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November 3, 2017

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

RE: Zoning Challenge
249 East 62nd Street
Block 1417, Lot: 22
Job No: 122975995

Dear Commissioner Chandler:

At the request of the Friends of the Upper East Side Historic Districts, a community-based organization that promotes responsible development on the Upper East Side, I have reviewed the zoning diagram and related materials for the new building to be constructed at 249 East 62nd Street. My firm regularly consults with land owners, architects, community groups and Community Boards on the New York City Zoning Resolution, and I have been a member of the American Institute of Certified Planners for the past 20 years.

Summary of findings

1. There are a number of simple and basic arithmetic errors in the ZD1. These basic errors are not unusual have the potential to undermine the public's faith in the review process. I encourage the Department of Buildings ("DOB" or "Department") and applicants to closely review these diagrams for these errors. These are important documents and they should be treated as such.
2. But more than just trivial errors, these arithmetic errors hide the fact that the project is overbuilt. The split lot rules were not properly applied and the building as proposed is overbuilt according to the Zoning Resolution.
3. Further, the ZD1 shows a side yard that is just three feet deep. The Zoning Resolution does not require side yards in this district, but if one is provided it must be eight feet deep.
4. Finally, the project includes a huge void, which is vastly larger than necessary for any mechanical use. It is the DOB's responsibility to ensure that areas claimed as mechanical and exempt from zoning floor area are necessary and being actively used for mechanical or other exempt purposes.

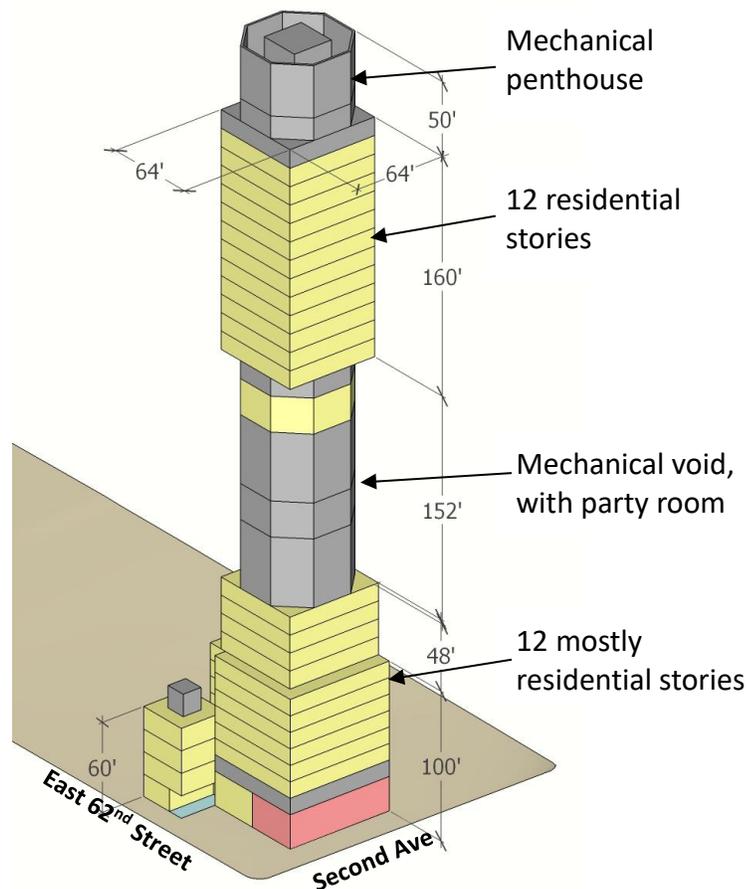
Finally, this document concludes with thoughts on what this huge void may mean for the Zoning Resolution's tower-on-base building form.

Project summary

The proposed building is on an interior L-shaped lot with 75 feet fronting the west side of Second Avenue with the 35 foot wide portion fronting 62nd Street, 70 feet from the corner. The lot is 105 feet deep and 100.42 feet wide at its largest dimensions. The zoning district is C2-8 for the portion of the lot within 100 feet of Second Avenue. A five by 100.42 feet portion is in the R8B district mapped on the midblock between Second and Third Avenues. The zoning lot was described and filed on 4/17/2017.

The proposed form is tower-on-base (23-651), but this tower-on-base is unlike most any other and includes a huge inter-building void of approximately 150 feet, which contains no residences. The top 12 residential floors sit on top of this void and start at approximately 300 feet.

My office modeled a massing of the building as proposed, shown below. Dimensions and locations of uses are approximate, as not all are shown on the ZD1. Yellow areas are residential floor area, gray areas are mechanical spaces and red areas are commercial.



Massing of proposed building color coded by use

The base of the Second Avenue portion is taller than most tower-on-base buildings at 100 feet. This is allowed because the neighboring building to the north is over 100 feet within 10 feet of the streetline (23-651). It is then setback 10 feet as required by the tower-on-base regulations and residential floors extend to the 12th floor. Unusual with tower-on-base buildings, the building has no “air rights” parcels and the 62nd Street townhouse on the plan and above is a part of the new building permit.

