Date: August 28, 2019

Examiner's Name: Toni Matias

BSA Calendar #: 2019-89-A and 2019-94-A

Electronic Submission: ■ Email ☐ CD

Subject Property/
Address: 36 West 66th Street, Manhattan

Applicant Name: John Low-Beer on behalf of City Club of New York and Klein Slowick, PLLC on behalf of Landmark West!

Submitted by (Full Name): David Karnovsky, Fried, Frank, Harris, Shriver & Jacobson LLP on behalf of West 66th Sponsor LLC

A) The material I am submitting is for a case currently **IN HEARING,** scheduled for 9/10/19.
The reason I am submitting this material:

- ◉ Response to issues/questions raised by the Board at prior hearing
- ○ Response to request made by Examiner
- ○ Other: _____

Brief Description of submitted material: Statement on behalf of West 66th Sponsor LLC and exhibits

List of items that are being voided/superseded: _____

B) The material I am submitting is for a **PENDING** case. The reason I am submitting this material:

- ○ Response to BSA Notice of Comments
- ○ Response to request made by Examiner
- ○ Dismissal Warning Letter

Brief Description of submitted material: _____

List of items that are being voided/superseded: _____

MASTER CASE FILE INSTRUCTIONS

- ***Bind* one set of new materials in the master case file**
- ***Keep master case file in reverse chronological order* (all new materials on top)**
- ***Be sure to VOID any superseded materials (no stapling!)***
- ***Handwritten revisions to any material are unacceptable***

Fried, Frank, Harris, Shriver & Jacobson LLP

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August 28, 2019

Honorable Members of the Board
NYC Board of Standards and Appeals
250 Broadway, 29th Floor
New York, NY 10007

Re: Cal. No. 2019-89-A; 2019-94-A
Premises: 36 West 66th Street

Dear Honorable Members of the Board:

On behalf of West 66th Sponsor LLC, the owner of the property at 36 West 66th Street, enclosed is one original and one copy of a letter statement and accompanying exhibits, responding to issues raised in Appellants' August 21, 2019 submissions to the Board.

This submission is also being filed electronically by email.

Sincerely,

David Karnovsky

Enclosures

cc: Michael Zoltan, Assistant General Counsel, NYC Department of Buildings
John Low-Beer, Esq. (On Behalf of the City Club of New York)
Charles Weinstock, Esq. (On Behalf of the City Club of New York)
Stuart A. Klein, Esq. (On Behalf of Landmark West!)
Susan Amron, General Counsel, NYC Department of City Planning
Ellen V. Lehman, Esq., Fried Frank Harris Shriver & Jacobson LLP

BSA Cal. No. 2019-89-A; BSA Cal. No. 2019-94-A
August 28, 2019 Statement of West 66th Sponsor LLC

This statement is submitted on behalf of West 66th Sponsor LLC ("Owner") in response to Appellants' August 21, 2019 submissions to the Board.

A. The Language of Section 82-34 of the Zoning Resolution is Clear and Unambiguous; Appellants Have Not Demonstrated Otherwise

The language of the bulk distribution provision of ZR Section 82-34 is clear and unambiguous:

i. "*Within the Special District...*": within the Lincoln Square Special District ("SLSD" or "Special District") depicted in Appendix A ("Special Lincoln Square District Plan") to the SLSD Regulations and Zoning Map 8c, Exhibits A and B hereto, not limited to any specified subdistrict, zoning district or location therein;

ii. "*...at least 60 percent of the total floor area permitted on a zoning lot...*": the total floor area permitted on any zoning lot within the Special District without limitation as to zoning district designation, split lot condition or otherwise;

iii. "*...shall be within stories located partially or entirely below a height of 150 feet from curb level.*": irrespective of whether a development or enlargement is built under tower regulations or standard height and setback, and without any fixed limitation on the number of stories either below or above 150 feet.

The Project complies with all of the foregoing: (i) the Project Site is located within the SLSD; and (ii) the total floor area permitted on the zoning lot is 548,543 square feet, with 329,125.8 square feet, an amount slightly in excess of 60% of the total, (iii) located below a height of 150 feet. (Owner SOFL at 2, Exhibit 9.)[1]

Throughout this proceeding, Appellants have nevertheless advanced multiple fanciful, ever changing and often inconsistent interpretations of the plain language of ZR Section 82-34 in an attempt to persuade the Board that the provision does not mean what it says, and that it excludes the floor area permitted on the R8 portion of the zoning lot from the 60% bulk distribution calculation:

i. Within the Special District means "within the Special District, where applicable" (Reply SOFL at 5)[2];

[1] Citations to "Owner SOFL" refer to the Statement submitted on behalf of West 66th Sponsor LLC on July 24, 2019.

[2] Citations to "Reply SOFL" refer to the Reply Statement of Facts and Law of the City Club et al. submitted to the Board on August 1, 2019.

ii. Within the Special District means only that "the general version [of the Bulk Packing rule in ZR Section 23-651(a)(3)] differs from the Special District version [in ZR Section 82-34] in that it is slightly less demanding, and also more complex: the required percentage of floor area below 150 feet [under ZR Section 23-651(a)(3)] starts at 55 percent and increases to 59.5 percent as tower lot coverage decreases from 40 percent to 31 percent]" (CC SOFL at 19; LW! SOF at 12-13)[3];

iii. Within the Special District means that ZR Section 82-34 is a variant of Tower-on-a-Base regulations despite the fact it makes no reference whatsoever to those regulations because it would have been too complicated to do so, and would have "severely challenged the drafters" (Reply SOFL at 16);

iv. Within the Special District refers to the C4-7 portions of the Special District only because Section 82-36, which prescribes a minimum tower coverage requirement for towers built pursuant to commercial tower regulations, applies in the C4-7 district (Reply SOFL at 17);

v. Within the Special District excludes the R8 district from the bulk distribution calculation because towers are not permitted in R8 districts (CC SOFL at 2; LW! SOF at 2);

vi. Within the Special District may include the R8 district when community facility towers are built under ZR Section 24-54, but not when a building is built under standard height and setback regulations (Reply SOFL at 23); and

vii. Within the Special District "implicitly" excludes the total floor area permitted in an R8 district from the bulk distribution calculation, and is an implicit qualification "routinely read into [statutory] language all the time." (Reply SOFL at 22.)

None of these arguments find any support in the language of ZR Section 82-34 for the reasons discussed in detail in our prior papers. The arguments also find no support in the language or structure of the SLSD regulations as a whole; to the contrary, ZR Section 82-34 stands in contrast to the many provisions of the SLSD which, by their terms, apply to a designated Subdistrict, zoning district, street frontage or other specific location within the SLSD, further demonstrating that the phrase "within the special district" means nothing less than what it says—without any of the exclusions, qualifications or exceptions to its language that Appellants' various interpretations add to the provision.

Moreover, by applying ZR Section 82-34 to the C4-7 portion of the Project Site only, and ignoring the R8 portion, each of the arguments made by Appellants flatly violates the split lot

[3] Citations to "CC SOFL" refer to City Club of New York's Statement of Facts and Law, BSA Cal. No. 2019-89-A, submitted May 7, 2019. Citations to "LW! SOF" refer to Landmark West's Statement of Facts, BSA Cal. No. 2019-94-A, submitted May 13, 2019.

rules, contrary to the Appellate Division's decision in Beekman Hill Ass'n v. Chin, 274 A.D.2d 161 (1st Dep't 2000), which held that compliance with zoning requirements is determined and measured on the basis of the zoning lot as a whole where both parts of a zoning lot split by a zoning district boundary are subject to the same rule. Id. at 175. Nothing in ZR Section 82-34 states that it applies to a C4-7 district only, and nowhere is the "zoning lot" referenced in the provision limited to the C4-7 portion of a zoning lot only. For purposes of the split lot rules, ZR Section 82-34 is a provision where both parts of a zoning lot split by a zoning district boundary are subject to the same rule.

In its August 21 Statement, Appellant City Club resurrects an argument made in its initial papers (see CC SOFL at 16) that ZR Section 82-34 mandates a "60/40" ratio between the floor area in the base and tower portions of the building. (CC 8.21 Letter at 1-2.) What Appellants mean by this, of course, is that in their view the 60 percent bulk distribution must be calculated on the basis of the C4-7 portion of the zoning lot alone in order to produce what they characterize as the "correct" ratio. The 48/52 ratio Appellants judge to be improper is simply the ratio of the floor area located in the tower of the Project (219,403 sf) to the floor area permitted within the C4-7 district (421,260 sf), based on a calculation which removes from the denominator the 127,283 square feet of floor area permitted in the R8 district. This argument is thus nothing more than another way of restating Appellants flawed argument that ZR Section 82-34 applies to only a portion of the Project Site, i.e., the portion within the C4-7 district, contrary to the regulation's plain language.

At the August 6 public hearing, the Chair asked counsel to Appellant City Club whether he could identify any ambiguity in ZR Section 82-34, considered alone or in conjunction with the other provisions of the SLSD of which it is a part, specifically noting that the question should be answered by counsel without resort to extrinsic evidence such as legislative history or the provisions of Article 2, Chapter 2 of the Zoning Resolution (i.e., the Tower on a Base regulations of ZR Section 23-651). Multiple submissions later, Appellants have plainly demonstrated that they cannot identify any such ambiguity. In the face of that failure, they instead continue to base their arguments on preferred readings of the text that have no basis in the actual plain language.

B. There is no Fixed Upper Limit to the Number of Stories Permitted in the Special District

Throughout this proceeding, Appellants have sought to prove that the SLSD establishes an absolute limit upon the maximum of stories allowed in buildings within the Special District. In its August 21 statement, Appellant City Club argues that the statute "inexorably dictate[s]" an upper limit to the number of occupied floors that is in the low 30s, a figure that Appellants calculate with a remarkable (and inherently incredible) precision as 32.4 stories. (CC 8.21 Letter at 3.)[4] No such limit can be found anywhere in the Special District regulations. While it would be inappropriate to rely upon in any event, the legislative history also does not provide support for such a limit. Appellants' 32.4-story calculation is only one result that can be produced under the regulations, demonstrating that Appellants' claim that the statute embodies such a "mathematical limit" is simply an invention. (CC 8.21 Letter at 4.)

[4] Citations to "CC 8.21 Letter" refer to the letter submitted to the Board by City Club of New York et al. on August 21, 2019.

Had the City Planning Commission wished to establish a fixed limit on the number of permitted stories in the Special District, it obviously and easily could have done so by codifying a 32.4-story limit in the statute. Instead, it did the opposite: it specifically rejected any absolute height limit in the Special District and disclaimed an interest in producing uniform results by noting that the SLSD is an area characterized by towers of various heights. (Owner SOFL, Exhibit 17 at 19.)

Appellants claim that the legislative history is replete with references to the drafters' intention to limit the number of stories to the low 30s, but there is only one such reference in the City Planning Commission Report and, as discussed in our prior submissions, this reference was made only with respect to the six soft sites identified by DCP for study at the time, i.e., "the remaining development sites." (Id.) Appellants point to two similar statements in a May 1993 DCP study document which preceded the referral of the zoning text amendments into the public review process, but these predictions were also clearly based on DCP's evaluation of the soft sites only. (CC SOFL Exhibit B.)

As discussed in our prior submissions (Owner SOFL at 17; Owner 8.21 Letter at 7), the "bulk distribution" proposal advanced by DCP and adopted by CPC encountered significant opposition, precisely because it did not produce the certainty of an absolute height limit. Appellant Landmark West! was a vocal opponent of bulk distribution in 1993, and testified as such in the CPC public hearing held on November 17, 1993:

> While we agree with the intention of limiting height expressed by the Department, we cannot accept the device of "packing the bulk." This device would not in fact limit the height of buildings, but only makes achieving a tall building slightly more difficult than at present. This aspect is especially true on large development sites (ones commanding an entire block frontage or more).

(Exhibit C hereto at 2.) Indeed, Landmark West! itself observed, based on work conducted at the Environmental Simulation Center, that buildings of 33 to 35 stories "would not be uncommon" on the remaining development sites. Id. The legislative history therefore provides no support for Appellants' wishful claim that there is a 32.4-story limit hidden in the statute, and to the contrary shows that the stakeholders recognized and debated the consequences of the proposed regulation including no such limit.

The flaws in Appellants' rigid mechanical application of an Excel spreadsheet formula to produce an invariable 32.4 stories of occupied floors are further demonstrated by a Development Consulting Services study commissioned by Owner of a site located at 1865 Broadway, an actual development site within the SLSD that is wholly located in the C4-7 district. (See Exhibit D hereto.) The actual building being constructed at that site is nearing completion. Avalon Bay, which developed the building with Skidmore, Owings & Merrill LLP as architect, made various zoning and development decisions which resulted in fewer stories than are clearly possible under the regulations. The building will have 32 occupied floors, including two one/half interstitial (mid-rise) mechanical floors, with the balance of each of these two floors containing dwelling units. Specifically, while the minimum tower coverage size of 30% is 6,850 gross square feet,

1865 Broadway has a tower coverage of 7,298 gross square feet, an equivalent of 33% tower coverage. Additionally, Avalon Bay did not utilize the allowances for floors with less than 30% tower coverage at the top of the building, each of which can have a tower coverage of 80% of the floor below.

The attached study modifies the assumptions for development at 1865 Broadway, all in ways which are fully permitted under the SLSD regulations. The study reduces the tower coverage to 30%, or 6,850 gross square feet per floor, and takes advantage of the lesser coverage requirement for floors at the top of the building. The resulting building has 35 residential floors, 2.6 floors more than Appellants' supposed 32.4-floor limit, *and a number identical to the number of residential floors in the Project*. No mechanical floors are shown in the study, since the number of mechanical floors in contemporary buildings varies, depending upon the amount and size of mechanical equipment planned for the building.

In short, neither the language nor the legislative history of ZR Section 82-34 supports an absolute limit on the number of stories, and Appellants' preferred maximum of 32.4 occupied stories is only one result possible within a range of results.

C. New York Law Does Not Permit the Board to Override the Plain Language of ZR Section 82-34 Based on Appellants' Planning Theories.

In their statement, Appellants stress the importance of legislative intent as a mechanism for introducing extrinsic evidence that cannot be found in the plain language of ZR Section 82-34 itself. (CC 8.21 Letter at 2.) But the law is that "[l]egislative history… should not be confused with legislative intent, as the two are not coextensive with each other." Matter of Peyton v. New York City Bd. of Standards and Appeals, 86 N.Y.S.3d 439, 452 (1st Dep't 2018). Indeed, "the best evidence of the legislative intent is the plain language of the text chosen by the legislature." Matter of Lisa T. v. King E.T., 30 N.Y.3d 548, 556 (2017).

