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May 27, 2022

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Eric Ulrich
Commissioner
Department of Buildings
280 Broadway
New York, NY 10007

RE: Community Appeal
1299 Third Avenue
Block 1429, Lot 4
Job No: 121187964

Dear Commissioner Ulrich:

This is a Community Appeal of Scott Pavan's May 12, 2022 response to our April 8, 2021 Zoning Challenge for the above address. It is being filed at the request of the Friends of the Upper East Side Historic Districts (FRIENDS), a community-based organization that promotes responsible development on the Upper East Side. A new ZD1 for the above address has recently been posted and there is currently an open challenge period. We intend on filing a full Zoning Challenge of that ZD1.

We have elected to file this narrow Community Appeal now, however, to address a single issue -- which we believe represents a serious error in judgment in the Department's approval of the above project -- in the hopes that the Department will reconsider its approval of the project as soon as possible.

Background & Project History

The project is proposed on the east side of Third Avenue between East 74th and East 75th Street on Block 1429, Lot 4 (formerly lots 3, 4 and 44). The zoning lot includes lot 48 directly to the north and lots 1, 2 and 103 to the south. The zoning lot is mostly in the C1-9 zoning district and mostly a corner lot. There is a small portion beyond 100 feet from Third Avenue in the R8B district.

In June 2018, the applicant received a zoning approval for a six-story building on this site. In 2017, a tower similar to the one the Department approved in 2021 was submitted in an application to the Board of Standards and Appeals (BSA) to get permission to include lot 103 (which was a subject of a 1970 BSA variance) into the larger zoning lot. The BSA matter was considered in early 2019. Consequently, this applicant had two dramatically different buildings in front of two different New York City agencies for the same site at the same time, one of which it clearly had no intention of building.

Zoning approval for the tower was posted on February 22, 2021; building plans were approved shortly thereafter. The building had three main portions: A tower facing Third Avenue, an R8B Quality Housing building facing 75th Street and a narrow one-story structure that connects 74th Street to the main portion of the building. This one-story portion is proposed in the rear of tax lots 1 and 2, which are on the same zoning lot as the tower. The one-story portion of the building facing 74th Street is also a residential entrance to the building.

The Department responded to our April 8, 2021 Zoning Challenge on May 13, 2022, denying all challenges. The Department agreed with three of the issues challenged, but because so much time had passed between the Challenge and response, that the applicant had addressed those issues in their May 2022 filing. One issue that the Department denied outright was the one-story base along at 74th Street. The one-story base is the subject of this Community Appeal. It was challenged as item 3 in the 2021 Zoning Challenge.

The one-story base and ZR 23-651

The Zoning Challenge stated that this one-story base facing 74th Street did not comply with ZR 23-651. ZR 23-651 requires that tower developments in this location “shall be constructed as a tower-on-a-base,” and ZR 23-65(a) states that “the entire #zoning lot# shall be subject to the provisions of Section 23-651.”