1. Errors in the application materials

There are a number of basic arithmetic errors in the ZD1 and related materials. Part 4 of the second page of the ZD1 is reproduced in two parts below:

4 Proposed Floor Area Required for all applications. One Use Group per line.							
Floor Number	Building Code Gross Floor Area (sq. ft.)	Use Group	Zoning Floor Area (sq. ft.)				FAR
			Residential	Community Facility	Commercial	Manufacturing	
Sub-Cellar	6,532	2	0	0	0	0	0
Cellar	7,855	2	0	0	0	0	0
1	2,629	6	0	0	2,588	0	0.3
1	4,644	2	4,497	0	0	0	0.5
2	6,688	2	1,149	0	0	0	0.7
3	6,312	2	5,907	0	0	0	0.7
4	6,688	2	6,277	0	0	0	0.7
5	5,719	2	5,325	0	0	0	0.6
6	5,518	2	5,132	0	0	0	0.6
7	5,518	2	5,132	0	0	0	0.6
8	5,518	2	5,132	0	0	0	0.6
9	3,942	2	3,645	0	0	0	0.4
10	3,942	2	3,645	0	0	0	0.4

Below is a detail of floor 2 taken from the above table:

2	6,688	2	1,149	0	0	0	0.7
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It shows Floor 2 at 1,149 zoning floor area. The last column tells us the ratio of this floor’s floor area to the zoning lot. The zoning lot is 8,765 SF. The FAR of this floor is 1,149 SF of floor area divided by 8,765 SF of lot area, which is 0.13, not 0.7. While slightly more complicated than the addition error, this is still a skill taught in elementary school.

These are not trivial differences that can be attributed to rounding. The sum of the Gross Floor Area column in the table is within two SF of the total shown on the table. That is a number that can be attributed to rounding. The difference in the building’s zoning floor area, however, is 2,762 SF, or 0.32 FAR, which is a significant amount of floor area to be missing from the building’s total zoning floor area.

Further, a similar error can be found on the PW1:

12 Zoning Characteristics										
12A District(s) C2-8				12B Street legal width: 100 ft.						
Overlay(s)				Street Status: <input checked="" type="checkbox"/> Public <input type="checkbox"/> Private						
Special Dist.(s)				If the zoning lot includes multiple tax lots, list all tax lots here ►						
Map Number 8c										
12C Proposed: Use*		Zoning Floor Area	District	FAR	Proposed Lot Details:			Proposed Yard Details:		
RESIDENTIAL	98,526	sq. ft.	C2-8	11.97	Lot Type: <input type="checkbox"/> Corner <input checked="" type="checkbox"/> Interior <input type="checkbox"/> Through	Check here if no yards: <input checked="" type="checkbox"/> or				
COMMERCIAL	2,588	sq. ft.	C2-8	0.03	Lot Coverage 82.97 %	Front Yard		ft.		
		sq. ft.			Lot Area 8765 sq. ft.	Rear Yard		ft.		
		sq. ft.			Lot Width 75 ft.	Rear Yard Equivalent		ft.		
		sq. ft.			Proposed Other Details:			Side Yard 1		
		sq. ft.			Enclosed Parking? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No			ft.		
Proposed Totals		101,114	sq. ft.	12.0	If yes, no. of parking spaces:			Side Yard 2		
Existing Total			sq. ft.		Perimeter Wall Height 100 ft.			ft.		

*Use can be one of the following: residential, commercial, manufacturing, or community facility. List only one use per line.

Detail of PW1. The circled numbers are incomplete (District) or wrong (FAR)

The zoning district is C2-8 / R8B: it is a lot split by a zoning district. Second, presuming 98,526 SF is correct for residential space, the FAR would be 11.24, not 11.97. The commercial space reads 2,588 SF, which totals 0.3 FAR, not 0.03 FAR. Again, the basic arithmetic is wrong and not even consistent with the errors found on the ZD1.

It is fair to ask the question, so what if some numbers are off? What’s important is that the building is still legal. There are two answers to that question.

First, both of these forms (the ZD1 and the PW1) include the following, right above the signature and stamp:

“Falsification of any statement is a misdemeanor and is punishable by a fine or imprisonment or both.”

I do not claim or expect intentional misdoing, but this statement does communicate that these forms are important and great care should be taken to ensure they are accurate and that did not happen here. To allow otherwise is to undermine the public’s faith in our system of governance. The DOB must ask the applicant to correct their ZD1 and their PW1 to actually describe what they are planning to do.

Second, and more importantly, if we use either set of Floor Area total numbers from the ZD1 (the total shown or the sum of the parts), the building is not legal under the Zoning Resolution because of the misapplication of the split lot rules.

