BENJAMIN J. KALLOS
COUNCIL MEMBER, 5TH DISTRICT

244 East 93rd Street
New York, NY 10128
(212) 860-1950 Voice
(212) 980-1828 Fax
www.BenKallos.com

BKallos@BenKallos.com

THE COUNCIL OF THE CITY OF NEW YORK

CHAIR
Planning, Dispositions, & Concessions

CO-CHAIR
Progressive Caucus

COMMITTEES
Civil Rights
Education
Governmental Operations
Higher Education
Land Use
Oversight & Investigations
Women

Testimony to the Board of Standards and Appeals

RE: 2017-290-A, 1558 Third Avenue (a.k.a. 180 East 88th Street), Manhattan
In Support of Appeal of DOB Determination

Tuesday, July 17, 2018

Thank you to Chair Perlmutter and the members of the Board of Standards and Appeals for the opportunity to testify in support of the community's appeal of the Department of Building's determination to allow the construction of a tower at 1558 Third Avenue—or 180 East 88th Street as it is marketed—despite its frontage on 88th Street, which should require it to conform to Tower on a Base zoning. The Buildings Department allowed a tower, because the developer carved out a micro-sized, unbuildable sham zoning lot to make it appear as if the building did not front 88th Street. I strongly support the community's appeal because this lot was created purely for the purpose of evading the zoning code, and I urge the Board of Standards and Appeals to uphold the spirit of the zoning code and overrule the Buildings Department's determination.

Neighborhood Context: C1-9

The Upper East Side is known for its town houses along the side streets, its modestly high apartment buildings along the avenues, and its many relatively small commercial establishments serving its residents. Its zoning is designed to promote and preserve those qualities. In response to prior instances of overdevelopment, zoning regulations have been enacted to establish consistent street walls and to limit the size and scale of new buildings.

According to the Department of City Planning's zoning handbook, in the C1-9 zoning present on Third Avenue, "typical retail uses include grocery stores, dry cleaners, drug stores, restaurants and local clothing stores that cater to the daily needs of the immediate neighborhood." These retail locations serve the residential side streets, and the commercial buildings they anchor are required to be set back at 60 feet, to keep a consistent street wall with the low bulk of the residential buildings of the side streets. The zoning limits the height of buildings on narrow lots to 100 feet, and requires all towers to honor the predominant, relatively low and continuous street walls of the area by building a base no more than eight feet away from the street line and setting the tower back from that line.

BENJAMIN J. KALLOS
NEW YORK CITY COUNCIL MEMBER
DISTRICT 5, MANHATTAN

The Sham Lot at 180 East 88th Street

The development we are discussing today will rise more than 500 feet high, with a blank open space running back from 88th street, rather than a street wall coordinated with the height of neighboring buildings. Furthermore, the portion of the building facing 88th Street will be much higher than would be allowed under the sliver rule.

To evade zoning regulations, the developer created a tiny sham zoning lot, a four-foot strip running the width of the lot (22 feet) along 88th Street, that purports to insulate the building from 88th Street, and thereby to exempt it from those requirements that would otherwise apply to a building fronting on 88th Street. The Zoning Resolution expressly prohibits the creation of a new zoning lot where the result is a non-complying building.

On May 16, 2016, together with Manhattan Borough President Gale Brewer, I challenged the legality of this building by writing to the Department of Buildings. In response to our challenge of this charade, the Department of Buildings issued a Stop Work Order on May 26, 2016, on the absolutely correct ground that "Zoning lot cannot be subdivided into a 4' lot for sole purpose of avoiding a zoning lot requirement." That Order remained in effect for some seven months until the Department lifted it on December 21, 2016, with no explanation of its change of position. The only changes that the Department required was that the developer add six feet to the depth of the micro-lot, bringing its size to ten by 22 feet.

I subsequently lent my name in support of Carnegie Hill Neighbors' Zoning Challenge and Community Appeal, which formally challenged the validity of the building permit.

On April 19, 2017, after receiving complaints from my constituents, I wrote to the Borough Commissioner of the Department of Buildings to express my concern about the Department's repeated issuance of After Hours Variance permits for construction at 180 East 88th Street. As I said in that letter, Section 24-223(e) of the Building Code allows such variances only for one of five specific reasons: (1) emergency work; (2) public safety; (3) city construction projects; (4) construction activities with minimal noise impact; and (5) undue hardship. None of these reasons appears to be applicable here. I received no answer to this letter, and the Department continued to issue these variances.

