

One Hundred Years of Zoning in New York City: Procedural Justice Issues in the New Century

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I. INTRODUCTION

By 2020, Manhattan’s skyline may look very different. Although nineteenth-century developers originally bypassed New York City in favor of other cities with less stringent building codes to build skyscrapers, New York City is undoubtedly the preeminent American city associated with skyscrapers today.¹ Indeed, various Manhattan buildings have held the records for tallest building in the United States and the world throughout the twentieth and twenty-first centuries. As construction and engineering techniques continue to progress, developers are again drawn to New York City—particularly Manhattan—to build a new class of “supertall” buildings. The Council on Tall Buildings and Urban Habitat designates a building as supertall when its height reaches at least 300 meters or 984 feet.² Twenty-two such buildings

¹ Architects and engineers in the nineteenth century first flocked to Chicago. The Great Chicago Fire of 1871 razed the city leading to a massive building boom while the lack of building codes allowed for experimentation with steel-framed buildings. In contrast, New York City’s building codes mandated masonry construction techniques which could only accommodate relatively short, squat buildings. See ALICE SPARBERG ALEXIOU, *THE FLATIRON: THE NEW YORK LANDMARK AND THE INCOMPARABLE CITY THAT AROSE WITH IT* (2010), Ch. 1.

² COUNCIL TALL BUILDINGS & URBAN HABITAT, *Criteria for the Defining and Measuring of Tall Buildings*, <http://www.ctbuh.org/LinkClick.aspx?fileticket=zvoB1S4nMug%3d&tabid=446&language=en-US> (last visited Mar. 5, 2017).

either currently exist, are under construction, or are planned in Manhattan.³

That New York City is home to so many iconic tall buildings and will be home to so many supertall buildings in the near future is somewhat ironic in light of the City's groundbreaking role in zoning history. Although cities such as Washington, D.C., and Boston had adopted building height limits earlier, New York City became the first American city to implement comprehensive zoning laws when it enacted the Building Zone Resolution of 1916.⁴ In 1922, the Department of Commerce issued the State Zoning Enabling Act, a model law ostensibly based on New York's laws, which provided the framework for countless cities' zoning laws.

Zoning law turned one hundred years old in New York City last year. Considering the import of the City's zoning laws on American zoning history, there is no better time to reexamine the City's zoning laws. This paper uses the new building approval process, focusing particularly on the proposed building heights, of four Manhattan buildings that seemed impossibly tall at the time of development to demonstrate how New York City's zoning laws have evolved over time yet also stayed the same (see Figure 1 for a map of Manhattan illustrating where the four buildings are located).⁵ The Flatiron Building was constructed prior to the adoption of zoning. Rumblings about zoning had begun to arise amongst city planners and architects, but zoning law was still over a decade away. Instead, the issues that arose regarding the building's proposed height emerged indirectly from the City's building code, which at the time remained fixated on outdated masonry construction techniques. The developers of the

³ For a list of completed or planned supertall buildings in New York City, see Amy Plitt, *Mapping the Rise of New York City's 20+ Supertall Towers*, CURBED: NYC (Oct. 14, 2015, 2:50 PM), <http://ny.curbed.com/maps/mapping-the-rise-of-new-york-citys-20-supertall-towers>.

⁴ See Georgette C. Poindexter, *Light, Air, or Manhattanization?: Communal Aesthetics in Zoning Central City Real Estate Development*, 78 B.U. L. REV. 445, 454-58 (1998) (describing Washington, D.C.'s and Boston's early building height limitations).

⁵ I apologize to the reader for this article's obvious Manhattan-centric view of New York City. While the zoning laws apply to all five boroughs, the actual zoning policies only permit supertall construction in Manhattan.

Empire State Building had to contend with the 1916 Building Zone Resolution. But, these were the early days of city planning when city planners still grappled with the nascent power of zoning. The developers of the Empire State Building easily acquired variances from the Board of Standards and Appeals which allowed them to disregard zoning law regulations. In between the Empire State Building and this paper's two modern-day examples, New York City adopted a completely new Zoning Resolution. 432 Park Avenue began its new building application just over five years ago. The developers of 432 Park Avenue depended on the concepts of transferable development rights and the zoning lot merger in order to achieve the building's height. Since 432 Park Avenue complied with all of the 1961 Zoning Resolution's provisions, it was able to proceed as-of-right. Neither the public nor the City could demand any changes to the building. The development of One Vanderbilt could not be more different. One Vanderbilt required a number of special permits which entailed an extensive review process. One Vanderbilt underwent numerous public hearings as a result and the City negotiated extensively with the developers over its proposed design.

Much of the literature on zoning law considers when a municipality's zoning laws overstep permitted authority.⁶ Since the Supreme Court held in *Village of Euclid v. Ambler Realty Company* that zoning laws do not inherently constitute unconstitutional takings, these scholars ask when municipal zoning laws go too far and encroach private property rights.⁷ But as the case studies will illustrate, the inverse is also a question worthy of consideration. That is, what happens when a municipality's zoning laws do not do enough in the public's eye?

⁶ See, e.g., Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1954) (arguing that zoning law must be enacted in accordance with some kind of master plan in order to be legitimate); Poindexter, *supra* note 4 (questioning whether municipalities have the authority to enact aesthetic zoning); Terry Rice, *Zoning*, 39 SYRACUSE L. REV. 573 (1988) (providing an overview of situations when zoning law may not legitimately apply).

⁷ 272 U.S. 365 (1926).



Figure 1: Courtesy of *Manhattan Street Map*, N.Y.C. MAP, available at <http://www.new-york-city-map.com/manhattan.htm> (last visited April 26, 2017). The author has cropped the map to the relevant area and added markers to demonstrate where the Flatiron Building, the Empire State Building, 432 Park Avenue, and One Vanderbilt are, or will be, located.

Zoning laws interfere with sacrosanct—at least in the eyes of American culture—private property rights. One might think of zoning law as the precarious balancing of two opposing forces. On the one hand, property owners wish for autonomy over their private property. On the other, the public has an interest in regulating private property to maximize satisfaction for all city dwellers. To this end, many city planners tout zoning law as a reflection of the public’s tastes and desires and emphasize the public’s role in shaping zoning policies. But as the public opinion surrounding supertall buildings illustrate, many New Yorkers now believe that zoning laws fail to represent their wishes. They see the supertall structures as emblematic of zoning law’s failure and they feel powerless to stop the erection of supertall buildings going forward, for as-of-right

development requires no public input nor discretionary City action.⁸

The question of what happens when zoning laws fail to represent the public's desire has hefty consequences for procedural justice. When individuals view the rulemaking process as fair, they are more likely to be satisfied by the rules and to adhere to them, lowering enforcement costs.⁹ Inversely, when the public feels detached from zoning policies, several problems may arise. First, zoning law may lose legitimacy in the public's eye. The public may come to see it as ineffective and consequently unnecessary. Relatedly, developers may be less inclined to adhere to zoning laws. The City Planning Commission may be able to reject building applications which violate zoning law but nothing restrains unscrupulous developers from building anyway.

The four case studies in this paper provide a starting point for considering how zoning law should be changed in order to preserve procedural justice in the zoning process. Importantly, New York City's zoning laws currently provide procedures for public input prior to any zoning amendments. But, the structure of the Zoning Resolution undermines any meaningful participation. What results is a sort of accountability hot potato. The public blames the City for allowing the construction of offensive as-of-right developments while city planners retort that the public should have spoken up earlier against the zoning amendments giving rise to the as-of-right developments. New York City needs comprehensive rezoning if procedural justice is to be achieved. The new zoning law should strive for simplicity and the answer may lie in the earlier 1916 Building Zone Resolution.

⁸ For an explanation of as-of-right development, see *infra* Section IV, Part 1. One of this paper's case studies, 432 Park Avenue, was constructed as-of-right. Two of 432 Park Avenue's supertall neighbors, One57 and the Extoll Nordstrom Tower, were and will be, respectively, constructed as of right. Michael Kimmelman, *Seeing a Need for Oversight of New York's Lordly Towers*, N.Y. TIMES, Dec. 22, 2013, available at <http://www.nytimes.com/2013/12/23/arts/design/seeing-a-need-for-oversight-of-new-yorks-lordly-towers.html>.

⁹ For a general overview of the psychological literature on procedural justice, see Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCH. 117 (2000).

II. A SHORT HISTORY OF ZONING

With the exception of Houston, every major city has enacted zoning laws.¹⁰ But zoning is actually a fairly new phenomenon. Throughout its short history, zoning law has been plagued by questions of legitimacy and authority. After all, zoning law curtails the individual's private property right. Considering the centrality of private property in American political and legal history and the ubiquity of bucolic notions of homesteading in American folklore, it is no surprise that city planners have had to tread carefully when justifying zoning laws. A quick examination of zoning history reveals the perpetual clash between private property rights and regulations meant to benefit the public at large.

The history of zoning law is inexplicably tied to New York City, the progenitor of the 1922 State Zoning Enabling Act. Calls for some kind of building height restriction first emerged in the late nineteenth century but reached no conclusion. In 1894, the Architectural League of New York organized a symposium to debate height limitations on office buildings.¹¹ Though the League generally supported height limits, it thought that market forces like congested streets and the costliness of constructing taller buildings would limit the construction of tall office buildings. Consequently, the League endorsed no action.¹² The argument that market forces already serve as adequate regulation prevails today.

Though New York City possessed a more stringent building code than other municipalities at the time, its power to regulate private property was still markedly weak.¹³ Even when laws existed, weak enforcement often undermined regulatory goals. In 1901, the City

¹⁰ Paul Goldberger, *When Developers Change the Rules During the Game*, N.Y. TIMES, Mar. 19, 1989.

¹¹ Sally A. Kitt Chappell, *A Reconsideration of the Equitable Building in New York*, 49 J. SOC. OF ARCHITECTURAL HIST. 90, 90 (1990).

¹² GREGORY F. GILMARTIN, *SHAPING THE CITY: NEW YORK AND THE MUNICIPAL ARTS SOCIETY* 156-57 (1995).

¹³ See generally ALEXIOU, *supra* note 1, ch. 1. New York adopted its first law regulating building construction in 1860. Responding to the structural weakness of masonry construction, the laws required thicker walls toward the bottom of the building to support the building's load. *Id.* at 4.

adopted a law allowing the Board of Aldermen to regulate tenement heights to ensure light and fresh air for inhabitants.¹⁴ The Board, however, rarely exercised the right.¹⁵ The City also prohibited the construction of horse stables next to schools, but again the law was rarely enforced.¹⁶ New York was largely a laissez-faire city; it had no traffic laws¹⁷ and could not even compel property owners to display street numbers on their buildings.¹⁸

By the beginning of the twentieth century, new developments highlighted the urgency for some kind of zoning regulation. Various technological developments allowed developers to profitably build higher and higher. Builders were beginning to switch over from masonry construction to steel-framed building construction.¹⁹ Since City law required builders to construct thicker walls toward the bottom of masonry buildings, developers were physically and economically limited by how tall they could build, for by the time they reached the top floor, walls were half the width of ground-floor walls, resulting in significant wasted space.²⁰ Although the building code lagged behind and still required builders to construct vestigial thicker ground walls for a while, the new steel-framed construction technique allowed for taller, streamlined buildings.²¹ Meanwhile, the proliferation of passenger elevators allowed developers to raise the rents on higher units which had previously rented out for less since tenants did not want to climb up several flights of stairs.²²

The new skyscrapers emerging downtown instilled fear and contempt in some New Yorkers. The architect Charles Lamb criticized the Flatiron Building as “an example of the

¹⁴ GILMARTIN, *supra* note 12, at 31.