This first principle of statutory interpretation is indisputable. Indeed, Appellant City Club's counsel agrees. Mr. Weinstock, co-counsel to Appellant City Club, has accurately summarized this bedrock principle in another case pending before the Board, as follows:

> The Court of Appeals has stated the controlling legal principle in this case: "[W]hen, as here, a statute is free from ambiguity and its sweep unburdened by qualification or exception, we must do no more and no less than apply the language as it is written." Zaldin v. Concord Hotel, 48 N.Y.2d 107, 113 (1979). More recently, the Court wrote:
>
> > [We] have correspondingly and consistently emphasized that "where the statutory language is clear and unambiguous, *the court should construe it so as to give effect to the plain meaning of the words used*" (Patrolmen's Benevolent Assn. v. City of New York, 41 NY2d 205, 208 [emphasis added] [citations omitted]; see, Doctors Council v. New York City Employees' Retirement Sys., 71 NY2d 669, 674-675).

> We have provided further clear teaching and guidance that "[a]bsent ambiguity the courts may not resort to rules of construction to broaden the scope and application of a statute," because "no rule of construction gives the court discretion to declare the intent of the law *when the words are unequivocal*" (Bender v. Jamaica Hosp., 40 NY2d 560, 562 [emphasis added] [citations omitted]). Lastly, "[t]he courts are not free to legislate and if any unsought consequences result, *the Legislature is best suited to evaluate and resolve them*" (id. (emphasis added)). Raritan Development Corp. v. Silva, 91 N.Y.2d 98, 107 (1997).
>
> This should properly be the end of the discussion.

(BSA Cal. No. 2019-199-A, Statement of Facts and Findings 9 (received July 31, 2019).) We agree—the language of ZR Section 82-34 is clear and unambiguous and should be applied consistent with its terms.

Appellants in this case nevertheless prefer a different result, and they therefore assert that while the above principles are "valid in most circumstances, there is a more fundamental principle that requires courts to override even unambiguous statutory language where there is a result that is plainly contrary to legislative intent or otherwise absurd." (CC 8.21 Letter at 5.) This bald assertion ignores the Court of Appeals' clear guidance that legislative intent is to be ascertained from the language of the statute itself, and that the courts resort to extrinsic evidence only where a statute is ambiguous. See Raritan, 91 N.Y.2d at 107. In stretching to make their argument, Appellants improperly conflate the absurd results doctrine with methods of interpretation employed to interpret ambiguous statutes.

In fact, the proper approach is confirmed by the very cases Appellants themselves rely on in their letter submission. In City v. Stringfellow's of New York (CC 8.21 Letter at 5), for example, the Appellate Division repeated these same principles of statutory interpretation, emphasizing:

> Such intent is ascertained from the words and language used in the statute and if the language thereof is unambiguous and the words plain and clear, there is no occasion to resort to other means of interpretation. Only when words of the statute are ambiguous or obscure may courts go outside the statute in an endeavor to ascertain their true meaning.

684 N.Y.S.2d 544, 548 (1st Dep't 1999). In that case, the Appellate Division interpreted an ambiguous term in the statute (specifically the term "customarily" as used in the zoning definition of an "adult use establishment") by considering how the term is used elsewhere in the Zoning Resolution and by employing other rules of construction, including the rules of construction set forth in ZR Section 12-01. Id.; see also Abood v. Hospital Ambulance Service, Inc., 283 N.E.2d 754 (1972) (determining how the ambiguous phrase "as may be reasonably necessary" qualifies the statutory requirement for ambulances to use a siren when violating traffic laws); People ex rel. McGoldrick v. Sterling, 126 N.Y.S.2d 803, 808 (1st Dep't 1953)

(applying the terms "landlord" and "tenant" as defined in the State Residential Rent Law to a housing cooperative and its proprietary lessees in order to reconcile different usages of these terms in a manner consistent with the overall system of rent regulation).[5]

In several of the other cases cited by Appellants, the courts were tasked with resolving conflicts between provisions of a particular statutory scheme. In Matter of Jamie J., 30 N.Y.3d 275 (2017) (CC 8.21 at 7), it was unclear whether a procedural provision governing permanency hearings provided the basis for the family court's jurisdiction, which was not otherwise established in the statute. In interpreting the statute, the Court of Appeals explained that the government's "hyperliteral reading" of one particular provision, section 1088, conflicted with other provisions of the Family Court Act (and was also disfavored under the constitutional avoidance doctrine because it would deprive the mother of due process). Id. at 284-85.

To the limited extent that New York courts have described an ability to go beyond the plain meaning of a statute to avoid an "absurd" result, the courts have made clear that such a measure can only be considered "with reluctance and only in extraordinary cases." McNerney v. Geneva, 290 N.Y. 505, 511 (1943). For example, in Long v. Adirondack Park Agency, 76 N.Y.2d 416 (1990), the Court of Appeals interpreted a provision setting the 30-day time limit for agency review to give the statute a practical construction that afforded the agency a meaningful opportunity to review rather than interpreting the period to run in a way that gave the agency no practical notice of the decision to be reviewed, thereby rendering other statutory and regulatory duties "literally meaningless and useless." Id. at 422. Critically, the Court of Appeals did not look beyond the four corners of the statute to do so, rather it explained that it would not read certain phrases "in vacuum-like isolation with absolute literalness," but would "approach the statute's provisions sequentially and give the statute a sensible and practical over-all construction, which is consistent with and furthers its scheme and purpose and which harmonizes all its interlocking provisions." Id. at 420. The court noted that such an approach to statutory interpretation is preferable "especially when an opposite interpretation would lead to an absurd result that would frustrate the statutory purpose,"—but notably the court did *not* reach into the legislative history to deduce some "statutory purpose" absent from the text of the statute. Id. Rather, consistent with the rule prescribed by the Court of Appeals in King E.T. (and applied by the Stringfellow's court), it looked at the "textual primacy" within the statute of the reviewing agency receiving "such pertinent information as the agency may deem necessary" (statutory language), which established the "Legislature's *manifest* intent"—i.e., manifest in the terms of the statute itself. Id. at 420-21 (emphasis added).[6]

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[5] In New York State Bankers Ass'n v. Albright, 343 N.E.2d 735 (1975), the Court of Appeals stated that extrinsic evidence may be employed to interpret unambiguous statutes while acknowledging that the specific statute at issue was "not free from 'ambiguity.'" Id. at 739. Accordingly, the Court's discussion of employing extrinsic evidence to interpret unambiguous statutes was not necessary to its holding. That discussion in any event predates the Court of Appeals' subsequent holdings in Zaldin and Raritan.

[6] Other cases cited by Appellant City Club are similarly "extraordinary cases" involving patently absurd results. See, e.g., People v. Santi, 3 N.E.2d 1146 (2004) (correcting a syntactical error in a statutory provision that if read literally would result in exempting licensed professionals from criminal liability relating to aiding and abetting the unlicensed practice of a profession); 89 Christopher Inc. v. Joy, 44 A.D.2d 417 (1st Dep't 1974), modified 35 N.Y.2d 213 (1974) (involving, as stated by the Court of Appeals, "difficulties rarely confronting a court" resulting from the "patchwork of rent-control legislation in recent years [that] has created an impenetrable thicket, confusing not only to laymen but to lawyers. . . . the legislation contains serious gaps, not readily filled by interpretation based

Appellants have fallen far short of demonstrating that the application of ZR Section 82-34 according to its clear instruction creates "absurd" results. They describe the purpose of the provision as "limiting height." (CC 8.21 Letter at 7.) We have demonstrated that ZR Section 82-34 operates to do just that—reduce the height of the Project relative to what could be developed absent the bulk distribution requirement. (Owner SOFL at 19, Exhibit 24.) Further, it is clearly not an "absurd" result for the Project to have precisely the same number of residential floors achievable at 1865 Broadway, a site located entirely within a C4-7 district, as shown in the Development Consulting Services study (infra at 4). Finally, even assuming arguendo that application of ZR Sections 82-34 and 82-36 uniformly produces 32.4 residential floors on a zoning lot located wholly within a C4-7 district, it is clearly not absurd that the Project, with different conditions resulting from the fact that is a split lot, contains 35 residential floors—a difference of 2.6 floors.

In short, New York law dictates that the fundamental legal principle governing application of unambiguous statutory provisions, i.e., that a court "must do no more and no less than apply the language as it is written," governs and should be properly applied in this case with respect to ZR Section 82-34. Zaldin v. Concord Hotel, 48 N.Y.2d 107, 113 (1979).

D. Appellant Landmark West!'s Belated Attempt to Raise Issues Regarding Floor Area Deductions Taken for Mechanical Equipment Floor Space Should be Rejected

Appellant Landmark West!'s August 21 Supplemental Statement of Facts argues that the Board should address issues it raises regarding the floor area deductions taken for mechanical equipment on mechanical floors at the Project on the basis that its initial Statement of Facts submitted to the Board on May 13 squarely raised these issues. (LW! SSOF at 3.)[7] The Statement of Facts did nothing of the sort and these issues were first raised at the public hearing on August 6, more than two and a half months after submission of the Statement of Facts. The Board should not countenance this obvious attempt to prolong the Board process, and delay a final resolution of the issues.

Landmark West!'s initial Statement of Facts tracks the language and arguments made by Appellant City Club in its own submission, largely word for word, and defines the issues presented on appeal as follows:

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

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on intention, because there was none, or even by judicial construction to make reasonable and workable schemes that are self-abortive as designed" and concluding that a contrary interpretation "would lead to an absurd and unintended result"); Lake S. & M. S. R. Co. v. Roach, 80 N.Y. 339 (1880) (holding that a law that permits tax collectors to collect unpaid property tax by seizing personalty located on the land in question does not permit a tax collector from seizing the property of a visitor who temporarily entered the land, an outcome which would be manifestly unjust).

[7] Citations to "LW! SSOF" refer to the Supplemental Statement of Facts submitted to the Board by Landmark West! on August 21, 2019.

a) The Owner's attempts to exempt the Voids from floor area should be rejected, as the Voids are neither "used for mechanical equipment," ZR Sec. 12-10, nor are they accessory uses to the residential uses in the Tower in the Tower, ZR Sec.22-12; and
b) Floor area calculations are contrary to two sections of the ZR which work in tandem to limit building height in the Special Lincoln Square District ("the Special District") established by ZR art. VII, ch. 2 (ZR 82-00 et seq.):
    1) The "Bulk Packing Rule," ZR sec. 82-34, and
    2) The "Split Lot Rule," ZR Secs. 33-48 and 77-02.

(LW! SOF at 1-2). There is no question that the term "Voids" as used in the statement of the first of the issues raised on appeal refers to the building's tall mechanical spaces, and not to questions relating to whether the amount of horizontal floor space used for mechanical equipment in the Project is excessive or irregular and does not qualify for deduction under the ZR Section 12-10 definition of "floor area." The initial Statement of Facts states that "a substantial portion of the Tower's height - 196 vertical feet - would be composed of empty spaces (the "Voids")." (Id. at 1) Further, that the Voids "comprise purportedly non-floor area space of 20 vertical feet on the fifteenth floor; 'residential amenity space,' 42 feet high, on the sixteenth floor; and more 'mechanical space' on the seventeenth, eighteenth, and nineteen floors for a total of 176 vertical feet." (Id. at 3.)

Appellant Landmark West!'s arguments with regard to the Voids similarly focus on the floor-to-ceiling height of the mechanical spaces, largely tracking the arguments made by Appellant City Club, stating for example that: "[t]hese spaces violate the use restrictions because they are not a use 'customarily found in connection with residential uses.'" (Id. at 16.)

Insofar as Appellant Landmark West! questioned whether the Voids are in fact needed for mechanical equipment, it was with respect to their *vertical* dimension, i.e., the floor-to-ceiling heights of the spaces:

- "The Owner does not even try or feign an attempt to justify the subject 48- or 64-foot tall clearance voids as necessary for the operation of the mechanical equipment." (Id. at 18.)

- "There is nothing to stop the Owner from building a residential floor and use up the FAR at a reasonable height, say 20, 25 or 30 [feet] above the mechanical equipment. Going beyond the clearance that is specified by the manufacturer for the operation of the equipment, the Owner feels that the Zoning Resolution has no say in the height at which it can start building livable space. Hence the idea of the void." (Id. at 19)

- "To achieve the purpose of the 1993 tower on-a-base amendments, the space housing the mechanical equipment, as accessory use exclusion to bulk [sic], needs to be given its commonly accepted meaning of covering only footprint area and volumetric space, or spatial clearance, necessary for optimal operation of the equipment as per the manufacturer's guidelines." (Id. at 20)

Each and every one of these points was made to argue that mechanical spaces with tall floor-to-ceiling heights are unlawful or must be counted towards floor area. These are precisely

the issues which the Board addressed in Cal. No. 2016-427-A and which were the subject of the "Mechanical Voids Text Amendment." Appellant's assertion in its August 21 Supplemental Statement that the issue as presented in its Preliminary Statement "fairly covers all spatial objections (length, width and height) to the FAR deductions" (LW! SSOF at 3) is wishful thinking.

This is further demonstrated by the fact that on July 31, 2019, only five days before the Board's public hearing, Landmark West!'s counsel emailed this firm (copied to Board staff) requesting detailed information regarding the layout and identification of mechanical equipment in the Project, stating that "their receipt will go a long way in determining *If [sic] and when I can submit an appropriate response [to Owner's Statement in Opposition]*." (Exhibit E hereto (emphasis added).) We responded that the email "shows that you are now trying to determine at this late date-- on the very cusp of the hearing-- whether to add new issues to the mix. The appeals should be heard and decided on the issues raised in your appeal papers. We will therefore oppose any request made to the Board to expand the scope of the appeals to entertain new issues." (Exhibit F hereto.)

Quite simply, Appellants had the opportunity as early as May to raise issues concerning whether the floor space used for mechanical equipment in the Project is excessive or irregular and chose not to do so until just before and at the August 6 hearing. The conclusion is inescapable that this is a tactic designed to prolong proceedings at the Board, and postpone a final resolution of the issues, perhaps in the hopes that the Project will die a death by delay. Appellant Landmark West!'s maneuvering mocks the Board process (and in particular the requirement that an appeal be made within thirty days of the issuance of DOB determination) and if permitted would severely prejudice Owner. It should not be countenanced. The new issues raised by Appellant Landmark West! should not heard by the Board via a continuation of the appeal following a decision on the issues raised by Appellants in May.

E. Conclusion

For the reasons set forth herein, as well as in our prior submissions dated July 24, 2019 and August 21, 2019, we respectfully request that the Board expeditiously deny the appeals.

