide checking account services. They say nothing about checking accounts. Moreover, these statutes are not free from "ambiguity", if read in context as any language must be. Indeed, as demonstrated at the Appellate Division, the weight of meaning the savings banks would have the statutes bear is much too heavy, if in fact so great an expansion of the powers of savings banks had been contemplated. Only upon a literal and atomistic reading of the statutes, a reading blind to the legislative history antecedent to their enactment and even afterward, could one conclude that savings banks may offer checking account services. It was not, obviously, for lack of reading [*438] understanding that the superintendent let the 1965 revision lie dormant for nine years before promulgating his 1974 NOW account regulations.

Looking beyond the literal words, the limited reasons for the 1965 revision to *section 238* are made explicit in the legislative history, and they do not embrace authorization of checking accounts. Instead, the statute was added to authorize the use of nonpassbook savings accounts, but true savings accounts for the accumulation of reserves, thus permitting savings banks to take advantage of technological innovations in record keeping and to maintain a competitive position with commercial bank savings accounts (Banking Dept Memorandum of July 6, 1965 on Senate Intro [****18] No. 4143, Print No. 4651, at pp 2, 3, and ns; see Memorandum of Senator Bloom, 1965 NY State Legis Annual 154).

It is all but conclusive that the enactment of subdivision 6 of *section 238* was not intended to authorize savings bank checking accounts. Not until the spring of 1974 was any effort made to use the 1965 legislation to develop the so-called NOW accounts, after failure to obtain explicit statutory authorization for checking accounts from the 1974 Legislature (Assembly Intro No. 12044, § 46). Indeed, express statutory authorization for savings bank checking accounts has been repeatedly refused by the Legislature (1973 Assembly Intro No. 1946; 1974 Senate Intro No. 7996 [NOW accounts]; 1971 Assembly Intro No.

3925; 1971 Senate Intro No. 3350; 1972 Senate Intro No. 9041; 1974 Assembly Intro No. 6889; 1974 Senate Intro No. 5374; 1975 Assembly Intro No. 6444-D; 1975 Assembly Intro No. 7324; 1975 Senate Intro No. 4050; 1975 Senate Intro No. 6252-A [demand deposit accounts]).

Recognizing the public policy issues in the controversy, candid assessment is indicated. There is no doubt that both commercial banks and savings banks (and the same could be said about a number of classes of intermediate financial institutions) have changed markedly in function and operation from what they were in early and mid-nineteenth century (see *Androscoggin County Sav. Bank v Campbell, 282 A2d 858, 861* [Me]; for an older view of the respective roles of savings and commercial banks see, e.g., *Hun v Cary, 82 NY 65, 78*; *Rome Sav. Bank v Kramer*, 32 Hun 270, 273, affd *sub nom. Rome Sav. Bank v Krug, 102 NY 331*; *People v Ulster County Sav. Inst.*, 20 NYS 148, 150, affd *64 Hun 434*, affd *133 NY 689*; *Matter of Wilkins, 131 Misc 188, 193-194*; compare *People v [*439] Franklin Nat. Bank of Franklin Sq., 305 NY 453, 461*, revd *347 U.S. 373*; see, also, 1937 Opns Atty Gen 304, 305-306; 1940 Opns Atty Gen 385, 386; Comment, NOW Accounts, 14 Boston Coll Ind & Comm L Rev 471, at pp 473-474).

The demarcations between savings and commercial banks have been progressively blurred with respect to their different standards of investment, liquidity, and required reserves, types of credit transactions they are authorized to provide, and the kinds of sources from which they draw their deposits. Each has progressively and competitively encroached [****20] upon the field of the other. Commercial banks now have savings accounts upon which they pay interest, with a differential in rate less significant as general and bank interest rates have risen. Savings banks issue and "sell" money orders, as distinguished from officers' checks, payable to named payees, and charged against savings accounts. Both kinds of banks sell traveler's checks; both provide safe deposit boxes for rental to nondepositors; both provide specialized savings accounts for fiduciaries and corporations; and the list could be extended still more. Particularly interesting in showing both the blurring of distinction and encroachment, in this instance by the commercial banks, are the combination checking and savings accounts currently being offered and widely advertised by the commercial banks which are almost identical to the NOW accounts offered by the savings banks. Of course, to begin with savings accounts in commercial banks were a gross competitive encroachment on thrift institutions.

Despite these competitive encroachments, and there are some who deplore them and some who applaud them, each encroachment has almost invariably been authorized by explicit legislation [****21] (see, e.g., L 1923, ch 669; L 1958, ch 238; L 1961, ch 164 [safe deposit boxes]; L 1938, ch 352, § 1 [traveler's checks]). Presumably and certainly purportedly, the legislative grants of power to one kind of bank or the other have been influenced by strong policy considerations designed to assure availability of banking services, safety of funds entrusted to banks, and avoidance of competition so severe that it might undermine the safety of banks. Thus, it is a significant policy consideration whether savings banks, originally designed to keep and repay funds which are withdrawn from or move into circulation slowly, should have the kind of checking service which emphasizes volatile turnover of funds (see Report of the Superintendent's Advisory Committee on Financial Reform, [*440] 1974, pp 28-32). Integrated into the classification of intermediate financial institutions are different standards of investment and reserves, ratios of deposits to capital, and access to different kinds of central discouting banks. It is relevant but also probative of opposite conclusions on the issue at hand that the superintendent under his NOW [**741] account regulations requires the [****22] savings banks to maintain reserves comparable to those required of commercial banks for demand deposits.

The Superintendent of Banks and the banking board have broad powers of regulation to control and police the banking institutions under their supervision (*Banking Law, §§ 12*, *14*, *subd 1*; *§ 238, subd 6*). Those powers, however, are first defined in the statutes, and, it would seem, that unless the statutes make reasonably clear that the superintendent has power to authorize the several classes of institutions under his supervision [***23] to perform new or additional services, his powers of rule making do not go beyond the statute (cf. *Banking Law, § 12*, *subd 3*). It is at this point that the overly broad meaning which the savings banks would attach to the 1965 revision of *section 238* fails of persuasion. Indeed, the power of the superintendent to make rules and regulations concerning passbook-less accounts was included in subdivision 6 "to prevent the misuse of non-passbook savings accounts for checking purposes" (Banking Dept Memorandum of July 6, 1965 on Senate Intro No. 4143, at p 4).

In saying what has been said, however, it does not mean that the court has any view, [****23] or if it did that it would be relevant, whether savings banks should have power to provide checking account services to its customers (cf. *Montgomery v Daniels, 38 NY2d 41, 53)*. What has been said simply emphasizes that there are involved policy considerations which must be resolved by the Legislature, and that the particular policy issue was not resolved by the Legislature in the 1965 revision. The court is also aware that the policy issue is one in which competitors are at loggerheads, and that they have demonstrated capability of securing legislative redress, correction, clarification, or even innovation, explicitly and beyond cavil. Indeed, pending Federal legislation may forcefully suggest the path of resolution of the problem. The new legislation, already having passed the Senate, would allow Federally regulated savings banks and other thrift institutions to offer checking and NOW accounts (see *New York Times*, Dec. 12, 1975, p 1, col 6).