¹⁵ S.J. MAKIELSKI, JR., *THE POLITICS OF ZONING: THE NEW YORK EXPERIENCE* (1966), 11.

¹⁶ GILMARTIN, *supra* note 12, at 138.

¹⁷ *Id.*, at 54.

¹⁸ *Id.*, at 53.

¹⁹ ALEXIOU, *supra* note 1, ch. 1.

²⁰ *Id.* at 4.

²¹ *Id.* at 16.

²² GILMARTIN, *supra* note 12, at 148-49.

greed of the corporation controlling it and owning it. Architecturally, it is unfit to be in the center of the city.”²³ Others found the new skyscrapers inherently ugly²⁴ and the increasingly jagged skyline unsightly.²⁵ Yet others doubted the strength of the new skyscrapers, fearing they would topple down into the streets below.²⁶

The new skyscrapers also wrecked havoc on the streets below. They cut off sunlight to the streets²⁷ and contributed to “bridge crush,” a phenomenon that occurred at rush hour everyday when commuters overwhelmed the trolley running across the Brooklyn Bridge.²⁸ Between 1900 and 1910, dozens of New Yorkers wrote to *The New York Times* commenting on bridge crush. W.W. Hallock, for example, wrote to the editor of the *Times* in 1903 describing bridge crush as “the mad effort of human hogs and hellions generally . . . to reach their destination by sheer force and brutal indecency,”²⁹ while “another New Yorker” wrote to the editor offering “another remedy for bridge crush” consisting of adding additional boarding areas around Chatham Square and Park Row to reduce the number of riders boarding at any given time.³⁰

Progressive ideologies which favored city planning and greater government intervention concurrently gained steam, although Tammany Hall retained a fairly dominant stronghold on New York City politics.³¹ The positive environmentalism movement claimed that improved living conditions could improve people’s morals; thus, they believed that “access to parks, air,

²³ *Id.* at 139.

²⁴ ALEXIOU, *supra* note 1, at 13 (“Critics denounced what they considered the sheer ugliness of the new buildings. There was no possible way, they shouted, for skyscrapers to be made beautiful.”).

²⁵ Previously, the majority of buildings had topped out at 50-60 feet tall, leading to a relatively uniform skyline. See GILMARTIN, *supra* note 12, at 155-56.

²⁶ ALEXIOU, *supra* note 1, at 15.

²⁷ GILMARTIN, *supra* note 12, at 155.

²⁸ *Id.* at 77.

²⁹ W.W. Hallock, Letter to the Editor, *Lindenthal and Bridge Crush*, N.Y. TIMES, Nov. 15, 1903, at 23.

³⁰ Letter to the Editor, *Another Remedy for Bridge Crush*, N.Y. TIMES, Mar. 1, 1903, at 27.

³¹ On the flipside, Tammany’s corruption and scandals further added fire to the progressives, who desired reform in political and economic life. SEYMOUR I. TOLL, *ZONED AMERICAN* (1969), ch. 1.

and light would enhance both the physical and moral health of the occupants.”³² The shocking exposés by Jacob Riis and Lewis Hine popularized progressivism.³³ Somewhat paradoxically, even adherents to social Darwinism saw justification for government regulation of private property. If one’s environment influenced evolution, they reasoned, city planning could improve the environment and lead humankind to evolve to new heights.³⁴

Finally, powerful interest groups began to organize in favor of height restrictions and other zoning measures. These groups provided intellectual brainpower and pressed the urgency of zoning upon city government and the media. Edwin Blashfield and William Vanderbilt Allen founded the Municipal Arts Society (MAS) in 1893.³⁵ Their initial goal was merely to beautify public spaces with “adequate sculptural and pictorial depictions.”³⁶ In fact, MAS initially shied away from technical issues, claiming that such issues fell out of their objectives.³⁷ But MAS grew increasingly interested in city planning over time. As renowned architects, builders, and government leaders joined their ranks, they also grew increasingly influential. MAS continues to play a pivotal role in critiquing and shaping zoning law today.³⁸

In 1907, Tammany Hall appointed a commission to revise the City’s building code. It named Charles Israels, an architect and MAS board member, as chairman. Israels’s main goal was to reduce fire hazard. In doing so, he proposed height and bulk limits on buildings. The Board of Aldermen rejected Israels’s plan in December. Tammany Hall disliked the level of

³² Richard H. Chused, Euclid’s *Historical Imagery*, 51 CASE W. RES. L. REV. 597, 602 (2000).

³³ *Id.* at 22-23.

³⁴ TOLL, *supra* note 31, at 18.

³⁵ GILMARTIN, *supra* note 12, at xi.

³⁶ *Id.* at 12.

³⁷ For example, when Charles Israels led a commission to revise the New York building code, he asked the MAS board for input but received no response, for the board considered construction regulation outside of its purview. *Id.* at 61.

³⁸ In 2014, MAS released a report titled *The Accidental Skyline* criticizing the zoning lot mergers which allowed for the construction of supertall structures in the Central Park South area. The Department of City Planning alludes to MAS as a “prominent civic organization.” See DEP’T OF CITY PLANNING, CITY OF N.Y., A SURVEY OF TRANSFERABLE DEVELOPMENT RIGHTS MECHANISMS IN NEW YORK CITY (2015), 4.

detail of the plan. By limiting factories to 100-feet tall (150-feet if they were “fire-proof”) and office buildings to 200-feet tall, the plan reduced the City’s discretion in granting building approval. The problem was that Tammany Hall thrived on “discretion,” otherwise known as corruption.³⁹

As the New York City Subway expanded, speculative development took hold. Developers brought construction to previously undeveloped neighborhood like those in the far-flung reaches of Queens and Brooklyn, as well as to established neighborhoods. In particular, developers began to turn their eyes toward the City’s ritzy Fifth Avenue. The narrow lots along Fifth Avenue encouraged developers to build tall thin buildings. Once one tall thin building appeared, a snowball effect would develop: the first skyscraper would cause the surrounding buildings’ property values to fall. As a result, surrounding property owners would tear down existing buildings and rebuild skyscrapers in their place. As more and more skyscrapers went up with no zoning laws to regulate their height or bulk, they began to block sunlight and air from each other. Companies stopped renting the stuffy, dark rooms as offices and garment manufacturers replaced them, converting the offices to lofts for use as factory space.⁴⁰ In any case, the garment manufacturers liked the location, preferring to locate as close as possible to buyers to reduce transportation costs and streamline transactions with buyers.⁴¹

The retailers who sold the garments abhorred the development. At lunch time, the dirty factory workers descended upon the streets, spitting on the streets and otherwise obstructing sidewalks and display windows. The retailers feared the indecent factory workers would dissuade well-bred ladies from shopping along Fifth Avenue. Even if wealthy women desired to shop along Fifth Avenue, they would not be able to move along the crowded sidewalks nor

³⁹ GILMARTIN, *supra* note 12, at 161-63.

⁴⁰ *Id.* at 190-91.

⁴¹ MAKIELSKI, JR., *supra* note 15, at 11.

would they be able to peer into the stores' display windows.⁴² In response, the retailers organized the Fifth Avenue Association in 1908.⁴³ They initially tried to arrest the workers for loitering, but the large numbers of workers made the strategy ineffective. The Fifth Avenue Association also tried to take the moral high ground by setting up placards reminding workers to be mindful of spitting in the presence of ladies, but that strategy failed as well.⁴⁴ The Fifth Avenue Association realized it would have to turn to the City for help.

Their calls were heard. In 1912, Manhattan Borough president and MAS member George McAneny formed the Fifth Avenue Commission to study the problem. The Commission recommended a 150-foot height limit on all buildings along Fifth Avenue, although the restriction was never adopted.⁴⁵ The Board of Estimate worried about the implication on private property rights. The Fifth Avenue merchants decided to try again, this time requesting citywide height limits.

The Fifth Avenue Association had focused on aesthetic issues, but city planners knew the regulations needed to be justified by something more to survive litigation. In February of 1913, the City formed a Committee on City Planning to evaluate whether zoning was legally feasible and politically a popular move.⁴⁶ The Committee mailed over 1,300 feelers to individuals and organizations to evaluate their concerns about zoning.⁴⁷ While it appeared that most people agreed some kind of zoning was needed, some worried that zoning would decrease property values.⁴⁸ Ultimately, the Committee members strategically decided to find refuge in state police powers. Zoning needed to purport to either protect property values or promote health for all

⁴² GILMARTIN, *supra* note 12, at 190-91.

⁴³ GILMARTIN, *supra* note 12, at 183. *See also* TOLL, *supra* note 31, at 74-76.

⁴⁴ *Id.* at 190-91.

⁴⁵ *Id.* at 192-93.

⁴⁶ MAKIELSKI, JR., *supra* note 15, at 15.

⁴⁷ *Id.* at 18.

⁴⁸ *Id.* at 19-20.

residents.⁴⁹

On February 27, 1914, the City sent a draft bill to the state legislature requesting zoning powers. It passed quickly and then Governor Martin H. Glynn signed it into law on April 20, 1914.⁵⁰ The City had just won the authority to zone. In June, the City formed a Commission on Building Districts and Restrictions to decide the contours of zoning law.⁵¹ Throughout the process, the Commission elicited public feedback. They held numerous public hearings and corresponded with various local groups. The Commission knew zoning would best succeed if it reflected the public's wishes.⁵² Speaking years later, Edward M. Bassett, chairman of the Commission, claimed "[o]ne element of our success in New York was that the people handled all the zoning for the City The best zoning for any city is that zoning that the people of that locality want to put on their property."⁵³ On July 25, 1916, the Board of Estimate voted to adopt the Commission's Building Zone Resolution.⁵⁴ New York City became the first municipality in the United States to adopt comprehensive zoning.

Other municipalities soon followed. The Department of Commerce issued the Standard State Zoning Enabling Act (SZEa) in 1922.⁵⁵ The SZEa was a model law granting zoning rights to city governments. Unsurprisingly, the drafters of the SZEa based it on New York City's Building Zone Resolution. New York City's Committee on City Planning had already done the grunt work of identifying concerns surrounding zoning and formulating a justification which would likely survive litigation. Like the New York law, the SZEa advised that local

⁴⁹ *Id.*

⁵⁰ *Id.* at 22-23.