BSA Cal. No. 2019-89-A; BSA Cal. No. 2019-94-A
August 28, 2019 Statement of West 66th Sponsor LLC
Index of Exhibits and Appendices

Exhibit A — Special Lincoln Square District Plan

Exhibit B — Zoning Map 8c

Exhibit C — Landmark West! Testimony (November 17, 1993)

Exhibit D — Zoning Diagram - 1865 Broadway (August 23, 2019)

Exhibit E — Stuart Klein Email to David Karnovsky, Toni Matias and others (July 31, 2019)

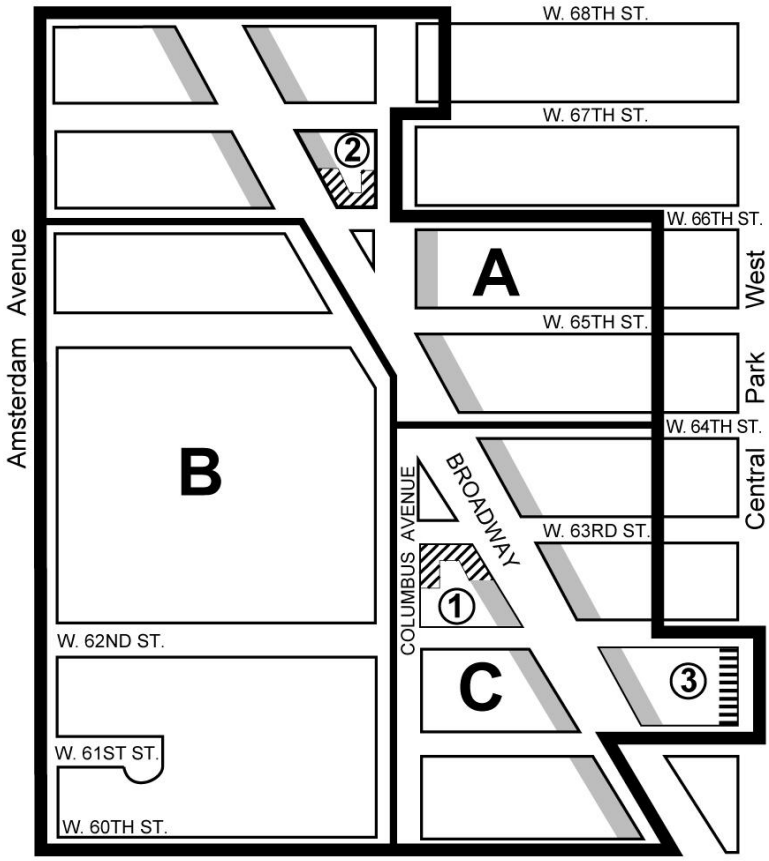
Exhibit F — David Karnovsky Email to Stuart Klein, Toni Matias and others (August 1, 2019)

Appendix A — Cited Case Law

- Matter of Lisa T. v. King E.T., 30 N.Y.3d 548 (2017).
- McNerney v. Geneva, 290 N.Y. 505 (1943).

Appendix A - Special Lincoln Square District Plan

LAST AMENDED
2/9/1994



Special Lincoln Square District Boundary

A Subdistrict

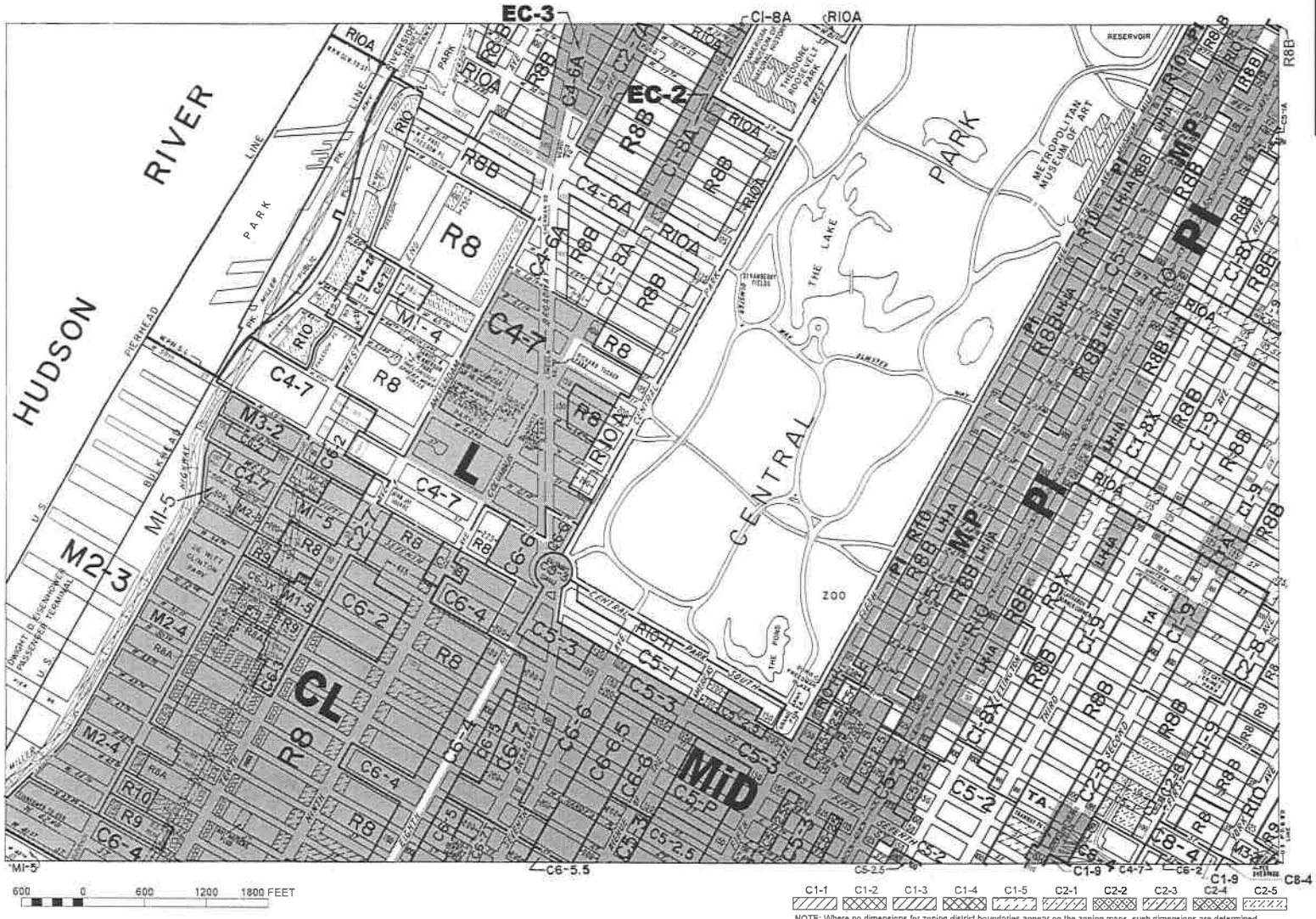
Required 85' *Street Wall*

Required 125' *Street Wall*

Required 150' *Street Wall*

1 Development Block

Click blue outline on map to view diagram of proposed zoning change



NOTE: Where no dimensions for zoning district boundaries appear on the zoning maps, such dimensions are determined in Article VII, Chapter 6 (Location of District Boundaries) of the Zoning Resolution.

Disclaimer

The Web version of the Zoning Resolution of the City of New York is provided for reference and the

R – RESIDENTIAL DISTRICT
C – COMMERCIAL DISTRICT
M – MANUFACTURING DISTRICT
SPECIAL PURPOSE DISTRICT
AREA(S) REZONED

Effective Date(s) of Rezoning:
06-26-2014 C 140187 ZRM

Special Requirements:
For a list of lots subject to CEQR environmental requirements, see APPENDIX C.
For a list of lots subject to "D" restrictive declarations, see APPENDIX D.
For Inclusionary Housing designated areas and Mandatory Inclusionary Housing areas on this map, see APPENDIX F.

MAP KEY

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

ZONING MAP **8C**

NOTE: Zoning information as shown on this map is subject to change. For the most up-to-date zoning information for this map visit the Zoning section of the Department of City Planning website www.nyc.gov/planning or contact the Zoning Information Desk at (212) 720-3291.

R. 002062

LANDMARK WEST!

1 copy

THE COMMITTEE TO PRESERVE THE UPPER WEST SIDE

SPECIAL LINCOLN QUARE DISTRICT
PROPOSED ZONING

PUBLIC TESTIMONY
NOVEMBER 17, 1993

VICTOR CALIANDRO, AIA, FIUD, PRACTICING ARCHITECT AND URBAN DESIGNER, PROFESSOR OF ARCHITECTURE, THE CITY COLLEGE OF NY

MR. CHAIRMAN, COMMISSIONERS:

I AM REPRESENTING LANDMARK WEST! AND THE COMMUNITY AFFECTED BY AND CONCERNED OVER THE FUTURE OF THE SPECIAL LINCOLN SQUARE DISTRICT.

WE HAVE WORKED WITH MEMBERS OF THE COMMUNITY AND CITY PLANNING STAFF AND HAVE REVIEWED THE PROPOSED ZONING UNDER CONSIDERATION. WE HAVE MODELED ZONING ENVELOPES AT THE SIMULATION CENTER, AND ANALYZED THEIR IMPACTS UPON THE DISTRICT AT BOTH A LARGE SCALE AND AT THE SCALE OF THE PEDESTRIAN.

THE ZONING ENVELOPES WHICH WE HAVE MODELED INCLUDE: EXISTING ZONING, ZONING PROPOSED BY THE DEPARTMENT OF CITY PLANNING, AND ZONING PROPOSED BY THE COMMUNITY AND LANDMARK WEST! THE MODELING INCLUDES THE SIX "SOFT" SITES AS PREVIOUSLY IDENTIFIED BY THE DEPARTMENT OF CITY PLANNING. THE RESULTS, SET IN A 10 FT BY 13 FT DISTRICT-WIDE MODEL, MAY BE VIEWED AT THE MUNICIPAL ARTS SOCIETY IN THE URBAN CENTER. WE URGE YOU TO SEE THE MODEL, ASSESS THE IMPACTS OF EACH PROPOSED PLAN, AND ASSIST IN FURTHER SIMULATION EFFORTS TO REACH A WIDE CONCENSUS.

THERE ARE THREE OVERRIDING ISSUES OF CONCERN TO THE COMMUNITY. THE FIRST IS DENSITY: IT MUST BE LOWERED SO AS TO NOT FURTHER NEGATIVELY IMPACT THE QUALITY OF LIFE AND SERVICES. WE PROPOSE THAT A MAXIMUM OF 10 FAR BE ESTABLISHED ON A DISTRICT WIDE BASIS. THIS EFFECTIVELY MEANS THAT THERE WOULD BE NO BONUS PROVISIONS. ARCADES, SUBWAY IMPROVEMENTS AND ON SITE INCLUSIONARY HOUSING WOULD BE A NORMAL PART OF DEVELOPMENT. THE AVERAGE FLOOR AREA RATIO (FAR) OF 23 BUILDINGS SURVEYED BY THE DEPARTMENT OF CITY PLANNING, IS 10.6. THE AVERAGE FAR FOR RESIDENTIAL USE IS 8.2. WHAT WE ARE PROPOSING IS INDEED CONTEXTUAL. THE EFFECTS OF A 10 FAR LIMIT CAN BE READILY STUDIED AND EVALUATED IN THE SIMULATION MODEL.

THE SECOND IMPORTANT ISSUE IS THAT OF BULDING HEIGHT. WE ARE CONCERNED WITH THE IMPACT OF TALL STRUCTURES ON THE DISTRICT AND ON THE PEDESTRIAN IN THE DISTRICT, WHERE URBAN SCALE AND CHARACTER ARE OVERWHELMED BY GIGANTIC MASSES. WE HAVE ONLY TO LOOK AT NOS. 1 AND 2 LINCOLN PLAZA, AND AT THE LINCOLN SQUARE UNDER CONSTRUCTION TO UNDERSTAND THE CONSEQUENCES. YET THE AVERAGE BUILDING HEIGHT FOR THE BUILDINGS SURVEYED BY THE DEPARTMENT OF CITY PLANNING IS JUST UNDER 28 FLOORS, OR 275 FEET. WHILE WE AGREE WITH THE INTENTION OF LIMITING HEIGHT EXPRESSED BY THE DEPARTMENT, WE CANNOT ACCEPT THE DEVICE OF "PACKING THE BULK." THIS DEVICE WOULD NOT IN FACT LIMIT THE HEIGHT OF BUILDINGS, BUT ONLY MAKES ACHIEVING A TALL BUIDING SLIGHTLY MORE DIFFICULT THAN AT PRESENT. THIS ASPECT IS ESPECIALLY TRUE ON LARGE DEVELOPMENT SITES (ONES COMMANDING AN ENTIRE BLOCK FRONTAGE OR MORE). OF THE SIX SOFT SITES, FOUR ARE LARGE, AND WILL CONSISTENTLY PRODUCE TALL BUILDINGS. THIRTY THREE TO THIRTY FIVE STORIES WOULD NOT BE UNCOMMON. WE PROPOSE INSTEAD A SIMPLE HEIGHT LIMIT FOR THE ENTIRE DISTRICT OF 275 FEET. WITHIN THIS UPPER LIMIT THE DESIGN OF THE BUILDING AND ITS MASSING WOULD BE QUITE FREE. ABOVE THIS HEIGHT ONLY MECHANICAL BULKHEADS WOULD BE PERMITTED. THE IMPACT OF HEIGHT (AND LARGE DEVELOPMENT SITES) CAN BE READILY ASSESSED IN THE SIMULATION MODEL.

THE THIRD ISSUE REFLECTS A CONCERN FOR THE IMPACT OF THE GIGANTIC SCALE OF DEVELOPMENT UPON THE DISTRICT AND THE PEDESTRIAN. WHILE WE RECOGNIZE THAT THE "TOWER ON A BASE" BUILDING TYPE WHICH UNDERLIES THE ZONING WAS A 1960'S SOLUTION TO A MIXED COMMERCIAL-RESIDENTIAL DEVELOPMENT, WE ALSO RECOGNIZE THAT IT IS A BUILDING FORM WHICH IS FUNDAMENTALLY NOT AMENABLE TO BEING A GOOD NEIGHBOR-- THAT IS, OF RESPONDING TO ITS CONTEXT. THIS IS ESPECIALLY APPARENT WHEN WE AGAIN LOOK AT NOS. 1 AND 2 LINCOLN PLAZA AND AT THE LINCOLN SQUARE BUILDING UNDER CONSTRUCTION. THEIR LARGE -GIGANTIC- SIZE IS A RESULT OF THEIR LARGE SITES. THEIR LACK OF VARIETY AND ARTICULATION ONLY EXACERBATE THEIR LARGE PRESENCE. THIS IS ALSO APPARENT IN THE UNRELENTING STREET WALLS ALONG BROADWAY-- RUNNING FOR UP TO 235 FEET. THIS IS NOT IN THE CONTEXT OF THE UPPER WEST SIDE OR CENTRAL PARK WEST. WE PROPOSE THAT THE ZONING INCORPORATE A SERIES OF FLEXIBLE CONTEXTUAL RULES WHICH CAN ENCOURAGE VARIETY OF BUILDING FORMS, STREET SCALE AND STRONG ARCHITECTURAL RESPONSES TO LINCOLN CENTER. SPECIFICALLY, THE BUILDINGS ALONG BROADWAY SHOULD EXTEND THE 85 FOOT STREET WALL UP TO 150 FEET FOR NO MORE THAN 60 % OF ITS LENGTH, WRAP AROUND THE CORNERS AND STEP DOWN TO MEET ADJACENT BUILDINGS. THE MODELS SHOWN EXPRESS THE IDEA OF A STREET WALL BUILDING TYPE THAT IS A FAMILIAR FORM THROUGHOUT THE CITY. WE ARE ALSO PROPOSING CONTEXTUAL RULES FOR CENTRAL PARK WEST AND FOR THE BOW TIE SITE.