2. The zoning lot is overbuilt

This is a split lot district. It is mostly in C2-8 and partially in R8B. A C2-8 is a 10 FAR district that can be bonused to 12 FAR with an HPD affordable housing certificate, which this building has obtained. R8B is a 4 FAR residential district.

Section 77-22 instructs how to calculate the allowable FAR of a lot split by a zoning district:

Each such #floor area ratio# shall be multiplied by the percentage of the #zoning lot# to which such #floor area ratio# applies. The sum of the products thus obtained shall be the adjusted maximum #floor area ratio# applicable to such #zoning lot#.

The zoning lot is 8,765 SF. The C2-8 portion is 8,263 SF. The R8B portion is 502 SF. The following table shows the split lot calculation instructed by 77-22.

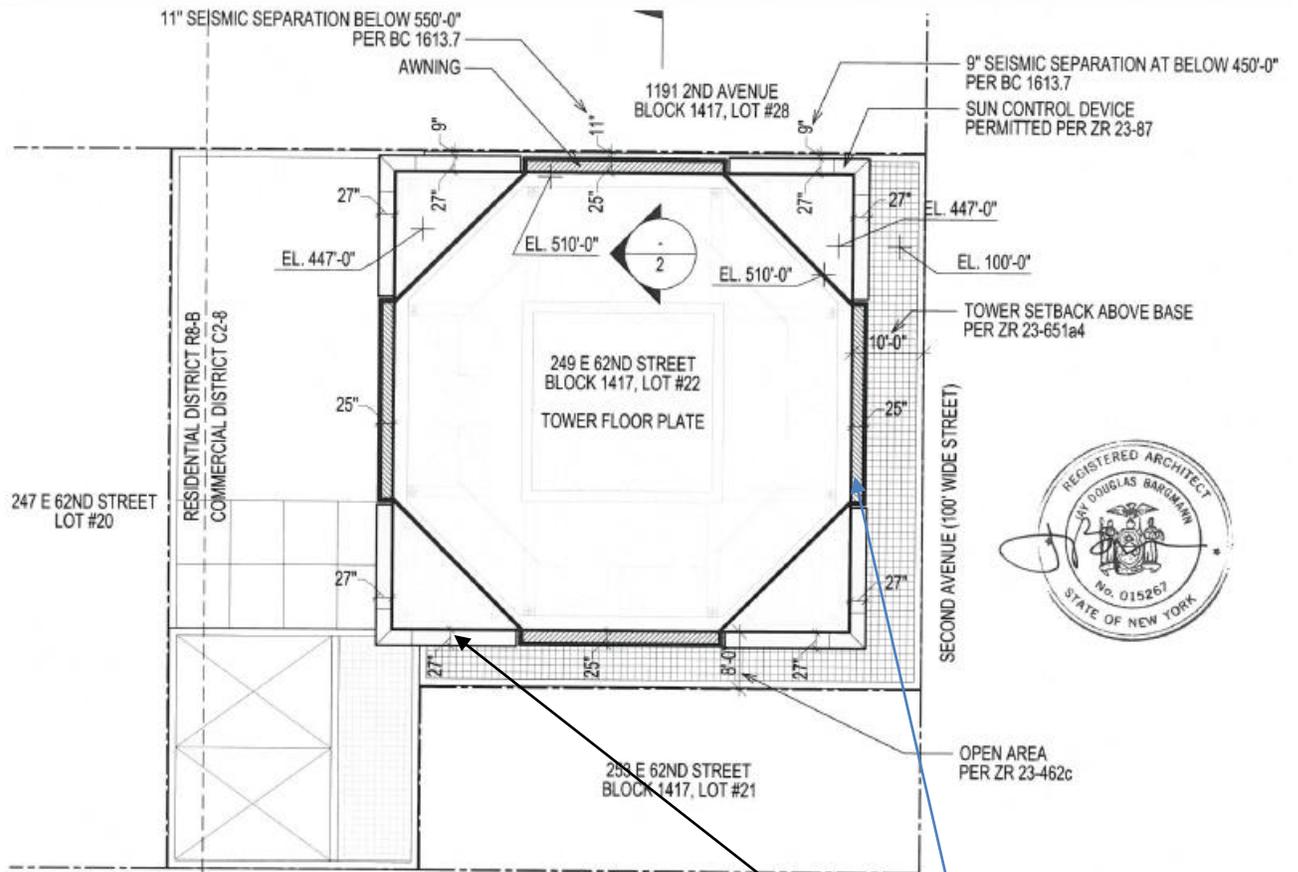
District	Lot area	Pct of lot	Base FAR	Adjusted FAR	Allowable Floor Area
C1-9	8,263	94.3%	12	11.31272	99,156
R8B	502	5.7%	4	0.229093	2,008
Total	8,765			11.54181	101,164

As was determined by Section 1 of this analysis, the building proposed is 103,876 SF of zoning floor area, which means that the building as proposed is overbuilt by 2,712 SF. These calculations were never shown on the ZD1, which incorrectly asserts that 12 FAR is allowed and the building proposed is 12 FAR.