⁵¹ *Id.* at 25.

⁵² *Id.* at 26.

⁵³ *Id.* (quoting Interview by Howard M. Bassett with Edward M. Bassett (Jan. 8, 1963)).

⁵⁴ See N.Y.C., N.Y., BUILDING ZONE RESOLUTION (1916).

⁵⁵ STANDARD STATE ZONING ENABLING ACT (DEP'T COMMERCE 1922).

governments enact zoning laws through the authority of state police powers.⁵⁶ The SZEAs drafters were also sensitive to private property rights and like New York's Zoning Commission sought to placate criticism by emphasizing how the law reflected the public's desires.⁵⁷

"[W]ithin a year of [the Act's] issuance, 11 States passed zoning enabling acts which were modeled wholly or partially after it."⁵⁸ The number of municipalities with zoning laws jumped from 48 in September of 1921 to 218 by December of 1923.⁵⁹ In the revised 1926 version of the Act, then Secretary of Commerce Herbert Hoover felt comfortable remarking that zoning "has made an almost instant appeal to the American people."⁶⁰

III. THE 1916 BUILDING ZONE RESOLUTION

The 1916 Building Zone Resolution was deceptively simple at the time of its adoption.⁶¹ It occupied a mere thirteen pages, *including* definitions. The Resolution divided the five boroughs into three different kinds of use districts;⁶² five different height districts;⁶³ and five different area districts.⁶⁴ The Resolution's stated purpose was to promote "the public health, safety, comfort, convenience and general welfare," language ostensibly based on state police

⁵⁶ *Id.* § 1, n. 3.

⁵⁷ Zoning would put the community's "best interest" first, and the public was to play a role in formulating what "best interest" consisted of. STANDARD STATE ZONING ENABLING ACT § 4. Footnote 38 emphasized that all citizens, not just interested property owners, possessed the right to be heard. *Id.*, n. 38 ("[A]nd citizens: This permits any person to be heard, and not merely property owners whose property interests may be adversely affected by the proposed ordinance. It is right that every citizen should be able to make his voice heard and protest against any ordinance that might be detrimental to the best interests of the city.") (internal quotations omitted).

⁵⁸ Herbert Hoover, *Foreword to the 1926 Revised Edition of STANDARD STATE ZONING ENABLING ACT* (DEPT. OF COMMERCE 1926) [hereinafter Hoover Forward to SZEAs].

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ For clarity's sake, I will refer to the 1916 law as the Building Zone Resolution throughout this text to distinguish it from the 1961 Zoning Resolution, although the reader will find that in later years, the law's name was amended to the 1916 Zoning Resolution.

⁶² The use districts included residence, business, and unrestricted districts. N.Y.C., N.Y., BUILDING ZONE RESOLUTION art. II, § 2 (1916).

⁶³ The height districts included one times, one and one-quarter times, one and one-half times, two times, and two and one-half times districts. *Id.* art. III, § 8.

⁶⁴ The area districts included A, B, C, D, and E districts. *Id.* art. IV, § 10.

powers.⁶⁵

The 1916 Building Zone Resolution divided the City into five different height districts, ranging from one times districts to two and one-half times districts.⁶⁶ The maximum height of a development consisted of two components: a maximum initial height, which dictated how high the wall could rise if built at the street line, and setbacks, which gave developers additional height for each foot they placed the building or a portion of it back from the street line. To calculate a building's maximum initial height, one would multiple the street's width times the district number. For example, a building located in a one and one-quarter times district could be built to 1.25 times the street's width. How high a developer could build thus depended on the interplay between the street's width—the wider, the higher—and the district's number. The Resolution also included a setback provision that rewarded a developer additional height for each foot he set back the building or a portion of it from the street. The setback provision was inspired by Paris's "angle of light" principle.⁶⁷ According to the principle, "an invisible, imaginary plane . . . tilted upward from the center of the street, and . . . no building was allowed to interrupt [it]."⁶⁸ Setbacks expanded the range of slopes upon which sunlight could reach the street. Higher numbered districts received more feet in height per foot of setback.⁶⁹ A developer in a one times district received an additional 2 feet of height per 1 foot of setback whereas a developer in a two and one-half times district received an additional 5 feet per 1 foot of setback. The setback provision accommodated art deco style architecture well as the geometric planes commonplace in art deco could be inserted as setbacks, allowing developers to seamlessly heighten buildings. At its extreme, the setback provision led to the creation of "wedding-cake

⁶⁵ *Id.* art. V, § 19.

⁶⁶ *Id.* art. III, § 8.

⁶⁷ GILMARTIN, *supra* note 12, at 158.

⁶⁸ *Id.*

⁶⁹ See N.Y.C., N.Y., BUILDING ZONE RESOLUTION art. III (1916).

style” buildings.⁷⁰

An examination of the maps accompanying the Resolution show that the areas districted as the highest height district (two and one-half times) at the time of the 1916 law’s issuance included the lower Manhattan area. The next highest district (two times) included the areas directly adjacent to the East River waterfront; the areas directly adjacent to the Hudson River waterfront from about West 72nd Street down to Battery Park; and a long rectangular-ish shape with many cutouts and pockets of one and one-quarter and one and one-half districts in the middle of the island running from approximately Central Park South down to lower Manhattan.⁷¹

In addition to height districts, area districts also indirectly limited building heights. The area district specified how much open space had to be preserved on each lot. The Resolution divided the City into five area districts, ranging from A to E.⁷² The amount of required open space increased from A to E district. A districts required a minimum of 1 square inch of open space per one foot of building height.⁷³ On the other hand, C districts required a minimum of either 1.5 square inches or 3 square inches of open space per foot of height, depending on whether the open space manifested as a rear yard, side yard, or court.⁷⁴ Since the area requirement required developers to preserve a certain amount of open space on each lot, the requirement physically limited the ground floor dimensions of the building and thereby limited the number of setbacks the developer could utilize. All of the two times and two and one-half

⁷⁰ For a prime example of a wedding-cake style building in Manhattan, see 120 Wall Street, New York City, New York, 10005.

⁷¹ N.Y.C. BD. ESTIMATE & APPORTIONMENT, HEIGHT DISTRICT MAP 15 (1916), available at <https://digitalcollections.nypl.org/items/510d47e4-80dd-a3d9-e040-e00a18064a99> [hereinafter 1916 HEIGHT DISTRICT MAP].

⁷² N.Y.C., N.Y., BUILDING ZONE RESOLUTION art. IV, § 10 (1916).

⁷³ *Id.* art. IV, § 11.

⁷⁴ The Zoning Resolution varies these requirements for lots less than thirty feet wide. Additionally, it notes that if a portion of the lot is permanently set aside as open space for the building’s residents’ recreational use and meets certain requirements, then the lot will be treated like a B district lot. *Id.* art. IV, § 13.

times height districts in Manhattan resided in B area districts.⁷⁵

If a developer's goal was to build the tallest possible building, he could utilize the tower exception in the 1916 Building Zone Resolution. The tower exception resides in Section 9 of Article III, which identifies exceptions to the height district scheme. According to the tower exception, a building or any portion of it covering twenty-five percent or less of a lot "may be erected to any height, provided that the distance which it sets back from the street line on each street on which it faces, plus half of the width of the street, equals at least 75 feet."⁷⁶

A. Case Studies

The 1916 Building Zone Resolution radically changed the process of building tall in New York City. Previously, the developer had only been limited by engineering capabilities and market demand. The sky was truly the limit. But after the adoption of zoning, developers had to comply with a new set of standards before construction could begin. This Part recounts the new building application process for two iconic Manhattan buildings: the Flatiron Building, completed in 1902 prior to the adoption of zoning, and the Empire State Building, completed in 1931.

1. Flatiron Building

Between West 23rd Street and West 22nd Street at the intersection of Broadway and Fifth Avenue lies a peculiarly shaped block.⁷⁷ At the beginning of the twentieth century, the block was surrounded by relatively short, squat buildings of approximately eight stories or less (see Figure 2). Despite its odd shape, the block proved to be a valuable advertising spot. Anyone

⁷⁵ N.Y.C. BD. ESTIMATE & APPORTIONMENT, AREA DISTRICT MAP (1916), available at <https://digitalcollections.nypl.org/items/de9cf0e0-c5f6-012f-c63b-58d385a7bc34#/?uuid=510d47e4-80de-a3d9-e040-e00a18064a99>.

⁷⁶ N.Y.C., N.Y., BUILDING ZONE RESOLUTION art. III, § 9(d) (1916).

⁷⁷ Broadway has since been moved westward, making the once-triangular block a trapezoidal shape. For a map depicting the block in 1899, see plate 9 of GEORGE W. BROMLEY & WALTER S. BROMLEY, 2 ATLAS OF THE CITY OF NEW YORK: BOROUGH OF MANHATTAN, FROM ACTUAL SURVEYS AND OFFICIAL PLANS, available at <https://digitalcollections.nypl.org/items/510d47e2-5570-a3d9-e040-e00a18064a99>.

traveling down Fifth Avenue or Broadway noticed advertisements perched on its northern corner, especially since the northern corner bordered Madison Square Park.⁷⁸ In 1901, the George A. Fuller Company decided to erect a building on the block to house its New York City headquarters. The George A. Fuller Company had recently merged with the Central Realty, Bond, and Trust Company, forming New York's first skyscraper trust. Capitalized at \$20 million, the George A. Fuller Company was the largest construction company in the world at the time.⁷⁹ Unsurprisingly, the George A. Fuller Company was drawn to such a conspicuous site. In March of 1901, the president of the company, Harry Black, assembled the Cumberland Realty Company with a handful of investors.⁸⁰ Less than two months later, Cumberland Realty purchased the two lots comprising the triangular block.⁸¹



Figure 2: Courtesy of the Library of Congress Prints and Photographs Division Washington, D.C. 20540. This photograph taken by the Detroit Publishing Company between c. 1902-1910 shows the Flatiron Building from Madison Square Park.

⁷⁸ ALEXIOU, *supra* note 1, at 27.

⁷⁹ *Id.* at 35.

⁸⁰ *Id.* at 34-35.

⁸¹ *Id.* at 40.

But the George A. Fuller Company did not want just an eye-catching lot. It also wanted an eye-catching skyscraper. At the time, Manhattan contained no skyscrapers north of Union Square.⁸² The previous owners of the upper lot had considered constructing a twelve-story building on the lot, the maximum height they believed physically possible on the small triangular lot.⁸³ The George A. Fuller Company wanted something taller and grander. Now was the perfect time to build as well. The New York City Building Code no longer mandated masonry walls,⁸⁴ which required thicker walls at the bottom resulting in ground floor walls of several feet of thickness in taller buildings.⁸⁵ A developer would not have been able to build a masonry skyscraper on a small lot due to the wall thickness requirements.