[*441] For some time now the savings banks throughout the State have been providing checking account services under the regulations adopted by the superintendent, and have advertised them extensively. Since these accounts have [****24] presumably been used widely by many customers of savings banks, it would be unduly disruptive to terminate these services abruptly. Hence, there should be a stay of enforcement of the determination in this action. Moreover, the Legislature will shortly meet in regular annual session, and if the superintendent and the savings banks be so advised, they may seek unequivocal legislation to accomplish what this court concludes they had mistakenly believed to be authorized in the 1965 revision.

Accordingly, the judgment of the Appellate Division should be affirmed, without costs, and enforcement stayed until March 31, 1976.

Judgment affirmed, etc.

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Park West Village Associates v. Abrams

Supreme Court of New York, Special Term, New York County

February 24, 1984

No Number in Original

Reporter
127 Misc. 2d 372 *; 491 N.Y.S.2d 886 **; 1984 N.Y. Misc. LEXIS 3757 ***

In the Matter of Park West Village Associates, Petitioner, v. Robert Abrams, as Attorney-General of the State of New York, et al., Respondents

Disposition: **[***1]** The petition is accordingly granted, and the cross motion is denied.

Core Terms

redevelopment plan, buildings, housing, rental, apartments, changes, ownership, tenants, occupancy, parties, terms, inland, dwellings, financing, density, provisions, references, auction, revised, sponsor, lease, plans, rent, Limitations, conversion, construct, covenant, mortgage, projects

Counsel: *Joseph L. Forstadt* and *Stroock, Stroock & Lavan* (*Michele Galen* and *Robin Stout* of counsel), for petitioner.

Robert Abrams, Attorney-General (*Oliver Rosengart* **[***2]** of counsel), respondent *pro se*.

Frederick A. O. Schwarz, Jr., Corporation Counsel (*Jeffrey E. Glen* and *Carol Slater* of counsel), for City of New York, respondent.

Judges: Martin Evans, J.

Opinion by: EVANS

Opinion

[*372] OPINION OF THE COURT

[886]** Petitioner is the sponsor of a noneviction condominium conversion plan for two apartment buildings, 372 and 382 Central Park West, part of the Park West Village housing development on Manhattan's Upper West Side. The Attorney-General has refused to accept the conversion plans for filing. Petitioner seeks an order annulling **[**887]** the determination of the Attorney-General and compelling him to accept the plans for filing. The Attorney-General opposes the petition and cross-moves to dismiss.

The Attorney-General based his determination on a belief that prior Board of Estimate approval, not sought by the sponsor was a prerequisite to the conversion. An agreement between the original owner of the land and the City of New York provided that there were to be no changes in land use or density for a period of 40 years from the completion date, without the consent **[*373]** of the Board of Estimate and of the City **[***3]** Planning Commission of the City of New York. [1]

[*4]** **[**888]** Claiming that this change of ownership, from tenant-occupied apartments to apartments owned by the occupants (at least as to those persons who may buy their apartments) was a change prohibited by the original agreement, the Attorney-General refused to accept the plan unless and until there has been a consent by the Board of Estimate, and a modification of the plan to set forth that requirement as a material statement that had been omitted from the original plan.

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[1] On September 15, 1983, the Board of Estimate of the City of New York adopted a resolution, in which it was stated that the intent of the Board of Estimate which adopted the original agreement of 1952 between the City of New York and Manhattantown, was to reserve to the Board of Estimate the right to determine the appropriateness of *any* change in the redevelopment plan; thereby, intending to include the conversion to a cooperative or condominium form of ownership as such a change.

In effect, this is an expression of the present members of the Board of Estimate of their opinion of the intent of their predecessors on the Board.

It is the court, and not the Legislature, which must determine the intention of the parties to an agreement. Even if the Board were constituted with the same membership as the Board of Estimate in 1952 (and none of the present members were then members) their statement would be of the same effect as if one party to a contract were to declare what its intentions had been at the time of execution. It is hornbook law that such parol evidence is inadmissible to alter the terms of a facially unambiguous contract.

The law in this respect is well settled. As long ago as 1857, the Court of Appeals, in *People ex rel. Mutual Life Ins. Co. v Board of Supervisors (16 NY 424)*, set forth the applicable rules. The Legislature, on March 24, 1855, enacted a law which declared that mutual insurance companies incorporated prior to the General Act of June 29, 1853 (L 1853, ch 469) should be subject to taxation on the sum of $ 100,000, and no more. The new act (L 1855, ch 83, § 1) also contained the statement that "[It] is hereby declared that such was the intention, and it is the true construction of said act, of June [29, 1853] in regard to any taxes imposed on said companies after said act took effect." The court said: "We habitually look with great respect upon all acts of the legislature, and never refuse to give them effect except where, upon the fullest consideration, we find that they conflict with the constitution. The act in question, considered as a persuasive argument for a particular construction of the statute of 1853, loses much * * * weight from the consideration that the legislative bodies had been renewed in the interval between the two enactments, and that but a few of the members of the legislature of 1853 sat in that of 1855; but if this were otherwise, we should feel constrained to rely upon the language of the statute which we are called upon to interpret, rather than any personal assurance as to the intention of its members. The acts of the legislature do not rest in any respect upon oral tradition. They are committed to writing, and it is by the written language that their sense is to be ascertained. As an authoritative mandate in favor of the construction claimed by the insurance company we cannot accord to it any force whatever. In the division of power among the great departments of the government, the duty of expounding written laws has been committed to the judiciary. The legislature has no judicial power, and cannot upon any pretence [whatever] interpose its authority respecting questions of interpretation pending in the courts. (*Dash* v. *Van Kleeck*, 7 *John*., 447; *Ogden* v. *Blackledge*, 2 *Cranch*, 272.)" (Pp 431-432.)

A later statement of prior legislative intent respecting legislation passed by an earlier Legislature, while not conclusive, is entitled to some weight in determining the construction to be given it. (*See, Federal Hous. Admin. v Darlington, Inc., 358 U.S. 84, 90*.) How much weight should be given it will depend upon a number of factors, including the number of persons who continued as members of the same Legislature. (*Matter of Chatlos v McGoldrick, 302 NY 380, 388*.)

However, we deal here, not with legislative intent with respect to a statute, which has been passed as a unilateral declaration by the Legislature. Involved here is a contract, which creates vested rights and responsibilities. It is a fundamental principle of contract law that these rights cannot be changed or diminished or increased by unilateral acts of either party. To the extent that the present Board of Estimate has, by resolution, stated what the intent of the predecessor Board was, the court is bound to accord their statement the same weight that would be given to any witness who offered such testimony in a similar case. The court notes that the Board's resolution could only have been intended as an expression of past intent. Had it attempted to alter the terms of the parties' prior agreement, it would have amounted to an unconstitutional attempt to impair the obligations of a contract. (*See*, *US Const, art I, § 10*; *Trustees of Dartmouth Coll. v Woodward*, 4 Wheat [17 U.S.] 518.)