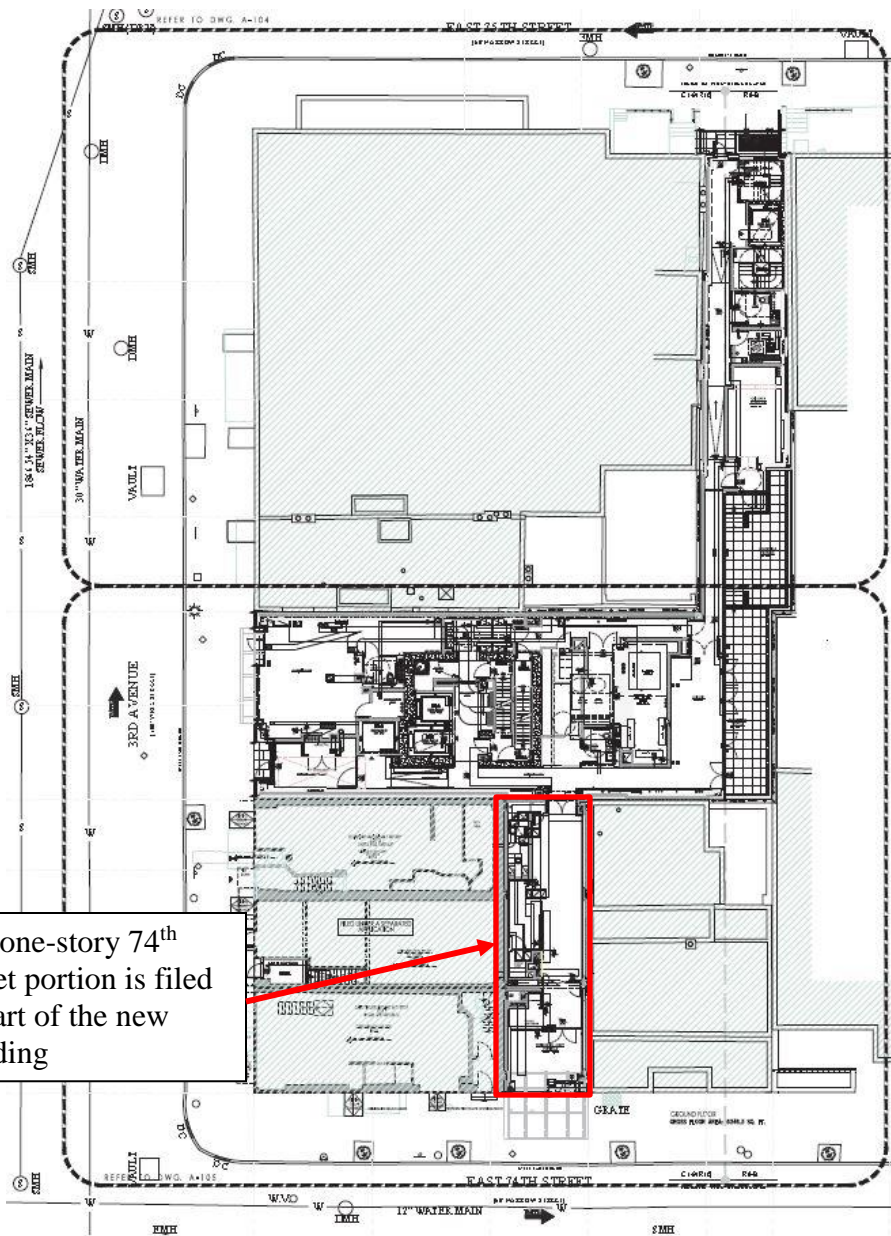
The applicant is not required to use the tower-on-a-base building regulations, but if they elect to do so they must follow the regulations of 23-651. ZR 23-651(b) requires that the base rise to at least 60 feet, but not more than 85 feet. The building base that fronts 74th Street is just one-story and 14 feet tall.

In denying this item of the Zoning Challenge, the Department wrote:

Response 3: A review of the application records indicates that the area referenced by the challenger is not part of the building/development in question. Rather, these are each a one story horizontal enlargement filed on the existing buildings on lot 1 - 1291 3rd Avenue and lot 2 - 1295 3 Avenue. These were filed under application numbers 121188339 and 121188320 respectively. All three application records indicate lawful convenience access doors between the three buildings with no required egress function. Neither of the two enlarged buildings include a tower and as such are not subject to ZR 23-651.

There have, indeed, been filings for lots 1 and 2 showing one-story extensions in the rear of the existing tenements. The original ZD1s for these extensions were posted in 2018 and were updated in February 2022, apparently in relation to the amended filing for the tower.

The 2021 building plans showed these one-story extensions of lots 1 and 2 on most of the new building plans. An example can be seen on page A-103 and is shown below:



The one-story 74th Street portion is filed as part of the new building

SE EXPOSURE PROTECTION NOTES

1. ALL EXPOSURE PROTECTION SHALL BE INSTALLED AND MAINTAINED THROUGHOUT THE CONSTRUCTION PERIOD. THE PROTECTION SHALL BE REMOVED IMMEDIATELY UPON COMPLETION OF THE WORK AND THE SURFACE SHALL BE RESTORED TO ORIGINAL CONDITION OR BETTER.

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FLOOR PLAN NOTES

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PROFESSIONAL SEAL

151 HOOVER KEY PLAN
(CONET, & A-103 KEY PLAN)

DATE: 10/10/2021
SCALE: AS SHOWN
PROJECT: 151 HOOVER KEY PLAN
(CONET, & A-103 KEY PLAN)

151 HOOVER KEY PLAN
(CONET, & A-103 KEY PLAN)

Reproduction of the 2021 approval of A-103, which is one of many pages showing the non-compliant one-story portion facing 74th Street as part of the same building as the tower

The one-story extension could not be found in the Z-series approval, however. This was clearly an error: the Z-series plans need to describe the same building as the A-series plans. We understand that many pages of plans have been updated this month, and we are working to obtain them. We expect to find that the new plans for the tower omit the one-story addition on the two tenements and those extensions are filed using separate building plans.

In sum, the applicant has received an approval for a building that has been filed in three different parts, each of which is individually permitted, but when put

together produces a tower-on-a-base building on a zoning lot that does not comply with the tower-on-a-base regulations.