Additionally, the Building Zone Resolution was still over a decade away. For developers, the sky was the limit, bar engineering capabilities. The popularization of passenger elevators coupled with new steel-framed construction techniques made it financially rational to build taller: “At the minimum investors were building fifteen stories, if they wanted any return on their money. A building’s first five stories paid the taxes, the second five, the other building expenses. But only above the tenth floor did the profits begin to roll in.”⁸⁶ The George A. Fuller Company selected the esteemed Chicago firm D.H. Burnham & Company as its architect for the project.⁸⁷

On August 1, 1901, Corydon Purdy of the George A. Fuller Company submitted an Application for Erection of Brick Buildings form to the Department of Buildings stating the George A. Fuller Company’s intent to build an office building on the “entire block” of “the

⁸² *Id.* at 41.

⁸³ *Id.* at 33.

⁸⁴ See N.Y.C., N.Y., THE BUILDING CODE OF THE CITY OF NEW YORK (1901); ALEXIOU, *supra* note 1, at 30.

⁸⁵ ALEXIOU, *supra* note 1, at 4.

⁸⁶ *Id.* at 60.

⁸⁷ Application for Erection of Brick Buildings from Corydon Purdy to the Department of Buildings of the City of New York (Aug. 1, 1901) (on file with the New York City Municipal Archives).

triangular block bounded by Fifth Avenue, Broadway and 22nd Street.”⁸⁸ The new building would be twenty stories high plus an attic and stand around 286-feet tall.⁸⁹ The application form went on to ask various questions about the ground, foundation, base, wall thickness, materials, and fire resistance.⁹⁰ The Department of Buildings was much more concerned about the strength and fire resistance of the building than the height. Indeed, the Department of Buildings cared to know the height of the building not for any proto-zoning reasons but rather to evaluate how well the building would hold up. Although curtain walls of steel-framed buildings carry none of the building’s load, the Building Code nevertheless imposed burdensome curtain wall regulations, no doubt a vestigial reminder of old masonry construction techniques.⁹¹

On August 15, 1901, the Commissioner of Buildings for Manhattan and the Bronx disapproved Purdon’s application for failing to include a complete column schedule; describe and show provisions made for wind bracing; conform with wall thickness requirements; design the retaining walls with stone or brick; specify where the girders and beams of floor framing would be; design the steel work of the sidewalk too weakly; include details of column and column shoes; include proper fire apparatuses; and provide proper fire escapes.⁹² The Commissioner’s concerns all revolved around the building’s ability to stay up and resist fires. Corydon Purdy submitted new plans on August 27, 1901, in response to the Commissioner’s objections.⁹³ Two weeks later, the Commissioner of Buildings for Manhattan and the Bronx

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ According to Section 37 of the Code, “[c]urtain walls . . . shall not be less than twelve inches thick for sixty feet of the uppermost height thereof . . . and increased four inches for every additional section of sixty feet.” N.Y.C., N.Y., THE BUILDING CODE OF THE CITY OF NEW YORK § 37 (1901). *See also* ALEXIOU, *supra* note 1, at 15.

⁹² Memorandum from the Commissioner of Buildings for the Boroughs of Manhattan and the Bronx regarding Application #1356, N.B., 1901 (Aug. 15, 1901) (on file with the New York City Municipal Archives).

⁹³ Amendment to Application No. 1356 from Corydon Purdy to the Department of Buildings of the City of New York (Aug. 27, 1901) (on file with the New York City Municipal Archives).

approved the George A. Fuller Company's new building application.⁹⁴

Construction on the new Fuller Building finished in 1903.⁹⁵ (Despite the George A. Fuller Company's best efforts to publicize the building as the "Fuller Building," the name never caught on. Instead, the public preferred to refer to it as the "Flatiron Building," so named for the triangular shape of its lot).⁹⁶ Thus was how the George A. Fuller Company erected the first skyscraper north of Union Square without any objections from the Department of Buildings as to the building's height or bulk. The Department only cared that the walls of the building were "strong" enough for a steel-framed building of that height. It did not care about the height of the building itself.

From our contemporary perspective, the Department of Buildings' reticence is particularly surprising considering that the building constituted the first skyscraper in the area and took up the whole lot. Photographs and illustrations from the time period depict the Flatiron Building like the bow of an enormous ship rising over the horizon, dwarfing its neighboring buildings, and hulking over Madison Square Park (see Figure 2). But the Department of Buildings' lack of concern for the Flatiron Building's height and bulk was not an oversight. It was simply how city officials operated in the absence of a zoning code. In 1905, the Fifth Avenue Building Company submitted an alteration application to the Bureau of Buildings for the Borough of Manhattan to build a penthouse atop the "present roof" of the Flatiron Building.⁹⁷ The penthouse would bring the building's height from 286 feet to approximately 300 feet.⁹⁸ The Bureau rejected the alteration application a number of times, though again all for safety-related

⁹⁴ Detailed Statement of Specifications for the Erection of Brick Buildings regarding Application #1356 Submitted Aug. 2, 1901 (on file with the New York City Municipal Archives).

⁹⁵ On October 1, 1903, a Department of Buildings inspector made a final inspection on the new building. Final Report of Inspector (Oct. 1, 1903) (on file with the New York City Municipal Archives).

⁹⁶ ALEXIOU, *supra* note 1, at 106.

⁹⁷ Application to Alter, Repair, Etc. regarding Plan No. 470 from Jay H. Morgan to the Office of the Borough President of the Borough of Manhattan (Mar. 18, 1905) (on file with the New York City Municipal Archives).

⁹⁸ *Id.*

reasons. For example, on April 4, 1905, the Manhattan Superintendent of Buildings disapproved the plans for the new penthouse due to perceived structural weakness of the walls and roof.⁹⁹ The fact that the building would become even taller was immaterial to the Superintendent's decision.

Another noticeable feature about the Flatiron Building's new building application process was the lack of public input. All power resided in the Department of Buildings or Manhattan Borough Bureau of Buildings, depending on the nature of the application. Although the Flatiron Building would significantly change the Manhattan skyline, at no point in the application process did the public have an opportunity to speak against its erection. In any case, the building captivated the public, though the reactions were mixed. Some thought the building to be absolutely sublime. One observer described it as "most aquiline" while another called it "the sharpest thing any architect ever perpetrated."¹⁰⁰ Surrounding property owners had cause to complain about the new building—the building's triangular shape contributed to such strong wind flows that the wind occasionally smashed neighbors' windows.¹⁰¹ In fact, the wind problem was so serious that it injured pedestrians by knocking them down and dropping tree branches on their heads.¹⁰² During one severe storm, it even led to a boy's death when it blew him into the middle of the street where he was hit by a moving car.¹⁰³ Considering how the 1916

⁹⁹ Memorandum from the Superintendent of Buildings, Borough of Manhattan, regarding Amendment to Application #407, Alt. 1905 (Apr. 4, 1905) (on file with the New York City Municipal Archives).

¹⁰⁰ *Most Remarkable Building in New York*, COURIER-J., July 6, 1902, C5.

¹⁰¹ See, e.g., *The "Flatiron Building" Case*, AM. LAWYER, Feb. 1903, 51 (describing a neighboring clothier's lawsuit against the Flatiron Building for directing winds in a way that it "strikes his windows, breaks the glass and carries mud and rain over his stock"). Many nearby merchants even called to lower the Flatiron Building by three to four stories to thus weaken the wind flow. *May Have to Lower Flatiron Building*, S.F. CHRON., Feb. 9, 1903, 1.

¹⁰² *Minaret Blown Off: Wind Also Hurls Woman Against Flatiron Building*, N.Y. TRIB., July 3, 1903, 2.

¹⁰³ See, e.g., *Wind Causes Boy's Death: Blows Him Under an Automobile Near Flatiron Building*, N.Y. TIMES, Feb. 6, 1903, 1; *Wind Whirlpool: Caused by Flatiron Building Throws Boy to Death Beneath Automobile*, CINCINNATI ENQUIRER, Feb. 8, 1903, 4.

Resolution justified zoning as a means to promote “public health, safety, and general welfare,”¹⁰⁴ the Flatiron Building would have been a perfect candidate for regulation. In fact, the building did inspire some calls for zoning regulation. As one New Yorker wrote, “[t]he flatiron building [sic] is more of a monstrosity than other skyscrapers, because it can be seen from more directions When the flatiron [sic] has all its offices filled . . . the streets about it will be flooded between half after 5 and 6 o’clock each day.” The author went on to call for some kind of plan which would regulate population density not only in Manhattan, but all the outer boroughs as well.¹⁰⁵ New York City would have to wait over ten years for such a plan to surface.

2. Empire State Building

If one stands at the base of the Flatiron Building today and looks north across Madison Square Park, one will see another architectural behemoth rising in the sky. The story of the Empire State Building is significantly more complex than that of the Flatiron Building, both as a result of the complex circumstances surrounding the building’s development as well as the new regulations imposed by zoning.

In the early twentieth century, the corner lot bounded by West 33rd Street, West 34th Street, and Fifth Avenue housed the old Waldorf Astoria hotel.¹⁰⁶ Over time, however, New York’s elites began moving further and further uptown. In fact, by the time the Flatiron Building broke ground just ten blocks south at the beginning of the twentieth century, many New Yorkers believed the once upper-class enclave had declined to the point of no return.¹⁰⁷ Thus, in December of 1928, the Waldorf Astoria Realty Corporation sold the site to the Bethlehem

¹⁰⁴ *Preamble to N.Y.C., N.Y., ZONING RESOLUTION (1961)*. Similar language is also included in *N.Y.C., N.Y., BUILDING ZONE RESOLUTION art. V, § 19 (1916)*.

¹⁰⁵ *Give Greater New York a Plan*, *N.Y. TIMES*, Dec. 24, 1902, 8.

¹⁰⁶ *See* Plate No. 75 of *SANBORN-PERRIS MAP CO., INSURANCE MAPS OF THE CITY OF NEW YORK: BOROUGH OF MANHATTAN (1899)*; *see also* JOHN TAURANAC, *THE EMPIRE STATE BUILDING: THE MAKING OF A LANDMARK* 118 (2014).

¹⁰⁷ ALEXIOU, *supra* note 1, at 40.

Engineering Company.¹⁰⁸

The Bethlehem Engineering Corporation wished to demolish the Waldorf Astoria Hotel and build a mixed-use building with lofts and offices called the Waldorf Astoria Office Building in its place. The Bethlehem Engineering Corporation formed the Waldorf Astoria Office Building Company to undertake the project. It selected Shreve, Lamb & Harmon (then Shreve & Lamb) as its architect.¹⁰⁹ On January 22, 1929, R.H. Shreve filed a new building application for the proposed Waldorf Astoria Office Building with the Manhattan Bureau of Buildings. The building would contain fifty-five floors plus a basement and rise approximately 670 feet tall.¹¹⁰ But several problems arose which prevented the approval and construction of the building.