In addition, the Attorney-General attempted to reserve his rights to deny acceptance for filing on other, unspecified grounds, stating that the plan had not been fully reviewed for other deficiencies.

For proper analysis of this case, a brief history of the buildings and of the agreement involved is desirable.

[*374] The two buildings are a part of a group of buildings that were constructed in the 1950's as part of a redevelopment plan in the area known as the Manhattantown Redevelopment Site, comprising the blocks between West 97th and West 100th Streets, between Central Park West and Amsterdam Avenue.

The City of New York, taking advantage of the provisions of Housing Act of 1949 title I (*42 USC § 1441 [***5] et seq.*), and borrowing and obtaining some moneys from the Federal Government under title I, acquired title to the entire area and sold the land, at a public auction, to Manhattantown, Inc. Manhattantown paid a fair market price for the land. Schedule B, annexed to the agreement, sets forth the conditions of the sale upon which the public auction was based.

Pertinent here are the statements in the condition of sale that the property was to be sold subject, among other things, to the terms and provisions of the contract between the city and the Federal Government, and the terms, covenants and conditions of the contract with the city. This contract was described in general terms, stating the obligation of the successful bidder to relocate the existing tenants, to demolish the buildings, and to construct one or more housing projects on the property in accordance with a site and layout plan approved by the City Planning Commission, the Board of Estimate and the Federal Administrator of the Housing and Home Finance Agency. It described the projects as a park-like development, landscaped and improved with fireproof multiple dwellings, as was shown on the redevelopment plan attached **[***6]** as schedule A to the contract on file.

[*375] The purpose of title I was to enable communities to restore needed housing, but it did not concern itself with the type of housing, or with the nature of the occupancy. In some areas, private homes could be rehabilitated; in others, apartment houses. Neither was it concerned with the question of whether the dwellings were to be occupied by tenants or by their owners.

I

THE CONTRACT BETWEEN MANHATTANTOWN AND THE CITY

Manhattantown entered into a contract with the City of New York on May 22, 1952, wherein it agreed, in the event that it became the successful bidder at the auction of the land, to relocate the then existing tenants, and to demolish the then existing buildings.

Paragraph 302 of the agreement states that "The project shall consist of fireproof multiple dwellings, together with such business, commercial and garage facilities as are deemed reasonably incident thereto, and as shown on the Redevelopment Plan attached hereto, as Schedule 'A'".

Paragraph 401 of the agreement required Manhattantown to commence relocation and demolition activities, and "to devote the land to the uses specified in the Redevelopment Plan, **[***7]** Schedule 'A'".

[889]** No financial benefits or tax abatements were given to Manhattantown by the city or by the Federal Government. Nevertheless, to prevent "speculation" by Manhattantown, and the possibility of the reaping of improper profits as the result of the condemnation and the sale at auction of the land, the contract provided, in paragraph 405 (referred to in paragraph 506 as "the anti-speculation provisions") that

"The sponsor covenants and agrees not to resell the real property in the area prior to the actual completion of the projects at a price in excess of the actual cost to the sponsor of the property including carrying charges and the costs of any improvements thereon * * * without the approval of the Board of Estimate".

It was not prevented from making a profit at a later date. This of course was the incentive to enter into the contract.

[*376] Central to the questions on this petition are the terms in section 509 of the agreement. This provided that there was to be a covenant, running with the land, which was to provide that any grantee "*shall devote such land to the uses specified in the Redevelopment Plan* of the Area (Schedule A of this Agreement) **[***8]** *as said plan may exist from time to time*. Said covenant is to run for a period of forty (40) years from the completion of the project" (emphasis added) and a further covenant that "for the period of forty (40) years from the completion of the project no change shall be made in the project as set forth in the Redevelopment Plan of the Area (Schedule A of this Agreement) without the consent of the City Planning Commission and the Board of Estimate of the City".

Paragraph 510 of the agreement provided, in effect, that there were to be no third-party beneficiaries of the agreement.

In support of his proposed interpretation of the contract, the respondent Attorney-General relies on nine separate references (which are set forth in his rejection letter of June 10, 1983) to the redevelopment plan attached to the contract as exhibit A.

Of these nine references, four (the first two and the last two) are not a part of exhibit A which was attached to the contract. The first (referred to as p 3, col, fourth full paragraph but apparently intended to mean p 2, rather than p 3); and the second (referred to as p 4, line 4 but intended to mean p 3, line 4) were references to a report to the **[***9]** Mayor and the Board of Estimate by the Committee on Slum Clearance Plans and were not, so far as can be determined from the papers before this court, a part of exhibit A.

The last two references, both on page 51, are apparently references to an appraisal letter from an officer of Charles F. Noyes Co., in which he was to determine: (a) the suitability of the area for housing; (b) the economic feasibility of the proposed project; and (c) the price that could be realized by the City of New York, if offered at public auction after acquisition by condemnation.

The appraiser's conclusions were based on many factors. Among them was his statement that he used minimum rental value as a basis for calculations of the capitalized value of the projected development. In any event, this appraisal was not a part of the exhibit A annexed to the agreement.

Turning to the remaining five references in the redevelopment plan, exhibit A (three on p 14, one on p 15 and one on p 20), it is apparent that these do not support the proposition that exhibit A contained a restriction on the type of ownership of the buildings or as to the type of ownership or occupancy of the apartments. Pages 14 and 15 of **[***10]** the redevelopment plan are **[*377]** primarily concerned with the floor layout of the apartments, and with permitting flexibility (e.g., the possibility of converting two five-room apartments to one six-room and one four-room apartment). It is contextually clear that the use of the terms "rental" or "rental basis" or "rental rooms" referred, essentially, to the concept that in all probability, income to sustain the **[**890]** operation of the buildings would come from rentals. In short,

the conclusion, and argument of the respondent is based on the few instances, in the redevelopment plan, wherein rents, and rental units, are referred to.

These do not even rise to the level of precatory statements. Essentially, they are used as the basis for concluding that the cost of the land, at public auction, was a fair value, based on the rents that could be received; and that the project would be financially feasible to a private building, assuring that a private builder would be able to build and operate it profitably.

This was an important consideration, since the building was to be financed by a mortgage which was to be held, or guaranteed by the Federal Government. It was necessary **[***11]** to be as certain as possible that the moneys lent could be repaid over a period of time.

It is interesting that the maximum period of time for the repayment of the mortgage was set by statute at 40 years (*42 USC § 1452 [a]*), the same time period during which there could be, by virtue of the agreement, no changes in the project. It appears that provision may well have been for the purpose of insuring the repayment of the borrowed moneys.