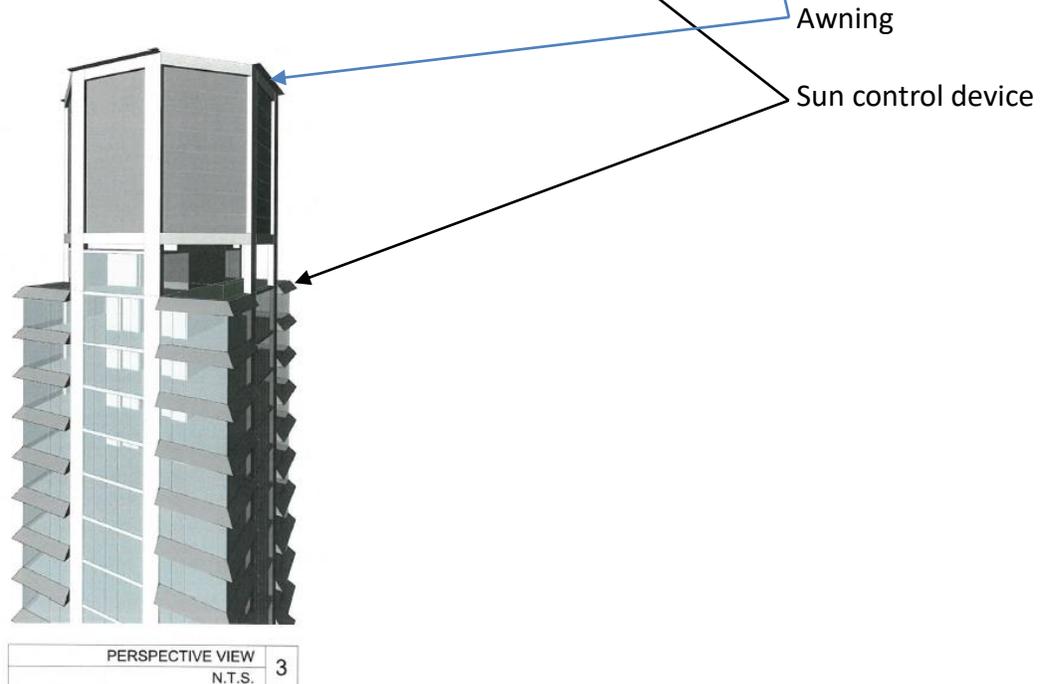
While not a part of this challenge, the DOB may wish to look into the HPD certificate to determine if the bonus it is receiving is still accurate since the building cannot be 12 FAR as claimed.

3.1 The northern side yard does not comply

ZRD1 51136 of 9/5/2017 concerns the sun shading devices planned for the upper floors of the building. The following show a plan and perspective view taken from that ZRD1:



Detail of plan from ZRD1 51136

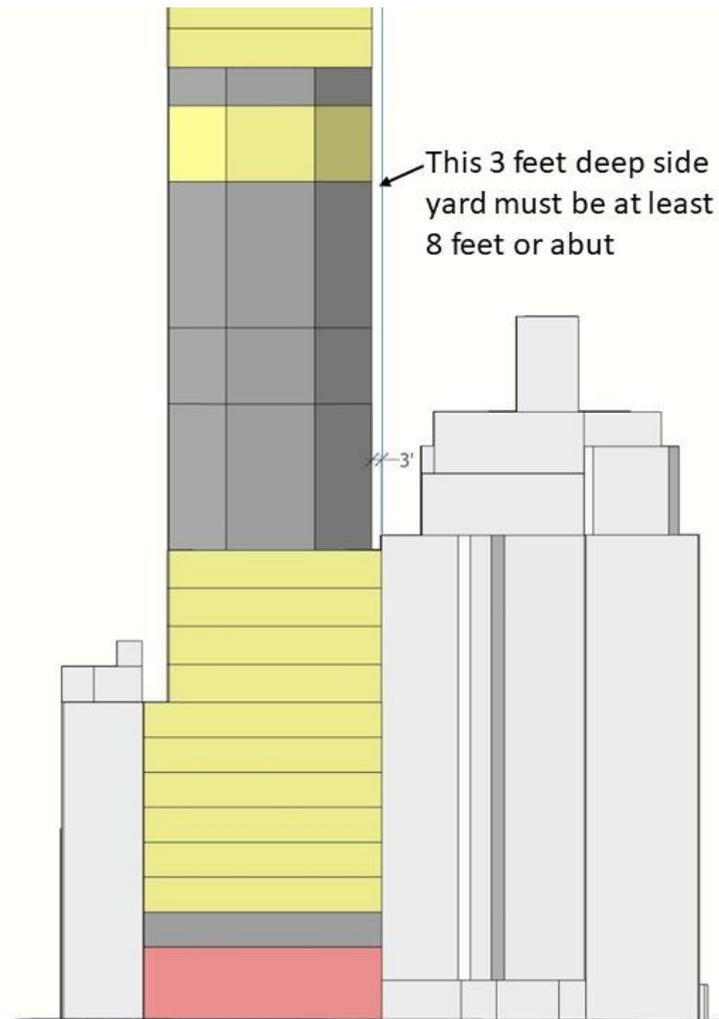


Reproduction of perspective view of building with shading devices from ZRD1 51136