First, the Manhattan Bureau of Buildings found the “proposed height . . . excessive” on January 23, 1929.¹¹¹ The lot of the proposed Waldorf Astoria Office Building was split between two different height districts, leading to an awkward height-district zoning designation (see Figure 3). The lot was a rectangle, measuring approximately 425-feet long and 200-feet wide. The eastern portion of the lot, measuring approximately 100-feet long and 200-feet wide, was zoned as a one and one-quarter times district. Meanwhile, the rest of the lot was districted as a two times district, meaning the height district designation abruptly changed mid-lot.¹¹²

¹⁰⁸ *Smith to Help Build Highest Skyscraper*, N.Y. TIMES, Aug. 30, 1929, 1; TAURANAC, 118.

¹⁰⁹ TAURANAC, *supra* note 106, at 120.

¹¹⁰ N.B. Application No. 31, 1929, from R.H. Shreve (Jan. 22, 1929) (on file with the New York City Municipal Archives).

¹¹¹ Memorandum from the Superintendent of Buildings, Bureau of Buildings, Borough of Manhattan, disapproving New Building Application No. 31, 1929, (Jan. 23, 1929) (on file with the New York City Municipal Archives) [hereinafter January 23, 1929, Memorandum].

¹¹² N.Y.C. BD. ESTIMATE & APPORTIONMENT, HEIGHT DISTRICT MAP (1929), available at <https://digitalcollections.nypl.org/items/c02c72da-4e6a-31c2-e040-e00a18061e9a> (see section no. 8). Since the map displayed the one and one-quarters times district running through the lot parallel to Fifth Avenue, the height district extended 100-feet into the block. N.Y.C. BD. ESTIMATE & APPORTIONMENT, BUILDING ZONE PLAN: MAP DESIGNATIONS AND MAP DESIGNATION RULES 12 (1916), available at <https://www1.nyc.gov/assets/planning/download/pdf/about/city-planning-history/building-zone-plan.pdf>

Avenue. Two times district regulations would govern the rest of the northern street wall. In the two times district portions, the street wall could be built up to 200-feet tall since West 34th Street is 100-feet wide, and every 1-foot setback would garner 4 feet of additional height to the wall.¹¹⁴ Meanwhile, a special exception would regulate the height along the southern street wall fronting West 33rd Street. According to Article III, Section 9(b) of the 1916 Building Zone Resolution, “[a]long a narrower street near its intersection with a wider street, any building or any part of any building within 100 feet of the wider street, measured at right angles from the side of the wider street, shall be governed by the height regulations provided for the wider street.”¹¹⁵ Since West 33rd Street is only 60-feet wide, the southern street wall would be subject to the same regulations governing the eastern street wall along Fifth Avenue. Like the eastern street wall, the southern street wall could rise to 125-feet tall.

An examination of Shreve & Lamb’s blueprints for the proposed Waldorf Astoria Office Building readily reveals zoning violations. The fifty-five stories of the building were separated into thirteen different levels, decreasing in floor area the higher one went up.¹¹⁶ At the bottom was level A, covering the whole lot.¹¹⁷ Isometric plans of the building show it rising in a complex series of setbacks to a cross-shaped roof.¹¹⁸ Parts of the southern street wall fronting West 33rd Street rose as high as 237-feet. Shreve & Lamb attempted to placate the zoning violations by lowering the street wall significantly along other sections of the building. For

¹¹⁴ *Id.* at art. III, § 8(d).

¹¹⁵ *Id.* at art. III, § 9(b).

¹¹⁶ Shreve & Lamb, Blueprint Showing “Transverse Section Thru Center of Tower Looking West” of Waldorf-Astoria Office Building (on file with the New York City Municipal Archives).

¹¹⁷ Shreve & Lamb, Blueprint Showing “Plan at Level ‘A’” of Waldorf-Astoria Office Building (on file with the New York City Municipal Archives).

¹¹⁸ See Shreve & Lamb, Blueprint Showing “Isometric: 5th Ave. & 33rd St.” of Waldorf-Astoria Office Building (received Oct. 2, 1929) (on file with the New York City Municipal Archives); Shreve & Lamb, Blueprint Showing “Isometric: 5th Ave. & 34th St.” of Waldorf-Astoria Office Building (received Oct. 2, 1929) (on file with the New York City Municipal Archives).

example, the lowest part of the southern street wall would only be 67.5-feet tall.¹¹⁹

Nevertheless, the Manhattan Bureau of Buildings rejected the application only one day after Shreve & Lamb's filing, stating the "proposed height is excessive" and demanding complete plans.¹²⁰ The project's attorneys immediately went to work. Later that day, Hamill, Weinberg & Munro filed a variance request with the Board of Standards and Appeals for exemption from the maximum street wall height.¹²¹ On March 12, 1929, the Board of Standards and Appeals held a public hearing to consider the variance request. The Board noted that there had been only one objection against the request and the objector had signed a stipulation one week earlier. The Board voted to approve the variance as long as the developers complied with the following requirements:

an open court, not less than 25 ft. in width, starting at a point not more than 62 ft. 6 in. above curb level . . . be maintained at the rear of the building from 34th to 33rd streets; that an open, unobstructed arcade, not less than 25 ft. in width, for the full height of the first story, shall be maintained at street level, running through from 34th to 33rd streets for trucking and the discharge and delivery of merchandise or other material used or incidental to the conduct of the premises; that the building shall be restricted from industrial or manufacturing use throughout; [and] that all necessary permits shall be obtained within nine months.¹²²

¹¹⁹ See Shreve & Lamb, Blueprint Showing "34th St. (North) Elevation" (on file with the New York City Municipal Archives) for a diagram labeling the heights each level.

¹²⁰ January 23, 1929, Memorandum, *supra* note 110.

¹²¹ Letter from Hamill, Weinberg & Munro, to Charles Brady, Superintendent of Buildings, Bureau of Buildings (Jan. 23, 1929) (on file with the New York City Municipal Archives) (letter indicating their variance request filing with the Board of Standards and Appeals); Application for Variation from the Requirements of the Building Zone Resolution, CAL. No. 58 1929-BZ, from Hamill, Weinberg & Munro (received Jan. 25, 1929) (on file with the New York City Municipal Archives).

¹²² Variance Request from Hamill, Weinberg & Munro for Waldorf-Astoria Office Building Company, 58-29 BZ, 14 BULL. NO. 12 (1929) (on file with the New York City Municipal Archives).

These conditions mirrored those in the stipulation with the objector.¹²³

Though the Board of Standards and Appeals approved their variance, trouble was on the horizon. The Waldorf Astoria Office Building Company could not fulfill payment that summer and the mortgagee bank took over the property.¹²⁴ The bank initially desired to develop the lot itself but ultimately decided to sell to a mystery buyer on June 3, 1929.¹²⁵ John J. Raskob, a wealthy businessman and chairman of the Democratic National Committee,¹²⁶ had formed the Empire State Building Corporation with the financial backing of wealthy friends such as Pierre S. du Pont.¹²⁷ He selected Al Smith, the former governor of New York,¹²⁸ as the company's president with the belief that Smith's influence would help find tenants to fill a huge office building.¹²⁹

Huge the building would be. On August 30, 1929, Smith announced details of the proposed structure to newspaper reporters. The office building would stand eighty stories high, occupy more than two acres of land, and contain 200 feet of frontage on Fifth Avenue and 425 feet of frontage on West 33rd and West 34th streets.¹³⁰ According to these dimensions, the Empire State Building would be the tallest building in the world upon completion. Unsurprisingly, Smith's announcement made headlines around the country.¹³¹

But the Empire State Building would grow even larger and taller than the dimensions

¹²³ See *id.*

¹²⁴ TAURANAC, *supra* note 106, at 121.

¹²⁵ Deeds for Manhattan, Block 835, Lot 19, in N.Y. COUNTY REG. (on file with Manhattan City Register Office) [hereinafter Block 835, Lot 19 Deeds].

¹²⁶ TAURANAC, *supra* note 106, at 92.

¹²⁷ *Id.* at 121.

¹²⁸ *Id.* at 97.

¹²⁹ *Id.* at 122.

¹³⁰ See *Smith to Head Firm Erecting 80-Story Tower*, N.Y. HERALD TRIB., Aug. 30, 1929, 1; TAURANAC, *supra* note 106, at 129.

¹³¹ See, e.g., *Al Smith Goes into Building Business on Grand Scale*, ATLANTA CONST., Aug. 30, 1929, 4; *Al Smith's Going up in World Now*, L.A. TIMES, Aug. 30, 1929, 1; *Al Smith Heads Firm Which will Erect 80-Story Building*, AUSTIN STATESMAN, Aug. 30, 1929, 1; *Al Smith Plans to Boss World's Highest Building*, CHI. DAILY TRIB., Aug. 30, 1929, 1; *Tallest Office Building to Rise over New York*, CHRISTIAN SCI. MONITOR, Aug. 30, 1929, 2.

Smith announced in August of 1929. Several factors motivated the Empire State Building Corporation to build even taller. First, like the George A. Fuller Company, the Empire State Building Corporation recognized that tall buildings garner more publicity. For a massive building like the Empire State Building, publicity would be key to finding tenants to fill its numerous floors.¹³² Second, and again like the George A. Fuller Company, the Empire State Building Corporation wanted a building to display its might. Several other tall buildings were either proposed, in planning, or under construction at the time. Most notoriously, Schulte Realty purchased two blocks and proposed a 150-story building on the site.¹³³ More significantly, Raskob had a personal vendetta against the developer of another spectacularly tall skyscraper in the works. There had been rumors that Raskob would work with Walter P. Chrysler, the developer of New York City's iconic Chrysler Building, although the negotiations broke down and Chrysler ultimately went on to construct the Chrysler Building without Raskob's aid.¹³⁴ Walter Chrysler's goal had been height. When construction of the Chrysler Building finished in October of 1929, the building stood at 1,048 feet, thanks to the addition of a nearly fifty-foot-tall steel spire, making it the tallest building in the world.¹³⁵ John Raskob had a goal to beat.

On November 16, 1929, the Empire State Building Corporation purchased an adjacent lot

¹³² TAURANAC, *supra* note 106, at 129. In the Empire State Building's case, however, building taller to gain publicity to help find tenants was not a wholly rational motive, for the reason the Empire State Building struggled to find tenants in the first place was its excessive size. Architect John Tauranac points out that there is a breaking point in terms of height past which a building ceases to be profitable. According to Tauranac, "[i]t does not pay to build higher than a certain height no matter how much rent the developer thinks he can get for the space." *Id.* Thus, while the general wisdom at the time of the Flatiron Building's development had been that one needed to build at least fifteen stories to make a profit, it was not categorically true that the higher the developer built, the more profits he would receive. *See supra* text accompanying note 86. One reason is that it costs more per square foot to build taller floors. "Tall buildings require proportionately more steel and heavier construction . . . posts and beams on the lower floors are increased in size, bracing is used where columns meet beams, and, because the necessary heavy cross girders take up so much room, the distance between floors is increased to create the required headroom."