More important to the determination of the meaning of the word "change" in paragraph 509 of the contract, is that part of exhibit A, under "GENERAL STATEMENT" which appears in the page following 32 (one of many pages showing the general layout of the proposed buildings) where there is, in typewritten form, the following:

"6. The following is the general statement on the project, dated February 1, 1952.

"A. Limitations on changes:

"No increase in density or change in land use shall be made for a period of 40 years except upon the approval of the Board of Estimate of the City of New York."

Since the only reference to "change" in the contract is found in section 509, and since the wording of that section is "no change shall be made in the project **[***12]** as set forth in the Redevelopment Plan of the Area (Schedule A of this Agreement) without the consent of the City Planning Commission and the Board of Estimate of the City" it seems clear that the "change" referred to in the agreement is the type of change set forth under general **[*378]** statement No. 6, which limits the changes in the project requiring approval to increases in density or changes in land use.

Had it been the intent of the contracting parties, i.e., the City of New York and the sponsor, Manhattantown, to limit the occupancy of the apartments solely to rental tenants, who had no share of ownership of the property, that could have been done by and undoubtedly would have been done, with easily inserted language. To attempt to construe such an important limitation from the few instances in which the words "rental" or "tenants" occur, especially in an entirely different context, is stretching the meaning of the contract far beyond its facial and contextual intent. [2]

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[2] The contract was obviously drawn by the City of New York. It is a well-recognized rule of construction requiring no citation or authority, that, if there is an ambiguity, it is to be construed against the maker of the document. This rule is based on the simple principle of equity that one cannot be permitted to take advantage of a surprise which one has created by oneself. The court finds that the provisions here at issue, when read together, are clear and unambiguous. However, to the extent that the city argues that there is an ambiguity which must be resolved by the court, it should be barred from benefiting from it. In any event, in construing an ambiguity, the court must look to the relevant surrounding circumstances to determine the contracting parties' intent. Nothing in the record indicates that the parties contemplated the word

[*13]** To carry respondents' argument to its logical conclusion, the court would be required to impose other utterly illogical and **[**891]** unintended constructions. Since the redevelopment plan referred, in some cases, to "Estimated Rental Value" at $ 30.50 per room per month (see p 20 of the 1952 plan), rental of stores at 50 cents per foot per month, and rental of parking space for 464 cars at $ 120 per car per year (*id.*) the court would be compelled to conclude that these rates and charges could not be changed without permission of the Board of Estimate. Respondent's argument, based on the redevelopment plan, would limit the taxes that could be imposed on the premises to those which are set forth (at p 20) of only $ 900,000 per year. There is no evidence that the City of New York and Manhattantown intended to prevent the city from increasing the tax rate or the assessed valuation to keep the taxes at that low (in present terms) figure, or to require Board approval for every such change. Indeed, the history of the project's management over the last three decades belies such an intent.

Moreover, if the selective figures and quotes taken by the respondent from the redevelopment **[***14]** plan are to be given such **[*379]** weight as to amount to a binding term of the contract, it would lead to an absurd conclusion. Because the redevelopment plan indicated that those buildings would not be subject to any form of rent control one might be compelled to conclude that the city was contractually prevented from imposing rent controls of any nature on these buildings. It should be kept in mind, in determining the intent of the parties at the time of the agreement, that these buildings were then envisioned as and in fact were, after their construction, entirely free of all rent controls or other forms of rent limitations. Tenants then had no rights beyond the rights given by their leases. Nothing then existed to prevent any owner of post World War II constructed housing from refusing to renew the lease of a tenant, or from evicting a tenant at the termination of the lease, and disposing of the property as it desired.

Significant, also, to show the intent of the parties, is the provision in section 508 of the agreement. Clearly stated is the right of the sponsor, Manhattantown, to construct any of the buildings as a cooperative project, under National Housing Act § **[***15]** 213. (*See*, National Housing Act tit II [*12 USC § 1701 et seq.*; *§ 1715e*].)

The National Housing Acts are essentially financing acts. Section 213 authorized the Federal Housing Commissioner (now, the Secretary of Housing and Urban Development), to insure mortgages. The purpose of this is to enable persons, such as developers and builders, to obtain financing in order to build the desired properties. Section 213 permits such insurance on property held by.

"(1) a nonprofit cooperative ownership housing corporation or nonprofit cooperative ownership housing trust, the permanent occupancy of the dwellings of which is restricted to members of such corporation or to beneficiaries of such trust;

"(2) a nonprofit corporation or nonprofit trust organized for the purpose of construction of homes for members of the corporation or for beneficiaries of the trust". (*12 USC § 1715e [a]*.)

Section 213 was not designed to be limited to low income housing. Mortgages up to a principal amount of $ 36,000 were permitted on nonelevator type buildings, and for buildings of the type contemplated in the Manhattantown project, containing elevators. Depending on the number of bedrooms, **[***16]** the principal amount of the mortgage insured could be up to $ 43,758 per family unit. These amounts could

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"changes" to mean anything other than changes in land use or increased density. The substituted form of ownership anticipated here is not, by definition, such a change; the use is to continue to be residential, and the density is not projected as changing.

be increased in the discretion of the Secretary (*see*, *12 USC § 1715e [b]*) and were equally applicable to apartments or single-family dwellings (*12 USC § 1715e [c]*).

[*380] It is therefore apparent that, even under the original redevelopment plan, occupancy of the proposed buildings was not limited to persons who had no right of ownership, beneficial or otherwise, in the property.

II

The redevelopment plan relied upon by respondent is no longer in effect. The redevelopment plan **[**892]** in effect in 1952 had been amended in 1955, and the amendment approved by the Board of Estimate at a meeting on July 21, 1955. That was known as the "Amended Redevelopment Plan" and was then incorporated in the contract between the City of New York and Manhattantown, Inc.

It is important to note that the original 1952 redevelopment plan relied upon by the respondent, which was amended in 1955, was once again revised in 1961, and, as revised, was approved by the Board of Estimate on June 25, 1964. Such periodic revision was contemplated in the agreement of May 22, 1952. This **[***17]** is clear from the provisions of section 509, which as set forth above, referred to the redevelopment plan "as said plan may exist from time to time."

The revised redevelopment plan was the subject of an agreement between the City of New York and Manhattantown, Inc., which was executed on June 26, 1964.

Clearly stated, in paragraph First: A is the substitution for and in place of the redevelopment plan relied upon by respondent, of the revised redevelopment plan, which was, in the words of the amendatory agreement, "substituted for and instead of, respectively, the Amended Redevelopment Plan and the site plans and the unit plans now in effect hereby are declared to have no further force or effect."

The revised redevelopment plan (1964) contains none of the statements used by respondent as the basis for his conclusion that only rental apartments could be built, and that they must be continued as rental apartments.