COMPARISONS OF THE EFFECT OF THE PROPOSED ZONING RULES AND AN ASSESSMENT OF THEIR IMPACTS BY USE OF THE SIMULATION MODEL IS IMPORTANT.

WE URGE YOU TO VISIT, STUDY, CRITICIZE, PROPOSE AND DESIGN WITH THE SIMULATION MODEL.

WE ARE ALSO ATTACHING A COMPARATIVE ANALYSIS OF BUILDING TYPES IN RELATION TO BULK CONTROL RULES TO ILLUSTRATE THE FLEXIBILITY AND VARIETY WHICH THIS APPROACH CAN FOSTER.

IN SUMMARY, THE COMMUNITY IS IMPACTED AND CONSTRICTED BY EXCESSIVELY LARGE DEVELOPMENT WITHOUT EITHER RELIEF THROUGH THE PROVISION OF PUBLIC AMENITIES OR THE SENSE THAT ITS CHARACTER, VITALITY AND VARIETY CAN BE PRESERVED AND ENHANCED. WE ARE SEEKING A RESPONSIVE ZONING TO GUIDE FUTURE DEVELOPMENT: ONE WHICH LOWERS THE DENSITY AND SCALE OF THE BUIDINGS AND CREATES PREDICTABLE BUILDINGS WHICH ENHANCE THE DISTRICT.

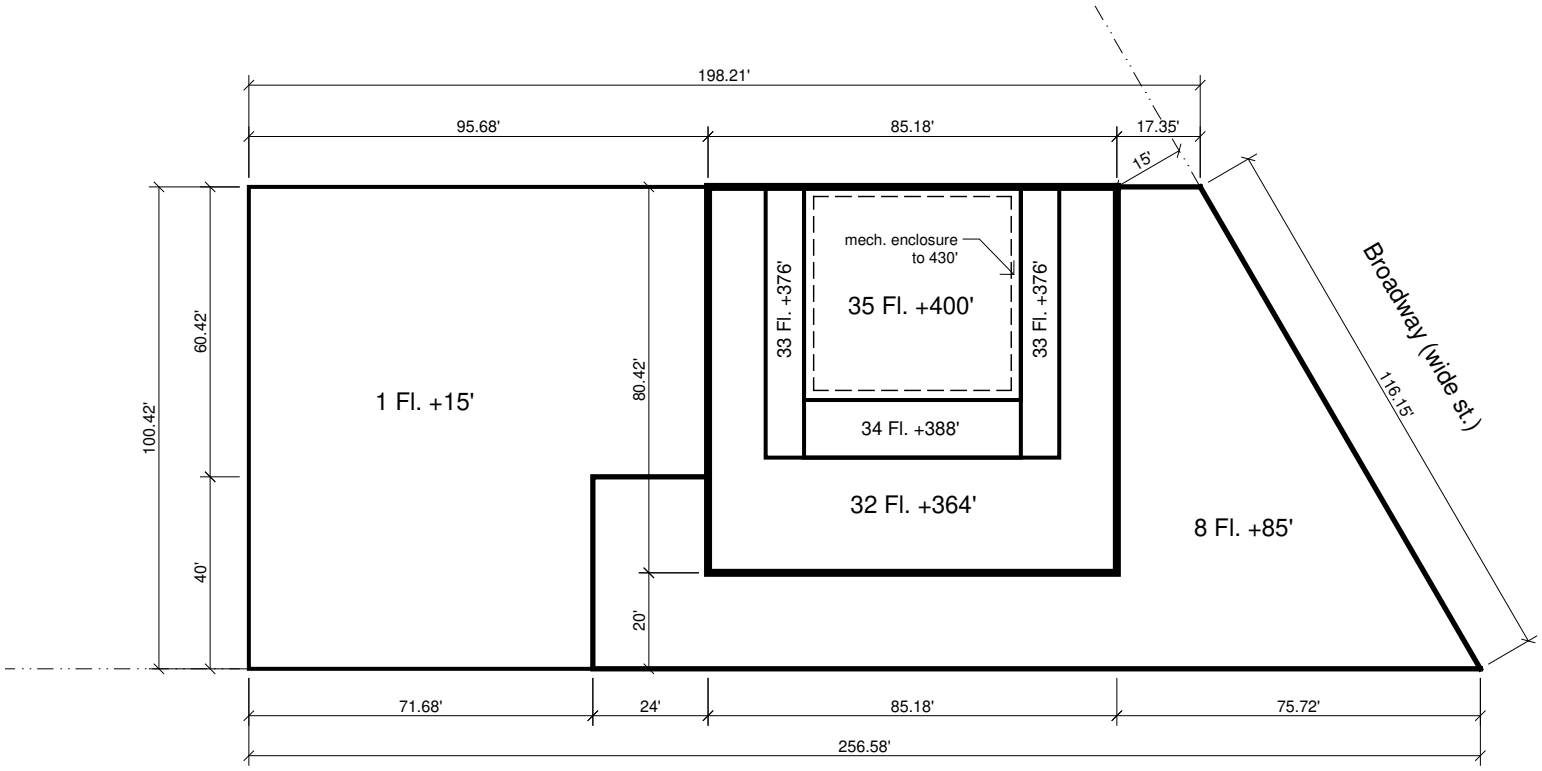
WE WOULD LIKE TO ALSO ILLUSTRATE HERE SOME OF THE EFFECTS OF THE PROPOSED RULES IN COMPARISON WITH THE EXISTING ZONING CONTROLS.

THANK YOU.

1865 Broadway

Block 1114, Lot 9

Scheme 1: Residential tower above ground floor retail



Zone: C4-7
Special Lincoln Square District

Lot Area: 22,835 SF

Maximum Permitted Floor Area:

Commercial @ 10 FAR	228,350	ZSF
Residential @ 10 FAR	228,350	ZSF
Inclusionary @ 2 FAR	45,670	ZSF
Maximum total @ 12 FAR	274,020	ZSF

Used This Scheme:

Retail	14,000	ZSF
Residential	260,020	ZSF
Total	274,020	ZSF

Floor-to-floor Heights:

1	15'	Retail & lobby
2-8	10'	Residential
9-15	10.7'	Residential
16	12'	Residential
17-35	12'	Residential
	400'	Building Height (430' w mech. enclosure)

150' "measure"

Floor sizes:

1	22,835	GSF	Retail & lobby
2-8	14,187	GSF	Residential
9-32	6,850*	GSF	Residential
33	3,407	GSF	Residential
34	2,726	GSF	Residential
35	2,044	GSF	Residential
Total	294,721		Gross Square Feet

*Min tower size 30% (6,850 SF)

1865 bulk study.dwg

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

Date: 08/23/19 Scale: 1" = 40'

1

Drawing No:

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

R. 002066

Lehman, Ellen

From: Stuart A. Klein <SKlein@buildinglawnyc.com>
Sent: Wednesday, July 31, 2019 11:01 PM
To: Toni Matias (BSA)
Cc: Mikhail Sheynker; Karnovsky, David; John Low-Beer
Subject: Re: 36 West 66th Street

David:

I have finished reading though your latest, extraordinarily detailed submission, which includes many things about the ZR that I never really wanted to know, most being far beyond my pay grade. But despite the avalanche of notations and references, I do not see a copy of plan number A-300.01, referenced in the FD's March, 2019 letter. Nor do I see any plans indicating the layout of the mechanical equipment, the identification of the mechanical equipment with the MEA and/or UL ratings or any manufacturers' specification sheets for same.

Were items these submitted to DOB prior to its rescission letter, or were they part of the original ND filing or subsequent filings? No matter the answer, could I get copies of all, as their receipt will go a long way in determining If and when I can submit an appropriate response.

Best regards,

Stu

.

STUART A. KLEIN, ESQ.
KLEIN SLOWIK PLLC
90 BROAD ST., SUITE 602
NEW YORK, NY 10004
Phone: (212) 564-7560 x 102
Fax: (212) 564-7845
sklein@buildinglawnyc.com

Lehman, Ellen

From: Karnovsky, David
Sent: Thursday, August 1, 2019 1:23 PM
To: 'Stuart A. Klein'; Toni Matias (BSA)
Cc: Mikhail Sheynker; John Low-Beer
Subject: RE: 36 West 66th Street

Stuart:

I hope you are well and look forward to seeing you on the 6th.

Our papers address in detail the two issues that Landmarks West and City Club have raised on appeal: First, whether the floor to ceiling heights of the mechanical spaces are lawful under zoning ; and Second, whether DOB correctly applied the bulk distribution provisions of Section 82-34. The documentation we provided as exhibits, including the ZD-1, are addressed to those two issues.

Your request for information relating to the layout of the mechanical equipment on the mechanical floor space, the identification of the mechanical equipment with the MEA and/or UL ratings or manufacturers specification sheets, etc., shows that you are now trying to determine at this late date --on the very cusp of the hearing-- whether to add new issues to the mix.

The appeals should be heard and decided on the issues raised in your appeal papers . We will therefore oppose any request made to the Board to expand the scope of the appeals to entertain new issues.

Best

David

David Karnovsky
Partner

David.Karnovsky@friedfrank.com | Tel: **+1 212 859 8927**

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

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Were items these submitted to DOB prior to its rescission letter, or were they part of the original ND filing or subsequent filings? No matter the answer, could I get copies of all, as their receipt will go a long way in determining If and when I can submit an appropriate response.

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Stu

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STUART A. KLEIN, ESQ.
KLEIN SLOWIK PLLC
90 BROAD ST., SUITE 602
NEW YORK, NY 10004
Phone: (212) 564-7560 x 102
Fax: (212) 564-7845
sklein@buildinglawnyc.com

Matter of Lisa T. v King E.T.

Court of Appeals of New York

November 16, 2017, Argued ; December 19, 2017, Decided

No. 129

Reporter
30 N.Y.3d 548 *; 91 N.E.3d 1215 **; 69 N.Y.S.3d 236 ***; 2017 N.Y. LEXIS 3778 ****; 2017 NY Slip Op 08800; 2017 WL 6454309

[1] In the Matter of Lisa T., Respondent, v King E.T., Appellant.

Prior History: [**1]** Appeal, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that Court, entered February 28, 2017. The Appellate Division affirmed (1) an order of the Family Court of Bronx County (John J. Kelley, J.) which, insofar as appealed from, had found that respondent willfully violated two temporary orders of protection; and (2) an order of that court which had issued a one-year order of protection against respondent. The following question was certified by the Appellate Division: "Was the order of this Court, which affirmed the order of the Family Court, properly made?"

Matter of Lisa T. v. King E.T., 147 AD3d 670, 48 NYS3d 119, 2017 N.Y. App. Div. LEXIS 1472 (Feb. 28, 2017)affirmed.

Disposition: Order affirmed, without costs, and certified question answered in the affirmative.

Core Terms

family court, temporary order, violations, offenses, contempt, emails, criminal court, final order, plain language, judiciary law, orders, court's authority, new order, petitions, provides, visitation, obey, willful violation, violation of the order, court's jurisdiction, new family, communications, arrangements, constitutes, harassment, parties, courts, words, bail, jail

Case Summary

Overview

HOLDINGS: [1]-The Appellate Division properly affirmed a family court's dismissal of a family offense petition, sustentation of a violation petition, and issuance of a one-year final order of protection because a father—through e-mail communications unrelated to the parties' child's visitation or any emergency—willfully violated two temporary orders of protection issued during the pendency of a family offense, the plain language of Family Ct Act §§ 846 and 846-a supplied the essential statutory jurisdiction to enter a new order of protection where the original family offense petition had been dismissed, and the jurisdiction exercised by the family court was consistent both with the statutory text and the purpose of Family Ct Act art. 8.

Outcome
Order affirmed and certified question answered affirmatively.

LexisNexis® Headnotes

Family Law

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Limited Jurisdiction

HN1[] **Family Law**

A family court is a court of limited jurisdiction, constrained to exercise only those powers granted to it by the State Constitution or by statute.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over

30 N.Y.3d 548, *548; 91 N.E.3d 1215, **1215; 69 N.Y.S.3d 236, ***236; 2017 N.Y. LEXIS 3778, ****1; 2017 NY Slip Op 08800, *****08800

Actions > Concurrent Jurisdiction

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Domestic Offenses

Family Law > Family Protection & Welfare

HN2 **Concurrent Jurisdiction**

In accordance with N.Y. Const. art. VI, § 13, the Family Court Act provides that court with concurrent jurisdiction (shared with the criminal courts) over "family offenses." Family Ct Act § 812(1). The statutory procedures concerning family offenses are set forth in Family Ct Act art. 8, and Family Ct Act § 812 enumerates the crimes which, if committed between persons in specified relationships, constitute family offenses.

Family Law > Family Protection & Welfare

HN3 **Family Protection & Welfare**

A family offense proceeding is commenced by the filing of a petition alleging the commission of a family offense between parties with the requisite familial relationship, and the petition typically seeks an order of protection. Family Ct Act § 821. The purpose of Family Ct Act art. 8 is to remove in the first instance from the criminal courts a limited class of offenses arising in the family milieu, in order to permit a more ameliorative and mediative role by a family court.

Criminal Law & Procedure > ... > Crimes Against Persons > Violation of Protection Orders > Application & Issuance

Family Law > Family Protection & Welfare

HN4 **Application & Issuance**

Upon the filing of a family offense petition, a family court may, for good cause shown, issue a temporary order of protection in favor of the petitioner and against the respondent. Family Ct Act §§ 821-a(2)(b), 828. A temporary order of protection is not a finding of wrongdoing. Family Ct Act § 828(2). Nevertheless, it is an order of the court and, pursuant to Family Ct Act § 846, in the event of a violation, a new petition may be filed alleging that the respondent has failed to obey a lawful order" of the court. The court may hear the violation petition itself and either take such action as is authorized under this article, or determine whether such violation constitutes contempt of court, and transfer the allegations of criminal conduct constituting such violation to the district attorney for prosecution; or transfer the entire proceeding to the criminal court. Family Ct Act § 846(b)(ii)(A)-(C).