At issue is the northern lot line. Regarding side lots, ZR 23-462 (c) states:

"If any open area extending along a #side lot line# is provided at any level, it shall have a minimum width of eight feet"

The following shows the Second Avenue elevation view:



Second Avenue elevation with three foot side yard identified. The awning and sun control devices are permitted obstructions and so not shown.

There is an open area of three feet between the building wall of the new building and the lot line. If this space were eight feet, it would comply. If this space were 11 inches (the required seismic separation distance), it would also comply since ZR12-10 states that abutting buildings do not include: "separations required for seismic load as set forth in the New York City Building Code." But a three foot separation, even when up to 11 inches of that is required seismic separation distance, is not allowed under 23-462 (c) and does not comply with the side yard requirement for this district.

Indeed, ZRD1 51136 states that the solar projections are permitted obstructions in a side yard under 23-44. This is true, they are permitted obstructions in a side yard: a side yard that is too small to comply with 23-462 (c).

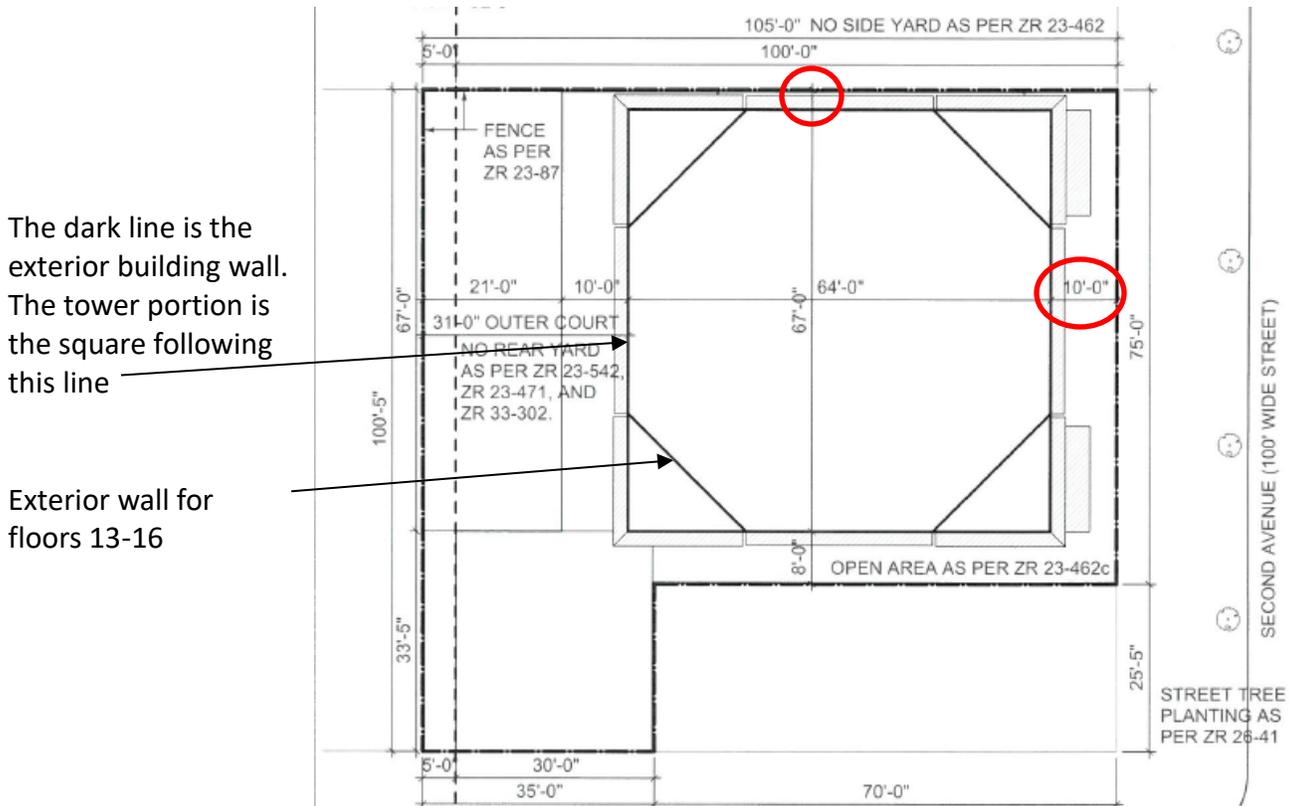
ZRD1 51136 involves a complex argument for two simple questions: How big is the side yard? Three feet. Does the side yard comply? No. The arguments contained in ZRD1 51136 regarding the building code are NOT contrary to the requirements of the zoning, since an eight-foot separation would have complied.