The 1964 redevelopment plan states in section 4a:

"The following uses shall be permitted in land use areas, as shown on the Land Use Map, and all other uses shall be excluded.

"1. Residential: Multi-family residential together with appurtenant permitted services recreation **[***18]** areas and parking facilities."

[*381] That the contracting parties considered, and contemplated the ownership of portions of the properties by purchasers, as well as by lessees, is evident from paragraph 4 (h), which is the "Non Discrimination C Clause", states that "No agreement, lease, conveyance or other instrument shall be executed whereby land in the Project Area is restricted, either by the City or by purchasers, lessees or successors in interest, upon the basis of race, creed or color in the sale, lease or occupancy thereof."

III

The original project was based on financing availability under Housing Act of 1949, title I (*42 USC § 1441 et seq.*). The provisions of the act contemplated financing of both rental and privately owned

housing. The legislative history of the act demonstrates that the financing under the act was not limited to rental apartments, but included owner-occupied dwellings. Senate Report No. 84 (US Code Cong & Admin News, 1949, vol 2, at 1550) demonstrates that the Senate was concerned solely with the acquisition of land for a residential use, and not with any particular form of ownership. The act itself shows no intention of favoring any particular **[***19]** type of occupancy, whether tenanted or owned. In the different sections, housing is variously referred to as housing, dwellings or homes. It provided (*42 USC § 1452b*) that loans may be made both to owners and tenants of property for rehabilitation, and included owner-occupied property. (*42 USC § 1452b [a] [1] [A]*, *[B]*.)

The contract in effect between the City of New York and the United States of America, pursuant to which the land was acquired, contained no limitations on the redevelopers of the type sought to be established by respondent; the sole reference to obligations of the redevelopers, is found in section 106 (H) in which the contract states **[**893]** "When Project land is sold or leased by the Local Public Agency, it will obligate the purchasers or lessees, as the case may be, (1) to devote such Project Land to the uses specified in the Project Redevelopment Plan; and (2) to begin and complete the building of the improvements on such Project Land within a reasonable time."

The uses specified in the redevelopment plan relate only to multifamily occupancy, and, within that definition, there is no limitation to any particular type of occupancy.

In conclusion, **[***20]** it seems clear that the "Changes" requiring prior approval, as specified by the agreement to which both the City of New York and Manhattantown were parties, and which controls the rights and responsibilities of petitioner as a successor to Manhattantown, were the changes set forth in the "GENERAL STATEMENT" following page 32 of the redevelopment plan, wherein condition A provides:

[*382] "A. Limitations on changes:

"No increase in density or change in land use shall be made for a period of 40 years except upon approval of the Board of Estimate of the City of New York."

Since the clear intent of the parties to the agreement was to permit the occupancy of the apartments by owners thereof as well as by tenants, and since the limitation on changes without prior approval was intended to apply only to changes in land use and land density, no approval by the Board of Estimate was needed by the petitioner, the successor to Manhattantown, for the conversion planned in its filing with the Attorney-General.

The petition is accordingly granted, and the cross motion is denied.

End of Document

Parkview Associates v. New York

Court of Appeals of New York

January 11, 1988, Argued ; February 9, 1988, Decided

No Number in Original

Reporter
71 N.Y.2d 274 *; 519 N.E.2d 1372 **; 525 N.Y.S.2d 176 ***; 1988 N.Y. LEXIS 88 ****

In the Matter of Parkview Associates, Appellant, v. City of New York et al., Respondents, and Civitas Citizens, Inc., Intervenor-Respondent

Subsequent History: [**1]** As Amended November 8, 1988.

Prior History: Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered April 2, 1987, which affirmed a judgment of the Supreme Court (William P. McCooe, J.), entered in New York County in a proceeding pursuant to CPLR article 78, dismissing the petition to set aside the partial revocation of a building permit issued to petitioner.

Matter of Parkview Assocs. v City of New York, 129 AD2d 405.

Disposition: Order affirmed, with costs.

Counsel: *Jeffrey L. Braun, Hector Torres* and *Audry Weintrob* for appellant. I. Parkview's permit was issued in conformance with a reasonable interpretation of the zoning ordinance. *(* Soron Realty Co. v Town of Geddes, 23 AD2d 165; Keeney v Village of LeRoy, 22 AD2d 159; Matter of Allen v Adamik, 39 NY2d 275; Matter of Bayswater Health Related Facility v Karagheuzoff, 37 NY2d 408; FGL & L Prop. Corp. v City of Rye, 66 NY2d 111; *Matter of* 440 E. 102nd St. Corp. v Murdock, 285 NY 298.) II. Principles of equitable estoppel apply here and preclude the revocation of Parkview's **[****5]** permit even if the permit's issuance was erroneous. *(* Metropolitan Life Ins. Co. v Childs Co., 230 NY 285; Triple Cities Constr. Co. v Maryland Cas. Co., 4 NY2d 443; Shapley v Abbott, 42 NY 443; Bender v New York City Health & Hosps. Corp., 38 NY2d 662; Matter of Faymor Dev. Co. v Board of Stds. & Appeals, 45 NY2d 560; Matter of Bayswater Health Related Facility v Karagheuzoff, 37 NY2d 408; Matter of Temkin v Karagheuzoff, 34 NY2d 324; Matter of Pokoik v Silsdorf, 40 NY2d 769; La Porto v Village of Philmont, 39 NY2d 7.) III. Respondents' actions have violated Parkview's Federal and State constitutional rights. *(* de St. Aubin v Flacke, 68 NY2d 66; French Investing Co. v City of New York, 39 NY2d 587, 429 U.S. 990; Euclid v Ambler Co., 272 U.S. 365; McMinn v Town of Oyster Bay, 66 NY2d 544; Nectow v Cambridge, 277 U.S. 183; Usery v Turner Elkhorn Min. Co., 428 U.S. 1; Chevron Oil Co. v Huson, 404 U.S. 97; **[****6]** Welch v Henry, 305 U.S. 134; Blodgett v Holden, 275 U.S. 142; In re U. S. Fin., 594 F2d 1275.)