Criminal Law & Procedure > ... > Crimes Against Persons > Violation of Protection Orders > Penalties

HN5 **Penalties**

When a family court retains jurisdiction over a violation petition, Family Ct Act 846-a—entitled "Powers on failure to obey order"—sets forth the dispositions available to the court upon a finding of a willful violation. Specifically, if a respondent is brought before the court for failure to obey any lawful order issued under this article or an order of protection or temporary order of protection issued pursuant to this act, and it is proven that the respondent willfully violated such an order, the court may, among other things, modify an existing order or temporary order of protection to add reasonable conditions of behavior to the existing order, make a new order of protection in accordance with Family Ct Act § 842, or may commit the respondent to jail for a term not to exceed six months.

Governments > Legislation > Interpretation

HN6 **Interpretation**

Because the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof.

Criminal Law & Procedure > ... > Crimes Against Persons > Violation of Protection Orders > Application & Issuance

Civil Procedure > Sanctions > Contempt

HN7 **Application & Issuance**

Family Ct Act §§ 846 and 846-a unequivocally grant a family court jurisdiction and authority to prosecute

contempt of its orders, including temporary orders of protection. Further, the statutory text explicitly authorizes the court to enter a new order of protection if a respondent is found to have willfully violated a temporary order of protection.

Criminal Law & Procedure > ... > Crimes Against Persons > Violation of Protection Orders > Application & Issuance

Governments > Courts > Authority to Adjudicate

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Concurrent Jurisdiction

HN8 **Application & Issuance**

While Family Ct Act § 812 provides a family court with concurrent jurisdiction over only specified family offenses, and the violation of a temporary order of protection does not necessarily involve a family offense, Family Ct Act § 115(c) states that the family court has such other jurisdiction as is provided by law.

Criminal Law & Procedure > ... > Crimes Against Persons > Violation of Protection Orders > Penalties

HN9 **Penalties**

Family Ct Act §§ 846 and 846-a contain no language tying a family court's authority to impose specific penalties for the willful violation of a temporary order of protection to the court's determination of whether or not the family offense petition, itself, should be sustained. Significantly, there is no basis in the statutory text upon which any distinction may be drawn between the family court's jurisdiction over violations of final orders of protection entered after a finding of a family offense, on the one hand, and violations of temporary orders of protection entered during the pendency of a family offense proceeding, on the other. Further, the statutory scheme makes clear that conduct constituting a violation of the order of protection need not necessarily constitute a separate family offense in order for the court to have jurisdiction over the violation. Indeed, § 846-a contains no such requirement.

Criminal Law & Procedure > ... > Crimes Against Persons > Violation of Protection Orders > Application & Issuance

Criminal Law & Procedure > ... > Crimes Against Persons > Violation of Protection Orders > Penalties

HN10 **Application & Issuance**

The reference in Family Ct Act § 846-a to Family Ct Act § 842—which, in turn, references Family Ct Act § 841—implicitly incorporates a limitation that a final order of protection may be entered only after a finding that a family offense was committed. Section 842 sets forth the terms, conditions, and durations, of orders of protection entered pursuant to Family Ct Act art. 8. Notably, while § 842 references orders issued pursuant to § 841—which governs the disposition of family offense petitions—§ 846-a does not contain any such reference to § 841. Thus, on its face, § 846-a incorporates only that which is set forth in § 842 with regard to the terms and conditions of the order of protection entered upon a finding of a violation. This is evidenced by the fact that § 846-a expressly includes violations of temporary orders without drawing any distinction between temporary and final orders; the inclusion of temporary orders would be nonsensical if § 846-a applied only to those orders of protection entered upon a disposition under § 841.

Criminal Law & Procedure > ... > Crimes Against Persons > Violation of Protection Orders > Penalties

HN11 **Penalties**

Family Ct Act § 846-a does not require a family court to make a finding as to whether a new family offense has occurred as a prerequisite to finding and sanctioning a violation of a temporary order of protection. Moreover, the plain language of Family Ct Act § 841 does not address family offense findings made on violation petitions.

Criminal Law & Procedure > ... > Crimes Against Persons > Violation of Protection Orders > Application & Issuance

Criminal Law & Procedure > ... > Crimes Against Persons > Violation of Protection Orders > Penalties

HN12 **Application & Issuance**

30 N.Y.3d 548, *548; 91 N.E.3d 1215, **1215; 69 N.Y.S.3d 236, ***236; 2017 N.Y. LEXIS 3778, ****1; 2017 NY Slip Op 08800, *****08800

To be sure, where a family court concludes that the allegations of the petition charging a respondent with a family offense are not established, it must dismiss the family offense petition. Family Ct Act § 841(a). However, this does not compel the conclusion that a pending petition alleging the violation of a temporary order of protection must also be dismissed. The family offense and violation petitions are authorized by different statutory provisions. Family Ct Act §§ 821, 846, 846-a. Once the family court obtains jurisdiction over the parties by virtue of a petition facially alleging a family offense, it may issue a temporary order of protection. Family Ct Act §§ 821-a(2)(a) 828. A violation of that temporary order of protection is a separate matter over which §§s 846 and 846-a give the family court authority to act, including the authority to issue a final order of protection.

Criminal Law & Procedure > ... > Crimes Against Persons > Violation of Protection Orders > Penalties

HN13 **Penalties**

Insofar as Family Ct Act §§ 846 and 846-a specifically provide for punishments and remedies for violations of temporary and final orders of protection issued pursuant to Family Ct Act art. 8, resort to the Judiciary Law is unwarranted and inappropriate.

Family Law

HN14 **Family Law**

Family Ct Act § 156 provides that the Judiciary Law shall apply unless a specific punishment or other remedy for such violation is provided in this act or any other law. The court is always bound by a specific section of a substantive Family Ct Act article as opposed to § 156. In other words, this section is the default option, available only in the relatively rare event that a different remedy has not been legislated.

Criminal Law & Procedure > ... > Crimes Against Persons > Violation of Protection Orders > Application & Issuance

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions

Criminal Law & Procedure > ... > Crimes Against Persons > Violation of Protection Orders > Penalties

HN15 **Application & Issuance**

Allowing a family court to retain jurisdiction over violations of temporary court orders entered during the pendency of a family offense proceeding reinforces the goal of protecting victims and preventing domestic violence. Although, in some circumstances, the primary harm resulting from a violation of a temporary order of protection may be directed at the court whose authority has been thwarted, there is generally also harm to the person who has been contacted in violation of the order. Further, permitting Family Court to enter an order of protection is consistent with the dispositions available should the matter proceed, instead, to criminal court. Penal Law §§ 215.50(3), 215.51, CPL 530.12(5), 530.13(4). Thus, the statutory language permitting the entry of an order of protection upon a violation of a temporary order is consonant with the legislative goal of achieving resolution of intra-family disputes in a family court without the need to resort to the criminal forum, where harsher sanctions—such as lengthier incarceration periods—may be imposed for criminal contempt. Notably, the act of disobeying the order in and of itself—regardless of whether it amounts to a family offense—constitutes criminal contempt in the second degree. Penal Law § 215.50(3) criminalizes the intentional disobedience or resistance to the lawful process or other mandate of a court.

Governments > Legislation > Interpretation

HN16 **Interpretation**

The best evidence of the legislative intent is the plain language of the text chosen by the legislature. If, however, the wording of a statute has created an unintended consequence, it is the prerogative of the legislature, not a court, to correct it.

Headnotes/Summary

Headnotes

Husband and Wife and Other Domestic Relationships — Order of Protection — Final Order of Protection Issued Where Related Family Offense Petition Dismissed

30 N.Y.3d 548, *548; 91 N.E.3d 1215, **1215; 69 N.Y.S.3d 236, ***236; 2017 N.Y. LEXIS 3778, ****1; 2017 NY Slip Op 08800, *****08800

1. Family Court had jurisdiction to sustain the petition alleging that respondent husband had willfully violated two temporary orders of protection and issue a final order of protection notwithstanding its dismissal of the related family offense petition filed against respondent. Family Court Act §§846 and 846-a unequivocally grant Family Court jurisdiction and **[****2]** authority to prosecute contempt of its orders, including temporary orders of protection. Further, the statutory text explicitly authorizes the court to enter a new order of protection if a respondent is found to have willfully violated a temporary order of protection (*see* Family Ct Act § 846-a). While section 812 provides Family Court with concurrent jurisdiction over only specified family offenses, and the violation of a temporary order of protection does not necessarily involve a family offense, Family Court Act § 115 (c) states that "[t]he family court has such other jurisdiction as is provided by law." Family Court Act §§846 and 846-a contain no language tying Family Court's authority to impose specific penalties for the willful violation of a temporary order of protection to the court's determination of whether or not the family offense petition should be sustained. Thus, the jurisdiction exercised by Family Court here was consistent both with the statutory text and with the purpose of Family Court Act article 8. Allowing Family Court to retain jurisdiction over violations of temporary court orders entered during the pendency of a family offense proceeding reinforces the goal of protecting victims and preventing domestic violence.

Husband and Wife and Other Domestic Relationships — Order [**3] of Protection — Willful Violation — Requisite Knowledge**

2. The lower courts did not err as a matter of law by concluding that respondent had the requisite knowledge to support a finding that he violated a temporary order of protection issued in relation to petitioner's family offense petition under the following circumstances: several successive extensions of the temporary orders of protection were served on respondent, there were no differences between the terms of the challenged order and the most recent prior order, respondent's attorney was present in court when the order was issued, and each temporary order contained a conspicuous written warning to respondent that a failure to appear in court on the next scheduled date could result in an extension of the order of protection and that the order would therefore remain in force and effect.

Counsel: *Law Offices of Richard L. Herzfeld, P.C.*, New York City (*Richard L. Herzfeld* of counsel), for appellant. I. Petitioner failed to prove a violation of the temporary order of protection. (*Matter of Rivera v Quinones-Rivera*, 15 AD3d 583, 790 NYS2d 209; *Matter of Bah v Bah*, 112 AD3d 921, 978 NYS2d 301; *Matter of Tina T. v Steven U.*, 243 AD2d 863, 663 NYS2d 307; *Mayfair Nursing Home v Neidhardt*, 173 AD2d 794, 571 NYS2d 30; *People v McCowan*, 85 NY2d 985, 652 NE2d 909, 629 NYS2d 163; *Matter of B.H. Children [Robert H.]*, 29 Misc 3d 161, 904 NYS2d 653; *Matter of McGregor v Bacchus*, 54 AD3d 678, 863 NYS2d 260.) II. Absent proof of a family offense for the underlying petition or violations of the temporary orders of protection, the court lacked jurisdiction **[****4]** to impose a final order of protec tion. (*Matter of Silver v Silver*, 36 NY2d 324, 327 NE2d 816, 367 NYS2d 777; *Matter of Autar v Karim-Singh*, 144 AD3d 676, 40 NYS3d 482; *Matter of Mary C. v Anthony C.*, 61 AD3d 682, 877 NYS2d 366; *Matter of Steinhilper v Decker*, 35 AD3d 1101, 827 NYS2d 738; *Financial Indus. Regulatory Auth., Inc. v Fiero*, 10 NY3d 12, 882 NE2d 879, 853 NYS2d 267.)

Law Offices of Randall S. Carmel, P.C., Jericho (*Randall S. Carmel* of counsel), for respondent. I. The appellant violated the temporary orders of protection, dated November 20, 2013, and April 3, 2014, where he had actual notice of the terms of each order and willfully contacted the respondent in manners that were expressly prohibited by the temporary orders of protection. (*Matter of Andrews v Mouzon*, 80 AD3d 761, 915 NYS2d 604; *Matter of Rolon v Medina*, 56 AD3d 676, 868 NYS2d 226; *Matter of Winslow v Lott*, 272 AD2d 406, 707 NYS2d 481; *Matter of Janice M. v Terrance J.*, 96 AD3d 482, 945 NYS2d 693; *Matter of Melind M. v Joseph P.*, 95 AD3d 553, 944 NYS2d 82; *Matter of Everett C. v Oneida P.*, 61 AD3d 489, 878 NYS2d 301; *Matter of Lynn TT. v Joseph O.*, 129 AD3d 1129, 10 NYS3d 702.) II. The Family Court appropriately issued a final order of protection against the appellant based on the appellant's violation of temporary orders of protection even though the Family Court found that the appellant's offensive conduct did not constitute family offenses. (*Matter of Molloy v Molloy*, 137 AD3d 47, 24 NYS3d 333; *Anita W. v Rohan W.*, 13 Misc 3d 1224[A], 831 NYS2d 346, 2006 NY Slip Op 51965[U]; *Matter of Anderson v Anderson*, 25 AD2d 512, 267 NYS2d 75; *Kuenen v Kuenen*, 122 AD2d 616, 504 NYS2d 937; *Matter of Mary C. v Anthony C.*, 61 AD3d 682, 877 NYS2d 366; *Matter of Steinhilper v Decker*, 35 AD3d 1101, 827 NYS2d 738; *Matter of Rachel L. v Abraham L.*, 37 AD3d 720, 831 NYS2d 218; *Matter of V.C. v H.C.*, 257 A.D.2d 27, 689 NYS2d 447.)

30 N.Y.3d 548, *548; 91 N.E.3d 1215, **1215; 69 N.Y.S.3d 236, ***236; 2017 N.Y. LEXIS 3778, ****4; 2017 NY Slip Op 08800, *****08800

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

Opinion by: STEIN

Opinion

[*237] [**1216] [*550]** Stein, J.

Petitioner Lisa T. filed a family offense petition against respondent King E.T., who is her husband and the father of her child. Petitioner requested and received a temporary **[2]** order of protection, ex parte, at her first appearance in Family Court. The temporary order of protection directed respondent to refrain **[****5]** from all communications with petitioner except those relating to visitation arrangements and emergencies **[**1217] [***238]** regarding the child. It is undisputed that respondent was served with, and had knowledge of, this order. Throughout a series of subsequent court appearances concerning the family offense petition—at which respondent was present with one exception—the temporary order of protection was extended. While the family offense proceeding remained pending, petitioner filed two violation petitions, later consolidated into a single petition, **[*551]** alleging that respondent had contacted her in contravention of the temporary orders of protection.

Family Court held a combined hearing on the family offense and consolidated violation petitions. As relevant here, Family Court determined that petitioner had presented insufficient evidence to sustain the family offense petition, but that she had proved respondent's willful violations of two temporary orders through email communications unrelated to the child's visitation or any emergency. Accordingly, Family Court dismissed the family offense petition, but sustained the violation petition and issued a one-year final order of protection precluding respondent **[****6]** from, among other things, communicating with petitioner except as necessary to make arrangements for respondent's visitation with the child.