3.2 The DOB is not the Board of Standards and Appeals

The language used in ZRD1 51136 has requests that are inappropriate for the DOB to answer. The applicant states: “This represents a hardship,” and “we therefore respectfully request that a variance be granted.” Zoning variances due to hardship are to be determined by the Board of Standards and Appeals (BSA) (ZR 72-01), not the Department. The case as for why an eight-foot opening on the side lot line was a hardship should have been made to the BSA, not the DOB in a ZRD1.

3.3 Even if ZRD1 were right, the building would not comply with 23-651 because its findings were not consistently applied

Even if we are to take that the findings on ZRD1 51136 are accurate, the results of its findings have not been consistently applied to this building. Furthermore, if these findings were consistently applied, then the building would not comply with ZR 23-651. The following is a detail of the plan from the ZD1:



Detail of the plan from the ZD1

The northern side shows the “building” extending to the lot line (note the 67’ measure goes all the way to the northern lot line.) Effectively, the projections count as an exterior building wall for the purposes of the side yard. On the other three walls, the projections do not count as an exterior building wall. Had the other three walls used the standard described by ZRD1 51136, the tower would be 69 feet by 69 feet, or 4,761 SF. A tower of this size would be 54.3% of the zoning lot, which would mean that the tower is too large under 23-651, which limits towers on lots of this size to no more than 50% of the zoning lot.

Further, ZR 23-651 requires towers to be setback 10 feet from a wide streetline. It is only 10 feet from the exterior building wall, not from the sun-shading devices that function as the exterior building wall on the north side. The applicant is mixing and matching standards on the same building, selecting whichever standard benefits them most. The applicant’s intention to mix and match standards is not clear in the ZRD1; there is a difference in the representation of the exterior building wall when compared to the ZD1. In the ZRD1, the wall is shown to the edge of the awning on all sides. On the ZD1 it is only shown to the edge of the awning on the north side.

3.4 ZRD1 51136 is missing information

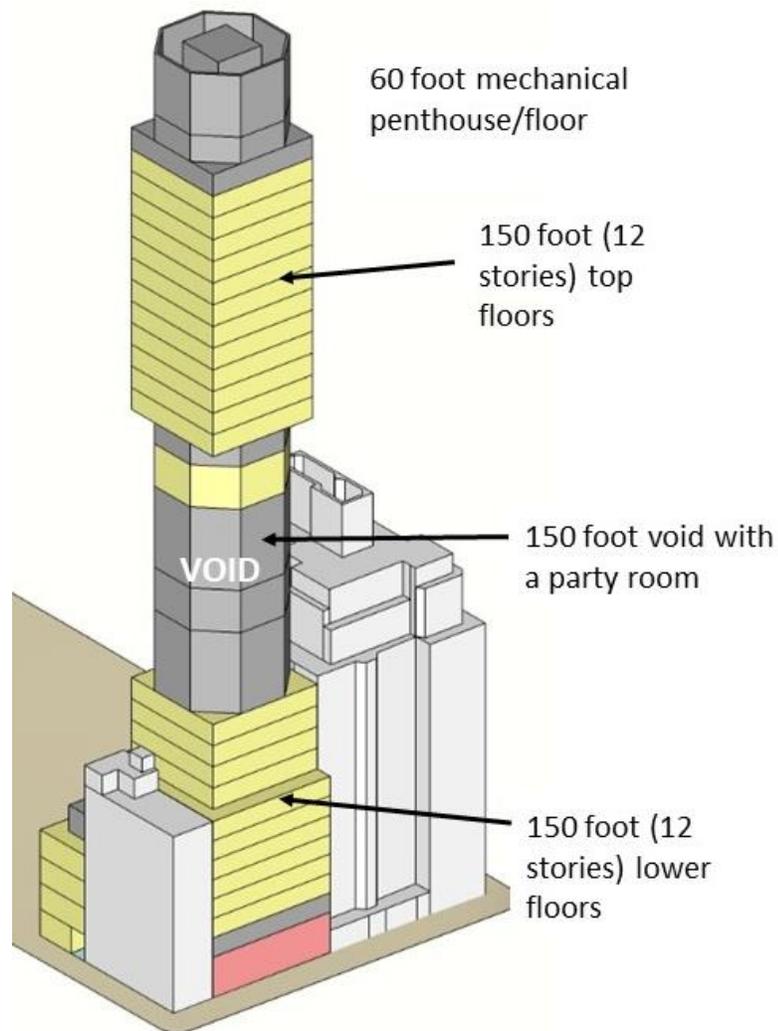
The applicant writes:

“All issues related to protected and unprotected openings along the side lot line have been addressed through the plan examination process and in compliance with BC Table 705.8 and BB 2015-017. All issues related to zoning projections and open areas along the side lot line separation have also been addressed. The proposed design is a permitted projection in a side yard as per ZR 23-44 and is not considered Lot Coverage in ZR 12-10.”