Peter L. Zimroth, Corporation Counsel (Phyllis Arnold, Pamela Seider Dolgow and *Elizabeth S. Natrella* of counsel), for respondents. I. The challenged determination by the Board of Standards and Appeals must be sustained because it has a rational basis in the record and in law. The partial revocation of the building permits was lawful because when the permits were issued the building failed to conform to applicable law. *(* Citizens for Preservation of Windsor Terrace v Smith, 122 AD2d 827; Shapiro v Town of Oyster Bay, 27 Misc 2d 844, 20 AD2d 850; La Porto v Village of Philmont, 39 NY2d 7; Matter of Schilling v Dunne, 119 AD2d 179; City of Utica v

Paternoster, 64 Misc 2d 749; Miner v City of Yonkers, 19 Misc 2d 321, 9 AD2d 907, 10 AD2d 647, 8 NY2d 705; People v Hartwell, 166 NY 361; American Bank & Trust Co. v Dallas County, 463 U.S. 855; **[****7]** United States v Welden, 377 U.S. 95; Stephan v United States, 319 U.S. 423.) II. Under New York law, municipal respondents cannot be equitably estopped from enforcing the zoning law, where, *inter alia*, the permits were invalid when issued. In any event, based upon the record, petitioner has failed to demonstrate its good faith, and has available remedies. *(* Scruggs-Leftwich v Rivercross Tenants' Corp., 70 NY2d 849; Matter of Daleview Nursing Home v Axelrod, 62 NY2d 30; Morley v Arricale, 66 NY2d 665; Collins v Manhattan & Bronx Surface Tr. Operating Auth., 62 NY2d 361; Public Improvements v Board of Educ., 56 NY2d 850; Matter of City of New York v City Civ. Serv. Commn., 60 NY2d 436, 61 NY2d 759; Matter of Hamptons Hosp. & Med. Center v Moore, 52 NY2d 88; Matter of Roberts v Community School Bd., 66 NY2d 652; Parsa v State of New York, 64 NY2d 143.) III. The petition fails to state a claim for an unconstitutional taking or deprivation of property without **[****8]** due process. *(* Church of St. Paul & St. Andrew v Barwick, 67 NY2d 510; Williamson Planning Commn. v Hamilton Bank, 473 U.S. 172; *Incorporated Vil. of Upper Brookville v Faraco, 282 App Div 943, 307 NY 642*; Hodel v Virginia Surface Min. & Reclamation Assn., 452 U.S. 264; Agins v Tiburon, 447 U.S. 255; Willing v Chicago Auditorium, 277 U.S. 274; Matter of St. Basil's Church v Kerner, 125 Misc 526; French Investing Co. v City of New York, 39 NY2d 587, 429 U.S. 990; Modjeska Sign Studios v Berle, 43 NY2d 468, 439 U.S. 809; Andrus v Allard, 444 U.S. 51.)

Robert S. Davis and *Karl S. Coplan* for intervenor-respondent. I. At the time of appellant's application as well as at the time that appellant's permit was revoked, the Park Improvement District boundary under the zoning resolution extended 150-feet east of Park Avenue at 96th Street. *(* People v Hartwell, 166 NY 361; Whelen v Warwick Val. Civic & Social Club, 89 Misc 2d 577, 63 AD2d 646, 47 NY2d 970.) **[****9]** II. The erroneous issuance of a building permit to an applicant charged with knowledge of the requirements of the zoning resolution does not estop the City from enforcing the unambiguous enactments of the Board of Estimate. *(* Matter of Daleview Nursing Home v Axelrod, 52 NY2d 30; Matter of Hamptons Hosp. & Med. Center v Moore, 52 NY2d 88; Scruggs-Leftwich v Rivercross Tenants' Corp., 70 NY2d 849; Board of Supervisors v Ellis, 59 NY 620; Albert Simon, Inc. v Meyerson, 36 NY2d 300, 423 U.S. 908; Morley v Arricale, 66 NY2d 665; City of Yonkers v Rentways, Inc., 304 NY 499; Matter of B & G Constr. Corp. v Board of Appeals, 309 NY 730; City of Buffalo v Roadway Tr. Co., 303 NY 453; *Matter of Albert v Board of Stds. & Appeals, 89 AD2d 960*.) III. Enforcement against appellant of the duly enacted P.I.D. height limitations neither constitutes a deprivation of property without due process nor effects a taking of property which would require compensation. *(* Euclid v Ambler Co., 272 U.S. 365; **[****10]** Scarsdale Supply Co. v Village of Scarsdale, 8 NY2d 325; Levitt v Incorporated Vil. of Sands Point, 6 NY2d 269; Penn Cent. Transp. Co. v City of New York, 42 NY2d 324, 438 U.S. 104; Park Ave. Tower Assocs. v City of New York, 746 F2d 135, *cert denied sub nom. Eastco v City of New York, 470 U.S. 1087*; Matter of Crossroads Recreation v Broz, 4 NY2d 39; Welch v Swasey, 214 U.S. 91; Bi-Metallic Co. v Colorado, 239 U.S. 441; Rogin v Bensalem Twp., 616 F2d 680, *cert denied sub nom. Mark-Garner Assocs. v Bensalem Twp., 450 U.S. 1029*.)

Jeremiah S. Gutman, Arthur C. Silverman and *Leonard Benowich* for the New York Society of Architects and another, *amici curiae*. In determining the boundaries of a special district, a professional architect must be permitted to rely upon such boundaries as they appear and as they are drawn on the official zoning maps prepared, printed and published by the Department of City Planning, and that such architect need not be required to exhaustively **[****11]** research the legislative history of such boundaries which would, of necessity, require his retrieving, analyzing, and comparing the actual texts of many resolutions of the Board of Estimate, memoranda and diagrams prepared by the Department of City Planning, and official maps.

Martin Gallent and *Marc Silver* for Carnegie Hill Neighbors and others, *amici curiae*. I. The zoning resolution as enacted by the Board of Estimate unambiguously places petitioner's property within the Special Park Improvement

District. II. The City of New York is not estopped from enforcing its laws where petitioner unreasonably relied on a building permit that was void *ab initio.* (*Matter of Jayne Estates v Raynor, 22 NY2d 417*; *Matter of Natchev v Klein, 41 NY2d 833*; *Reichenbach v Windward, 80 Misc 2d 1031, 48 AD2d 909, 38 NY2d 912*; *Matter of Pokoik v Silsdorf, 40 NY2d 769*; *Landmark Colony v Board of Supervisors, 113 AD2d 741*; *Matter of Faymor Dev. Co. v Board of Stds. & Appeals, 45 NY2d 560*; *Scruggs-Leftwich v Rivercross Tenants' Corp., 119 AD2d 88*; **[****12]** *Matter of Bayswater Health Related Facility v Karagheuzoff, 37 NY2d 408*; *Matter of 1555 Boston Rd. Corp. v Finance Adm'r, 61 AD2d 187*; *Ward v City of New Rochelle, 20 Misc 2d 122, 9 AD2d 911, 7 NY2d 711*.)

Judges: Bellacosa, J. Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Titone and Hancock, Jr., concur.

Opinion by: BELLACOSA

Opinion

[*278] [1372] [***176] OPINION OF THE COURT**

We hold in this case involving the height of a building on Park Avenue in Manhattan, already constructed in excess of the height limitations of applicable zoning provisions, that **[*279] estoppel is not available to preclude a governmental entity from discharging its statutory duties or to compel ratification of prior erroneous implementation in the issuance of an invalid building permit.** The rare exception to the unavailability of estoppel against governmental entities may not, in any event, be invoked in this case where **reasonable diligence by a good-faith inquirer** would have disclosed the true facts and the bureaucratic error. We may not address the additional claim that governmental correction of prior administrative action, erroneously **[****13]** overriding **[***177]** applicable zoning provisions, constitutes an **[**1373]** unconstitutional taking inasmuch as there is a pending variance application. We thus affirm the Appellate Division's order affirming the denial of relief to plaintiff.