Discussion

In this zoning district and location, applicants for mixed buildings have three different sets of height and setback regulations from which they can choose:

- 1) Basic height and setback (23-64)
- 2) Tower-on-a-base (23-651)
- 3) Quality Housing building (23-66)

Few applicants use the basic height and setback regulations for new buildings in this zoning district because there are benefits to both the Quality Housing program and tower-on-a-base regulations that cannot be obtained using the basic height and setback regulations. But with these benefits both the tower-on-a-base and Quality Housing program bring conditions. If the applicant agrees to follow those conditions, they can develop buildings using the tower-on-a-base or Quality Housing programs, and if they do so, they can reap the rewards of those bulk regulations. If they don't want to, or are unable to follow the conditions of the program, they are free to develop their property as-of-right using the basic height and setback regulations.

The one-story additions to the rear of lots 1 and 2 follow the height and setback regulations. The result is a base which cannot follow the tower-on-a-base bulk regulations. Consequently, the tower cannot use the tower-on-a-base regulations. We know this because the Zoning Resolution clearly says so:

“If a portion of such #building# is #developed# or #enlarged# with a tower the entire #zoning lot# shall be subject to the provisions of Section 23-651 (Tower-on-a-base).” (ZR 23-65(a))

In case there is any doubt on the clarity of that language, the ZR explains how language is used in section 12-01, which states in section (c):

(c) The word "shall" is always mandatory and not discretionary. The word "may" is permissive.

This isn't even a case of “overlapping or contradictory regulations” (11-22), as the ZR cannot be clearer. This applicant has chosen not to follow a condition of their tower-on-a-base bulk regulations and chose to put a one-story base fronting 74th Street. That is their choice, but if they choose to do so, then they cannot use the tower-on-a-base building form for the rest of the building.

Consequences of the Department approval

If the Department is correct that applicants can obtain different permits for different portions of buildings on the same zoning lot so that they don't have pay the cost of beneficial bulk regulations, while still receiving the benefit, I would expect to see many more such applications segmented to avoid the prescriptive regulations. Tower-on-a-base is especially prescriptive, with not only a base height but maximum and minimum tower coverage and requirements for bulk packing. The regulations are described by some as "threading the needle," as they only work on some sites, whereas they are impractical on others. If relief from streetwall, base height, bulk packing or tower coverage can be obtained simply by segmenting the approval into pieces, of course, we will see more such applications.

This is not good governance. The regulations for tower-on-a-base are prescriptive for a reason. If applicants don't want to follow them, they don't have to. They can opt to build a Quality Housing building or a building with height and setback regulations. Zoning provides no option to use only some of the tower-on-a-base program on a zoning lot while ignoring other parts.

Finally, as a practical matter, the one-story base on 74th Street will be an entrance to the tower at 1299 Third Avenue. This building will, presumably, try to obtain a permanent certificate of occupancy one day. How will the permanent certificate of occupancy for 1299 Third Avenue be obtained if it does not follow the bulk regulations of the tower-on-a-base? Or is it destined to be another building with temporary certificate of occupancies that span decades? The Department should not permit any building that does not have a clear path to a permanent certificate of occupancy.

Closing

Please reconsider your decision regarding your approval of this building as planned. The zoning here provides ample flexibility and gives applicants choices. They can follow Quality Housing, basic height and setback, or tower-on-a-base, but they have to follow all the regulations for the bulk program they choose. The bulk regulations are not designed to be used a la carte, where applicants can pick and choose which part of the regulations they want to follow. But that's exactly what the Department has approved.

This approval is of vital importance to the integrity and predictability of the bulk regulations of the Zoning Resolution. Please know that if the Department does not reconsider its approval, we intend on appealing this issue to the BSA, and if necessary to the courts as a matter of interpretation of law. Considering the clarity of the Zoning Resolution's language, combined with absurdity of three separate approvals for one building, we feel confident our appeal will prevail. It serves the public interest for the Department to reconsider its decision now.

Finally, it took more than 13 months for the Department to respond to this Zoning Challenge. It appears during that time the Department used the Challenge to identify errors in the approved plan, and then worked with the applicant to correct the errors, while leaving the Zoning Challenge unanswered. The Department should have answered the Zoning Challenge AND worked with the applicant to correct the errors the Challenge identified, instead of only answering the Challenge once the applicant corrected the errors. The public needs to have confidence that the Department treats all parties in the process equally. Unfortunately, by sitting on this Zoning Challenge for so long, and answering it only after the applicant amended their plans and sold their property to a new owner, it appears that the Department neglected to provide a timely response, in favor of helping the applicant get obtain a new approval. It should have done both, and we hope as a new Commissioner, you will work to improve the Department's service to everyone who has business with your agency.

Thank you for your careful reconsideration of this issue. Should you have any questions, please feel free to contact me at 917-612-7478 or george@georgejanes.com.

Sincerely,



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

Prepared for:



Rachel Levy
Friends of the Upper East Side Historic Districts

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Lo van der Valk, Carnegie Hill Neighbors
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