Upon respondent's appeal, the Appellate Division affirmed, with one Justice dissenting (147 AD3d 670, 48 NYS3d 119 [1st Dept 2017]). The dissenting Justice would have held that Family Court lacked jurisdiction to issue a final order of protection because the family offense petition had been dismissed (147 AD3d at 675). Thereafter, the Appellate Division certified to this Court the question of whether its order was properly made.

Respondent first argues that Family Court lacked jurisdiction to enter a final order of protection upon its finding that he violated the temporary orders of protection, absent a determination that either the conduct alleged in the original family offense petition or the conduct that comprised the violation of the temporary orders of protection constituted the commission of a family offense. We reject respondent's proposed limitation on Family Court's jurisdiction, inasmuch as it contradicts the plain language of the relevant Family Court Act provisions.

It is well established that ***HN1***[] "Family Court is a court of limited jurisdiction, constrained to exercise only those powers granted **[****7]** to it by the State Constitution or by statute" (*Matter of H.M. v E.T.*, 14 NY3d 521, 526, 930 NE2d 206, 904 NYS2d 285 [2010]; *see Matter of Johna M.S. v Russell E.S.*, 10 NY3d 364, 366, 889 NE2d 471, 859 NYS2d 594 [2008]). ***HN2***[] In accordance with the Constitution (NY Const, art VI, § 13), the Family Court Act provides that court with concurrent jurisdiction (shared with the criminal courts) over "family offenses" (Family Ct Act § 812 [1]). The statutory procedures concerning family offenses are set forth in article 8 of the Family Court Act, and section 812 enumerates the crimes which, if committed between persons in specified relationships, constitute family offenses (*see id.*). ***HN3***[] A family offense proceeding is commenced by the filing of a petition **[*552]** alleging the **[3]** commission of a family offense between parties with the requisite familial relationship, and the petition typically seeks an order of protection (*see id.* § 821). We have explained that "[t]he purpose of [article 8 is] to remove in the first instance from the criminal courts a limited class of offenses arising in the family milieu, in order to permit a more ameliorative and mediative role by the Family Court" (*People v Williams*, 24 NY2d 274, 278, **[***239] [**1218]** 248 NE2d 8, 300 NYS2d 89 [1969]).

HN4[] Upon the filing of a family offense petition, the court may, for good cause shown, issue a temporary order of protection in favor of the petitioner and against the respondent (*see* Family Ct Act §§ 821-a [2] [b]; 828). A temporary order of protection "is not a finding of wrongdoing" (*id.* § 828 [2]). Nevertheless, it is an order of the court **[****8]** and, pursuant to Family Court Act § 846, in the event of a violation, a new petition may be filed alleging "that the respondent has failed to obey a lawful order" of the court. Family Court may hear the

violation petition itself and either "take such action as is authorized under this article; or . . . determine whether such violation constitutes contempt of court, and transfer the allegations of criminal conduct constituting such violation to the district attorney for prosecution . . . ; or . . . transfer the entire proceeding to the criminal court" (*id.* § 846 [b] [ii] [A]-[C]). ***HN5***[↑] When Family Court retains jurisdiction over a violation petition, section 846-a—entitled "Powers on failure to obey order"—sets forth the dispositions available to the court upon a finding of a willful violation. Specifically, "[i]f a respondent is brought before the court for failure to obey *any lawful order issued under this article* or an order of protection or *temporary order of protection issued pursuant to this act*," and it is proved that the respondent willfully violated such an order, the court may, among other things, "modify an existing order or temporary order of protection to add reasonable conditions of behavior to the existing order, *make a new order* ***[****9]*** *of protection* in accordance with section [842] of this part, . . . [or] may commit the respondent to jail for a term not to exceed six months" (*id.* § 846-a [emphasis added]).

It is fundamental that, ***HN6***[↑] because "the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583, 696 NE2d 978, 673 NYS2d 966 [1998]; *see People v Golo*, 26 NY3d 358, 361, 23 NYS3d 110, 44 NE3d 185 [2015]). ***HN7***[↑] Family Court Act §§ 846 and 846-a unequivocally grant Family Court jurisdiction **[*553]** and authority to prosecute contempt of its orders, including temporary orders of protection (**see** *People v Wood*, 95 NY2d 509, 514, 742 NE2d 114, 719 NYS2d 639 [2000]). Further, the statutory text explicitly authorizes the court to enter a new order of protection if a respondent is found to have willfully violated a temporary order of protection (*see* Family Ct Act § 846-a).

Nevertheless, respondent argues, and the dissent agrees, that the court's authority to enter a new order of protection under Family Court Act § 846-a upon the violation of a temporary order of protection may not be exercised where the original family offense petition has been dismissed and the conduct underlying the violation does not constitute a family offense. **[4]** Respondent maintains that dismissal of the family offense petition deprives the court of further jurisdiction. We disagree. ***HN8***[↑] While **[****10]** section 812 provides Family Court with concurrent jurisdiction over only specified family offenses, and the violation of a temporary order of protection does not necessarily involve a family offense, section 115 (c) of the Family Court Act states that "[t]he family court has such other jurisdiction as is provided by law." The plain language of sections 846 and 846-a supply the essential statutory jurisdiction here.

[*240]** **[**1219]** ***HN9***[↑] Family Court Act §§ 846 and 846-a contain no language tying Family Court's authority to impose specific penalties for the willful violation of a temporary order of protection to the court's determination of whether or not the family offense petition, itself, should be sustained (*see generally People v Finnegan*, 85 NY2d 53, 58, 647 NE2d 758, 623 NYS2d 546 [1995] [courts should not read words into a statute and "courts are not to legislate under the guise of interpretation"]; McKinney's Cons Laws of NY, Book 1, Statutes § 74). Significantly, there is no basis in the statutory text upon which we may draw any distinction between Family Court's jurisdiction over violations of final orders of protection entered after a finding of a family offense, on the one hand, and violations of temporary orders of protection entered during the pendency of the family offense proceeding, on the other. Further, the statutory scheme makes clear that conduct **[****11]** constituting a violation of the order of protection need not necessarily constitute a separate family offense in order for the court to have jurisdiction over the violation. Indeed, section 846-a contains no such requirement.

The dissent contends that ***HN10***[↑] the reference in Family Court Act § 846-a to section 842—which, in turn, references section 841—implicitly incorporates a limitation that a final order of protection **[*554]** may be entered only after a finding that a family offense was committed (*see* dissenting op at 560). Section 842 sets forth the terms, conditions, and durations of orders of protection entered pursuant to article 8. Notably, while section 842 references orders issued pursuant to section 841—which governs the disposition of family offense petitions—section 846-a does not contain any such reference to section 841. Thus, on its face, section 846-a incorporates only that which is set forth in section 842 with regard to the terms and conditions of the order of protection entered upon a finding of a violation. This is evidenced by the fact that section 846-a expressly includes violations of temporary orders without drawing any distinction between temporary and final orders; the inclusion of temporary orders would be nonsensical if section 846-a applied only to those orders of protection entered upon a disposition under section 841 (*see Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95,

104, 761 NE2d 1018, 736 NYS2d 291 [2001] ["meaning and effect **[****12]** should be given to every word of a statute"]). Contrary to the dissent's assertion, our reading gives effect to, and does not render superfluous, the reference to Family Court Act § 842 found in **[5]** section 846-a, whereas the dissent's reading strains the plain language of that statutory provision.[1]

HN12[↑] To be sure, where the court concludes that the allegations of the petition charging respondent with a family offense are not established, it must dismiss the family offense petition (*see* Family Court Act § 841 [a]). However, this does not compel the conclusion that a pending petition alleging the violation of a temporary order of protection must also be dismissed. As noted, the family offense and violation petitions **[**1220]** **[***241]** are authorized by different statutory provisions (*see id.* §§ 821, 846, 846-a). Once Family Court obtains jurisdiction over the parties by virtue of a petition facially alleging a family offense, the court may issue a temporary order of protection (*see* Family Ct Act §§ 821-a [2] [b]; 828). A violation of that temporary order of protection is a separate matter over which sections 846 and 846-a give Family **[*555]** Court authority to act, including the authority to issue a final order of protection.[2]

The jurisdiction exercised by Family Court here is consistent both with the **[6]** statutory text and with the purpose **[****13]** of article 8 of the Family Court Act. ***HN15***[↑] Allowing Family Court to retain jurisdiction over violations of temporary court orders entered during the pendency of a family offense proceeding reinforces the goal of protecting victims and preventing domestic violence. Although, in some circumstances, the primary harm resulting from a violation of a temporary order of protection may be directed at the court whose authority has been thwarted, there is generally also harm to the person who has been contacted in violation of the order.[3]

Further, permitting Family Court to enter an order of protection is consistent with the dispositions available should the matter proceed, instead, to criminal court (*see generally* Penal Law §§ 215.50 [3]; 215.51; CPL 530.12 [5]; 530.13 [4]). Thus, the statutory language permitting the entry of an order of protection upon a violation of a temporary order is consonant with the legislative goal of achieving resolution of intra-family disputes in Family Court without the need to resort to the criminal forum, where harsher sanctions—such as lengthier incarceration periods—may be imposed for criminal contempt (*see Williams*, 24 NY2d at 278).[4]

[*556] The dissent postulates that it was not the

[1] The dissent posits that Family Court may enter an order of protection upon a violation petition if the underlying conduct constitutes a new family offense, but that the court otherwise may not utilize such a sanction for a mere violation. Significantly, no such distinction can be found in the plain language of the relevant statutes. ***HN11***[↑] Section 846-a does not require the court to make a finding as to whether a new family offense has occurred as a prerequisite to finding and sanctioning a violation of a temporary order of protection (*see* Family Ct Act § 846-a). Moreover, the plain language of section 841 does not address family offense findings made on violation petitions.

[2] The dissent's reference to Judiciary Law § 753 is inapt. ***HN13***[↑] Insofar as Family Court Act §§ 846 and 846-a specifically provide for punishments and remedies for violations of temporary and final orders of protection issued pursuant to article 8, resort to the Judiciary Law is unwarranted and inappropriate (*see* ***HN14***[↑] Family Ct Act § 156 [the Judiciary Law shall apply "unless a specific punishment or other remedy for such violation is provided in this act or any other law"]; Merril Sobie, Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 156 at 123 [2008 ed] ["The court is always bound by a specific section of a substantive Family Court Act article as opposed to Section 156. In other words, this section is the default option, available only in the relatively rare event that a different remedy has not been legislated"]).

[3] For example, a protected party may have reasonable safety fears insofar as a respondent's violation of an order of protection reflects an inability or unwillingness to abide by the court's authority and refrain from prohibited contact. Moreover, such conduct may give the court reason to believe that extended limitation of the contact between the parties is the appropriate sanction for violating the court's prior order of protection.

[4] Notably, the act of disobeying the order in and of itself—regardless of whether it amounts to a family offense—constitutes criminal contempt in the second degree (*see* Penal Law § 215.50 [3] [criminalizing "(i)ntentional disobedience or resistance to the lawful process or other mandate of a court"]). Furthermore, to the extent the dissent claims that it is "inconceivable" that violations of article 8 temporary orders of protection would be prosecuted in criminal court if Family Court lacked authority to issue an order of protection as a violation sanction (dissenting op at 562 n 3), this claim is both unsupported and, significantly, minimizes the seriousness of a respondent's demonstrated willingness to repeatedly ignore temporary orders of protection by directing disparaging and potentially harassing communications to the protected party. .

intention of the legislature to permit Family Court to enter orders of **[**1221]** protection as a sanction **[****14]** for violations of **[***242]** temporary orders of **[7]** protection when it enacted the 2013 amendments to article 8 of the Family Court Act. This is mere speculation, at best, insofar as the amendments were unquestionably intended to strengthen Family Court's authority and ability to prevent domestic violence and the escalation of conflicts among family members (*see* Senate Introducer's Mem in Support, Bill Jacket, L 2013, ch 1 at 9). Our plain reading of the statute is consistent with that stated legislative intent. In any event, ***HN16***[↑] the best evidence of the legislative intent is the plain language of the text chosen by the legislature which, as already discussed, unambiguously authorizes the imposition of orders of protection for violations of temporary orders of protection (*see Majewski*, 91 NY2d at 583). If, however, the wording of the statute has created an "unintended consequence," as the dissent suggests, it is the prerogative of the legislature, not this Court, to correct it (*Golo*, 26 NY3d at 362).

We further reject respondent's challenge to Family Court's finding that he violated the temporary order of protection issued on November 20, 2013. Several successive extensions of the temporary orders of protection were served on respondent, there were no differences between the **[****15]** terms of the challenged order and the most recent prior order, respondent's attorney was present in court when the order in question was issued, and each temporary order contained a conspicuous written warning to respondent that a failure to appear in court on the next scheduled date may result in an extension of the order of protection and that the order would therefore remain in force and effect. Under these circumstances, the courts below did not err as a matter of law by concluding that respondent had the requisite knowledge to support a finding that he violated the order in question (*see generally McCain v Dinkins*, 84 NY2d 216, 226, 639 NE2d 1132, 616 NYS2d 335 [1994]; *Matter of McCormick v Axelrod*, 59 NY2d 574, 583, 453 NE2d 508, 466 NYS2d 279 [1983], *amended* 60 NY2d 652, 454 NE2d 1314, 467 NYS2d 571 [1983]; *People ex* ***[*557]*** *rel. Stearns v Marr*, 181 NY 463, 470, 74 NE 431, 34 Civ Proc R 300 [1905]). Respondent's remaining contentions lack merit.

For the foregoing reasons, we hold that Family Court properly found that respondent willfully violated two temporary orders of protection issued during the pendency of the family offense proceeding and that the court acted within its jurisdiction to enter an order of protection upon those findings. Accordingly, the order of the Appellate Division should be affirmed, without costs, and the certified question answered in the affirmative.

Dissent by: WILSON

Dissent

Wilson, J.(dissenting):

I would reverse the Appellate Division order. Family Court dismissed **[****16]** the family offense petition, concluding that no family offense had been committed and the alleged violation of the temporary order of protection was not a family offense. In such a circumstance, Family Court lacks the authority to issue a final order of protection as a sanction for violation of a temporary order of protection.

King E.T. and Lisa T. were married and have a son. The couple's relationship disintegrated rapidly. Family Court noted that "for nearly all of [their son's] young life, the parties have been embroiled in a multitude of bitter legal disputes: first in New Jersey, and now **[8]** in New York. In fact, in New York alone, the parties have filed 24 family offense, custody, and violation petitions since December 2012." **[**1222]** When King E.T. obtained an ex parte order **[***243]** from a New Jersey court requiring Lisa T. to deliver their son to him within 24 hours, Lisa T. did not immediately comply. King E.T. sent emails to Lisa T. accusing her of lying, not responding, and neglecting their son. Based on those emails, Lisa T. filed the underlying family offense petition in New York against King E.T., alleging that he committed several designated family offenses—including aggravated harassment **[****17]** in the second degree, harassment in the first or second degree, menacing in the second or third degree and stalking. She obtained a series of temporary orders of protection—the first of which was issued ex parte—which were extended upon the same terms at each successive court appearance. As the majority notes, those preprinted form temporary protective orders contained an additional provision broadly barring King E.T. from communicating with Lisa T., but permitting him to contact her concerning "visitation arrangements."