Owner-builder Parkview's property, purchased in 1982, is at the southeast corner of Park Avenue and 96th Street, located 90- to 190-feet east of Park Avenue. A portion of the property is within a Special Park Improvement District (P.I.D.) created by enactment of the Board of Estimate of the City of New York in 1973. The enabling and authorizing resolution limits the height of new buildings in that district to 19 stories or 210 feet, whichever is less. The P.I.D. boundary ran uniformly 150-feet east of Park Avenue until, by resolution of the Board of Estimate on March 3, 1983, the metes and bounds description of the P.I.D. was amended, providing in part for a reduction from 150 to 100 feet between East 88 Street to midway between 95th and 96th Streets. The boundary north of this midblock division, pursuant to the metes and bounds, remained at all times 150 feet. Plaintiff's property was thus unaffected by this 1983 change and has always been governed **[****14]** by the 1973 original enactment.

Zoning Map 6b accompanying the March 1983 resolution depicted the amended boundary with a dotted line which fell within a shaded area constituting the existing P.I.D. A numerical designation of "150", included on earlier versions of the map to show the setback, had been removed and a new designation of "100" was inserted adjacent to the dotted line. This left no numerical designation along the northern part of the boundary. The "150" designation signaling the retention of the boundary north of the 95th-96th Street midblock line was reinserted on a version of Map 6b published to reflect a subsequent resolution of September 19, 1985.

Parkview's initial new building application, submitted on June 5, 1985, was rejected for failure to show compliance with **[*280]** the P.I.D. height limitation. Based upon its interpretation of the version of Zoning Map 6b existing in the summer of 1985, Parkview concluded that a 100-foot boundary controlled, and its revised building application, submitted on July 31, 1985, limited the height of the proposed new building to 19 stories between its property line

and 100 feet from Park Avenue. The portion of the building **[****15]** setback more than 100 feet from Park Avenue was to rise 31 stories. The application was approved by the Department of Buildings as conforming with all zoning requirements on August 12, 1985 and, after rereview, a building permit was issued on November 21, 1985 by the Borough Superintendent. There is no dispute that at the time the permit was issued the Department erroneously interpreted amended Map 6b as changing the boundary on 96th Street to 100 feet. On July 11, 1986, however, after substantial construction, the Borough Superintendent of the Department of Buildings issued a stop work order for those portions of the building over 19 stories within the full 150 feet of Park Avenue. After review, the Commissioner of Buildings partially revoked the building permit, consistent with the stop work order, on the grounds that the permit, to the extent it authorized a height of 31 stories from 100-feet back instead of 150-feet back, was invalid when issued.

Parkview appealed the Commissioner's decision to the Board of Standards and Appeals (BSA), which denied the appeal and sustained the determination of the Commissioner. In sum, the BSA found that the dotted lines on Zoning Map 6b **[****16]** within the shaded P.I.D., expressly connoting a reduction to 100 from 150 feet of the protected area, excluded the 96th Street frontage of plaintiff from any change; that the original resolution with its metes and bounds description, which was never changed in any event, controlled over the map depicting the boundaries even if the map could be misread; and that the boundary-height limitation applicable to Parkview under the metes and bounds description was and had always been 150-feet east of Park Avenue.

Parkview then turned to the courts, essentially in an article 78 proceeding, seeking **[***178]** to set aside the partial revocation of its building permit. It sought to reinstate the **[**1374]** full permit, arguing that the final BSA determination was arbitrary and capricious or affected by error of law because the original permit was properly issued; that its rights pursuant to that permit had vested; that its reliance on the permit caused substantial and irreparable harm requiring that the City be estopped from **[*281]** revoking the permit; and that the partial revocation deprived Parkview of its property without due process or just compensation.

The IAS Judge dismissed the petition holding **[****17]** that the BSA's determination was reasonable and supported by substantial evidence that the building permit was invalid when issued, vesting no rights, because the building plans did not comport with the metes and bounds description for the P.I.D. as contained in the controlling original legislative enactment of the Board of Estimate. The court also held that estoppel was unavailable as a matter of law. Finally, the constitutional taking argument was dismissed as premature because Parkview had failed to apply for a variance which is a prerequisite to that claim. The Appellate Division affirmed, and this appeal ensued by leave of this court.

Parkview argues that its original permit was issued in conformity with a reasonable interpretation of the zoning map, thus making it valid when issued; that the principles of equitable estoppel preclude the partial revocation of the building permit even if the permit was erroneously issued; and that the City's partial revocation of its permit constitutes a taking in violation of due process of law and without just compensation. The City counters that the decision of the BSA has a rational basis because the permit was invalid when issued; that **[****18]** equitable estoppel is not available to estop a municipality from enforcing its zoning laws when the building permit issued by the municipality violated those zoning laws; and that the petition below failed to state a claim for an unconstitutional taking.

There can be little quarrel with the proposition that the New York City Department of Buildings has no discretion to issue a building permit which fails to conform with applicable provisions of law, and that the Commissioner may revoke a permit which "has been issued in error and conditions are such that a permit should not have been issued" (*Administrative Code of City of New York §§ 27-191*, *27-197*). Since discrepancies between the map and enabling resolution are controlled by the specifics of the resolution (New York City Zoning Resolution §§ 11-22, 12-01), the original permit in this case was invalid inasmuch as it authorized construction within the 150-foot P.I.D. above 19 stories in violation of New York City Zoning Resolution § 92-06 (2 Journal of Proceedings of Board of Estimate of City of NY, at 1708 [Cal No. 6, Apr. **[*282]** 23, 1973], as amended [Cal No. 8, Mar. 3, 1983]). Therefore, the subsequent BSA action in ratifying **[****19]** the decision of the Commissioner partially revoking Parkview's permit

had a sound legal basis. Indeed, there was no discretion reposed in these authorities to do otherwise at that point and on the record before them at that time.