The Department of Buildings' rulings upholding the building permit for 180 East 88th Street stretch the Zoning Resolution beyond recognition. In reality, the developer's building still faces 88th Street, and must comply with the zoning requirements that go along with that. In reality, too, the newly created micro-lot is an integral part of the developer's building. Even if its tiny size did not make it unbuildable, it would be unbuildable because it must be kept clear and open to serve as a required emergency egress from the building. Its separate existence should be declared a sham and a nullity.

This building is plainly illegal in its present form. Construction should be halted immediately, and the developer should be required to redraw its plans to provide for a building that complies with the Zoning Resolution.

Legislative Intent and Interpretation

As a legislator, I know that the law, as written, can only go so far. When we draft legislation in the City Council, we try to game out how the language will be interpreted by city agencies, how it will be enforced on the street, how it will be adjudicated in the courts, how it will be bent, broken, and ignored. We know that the exact language we write can only go so far. Ultimately, our administrative government must carry out the laws according to a reasonable understanding of that language, and our judicial bodies and quasi-judicial boards must interpret the intent of the law to ensure legal outcomes.

In this case, the Department of Buildings has read the zoning code in such a way as to allow an absurd result. There is simply no way the zoning resolution was intended to allow a developer to create a 10-foot lot purely to avoid every restriction in the code. Legislators have no direct mechanism for dictating outcomes that run so clearly against the purpose of the law, and must rely on bodies like this Board to use common sense and apply context when adjudicating these matters.

The developer never bothered to hide that the unbuildable lot is a sham. On December 21, 2015, Block 1516, Lot 138 was sold for $10. 180 East 88th Street Realty LLC sold the lot for the paltry sum to Carnegie Green LLC. On the corresponding deed, both limited liability companies share a "care of" address of "DDG Partners LLC, 60 Hudson Street, 18th Floor, New York, NY, 10013," with the authorized signer Joseph McMillan. Quite clearly, the developer, DDG Partners, sold itself the lot for $10 for the sole purpose of claiming the building does not front 88th Street. Under the terms of federal and state laws, this transaction would likely be considered a fraudulent conveyance in a foreclosure or bankruptcy proceeding.

The Department of Buildings even acknowledged that the lot was created purely for the purpose of evading the zoning when it first issued a Stop Work Order. Enlarging the lot only enlarged the sham. The city has a responsibility to call this what it is and require the developer to follow the zoning code as it was intended.

Zoning Laws at the Point of Breaking Throughout Manhattan

On the Upper East Side, as well as throughout my district and throughout Manhattan, we have recently seen several buildings find ways of bending the zoning code to the point of breaking, with the result of disrupting the neighborhood character and aesthetic consistency that the regulations were meant to guarantee. These buildings have been made possible by questionable interpretations of the Zoning Resolution that all too often cross the line into illegality.

In another example this Board has reviewed, at 200 Amsterdam Avenue, on the West Side, a developer has proposed a 668-foot high building—the tallest in Manhattan north of 61st Street—that is made possible only by a crazily gerrymandered zoning lot that violates the open space provisions of the Zoning Resolution. On West 97th Street, a developer is trying to build another very tall building only 60 feet from the front windows of existing buildings in Park West Village by counting as open space the rooftop garden of a luxury building that is accessible only to the residents of that building. These proposed buildings are being challenged by community groups and civic organizations with the support of their elected officials.

Sleight of Hand

I am aware that the building we are considering today has been under construction for some time now. However, neither the community nor even the Department of Buildings was aware of the sleight of hand that enabled it to violate the Zoning Resolution until this was uncovered by Carnegie Hill Neighbors' consultant, George Janes, in the spring of 2016. At that point, Borough President Brewer and I brought it to the attention of the Department of Buildings.

For months after that time, Carnegie Hill Neighbors other elected representatives, and I pressed the Department of Buildings for rulings on the legality of the building permit.

Despite our best efforts, this process proved to be extremely lengthy. During this time, the developer was well aware of the charges of illegality, and yet chose to proceed with construction. This should not be held against the community in its appeal, and the developer should not be exempt from remedies for having moved forward in this manner.