TAURANAC, *supra* note 106, at 128.

¹³³ *Id.* at 73. The building never saw construction, presumably a victim of the Great Depression.

¹³⁴ *Id.* at 130.

¹³⁵ *Id.*

measuring approximately 75 feet by 100 feet.¹³⁶ The next month, they filed an amendment to the Waldorf-Astoria Office Building's original application.¹³⁷ According to the amendment, the new building would stand approximately 1,055-feet tall and include eighty-five stories.¹³⁸ The new plans Shreve, Lamb & Harmon¹³⁹ submitted to the Bureau of Buildings in December of 1929 depicted a significantly more streamlined building (see Figure 4). Gone were the complex zigzags of setbacks on the original Waldorf Astoria Office Building. Instead, the street wall on all sides of the proposed Empire State Building rose only to 73.5 feet tall, or the equivalent of six stories, well below the maximum street wall heights for the lot.¹⁴⁰ Thus, it appeared as though the architects were again trying to appeal to the Manhattan Bureau of Buildings and the Board of Standards and Appeals by generously lowering the street wall height to counter the building's other egregious height violations. Again, however, the Manhattan Bureau of Buildings rejected the application on the grounds of the proposed height being "excessive."¹⁴¹

¹³⁶ Block 835, Lot 19 Deeds, *supra* note 125.

¹³⁷ Rather than file a new application, the Empire State Building Corporation chose to file amendments to the Waldorf-Astoria Office Building's application, N.B. Application No. 31 of 1929.

¹³⁸ N.B. Application No. 31, 1929 (received Dec. 12, 1929) (on file with the New York City Municipal Archives) [hereinafter N.B. Application No. 31, rec'd Dec. 12, 1929].

¹³⁹ As noted earlier, Shreve, Lamb & Harmon was only Shreve & Lamb in 1929 when they submitted plans for the Waldorf-Astoria Office Building. By the time plans for the Empire State Building were submitted, Harmon had joined as a partner.

¹⁴⁰ See Shreve, Lamb & Harmon, Blueprint Showing "North Elevation (34th St.)" of Empire State Building (received Dec. 31, 1929) (on file with the New York City Municipal Archives); Shreve, Lamb & Harmon, Blueprint Showing "East Elevation, West Elevation" of Empire State Building (received Dec. 31, 1929) (on file with the New York City Municipal Archives); Shreve, Lamb & Harmon, Blueprint Showing "Cross Section (Looking East), Longitudinal Section (Looking South)" of Empire State Building (received Dec. 31, 1929) (on file with the New York City Municipal Archives); Shreve, Lamb & Harmon, Blueprint Showing "Isometric: 33rd Street & Fifth Ave. (Looking North)" of Empire State Building (received Dec. 31, 1929) (on file with the New York City Municipal Archives).

¹⁴¹ N.B. Application No. 31, rec'd Dec. 12, 1929, *supra* note 132.

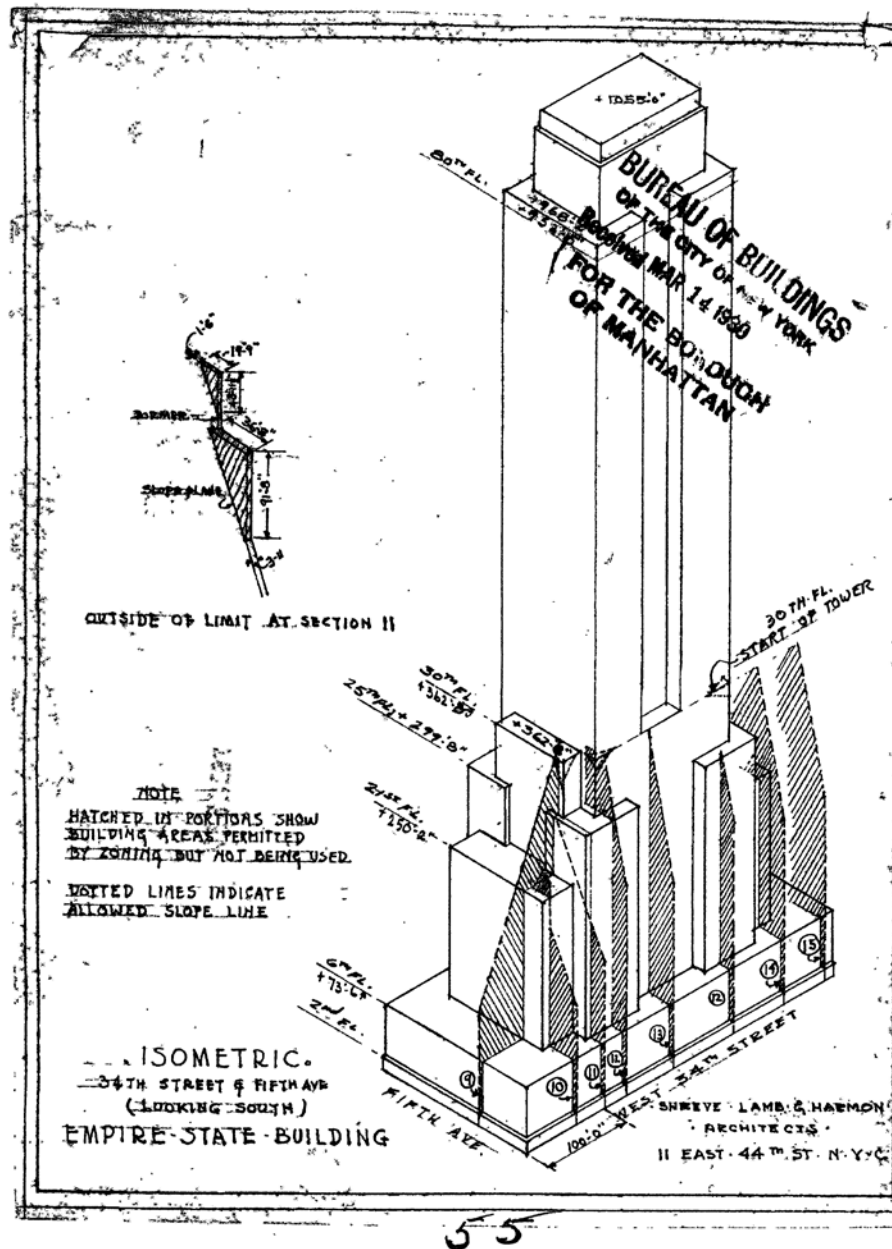


Figure 4: Courtesy of the New York City Municipal Archives, 31 Chambers Street, Room 103, New York, NY 10007. Plans for isometric view of the Empire State Building received March 14, 1930. Note the low street walls.

Consequently, Shreve, Lamb & Harmon filed a variance request with the Board of Standards and Appeals in January of 1930.¹⁴² On February 11, 1930, the Board of Standards and Appeals held a public hearing to determine the fate of the variance request. No mention of any

¹⁴² Application for Variation from the Requirements of the Building Zone Resolution, CAL. No. 58-29, from Shreve, Lamb & Harmon (received Jan. 6, 1930) (on file with the New York City Municipal Archives).

public objection is recorded in the Board of Standard and Appeals' resolution. The Board approved the variance, again requiring the construction of an open court and vehicular delivery area.¹⁴³ Shreve, Lamb & Harmon went on to file a number of other application amendments relating to various building matters, such as plans for concrete arches, but the variance marked the end of the Empire State Building's quest for height.¹⁴⁴ On April 15, 1930, the Manhattan Bureau of Buildings approved the Empire State Building's new building application.¹⁴⁵

The Empire State Building achieved Raskob's goal to beat the Chrysler Building in height. In fact, it retained the title of world's tallest building until 1972, when the World Trade Towers claimed the title.¹⁴⁶ The Empire State Building's new building application process differed significantly from the Flatiron Building's due to the adoption of zoning laws. Most obviously, the adoption of the 1916 Building Zone Resolution established a maximum as to how high the Empire State Building Corporation could build, although the limit proved quite soft. While the George A. Fuller Company was limited only by financing and engineering concerns, the Empire State Building Corporation was limited by these factors as well as law. To build as high as they desired, the Empire State Building Corporation had to apply for variances from the Board of Standards and Appeals.¹⁴⁷ Though the variances delayed approval, they proved fairly easy to obtain. The Board of Standards and Appeals was still figuring out its power to enforce the new zoning laws. "The Board of Estimate [*sic*] was hard pressed to deny petitioners, and feared that disappointed petitioners would charge the board with favoritism or discrimination."¹⁴⁸

¹⁴³ Variance Request from Shreve, Lamb & Harmon for Empire State Inc., 58-29 BZ, 15 BULL. NO. 7 (received Mar. 14, 1930) (on file with the New York City Municipal Archives).

¹⁴⁴ See, e.g., Amendment to New Building Application No. 31 from Shreve, Lamb & Harmon (Apr. 25, 1930) (on file with the New York City Municipal Archives).

¹⁴⁵ N.B. Application No. 31, rec'd Dec. 12, 1929, *supra* note 138.

¹⁴⁶ TAURANAC, *supra* note 106, at 17.

¹⁴⁷ The tower exception found in Article III, Section 9 was not available to the developers since the tallest floors contained floor areas greater than 25% of the total lot area.

¹⁴⁸ TAURANAC, *supra* note 106, at 65.

The new building application process now also allowed for public input under certain circumstances. When the George A. Fuller Company filed its new building application for the Flatiron Building, the process only involved back-and-forth between the Company and the Department of Buildings. With the advent of zoning, a new cast of characters entered the picture. The Empire State Building Corporation corresponded extensively with the Manhattan Bureau of Buildings and the Board of Standards and Appeals. Prior to voting on any variance requests, the Board of Standards and Appeals gave public notice and held a public hearing. Thus, the public had a voice in any projects that violated the Zoning Resolution. The public's voice was quite strong, too. The Board of Standards and Appeals considered objections when deciding variance requests. When the Board of Standards and Appeals granted the Waldorf Astoria Office Building's variance requests, it even required the building to comply with conditions lifted from a stipulation with an objector.¹⁴⁹

That the public possessed a voice during the new building approval process may have made the building more palatable to the public. Whereas the Flatiron Building received mixed reactions upon completion, the Empire State Building received largely positive reviews. The *New York Herald Tribune* described the building as “extraordinarily strong, fine and beautiful It is not the portentous height of the Empire State alone that gives it its distinction. It is the perfect adjustment of that height to the other dimensions involved.”¹⁵⁰ The *New York Times* considered the building “[s]uch a union of beauty and strength” that it would be “a valuable possession for the whole community.”¹⁵¹ Not only did lay people approve the building.

¹⁴⁹ Variance Request from Hamill, Weinberg & Munro for Waldorf-Astoria Office Building Company, 58-29 BZ, 14 BULL. NO. 12 (Mar. 12, 1929) (on file with the New York City Municipal Archives).