Turning to the next stage of our analysis, we have only recently once again said that "[generally], estoppel may not be invoked against a municipal agency to prevent it from discharging its statutory duties" *(Scruggs-Leftwich v Rivercross Tenants' Corp., 70 NY2d 849*, citing *Matter of Daleview Nursing Home v Axelrod, 62 NY2d 30, 33*; *Matter of Hamptons Hosp. & Med. Center v Moore, 52 NY2d 88, 93*; *see also, Matter of E.F.S. Ventures Corp. v Foster, 71 NY2d 359* [decided herewith]). Moreover, "[estoppel] is not available against a local government unit for the purpose of ratifying an administrative error" *(Morley v Arricale, 66 NY2d 665, 667)*. In particular, "[a] municipality, it is settled, is not estopped from enforcing its zoning laws either by the issuance of a building permit or by laches" *(City of Yonkers v Rentways, Inc., 304 NY 499, 505)* and "[the] prior issue to petitioner of a building permit could not 'confer rights in contravention of the zoning laws'" *(Matter of B & G Constr. Corp. v Board of Appeals, 309 NY 730, 732*, citing *City of Buffalo v Roadway Tr. Co., 303 NY 453, 463)*. Insofar as estoppel is not available to preclude a municipality from enforcing the provisions of its zoning laws and the mistaken or erroneous issuance of a permit does not estop a municipality from correcting errors, even where there are harsh results *(Parsa v State of New York, 64 NY2d 143, 147*; *Matter of New York City v City Civ. Serv. Commn., 60 NY2d 436, 448-449)*, the City should not be estopped here from revoking that portion of the building permit which violated the long-standing zoning limits imposed by the applicable P.I.D. resolution. Even if there was municipal error in one map and in the mistaken administrative issuance of the original permit, those factors would be completely outweighed in this case by the doctrine that reasonable diligence would have readily uncovered for a good-faith inquirer the existence of the unequivocal **[****21]** limitations of 150 feet in the original binding metes and bounds description of the enabling legislation, and that this boundary has never been changed by the Board of Estimate. The policy reasons which foreclose estoppel against a governmental entity in all but the rarest cases thus have irrefutable cogency in this case.

[*283] Finally, Parkview's claim that the City's action constitutes a taking without due process of law or just compensation may not be addressed in this action and at this time because Parkview had failed to apply for a variance *(see, Church of St. Paul & St. Andrew v Barwick, 67 NY2d 510, 519*; *see also, Scarsdale Supply Co. v Village of Scarsdale, 8 NY2d 325, 330*; *Levitt v Incorporated Vil. of Sands Point, 6 NY2d 269, 273)*. The variance application now pending is, of course, not affected by our decision today.

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

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Sunrise Plaza Assocs., L.P. v. Int'l Summit Equities Corp.

Supreme Court of New York, Appellate Division, Second Department

June 25, 2001, Argued ; November 13, 2001, Decided

2000-07049

Reporter
288 A.D.2d 300 *; 733 N.Y.S.2d 443 **; 2001 N.Y. App. Div. LEXIS 10877 ***

Sunrise Plaza Associates, L.P., Appellant, v. International Summit Equities Corp., Respondent.

Prior History: [*1]** In an action to enforce a cross-easement agreement, the plaintiff appeals from a judgment of the Supreme Court, Suffolk County (Catterson, J.), entered June 28, 2000, which, after a hearing, *inter alia,* declined to specifically enforce the agreement.

Core Terms

parties, cross-easement, parking area, unjust enrichment, adjoining parcel, motion for leave, matter of law, injunction, offending, drastic, devoid, amend

Counsel: Morton, Weber & Associates, Melville, N.Y. (John A. Harras and Kenneth A. Brown of counsel), for appellant.

Eugene L. Weisbein, P.C., Garden City, N.Y. (James W. Cooke of counsel), for respondent.

Judges: FRED T. SANTUCCI, J.P., SONDRA MILLER, NANCY E. SMITH, STEPHEN G. CRANE, JJ. SANTUCCI, J.P., S. MILLER, SMITH and CRANE, JJ., concur.

Opinion

[*300] [444]** Ordered that the judgment is affirmed, with costs.

The parties are owners of adjoining parcels of commercially developed land located on Wellwood Avenue in Lindenhurst. The parties' adjoining parcels appear to constitute a unified shopping center known as Sunrise Plaza with a single parking lot. Use of the parking areas is governed by a cross-easement agreement between the parties which allows each to have unrestricted access to the parking area on the other party's property, and requires that each party maintain a paved parking area that is 2.5 times greater **[***2]** than the building floor area located on each parcel. The instant dispute arose when the defendant constructed another building on its property which disturbed the building-to-parking-area ratio contained in the cross-easement agreement.

The plaintiff contends that the court improvidently exercised its discretion **[**445]** in denying its motion for leave to serve an amended complaint to add a cause of action alleging unjust enrichment. While

motions for leave to amend are to be liberally granted absent prejudice or surprise (*see,* CPLR 3025 [b]; **[*301]** *McCaskey, Davies & Assocs. v New York City Health & Hosps. Corp., 59 NY2d 755, 757*; *Fahey v County of Ontario, 44 NY2d 934, 935)*, it is equally true that leave should be denied "where the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit" (*Norman v Ferrara, 107 AD2d 739, 740*; *see, Nissenbaum v Ferazzoli, 171 AD2d 654*; *DeGuire v DeGuire, 125 AD2d 360*). In the instant case, the **[***3]** Supreme Court properly denied the plaintiff leave to amend the complaint on the ground that a claim alleging unjust enrichment cannot lie as a matter of law where a valid contract (in this case, the cross-easement agreement) covering the same subject matter exists between the parties (*see, Salomon v Hampton Athletic Club, 245 AD2d 282*; *Mariacher Contr. Co. v Kirst Constr., 187 AD2d 986*; *Feigen v Advanced Capital Mgt. Corp., 150 AD2d 281*).

The Supreme Court granted the plaintiff summary judgment on the issue of the defendant's breach of the cross-easement agreement, and then held a hearing on the issue of the relief to be granted to the plaintiff. Following the hearing, the court granted only nominal damages to the plaintiff and enjoined the defendant from any further construction. The court, however, refused to direct the defendant to remove the offending structure which had initiated the litigation.

Where the removal or destruction of a building is the object of an injunction, the courts will generally exercise caution in granting such **[***4]** relief, and will generally not do so unless there is a substantial benefit to be gained by the plaintiff (*see, Maspeth Branch Realty v Waldbaum, Inc., 20 AD2d 896*; *Evangelical Lutheran Church of the Ascension v Sahlem, 254 NY 161*; *Mandel v Oremland, 22 AD2d 794*; *Syracuse Supply Co. v Railway Express Agency, 45 Misc 2d 1000*, *affd 27 AD2d 635*, *affd 20 NY2d 718*). As observed by the Court in *Medvin v Grauer (46 AD2d 912)*: "The granting of a mandatory injunction is an extraordinary remedy and the court must weigh the conflicting considerations of benefit to the plaintiff and harm to the defendant which would follow the granting of such a drastic remedy."

The record is devoid of any evidence of the type of harm or damage to the plaintiff, or indeed, whether it even sustained any harm or damage, to justify the court directing the drastic relief the plaintiff requested. Accordingly, the Supreme Court properly determined that the defendant need not demolish all or a part of the offending **[***5]** structure.

The plaintiff's remaining contentions are without merit.

In light of our affirmance of the judgment, the defendant's **[*302]** contentions regarding the granting of that branch of the plaintiff's motion which sought a protective order with respect to certain discovery demands are academic.

Santucci, J. P., S. Miller, Smith and Crane, JJ., concur.

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