Lisa T. filed a violation petition alleging that King E.T. failed to obey the temporary order of the court by sending her additional **[*558]** emails unrelated to emergency matters or visitation. She did not file a new

family offense petition in connection with the conduct at issue. After a hearing on both petitions, Family Court determined that the original emails forming the basis for Lisa T.'s complaint did not constitute a family offense, and dismissed the family offense petition. The court characterized Lisa T.'s testimony as "vague, at times unresponsive, and . . . wholly unconvincing." However, Family Court found that two subsequent emails sent by King E.T. to Lisa T., **[****18]** which were the subject of the violation petition, violated the provision of the temporary order of protection as to the permissible content of emails. The first, which Family Court concluded "started out with a legitimate purpose," also reflected King E.T.'s concern that Lisa T. was abusing their son. The second email was in part insulting as to Lisa T.'s parenting skills, while also demanding that their son maintain his telephone visitation with King E.T. at the appointed times. Concluding that those two emails violated the provision of the temporary order of protection as to the permissible content of emails, Family Court entered an order of protection barring King E.T. from any communication with Lisa T. "except as necessary to arrange visitation" and from "assault, stalking, harassment, aggravated harassment, menacing, reckless endangerment, strangulation, criminal obstruction of breathing or circulation, disorderly conduct, criminal mischief, sexual abuse, sexual misconduct, forcible touching, intimidation, threats, identity theft, grand larceny, coercion or any criminal offense against" Lisa T. Thus, even though Family Court determined that King E.T. committed no family offense, **[****19]** it issued an order of protection of the kind that issues only upon proof of a family offense.

The majority correctly notes that Family Court "is a court of limited jurisdiction, constrained to exercise only those powers granted to it by the State Constitution or by statute" (majority op at 551). The majority also notes that Family Court's jurisdiction, which is concurrent **[9]** with the criminal court, extends only to statutorily-defined family offenses, and that here, the Family Court determined that King E.T. had not committed a family offense. However, the Family Court does have the authority to issue sanctions for violations of its own temporary orders of protection in a separate proceeding. In holding that "[t]he plain language of sections 846 and 846-a supply the essential statutory jurisdiction here," (majority op at 553) the **[**1223]** majority has, in fact, contravened the plain **[***244]** language of the Family Court **[*559]** Act and confused the court's statutory jurisdiction to issue an order of protection with its authority to impose a specific sanction for a violation of a court order.

As the majority notes, "[a] temporary order of protection 'is not a finding of wrongdoing,' " (majority op at 552, quoting Family Ct Act § 828 [2]), and therefore **[****20]** may issue even if the alleged family offense is determined to be baseless. Committing a designated family offense is the equivalent of committing the offenses defined in the Penal Law (*see* Family Ct Act § 812; CPL 530.11 [criminal contempt is not a family offense]). Violating a temporary order of protection by conduct that does not constitute a family offense is an affront to the court's authority, and is subject to sanction. It is a fundamentally different matter from offending conduct that constitutes a new family offense. The majority appears to recognize the incongruity of issuing an order of protection as a sanction for disobeying a court order based on nonthreatening speech set forth in an email, acknowledging that such a result may be an "unintended consequence" (majority op at 556). However, the plain language of the Family Court Act shows that the intended consequence is precisely the opposite of what the majority holds today.

Section 846-a, which specifies Family Court's "[p]owers on failure to obey order[s]," provides:

> "If a respondent is brought before the court for failure to obey any lawful order issued under this article or an order of protection or temporary order of protection issued pursuant to this act . . **[****21]** . and if, after hearing, the court is satisfied by competent proof that the respondent has willfully failed to obey any such order, the court may modify an existing order or temporary order of protection to add reasonable conditions of behavior to the existing order, make a new order of protection *in accordance with section [842] of this part*, may order the forfeiture of bail in a manner consistent with article [540] of the criminal procedure law if bail has been ordered pursuant to this act, may order the respondent to pay the petitioner's reasonable and necessary counsel fees in connection with the violation petition where the court finds that the violation of its order was willful, and may commit the respondent to jail for **[10]** a term not to exceed six months"(§ 846-a [emphasis added]).

[*560] If the majority's interpretation were correct, the italicized language would be utterly superfluous; we construe statutes to give "effect and meaning . . . to the entire statute and every part and word thereof" (*Friedman v Connecticut Gen. Life Ins. Co.*, 9 NY3d

105, 115, 877 NE2d 281, 846 NYS2d 64 [2007]).

Section 846-a provides the Family Court with various remedies when faced with a violation of any lawful order issued under article 8, or an order of protection or— as here—a temporary order of protection. However, the statutory **[****22]** language is quite clear that among the remedies, only "mak[ing] a new order of protection" is subject to the qualifier, "in accordance with section [842]." Section 842 itself begins with a limiting construction confining its reach to "order[s] of protection under section [841] of this part."

Section 841, in turn, sets forth the orders of disposition that family court may issue, and includes an order of protection as one such option. The others listed are, "dismissing the petition, if the allegations of the petition are not established," suspending **[**1224]** judgment, probation, and directing **[***245]** restitution. Thus, implementing section 846-a's requirement that, if Family Court intends to make a new order of protection as a sanction, it must do so in compliance with section 842, which in turn incorporates section 841 (d), means that Family Court cannot issue a new order of protection unless there has been a family offense. If, as here, there has been no family offense, the court may redress the offense to its authority by bail forfeiture, attorney's fees or jail time.

I agree with the majority that the Family Court Act provides that the violation of the temporary order of protection is a separate matter, distinct from the dismissal of the petition in which a family offense was alleged. **[****23]** Clearly, if the violation of the temporary order of protection provided a basis for a new family offense petition or prosecution in the criminal court for new crimes, a different path would have been taken to seek measures available for the protection of the petitioner. This fact supports the legislative determination that a new order of protection can issue only when a family offense has been proved. The Family Court Act provides one set of remedies for family offenses, and another for violations of court orders. In response to a proper petition alleging a family offense, the court may (i) dismiss the petition; (ii) suspend judgment; (iii) order probation, which may include education programming or drug and alcohol counseling; (iv) make an order of protection; **[*561]** or (v) order payment of restitution (Family Ct Act § 841). In contrast, a civil finding of contempt may result in jail time or fines, attorney's fees, or bail forfeiture (*see* Judiciary Law § 753; Family Ct Act § 846-a). By disregarding the meaning of sections 842 and 841 in its reading of section 846-a, the majority is undoing this clearly intended separation.

When Family Court determines that the defendant has not committed a family **[11]** offense, issuance of an order of protection to vindicate the court's authority **[****24]** is inappropriate. Instead, Family Court should utilize its contempt powers provided by the remaining sanctions under 846-a (bail forfeiture, attorney's fees or jail time)[5]. The judiciary law addresses the "[p]ower of courts to punish for civil contempts" and provides that "[a] court of record [such as family court] has power to punish, by fine and imprisonment, or either" (Judiciary Law § 753 [A]).

Embroiled in an ugly custody battle, King E.T. sent two intemperate and perhaps baseless emails. Family Court held that his conduct did not constitute a family offense,[6] yet subjected him to a one-year order of protection forbidding, inter alia, strangulation, sexual **[****25]** abuse and identity theft. The majority obliquely addresses this odd result, writing: "[a]lthough, in some circumstances, the primary harm resulting from a violation of a temporary order of protection **[**1225]** may be directed at the court whose **[***246]** authority has been thwarted, there is generally also harm to the person who has been contacted in violation of the order" (majority op at 555). The dismissal of Lisa T.'s family offense petition means that Family Court found that she suffered no legally-defined injury—at least none within Family Court's jurisdiction. The instant violation petition failed to allege any family offense occurred. The cognizable injury here is not to Lisa T., but solely to the court's authority. The majority's **[*562]** interpretation is

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[5] Section 156 of the Family Court Act provides:

> "The provisions of the judiciary law relating to civil and criminal contempts shall apply to the family court in any proceeding in which it has jurisdiction under this act or any other law, and a violation of an order of the family court in any such proceeding which directs a party, person, association, agency, institution, partnership or corporation to do an act or refrain from doing an act shall be punishable under such provisions of the judiciary law, unless a specific punishment or other remedy for such violation is provided in this act or any other law."

[6] Indeed, Family Court observed that mere speech cannot be penalized unless the words themselves "present[ ] a clear and present danger of some serious substantive evil" (*see People v Golb*, 23 NY3d 455, 467, 991 NYS2d 792, 15 NE3d 805 [2014]; *People v Dietze*, 75 NY2d 47, 52, 549 NE2d 1166, 550 NYS2d 595 [1989]).

not just incompatible with the statutory language, but also with the wrong sought to be addressed through a contempt finding. The issuance of an order of protection entails substantial legal consequences unrelated to any affront to the court (*see e.g. Matter of Veronica P. v Radcliff A.*, 24 NY3d 668, 3 NYS3d 288, 26 NE3d 1143 [2015])[7].

Finally, before 2013, while the Judiciary Law would have allowed the Family Court to do so, section 846-a did not authorize any sanctions for violations of temporary orders of protection. It is beyond dispute, **[****26]** then, that before the 2013 amendment, Family Court could not have entered an order of protection as a sanction for the violation of a temporary order. When, in 2013, the legislature amended section 846-a to include the words, "or temporary order of protection," it did so to ensure that a violation of a temporary order of protection would allow the court to "revoke [a] license [to carry a firearm] and . . . arrange for the immediate surrender" of any firearms held in possession by the party that violated the temporary order of protection (Family Ct Act § 846-a; *see* Letter to the Legislature from Counsel to the Governor, Jan. 14, 2013, Bill Jacket, L 2013, ch 1 at 5-6). There is no suggestion whatsoever in the legislative history that the amendment was enacted to permit Family Court to do what it did here: enter an order of protection as if King E.T. had been adjudged guilty of a family offense, when he was not. Family Court has sufficient tools to address contempt; the legislature did not, by amending section 846-a, enhance those; and we should not do so here by eliding statutory language and conflating injury to litigants with injury to the authority of the courts.

For the above reasons, I dissent.

[*563] Judges Rivera, Fahey, Garcia and **[****27]** Feinman concur; Judge Wilson dissents in an opinion, in which Chief Judge DiFiore concurs.

Order affirmed, without costs, and certified question answered in the affirmative.

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[7] The majority's argument that, were Family Court unable to issue an order of protection as a sanction even when no family offense has been proved, a defendant might wind up in criminal court, is a bugaboo. Since 1994, the legislature has made it evident that very serious domestic violence offenses should be prosecuted in criminal court. To this end, the legislature has reserved certain grave offenses for criminal court's jurisdiction by excluding them from the definition of family offense. Here, petitioner's allegations of family offenses fell within the concurrent jurisdiction of the two courts, and Lisa T. elected to proceed to Family Court, seeking an order of protection in connection with the family offense petition. Where the Family Court found upon a dispositional hearing that no family offense occurred in the matter, it is inconceivable that the statutory limitation on the ability to issue a final order of protection under these circumstances would prompt the Family Court to transfer the contempt violation to criminal court.

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McNerney v. Geneva

Court of Appeals of New York

April 19, 1943, Argued ; June 18, 1943, Decided

No Number in Original

Reporter
290 N.Y. 505 *; 49 N.E.2d 986 **; 1943 N.Y. LEXIS 1070 ***

In the Matter of Jeremiah McNerney et al., on Behalf of Themselves and Other Members of the Police Department of the City of Geneva Who Join in the Proceeding, Appellants and Respondents, v. City of Geneva et al., Respondents and Appellants

Prior History: [*1]** Cross-appeals from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 7, 1941, which modified, on the law and facts, and affirmed as modified, an order of the court at Special Term (Miles, J.) made in a proceeding under article 78 of the Civil Practice Act, directing the defendant Walter F. Foreman, as Treasurer of the City of Geneva and as Treasurer of the Police Pension Fund of such city and the defendants Vernon Alexander, Alfred C. Paull and Frank W. Reagen, constituting the Board of Trustees of said pension fund, forthwith to certify to the Comptroller of the State of New York, representing the New York State Employees' Retirement System, that the sum of money comprising the total fund of the Geneva Police Pension Fund, created for the benefit of the Police Department of the City of Geneva by chapter 391 of the Laws of 1911, was the amount of $ 91,326.82 as of March 15, 1940. The order also directed that such defendants certify that the whole sum of $ 91,326.82 now represents, and did represent on March 15, 1940, accumulated contributions of the members of the Police Department of the City of Geneva. It further directed **[***2]** these defendants to certify the relative shares of the members in such sum of $ 91,326.82, transferred as of March 15, 1940, so that each petitioner and member of the pension fund shall be given such proportionate share of the $ 91,326.82 as the amount deducted from his salary bears to $ 7,865.23, the total amount deducted from the salaries of the members of the Police Department and certified as being accumulated contributions of the members of the system as of March 15, 1940. In addition the order directed that the State Comptroller accept such certification. The modification consisted of striking out the figures "$ 91,326.82" from the last three places in which they appear in the ordering paragraph of the Special Term order, and inserting in place thereof the total of the moneys in the pension fund derived from the following sources as accumulated contributions of the members of the police force: (1) Deductions from the salaries of present and former members of the police force; (2) Rewards paid to the police force or to the members thereof; (3) Proceeds of benefit entertainments given by the police force, and (4) Interest received by the City on the above items. The petitioners **[***3]** appeal from the whole of such order of modification. The respondents appeal from so much thereof as directed that there be inserted in place of the figures $ 91,326.82 in the ordering paragraph of the order of Special Term, the total of the moneys in the pension fund derived from the sources enumerated in the order of modification, as accumulated contributions of the members of the police force.

Matter of McNerney v. *City of Geneva*, 261 App. Div. 754.

Disposition: Orders reversed, etc.

Core Terms

pension fund, accumulated contributions, retirement system, pension, police force

Case Summary

Procedural Posture
Petitioner, members of the city police department, and respondent fiscal officers appealed an order of the Appellate Division of the Supreme Court in the fourth judicial department (New York) that affirmed as modified an order of the trial court requiring the fiscal officers to certify the full amount of the former local police pension but to not include moneys used for general purposes of the city.