¹⁵⁰ *The Empire State Building*, N.Y. HERALD TRIB., May 2, 1931, at 14.

¹⁵¹ *Building in Excelsis*, N.Y. TIMES, May 1, 1931, at 24.

Many architects adored it as well.¹⁵² “The Fifth Avenue Association awarded the Empire State Building its gold medal for design.”¹⁵³ William F. Lamb received the Architectural League’s Medal of Honor in Architecture for 1931 for his work on the Empire State Building and the New York Chapter of the American Institute of Architects awarded its Medal of Honors for 1931 to Shreve, Lamb & Harmon.¹⁵⁴

B. Amendments to the 1916 Building Zone Resolution

As the Empire State Building illustrates, the adoption of New York City’s 1916 Building Zone Resolution complicated the new building application approval process. But the process would become even more complicated over time. By December of 1940, over twenty years *before* the City overhauled the Building Zone Resolution, the Resolution’s texts and maps had already been amended 1,371 times.¹⁵⁵ By the time the City retired the 1916 Resolution in 1961, it had been amended over 2,500 times.¹⁵⁶

The Resolution became more nuanced over time. In 1940 and 1944, the City Planning Commission issued a series of general revisions, although they also passed countless piecemeal amendments in the interim.¹⁵⁷ By November of 1960, the Resolution had been expanded to include nine use districts, a great diversification from the three originally included in the 1916 Building Zone Resolution;¹⁵⁸ nine height districts, compared to the original five;¹⁵⁹ and fifteen

¹⁵² See, e.g., TAURANAC, *supra* note 106, at 151 (recounting some popular architects’ responses to the Empire State Building).

¹⁵³ TAURANAC, *supra* note 106, at 18.

¹⁵⁴ *Id.*

¹⁵⁵ MAKIELSKI, JR., *supra* note 15, at 45 (showing a table from the New York City Planning Commission’s 1940 Annual Report depicting the number of amendments to the Zoning Resolution from July 1916 to December 194).

¹⁵⁶ CITY PLANNING COMM’N, ZONING HANDBOOK 4 (1961) [hereinafter ZONING HANDBOOK (1961)].

¹⁵⁷ CITY PLANNING COMM’N, *Minutes of Special Public Meeting of the City Planning Commission, Held in Room 16, City Hall, Tuesday, October 18, 1960*, 697.

¹⁵⁸ Use districts now encompassed residence, local retail, restricted retail, retail, retail-1, business, business-1, manufacturing, and unrestricted districts. N.Y.C., N.Y., ZONING RESOLUTION art. II, § 2 (1916) (amended 1940). Note that in later years, the City changed the name of the ordinance from “Building Zone Resolution” to “Zoning Resolution.” In the following citations, in an effort to promote clarity, I will cite original sections to the BUILDING ZONE RESOLUTION and amended sections to the ZONING RESOLUTION.

area districts, as opposed to the initial five.¹⁶⁰

The new height districts included more nuances between each district and started at a lower district. Whereas the 1916 Building Zone Resolution originally identified one times districts as the lowest district, the amendments established districts starting at one-quarter times.¹⁶¹ Again, the lower the district, the less additional height a developer would receive for setbacks. The amendments scaled back the possible maximum heights in the original height districts as well by reducing the maximum initial height and the amount of additional height a building could receive in exchange for setbacks. For example, in 1916, a building in a one and one-half times district could rise to one-and-one-half times the width of the street and could gain an additional 3 feet of height for every 1 foot of setback.¹⁶² But after the amendment, a building in a one and one-half times district could only rise to one-and-one-quarters times the width of the street and would only gain 2.5 feet of additional height for each 1 foot of setback.¹⁶³

Simultaneously, the new area districts mandated that developers maintain more open space. While an A district lot only required a minimum of 1 square inch of open space per foot of building height in 1916,¹⁶⁴ it required 2 square inches after the amendment.¹⁶⁵ Since the area requirement indirectly limits the height of a building, the expanded area requirements further limited building heights.¹⁶⁶ The Board of Estimate and Apportionment also introduced the concept of floor area ratios to E, F, and F-1 area districts on July 28, 1940, although it did not

¹⁵⁹ *Id.* at art. III, § 8 (amended 1940).

¹⁶⁰ *Id.* at art. IV, § 10 (amended 1955).

¹⁶¹ *See id.* at art. III, § 8(a) (amended 1940).

¹⁶² N.Y.C., N.Y., BUILDING ZONE RESOLUTION art. II, § 8(c) (1916).

¹⁶³ N.Y.C., N.Y., ZONING RESOLUTION, art. II, § 8(f) (1916) (amended 1944).

¹⁶⁴ N.Y.C., N.Y., BUILDING ZONE RESOLUTION art. IV, § 11 (1916).

¹⁶⁵ N.Y.C., N.Y., ZONING RESOLUTION, art. IV, § 11 (1916) (amended 1944).

¹⁶⁶ *See supra* text accompanying note 72

deliberately refer to it as such.¹⁶⁷ The floor area ratio regulates the bulk of a building by limiting how much square footage (or “floor area”) the building may contain. To figure out the maximum square footage, one multiplies the floor area ratio number by the lot’s square footage. For example, a building in an F-1 area district could only have a maximum floor area of 0.75 times the area of the lot.¹⁶⁸ Thus, if a developer possessed a 100-feet by 100-feet lot, his building could only contain up to 7,500 square feet of floor area, the equivalent of 10,000 square feet times 0.75. How he chose to apportion the square footage was up to him. He could build a one-story structure containing all the square footage on the ground floor, or he could divide it between multiple floors as long as the building complied with the lot’s other height district regulations.

For the time being, the Board of Estimate and Apportionment attempted to patch up the 1916 Building Zone Resolution with amendments to meet changing demands in the City. The new height and area districts recognized a major problem with the 1916 Resolution: it had vastly overestimated the City’s population capacity. The 1916 Zoning Resolution would have permitted enough construction to house a population of fifty-five million people.¹⁶⁹ Yet the distribution of population was highly unequal. Overbuilding only affected certain neighborhoods while “vacan[cy] and blight[.]” overtook others,¹⁷⁰ particularly where industrial uses were involved.¹⁷¹ Zoning had further allowed for the development of “dark canyons” of buildings

¹⁶⁷ See the Table of Amendments at the end of N.Y.C., N.Y., ZONING RESOLUTION (1916) (amended 1960). The FF and F-2 districts also included floor area ratio limitations, but those districts were not established until March 25, 1954. *Id.*

¹⁶⁸ N.Y.C., N.Y., ZONING RESOLUTION, art. Iv, § 16A(f) (1916) (amended 1940).

¹⁶⁹ *City Planning History*, N.Y.C. DEP’T OF PLANNING, <https://www1.nyc.gov/site/planning/about/city-planning-history.page?tab=2>. (last visited Jan. 17, 2017).

¹⁷⁰ James Felt, *Preface* to VORHEES WALKER SMITH & SMITH, A PROPOSAL FOR A ZONING RESOLUTION FOR THE CITY OF NEW YORK (1958).

¹⁷¹ *Id.* at 229.

along streets.¹⁷² Even though many buildings contained too high densities of people, the streets were often barren, due to a dearth of public space along the streets and use regulations which segregated commercial and retail spaces within the City.¹⁷³ (In 1961, the same year that New York City adopted its new Zoning Resolution, the esteemed city planner Jane Jacobs published *The Death and Life of Great American Cities*, in which she extolled the value of pedestrians and other onlookers on streets and decried the trend of barren streets increasingly evident in the 1950s).¹⁷⁴

Other serious side effects arose as well. In defining “width of the street,” a term so central to calculating maximum initial heights, the 1916 Building Zone Resolution originally allowed parcels across from parks, public places, and navigable bodies of water to include the width of the street *plus* the width of the park, public place, or body of water.¹⁷⁵ The Commission on Building Districts and Restrictions figured that if one of the goals of zoning was to preserve light and air, then tall buildings should be allowed to surround parks and other open spaces which already possess plenty of light and air.¹⁷⁶ The blip in the width of the street definition allowed for the construction of tall luxury co-ops along Central Park West. But even proponents of zoning came to see downsides in the width of the street definition, particularly in relation to the smaller parks in downtown Manhattan.¹⁷⁷ On July 12, 1945, the Board of Estimate and Apportionment revised the definition of width of the street to include only “the mean of the distances between the sides thereof within a block.”¹⁷⁸ The tower exception was also revised to

¹⁷² Charles G. Bennett, *Zone Curb Urged on Building Sizes: Head of Board of Standards, Feted at Luncheon, Asks End of ‘Dark Canyons’*, N.Y. TIMES, Mar. 6, 1959, at 26.

¹⁷³ GILMARTIN, *supra* note 12, at 367.

¹⁷⁴ JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961).

¹⁷⁵ N.Y.C., N.Y., BUILDING ZONE RESOLUTION art. I, § 1(c) (1916).

¹⁷⁶ GILMARTIN, *supra* note 12, at 197.

¹⁷⁷ *Id.*

¹⁷⁸ N.Y.C., N.Y., ZONING RESOLUTION art. I, § 1(c) (1916) (amended 1945).

exclude any towers built within 100 feet of a public park.¹⁷⁹

Even as the Board of Estimate and Apportionment scrambled to adopt amendments, there were undercurrents calling for comprehensive rezoning of the City. Indeed, various civic groups like the City Club and the Citizens Union began calling for rezoning as early as 1925.¹⁸⁰ After a City Planning Commission was finally established in New York City in 1938,¹⁸¹ the City buzzed with talk about comprehensive rezoning as the Commission geared up to write a new master plan for the City.¹⁸² In 1948, the City Planning Commission hired the architectural firm Harrison, Ballard, and Allen (HBA) to conduct a study of the 1916 Zoning Resolution and propose a new plan.¹⁸³ The HBA plan was released on April 29, 1951, and used zoning to reduce the City's population capacity to twelve million people.¹⁸⁴ The City held hearings over the report for the next two years but it ultimately never came before the Board of Estimate for vote.¹⁸⁵ Prominent Board members, including two borough presidents and influential city planner Robert Moses, opposed the plan.¹⁸⁶ Additionally, the Metropolitan Real Estate Board Association loudly voiced its discontent, desiring only amendments to the 1916 Resolution and not comprehensive overhaul.¹⁸⁷

But the call for comprehensive rezoning did not die off. Upon assuming the chairmanship of the City Planning Commission in 1956, Chairman James Felt reiterated the

¹⁷⁹ *Id.* at art. III, § 9(d) (amended 1945).

¹⁸⁰ Mayor Jimmy Walker appointed a City Committee on Planning and Housing, but its recommendations were anemic and no action was taken regarding zoning. MAKIELSKI, JR., *supra* note 15, at 44-46.