Clearly, these are permitted obstructions according to 23-44, and these are not lot coverage according to 12-10, but the logic for calling a three-foot open area along a side lot line, not a side yard is not effectively or reasonably explained at all. Further, by finding that an awning that hangs from the top of the building at 510 feet above grade function as the exterior building wall for the purposes of yards and courts, is absurd. If the Department supports such a bizarre finding, then it needs to clearly explain its logic. The answers ZRD1 51136 provides are unsatisfactory for a finding that allows an action that is clearly contrary to the Zoning Resolution.

4. The mechanical exemption is excessive and cannot be justified for any reasonable accessory mechanical use

The proposed building has an atypically large mechanical void in the middle of the building. The following is an approximation of the proposed building from information provided in the ZD1 and other sources for the proposed uses:



Approximate building massing annotated by use

We see the mechanical portion of the proposed building in gray. At issue is the space that starts at approximately 148 feet and extends to 300 feet. This space is mostly empty, but also includes an amenity room. Excluding the cellar, the amount of the building's gross floor area devoted to mechanicals and other exempt spaces is 25%.¹ Many of these mechanical void floors have very large floor-to-floor heights so that the volume of this building devoted to mechanicals and voids is nearly 31% of the building's mass. This percentage goes up to 33% if we consider the area not open to the sky that is also inscribed by perimeter walls.

This is an exceptional amount of space devoted to accessory building mechanicals and other exempt spaces. Clearly, much of this space, its configuration and floor-to-floor height serves another purpose, which is to provide extra height to the building's upper floors, yet the DOB still found the area exempt from floor area

¹ This is calculated using the correct ZFA number for this building. If we use the applicant's incorrect total at the bottom of the ZD1 it is 27%.

calculations, largely because they will be used for accessory building mechanicals.

The DOB has the responsibility to determine that the spaces claimed as mechanicals are, in fact, used for accessory building mechanicals and are reasonably proportionate to their use. If they are not, then the DOB must ask the applicant to redesign these spaces. We do not know if the DOB did any such review or simply accepted the applicant's assertion that these spaces are necessary for accessory building mechanical use, but the spaces are so large, so disproportionate to typical exempt uses, that such a review seems unlikely.

In the past, the DOB required applicants to justify their mechanical exemptions, and questioned the validity of these spaces on the record. I am attaching a ZRD1 dated 3/12/2010 that was reviewed by then Manhattan Deputy Borough Commissioner Raymond Plumney.² This document is the result of a DOB Notice of Objections dated 1/12/2010 where the DOB questioned the applicant's use of the mechanical exemption. This ZRD1 is notable because the building in question is what would become known as One Fifty Seven, the tallest residential building in Manhattan at the time.

The important point about this ZRD1 is that it documents the DOB asking questions and required the applicant to justify the spaces they were claiming as exempt from zoning floor area. The DOB has a duty to police the exemption, to ensure that the spaces claimed as exempt from zoning floor area actually should be exempt under the Zoning Resolution. Considering the vast increase in applications with huge spaces devoted to exempt uses³, this "hard look" does not appear to be happening in 2017, or at least the public record is noticeably absent of such a hard look.

Fundamental to the bulk regulations written into New York City's Zoning Resolution and New York State's Multiple Dwelling Law is the concept of floor area ratio. But in certain markets, the bulk regulations for tower districts are being debased by the DOB's overly generous interpretation of exempt floor area. When DOB finds 25% of a building's floor area exempt, we have to wonder how effective zoning floor area is as a foundation to our bulk regulations.

Mr. Plumney is no longer a Manhattan Deputy Borough Commissioner. He is now the Bronx Deputy Borough Commissioner, a position he has held since 2010.⁴ Mr. Pavan, the reviewer for 249 East 62nd Street, became Acting Manhattan Deputy Commissioner directly after Mr. Plumney moved to the Bronx.

²https://web.archive.org/web/20100418102203/http://www.nyc.gov/html/dob/html/about/senior_leadership_team.shtml

³ These include 15 East 30th Street, 217 West 57th Street, 180 East 88th Street, 432 Park, 281 Fifth Avenue, and 520 Park, among others.