Overview

The members of the city police department brought a proceeding under N.Y. Civ. Prac. Acts § 78 against the fiscal officers who had managed the police pension fund prior to March 15, 1940, the date on which the members were admitted to the New York State Employees' Retirement System. As of that date, the police pension fund amounted to $ 91,326.82. The fiscal officers certified that out of that total remaining in the pension fund on March 15, 1940, the sum of $ 7,865.23 represented the accumulated contributions of the members. The members sought to compel the fiscal officers to certify the full amount of the pension fund on March 15, 1940 as the sum of such accumulated contributions. The trial court ordered the certification. On appeal by the fiscal officers, the appellate division modified the trial court's order so as to not to include moneys used for general purposes of the city. The court reversed and ruled that the fraction of the police pension fund which had its source in the salaries of those who were participators on March 15, 1940, was then the whole of the accumulated contributions of the members within the scope and meaning of that phrase in N.Y. Civ. Serv. Law § 76.

Outcome

The court reversed the orders that required the fiscal officers to certify the full amount of the former local police pension but not including moneys used for general purposes of the city and remitted the matter for further disposition.

LexisNexis® Headnotes

Governments > State & Territorial Governments > Employees & Officials

Pensions & Benefits Law > Governmental Employees > Police Pensions

Pensions & Benefits Law > Governmental Employees > State Pensions

Pensions & Benefits Law > Governmental Employees > General Overview

HN1 **Employees & Officials**

N.Y. Civ. Serv. Law § 76 provides: Any cash and securities to the credit of the local pension system shall be transferred to the New York state employees' retirement system as of the date of the approval. The trustees or other administrative head of the local pension system as of the date of the approval, shall certify the proportion, if any, of the funds of the system that represents the accumulated contributions of the members, and the relative shares of the members as of that date. Such shares shall be credited to the respective annuity savings accounts of such members in the New York state employees' retirement system. The balance of the funds transferred to the New York state employees' retirement system shall be offset against the accrued liability before determining the special deficiency contribution to be paid by the locality as provided by N.Y. Civ. Serv. Law § 78. The operation of the local pension system shall be discontinued as of the date of the approval.

Governments > Local Governments > Finance

Pensions & Benefits Law > Governmental Employees > Municipal Pensions

Pensions & Benefits Law > Governmental Employees > Police Pensions

Labor & Employment Law > Wage & Hour Laws > Assignments & Deductions

Pensions & Benefits Law > Governmental Employees > General Overview

Pensions & Benefits Law > Governmental Employees > State Pensions

HN2 **Finance**

In New York statutes regulating the retirement benefits of civil employees, the word "contributions" has uniformly been used to signify sums deducted from the pay of an employee for transference to his "annuity"; the extra public commitment to the employee has been described as his "pension"; and such "annuity" plus such "pension" has been called the "retirement allowance." N.Y. Civ. Serv. Law §§ 50(11), (12), (15), (16), (17); N.Y. Educ. Law §§ 1100(10), (12), (13), (14); City of New York, N.Y., Administrative Code §§ B3-1.0 (13), (14), (15) (N.Y. Laws 1937 ch. 929).

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Governments > Legislation > Interpretation

HN3[] **Interpretation**

The power of extending the meaning of a statute beyond its words, and deciding by the equity, and not the language, approaches so near the power of legislation, that a wise judiciary will exercise it with reluctance and only in extraordinary cases.

Headnotes/Summary

Headnotes

Civil service -- composition of "accumulated contributions" of members of local retirement system which must be credited to their annuity accounts when admitted to State system (Civil Service Law, § 76) -- police pension fund of City of Geneva arose from salary deductions, other sources, and interest; respondents certified that only the salary deductions of present members were within definition; Special Term directed that they certify whole fund; Appellate Division reduced certification to salary deductions of present and past members, certain other sources, and interest -- word "contributions" includes only salary deductions of present members with interest thereon.

Syllabus

1. Section 76 **[***4]** of the Civil Service Law provides in effect that when members of a local police force are admitted to the State Employees' Retirement System, any cash to the credit of the local pension system as of the date of the approval of the admission shall be transferred to the State system and the relative shares of the members of "the proportion, if any, of the funds of the system that represents the accumulated contributions of the members" shall be credited to "the respective annuity savings accounts" of such members in the State system and the balance of the funds transferred shall be offset against the accrued liability in determining the deficiency contribution to be paid by the locality. The police pension fund of the City of Geneva as of the date of the approval was made up of deductions from police salaries, rewards, proceeds of benefits, court fees, bail forfeitures, dog license fees, fines, recompense for the care of insane persons, liquor taxes and interest. Respondents, trustees of the local system, certified in substance that only the amount derived from deductions from salaries of the members of the department as constituted on that date represented "the accumulated contributions **[***5]** of the members." Petitioners, members of the Police Department, brought this proceeding to compel respondents to certify the full amount, and the Special Term so ordered. On appeal by respondents, the Appellate Division held that the deductions from the salaries of present and former members of the department, the rewards, the proceeds of benefits and the interest received on those items should be certified as such accumulated contributions. This was error.

2. The fraction of the fund which had its source in the salaries of those who were participators on the date of the approval (with the interest thereon) was then the whole of "the accumulated contributions of the members" within section 76 of the Civil Service Law. In the statutes of the State regulating the retirement benefits of civil employees, the word "contributions" has uniformly been used to signify sums deducted from the pay of an employee for transference to his "annuity."

Counsel: *Thomas J. Cleere* for petitioners, appellants and respondents. The demand of the petitioners that the entire fund of $ 91,326.82 be recertified as being their accumulated contributions in the State system, is just and fair. It imposes no **[***6]** hardship upon the city. It is of benefit to the municipality and the taxpayers. The certification of the fund as requested by petitioners would give to them moneys which were derived from their own efforts or donated for their sole benefit and consecrated to their sole use. (*Matter of Harrington* v. *City of Lockport*, 235 App. Div. 895; *Matter of Mahon* v. *Board of Education*, 171 N. Y. 263; *Fox* v. *Mohawk & H. R. Humane Society*, 165 N. Y. 517; *People* v. *President & Trustees of Village of Ossining*, 238 App. Div. 684, 264 N. Y. 574; *People* v. *City of Yonkers*, 177 Misc. 406; *Matter of O'Brien* v. *Tremaine*, 285 N. Y. 233; *Riggs* v. *Palmer*, 115 N. Y. 506; *Surace* v. *Danna*, 248 N. Y. 18; *Rees* v. *Teachers' Retirement Bd.*, 247 N. Y. 372; *People* v. *Dethloff*, 283 N. Y. 309; *People* v. *Ryan*, 274 N. Y. 149.) The rule of law adopted in *Harrington* v. *City of Lockport* (235 App. Div. 895) is just and fair. The rule of law subsequently adopted in this case, *Matter of McNerney* (261 App. Div. 754) is too rigid and is contrary to the settled law of this State. Sections 172 and 181 of the City Charter (L. 1897, **[***7]** ch. 360, as amd.) clearly make the position of the respondents an illegal one. The course of conduct adopted by the municipality estops it from making use of

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the moneys of the local fund. (*Harrington* v. *City of Lockport*, 235 App. Div. 895.) The petitioners are entitled to a recertification of the entire fund as their accumulated contributions. (*People ex rel. Westbay* v. *Delaney*, 73 Misc. 5, 146 App. Div. 957; *Sun Publishing Association* v. *Mayor*, 152 N. Y. 257; *Matter of Chapman* v. *City of New York*, 168 N. Y. 80.)

James M. Ryan and *Arthur T. McAvoy* for defendants, respondents and appellants. The certification by the city officials was made in compliance with the mandate of the statute. (Civil Service Law, § 50, subds. 12, 15, 16, 17; § 58, subds. 1, 3; § 61, subd. 6; §§ 76, 78; *Matter of Schinasi*, 277 N. Y. 252; *Gitlow* v. *People*, 195 App. Div. 773, 234 N. Y. 132, 268 U.S. 652; *Matter of Stradar* v. *Stern Bros.*, 184 App. Div. 700.) The rights, if any, of the members of the Geneva Police Department must accrue from the provisions of the local law under which the fund was accumulated. (L. 1911, ch. 391; City Home Rule **[***8]** Law, § 32; *Greiner* v. *City of Syracuse*, 256 N. Y. 688.) The balance in the local pension fund which was transferred to the State Retirement System constitutes public funds which the members of the fund were not entitled to have certified as their accumulated contributions. *Matter of Mahon* v. *Board of Education*, 171 N. Y. 263; *Fox* v. *Mohawk & H. R. Humane Society*, 165 N. Y. 517; *People ex rel. Einsfeld* v. *Murray*, 149 N. Y. 367.) No power is granted to the courts by interpretation to vary the clear and positive mandate of the statute. (*Matter of O'Brien* v. *Tremaine*, 285 N. Y. 233; *Matter of Eberle* v. *LaGuardia*, 285 N. Y. 247; *People v. Ryan*, 274 N. Y. 149; *Matter of McCall*, 289 N. Y. 104; *Sabl* v. *Laenderbank Wien Aktiengesellschaft*, 30 N. Y. S. 2d 608; *Matter of Bissell*, 245 App. Div. 395; *Matter of Dorsey* v. *Cohen*, 268 N. Y. 620; *Sexauer & Lemke* v. *Burke & Sons Co.*, 228 N. Y. 341.) Articles 4 and 5 of the Civil Service Law must both be considered in interpretation of the law. (*Board of Education* v. *Town of Greenburgh*, 277 N. Y. 193; *People* v. *Ryan*, 274 N. Y. 149; *Rees* v. *Teachers'* **[***9]** *Retirement Bd.*, 247 N. Y. 372; *New York Rys. Co.* v. *City of New York*, 218 N. Y. 483; *Breslav* v. *New York & Queens Elec. Light & Power Co.*, 249 App. Div. 181, 273 N. Y. 593; *Matter of Village of Lawrence* v. *Retirement System*, 178 Misc. 962.)

Judges: Loughran, J. Rippey, Lewis, Conway and Desmond, JJ., concur; Lehman, Ch. J., taking no part.

Opinion by: LOUGHRAN

Opinion

[*508] [987]** This is a proceeding under article 78 of the Civil Practice Act. The defendants are fiscal officers who had managed the police pension fund of the city of Geneva prior to March 15, 1940 -- the date on which the members of the **[*509]** local police department (including the petitioners) were admitted to the New York State Employees' Retirement System through the approval of the Common Council of the city. (See Civil Service Law, art. 5.)

As of that date, the police pension fund of the city amounted to $ 91,326.82. ***HN1***[↑] Section 76 of the statute made this applicable provision: "Any cash and securities to the credit of the local pension system shall be transferred to the New York state employees' retirement system as of the date of the approval. The trustees or other administrative **[***10]** head of the local pension system as of the date of the approval, shall certify the proportion, if any, of the funds of the system that represents the accumulated contributions of the members, and the relative shares of the members as of that date. Such shares shall be credited to the respective annuity savings accounts of such members in the New York state employees' retirement system. The balance of the funds transferred to the New York state employees' retirement system shall be offset against the accrued liability before determining the special deficiency contribution to be paid by the locality as provided by section seventy-eight. The operation of the local pension system shall be discontinued as of the date of the approval."

In asserted compliance with these words of the statute, the defendants certified to the New York State Employees' Retirement System that out of the total of $ 91,326.82 remaining in the city police pension fund on March 15, 1940, the sum of $ 7,865.23 represented the accumulated contributions of the members. This reckoning left a balance of $ 83,461.59 to be credited to the city by way of offset against the liability which the statute imposed upon it **[***11]** in consequence of the participation of the members of its police force in the New York State Employees' Retirement System.

Dissatisfied with this outcome, the petitioners (as such members) brought the present proceeding to compel the defendants to certify the full amount of the former local police pension fund on March 15, 1940 -- $ 91,326.82 -- as the sum of such accumulated contributions. Special Term ordered the defendants to make that certification, citing *Matter of Harrington* v. *City of Lockport* (235 App.

Div. 895).

[*510] On appeal by the defendants, the order of Special Term was modified by the Appellate Division for reasons stated as follows: "In *Matter of Harrington* v. *City of Lockport* (235 App. Div. 895) the order of the Special Term was affirmed by this court without opinion. It was held in that case that all of the moneys in the local fire pension fund should be certified as representing the accumulated contributions of the members of the fire department. The statute was construed to mean that the accumulated contributions of the members of a local pension system consisted of money 'accumulated by their own acts or donated for their sole benefit.' **[***12]** We believe that this construction of the statute should not be extended so as to include moneys which before the creation of the local pension fund were used for general purposes of the city. Adopting this construction, we conclude that the moneys in the Geneva police pension fund derived from the following sources should be certified as accumulated contributions of the members of the police force: The deductions from the salaries of present and former members of the police force. Rewards paid to the police force or to the members thereof. The proceeds of benefit entertainments given by the police force. The interest received by the city on the above items." (261 App. Div. 754, 756.) **[**988]** As so modified, the order of Special Term was affirmed.

Items of the local police pension fund which were thus excluded from the accumulated contributions of the members had been taken from court fees, bail forfeitures, fees for dog licenses, fines, recompense for the care of insane persons and liquor taxes. (See L. 1911, ch. 391; L. 1916, ch. 288; Geneva Local Laws, No. 4 of 1927 and No. 2 of 1935.) The case is now here on cross-appeals from the order of the Appellate Division.

HN2[⬆] In our **[***13]** New York statutes regulating the retirement benefits of civil employees, the word "contributions" has uniformly been used to signify sums deducted from the pay of an employee for transference to his "annuity"; the extra public commitment to the employee has been described as his "pension"; and such "annuity" plus such "pension" has been called the "retirement allowance." (Civil Service Law, § 50, subds. 11, 12, 15, 16, 17; Education Law, § 1100, subds. 10, 12, 13, 14; Administrative Code of the City of New York, § B3-1.0, subds. 13, 14, 15; L. 1937, ch. 929.) We think this definitive statutory **[*511]** usage requires us here to declare that the fraction of the police pension fund of the city of Geneva which (with the interest thereon), had its source in the salaries of those who were participators on March 15, 1940, was then the whole of "the accumulated contributions of the members" within the scope and meaning of that phrase of section 76 of the Civil Service Law.

Argument invoking the fairness of a looser construction of that phrase is out of place. ***HN3***[⬆] "The power of extending the meaning of a statute beyond its words, and deciding by the equity, and not the language, approaches **[***14]** so near the power of legislation, that a wise judiciary will exercise it with reluctance and only in extraordinary cases." (*Monson* v. *Inhabitants of Chester*, 22 Pick [Mass.] 385, 387. See *Fisher* v. *Long Island Lighting Co.*, 280 N. Y. 63; *Matter of Rogalin* v. *New York City Teachers' Retirement Board*, 290 N. Y. 664.) In this instance, we see no substantial reason for thinking that the customary letter of the statute does not completely express the intent of the Legislature.

The orders should be reversed, without costs, and the matter remitted to the Special Term for further disposition not inconsistent with this opinion.

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