⁴https://web.archive.org/web/20101127204904/http://nyc.gov/html/dob/html/about/senior_leadership_team.shtml

Changes in government policy should not be contingent on the individual applying the policy. Other than differences due to modifications in the Building Code, the Zoning Resolution, or Building Bulletins, they should be reviewing applications in exactly the same manner, according to exactly the same rules and policies, and with the limited information available to the public, it appears that they may not have. At minimum, the DOB should explain:

- How it ensures that an applicant's mechanical exemption is actually for mechanical spaces and is proportional to the use proposed;
- How their enforcement has changed over time; and
- Why it has changed over time.

Without such an explanation, it appears that the Department of Buildings is making policy, a role that belongs with the City Planning Commission and our elected officials.

Final thoughts

For the past 23 years, the tower-on-base building form has produced a predictable outcome: a tower usually between 300 and 350 feet that typically includes air rights from neighboring tenement(s). The form keeps a consistent streetwall, while allowing tenements to realize the value of their air rights, which effectively preserves them. These regulations have helped ensure that the Upper East Side and other Manhattan neighborhoods have maintained a variety of building forms: new and modern towers, often directly alongside historic tenements. Not only does this variety keep neighborhoods interesting, they provide different types of dwelling units and commercial spaces that help to keep neighborhoods diverse in both their residential and commercial tenants. The City Planning Commission's recent endorsement of tower-on-base form in the Sutton Place area's rezoning application underscores the broad support for the tower-on-base form. Until the recent approvals of 249 East 62nd Street and 180 East 88th Street, the tower-on-base form, and the zoning that created, it has been a success.

As stated earlier, this building is a tower-on-base unlike any ever conceived. About 200 feet taller than the typical tower-on-base building, with no air rights parcels needed or desired,⁵ it is taller than the 467 foot tall Leighton House at First Avenue and 88th Street, which was one of the late 1980's towers that created the impetus for the development of the tower-on-base zoning regulation that were adopted in 1994. While there is no height limit in a tower-on-base building, the regulations are designed so that height would be *effectively* limited. We know this because the City Planning Commission (CPC) stated as much in their adoption of the tower-on-base regulations:

⁵ There was a neighboring tenement that has been demolished and is being rebuilt as a complying sliver building, not even using all of its available floor area. (DOB job number: 121332138)

“The height of the tower would be effectively regulated by using a defined range of tower coverage (30 to 40%) together with a required percentage of floor area under 150 feet (55 to 60%).”⁶

The tower-on-base rules were carefully considered over a period of years, with a process that involved the public and several Community Boards. According to the CPC’s ULURP documents from that era, the text amendment was approved by Community Boards 2, 4, 6, and 8 with not a single no vote from any Community Board member. The tower-on-base rules that were developed a generation ago to help protect and preserve our highest density residential neighborhoods are important, but they only work if the DOB polices the use of the mechanical exemption. Without the DOB ensuring that spaces claimed as exempt from zoning floor area are proportionally sized according to their exempt purpose, the regulations that the public considered, the CPC designed, and the lawmakers approved, become ineffective.

To be clear, we believe that the DOB does excellent work, especially as it regards issues of health and safety and is a national leader in this area. But the DOB should understand that its inaction on excessive mechanical exemptions is undermining the Zoning Resolution and the protections and certainty it provides developers, property owners and the general public. I hope you use this as an opportunity to seriously reconsider how you administer spaces claimed as exempt from zoning floor area.

Thank you for your attention to this matter. Should you have any questions or would like to discuss, please feel free to contact me at 917-612-7478 or george@georgejanes.com.

Sincerely,



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

For



Rachel Levy, Friends of the Upper East Side Historic Districts

⁶ N 940013 ZRM. Page 6

Attachments: ZD1 and ZRD1 51136 for 249 East 62nd Street
ZRD1 9631 for job 120011192

CC: Bill de Blasio, New York City Mayor
Daniel Garodnick, New York City Council Member
Benjamin Kallos, New York City Council Member
Gale Brewer, Manhattan Borough President
Liz Krueger, New York State Senator
Rebecca Seawright, New York Assembly Member
Beth Lebowitz, Director, Zoning Division, DCP
Erik Botsford, Deputy Director, Manhattan, DCP
Raju Mann, Director, Land Use, New York City Council
James G. Clynes, Chair, Community Board 8
Julianne Bertagna, Treadwell Farm Historic District Association
Barry Schneider, East Sixties Neighborhood Association
Valerie Mason, East 72nd Street Neighborhood Association
Betty Cooper Wallerstein, East 79th Street Neighborhood Association
Elizabeth Ashby, Defends of the Historic Upper East Side
Lo van der Valk, Carnegie Hill Neighbors
Alan Kersh, East River Fifties Alliance
Alexander Adams, CIVITAS
Sean Khorsandi, Landmark West!
Elizabeth Goldstein, Municipal Art Society of New York
Peg Breen, New York Landmarks Conservancy
Simeon Bankoff, Historic Districts Council
Andrew Berman, Greenwich Village Society for Historic Preservation
Olive Freud, Committee for Environmentally Sound Development