¹⁸¹ Talk of establishing a City Planning Commission had begun as early as in the 1920s, but the borough presidents continuously rejected it, fearing loss of borough autonomy. *Id.* at 46. To contextualize the borough president's worries, it is helpful to remember that New York City, as we know it today, was still quite young. The five boroughs had only consolidated into a single city in 1898. GILMARTIN, *supra* note 12, at 132. A one-man planning "department" was approved by the Board of Estimate in 1930, but the Board slashed it in 1933 to reduce expenditures. MAKIELSKI, JR., *supra* note 15, at 46.

¹⁸² GILMARTIN, *supra* note 12, at 358.

¹⁸³ MAKIELSKI, JR., *supra* note 15, at 72.

¹⁸⁴ *Id.* at 75.

¹⁸⁵ *Id.* at 75, 81.

¹⁸⁶ *Id.* at 80.

¹⁸⁷ *Id.* at 78.

belief that “rezoning is a must.”¹⁸⁸ City planners worried that the 1916 Building Zone Resolution simply couldn’t keep up with the times. The amendments had tried to update the Resolution to keep pace with social and technological changes, such as by including provisions on “car barns” and gasoline stations, but the ad hoc amendments proved inadequate.¹⁸⁹ “The auto age and incredible technological leapfrogging which have burst upon us in the past few decades have altered the use and organization of land as profoundly and far more rapidly than did the industrial revolution in the 19th century,” conceded the City Planning Commission in 1960. The 1916 Building Zone Resolution had not foreseen “the great increase in numbers of automobiles, the acceptance of the airplane, the initiation of large-scale housing developments embracing several city blocks, [and] extension of New York’s subway system.”¹⁹⁰ The threat of suburbanization and urban decline, so prevalent in city centers throughout the 1950s and 1960s, loomed over New York City as well. The *New York Times* warned of the danger of “permitting . . . a 37-year-old resolution, amended hundreds of times into a patchwork . . . to control the future of a city so much altered by time and a city facing new challenges in suburban attractions.”¹⁹¹

In terms of the architectural styles it encouraged, the 1916 Building Zone Resolution appeared outmoded as well. The setback requirement had served art deco well. Developers gained additional height from setbacks, which did not look out of place on art deco style buildings. But the setback requirement looked quizzically out of place when applied to the modernistic glass and steel structures becoming popular around midcentury.¹⁹² Nor did the setback requirements fit the ideals of modernism. “Modernism was supposed to be rational, pure,

¹⁸⁸ *Id.* at 84.

¹⁸⁹ See *supra* text accompanying note 155.

¹⁹⁰ *Rezoning the City*, N.Y. TIMES, Apr. 30, 1951, at 19.

¹⁹¹ *City Rezoning or Not?*, N.Y. TIMES, Jul. 7, 1953, at 26.

¹⁹² GILMARTIN, *supra* note 12, at 367.

efficient, and hygienic,” writes historian Gregory Gilmartin, “[but] [s]etbacks weren’t pure or efficient or even terribly rational.”¹⁹³

Finally, the 1916 Resolution failed to keep pace with the changing ideals of city planning theory. City planners itched to implement new policies and concepts reflecting the theories in vogue at the time, such as Le Corbusier’s tower-in-the-park model and incentive zoning in exchange for public amenities.¹⁹⁴

In the fall of 1956, Chairman Felt followed up on his promise. The City Planning Commission retained the architectural firm Vorhees, Walker, Smith, and Smith (VWSS) to undertake a new study of New York City’s zoning policies. VWSS released its report on February 16, 1959. The report proposed even greater cutbacks on bulk than the HBA plan, reducing the maximum population capacity to 10.94 million people. Additionally, it urged the creation of an independent zoning administrator and advised that nonconforming uses be eliminated.¹⁹⁵ Like the HBA plan, the VWSS plan faced rough roads ahead. It too would come onto the surgical table to be sliced and diced in attempt to placate all of the interested parties. But unlike the HBA plan, the VWSS plan would survive the procedure.

On December 15, 1960, the Board of Estimate and Apportionment voted to adopt a new zoning resolution based on the VWSS plan. The new law would take effect in exactly one year on December 15, 1961. The VWSS plan would be changed almost 1,000 times, but New York City had finally been rezoned.¹⁹⁶

IV. THE 1961 ZONING RESOLUTION

Ironically enough, although one of the goals of comprehensive rezoning had been to

¹⁹³ *Id.*

¹⁹⁴ See *supra* text accompanying 169; see also DEP’T CITY PLANNING, ZONING HANDBOOK 2 (2011) (describing the City’s motives for comprehensive rezoning in 1961).

¹⁹⁵ MAKIELSKI, JR., *supra* note 15, at 85-86.

¹⁹⁶ *Id.* at 104-06.

simplify the law, the 1961 Zoning Resolution started its life as a 260-page behemoth, not including maps which constituted another 256 pages. Nevertheless, the City Planning Commission was hopeful. They saw the 1961 Zoning Resolution as “a giant stride forward” which “free[d] the City from the shackles of the past as embodied by the old code.”¹⁹⁷

The new Resolution built on the basic foundations of the 1916 Building Zone Resolution but went further in terms of bulk and population density control. It continued to enforce use, height, and area (now referred to as yard) regulations though through new methods. While the old Building Zone Resolution had divided the City into separate use, height, and area districts that overlaid each other, the new Resolution divided the City into a panoply of residential, commercial, and manufacturing districts that each embodied its own use, height, and area requirements. As a result, the number of districts abounded. At the time of its adoption, the 1961 Resolution specified ten residential districts,¹⁹⁸ eight commercial districts,¹⁹⁹ and three manufacturing districts.²⁰⁰

Unlike the 1916 Resolution which defined use districts by listing exclusions, the 1961 Resolution specified allowed uses in an effort to eliminate loopholes.²⁰¹ The method for determining minimum yard requirements changed as well. The 1916 Building Zone Resolution had determined yard requirements by mandating developers leave open a set number of square inches per foot of building height. The new Resolution set out minimum dimensions for lots in each district. The size of the yard depended on whether the yard was a side yard or a rear yard. For example, none of the commercial districts at the time of the 1961 Zoning Resolution’s issuance required a side yard. They all, however, required a rear yard with a depth of at least

¹⁹⁷ ZONING HANDBOOK (1961), *supra* note 156, at 4.

¹⁹⁸ N.Y.C., N.Y., ZONING RESOLUTION § 21-12 (1961).

¹⁹⁹ N.Y.C., N.Y., ZONING RESOLUTION §§ 31-11 to 31-18 (1961).

²⁰⁰ *Id.* § 42-00.

²⁰¹ ZONING HANDBOOK (1961), *supra* note 156, at 4.

twenty feet unless the lot was a corner lot or subject to provisions otherwise specified in the Resolution.²⁰²

Like its predecessor, the 1961 Zoning Resolution regulated building heights by prescribing a maximum street wall height and allowing additional height to set-back portions of the building. The new Resolution streamlined the process and gave developers greater aesthetic discretion by establishing a minimum initial setback distance, beyond which the developer could build as high as she wanted as long as her building did not penetrate the sky exposure plane (for a visual representation of the new height regulation method, see Figure 5).²⁰³ Like the old setback provisions, the new height restrictions heeded the angle of light concept. For example, a developer in a C-3 commercial district could construct a building with a maximum street wall height of 30 feet or two stories, whichever was less.²⁰⁴ If the developer desired to build beyond this height, she would have to set back the upper portion of the building. If her building was located on a narrow street, defined as any street less than 75 feet wide,²⁰⁵ then the setback would have to be at least 20 feet. On wider streets, her setback would only have to be 15 feet.²⁰⁶ The set-back portion of the building could then be built as high as the developer desired, as long as it did not penetrate the sky exposure plane. In the C-3 district, the sky exposure plane rested at a slope of one unit horizontal distance to one unit vertical distance (1:1) or the equivalent of forty-five degrees.²⁰⁷

²⁰² N.Y.C., N.Y., ZONING RESOLUTION §§ 33-25, -26 (1961).

²⁰³ ZONING HANDBOOK (1961), *supra* note 156, at 20.

²⁰⁴ N.Y.C., N.Y., ZONING RESOLUTION § 33-432 (1961).

²⁰⁵ *Id.* § 33-41.

²⁰⁶ *Id.* § 33-432

²⁰⁷ *Id.* § 33-432

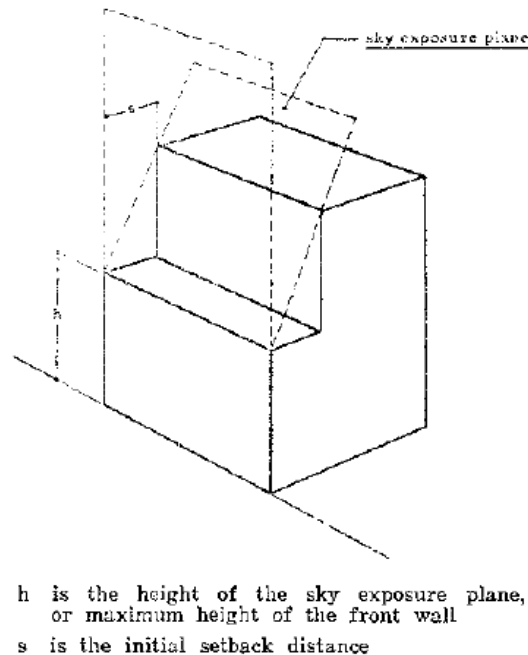


Figure 5: Courtesy of CITY PLANNING COMM'N, ZONING HANDBOOK 20 (1961). Visual representation of the new height regulation method offered in the 1961 Zoning Resolution.

The 1961 Zoning Resolution also preserved the tower exception. According to the old 1916 Building Zone Resolution, a building that covered twenty-five percent or less of its lot could be built to any height. The 1961 Resolution increased the amount of lot the building could cover to forty to fifty percent, depending on the size of the lot.²⁰⁸ The maximum height for towers was also indirectly capped by a new concept, the Floor Area Ratio (FAR).²⁰⁹ The FAR concept made a minor appearance in the 1916 Building Zone Resolution after a 1940 amendment introduced the concept to a small number of districts, none of which were located in Manhattan.²¹⁰ In contrast, the 1961 Resolution assigned a floor area ratio to every district. Even

²⁰⁸ ZONING HANDBOOK (1961), *supra* note 156, at 21.

²⁰⁹ “Floor area ratio” is the total floor area on a zoning lot, divided by the lot area of that zoning lot. If two or more buildings are located on the same zoning lot, the floor area ratio is the sum of their floor areas divided by the lot area.” N.Y.C., N.Y., ZONING RESOLUTION § 12-10 (1961) (amended 2011).

²¹⁰ See *supra* note 167 and accompanying text for a brief history of FAR in the 1916 Building Zone Resolution and a description of how the FAR operates.

buildings utilizing the tower exception must comply with the district's floor area ratio.²¹¹

Factors such as market demand and engineering capabilities are likely to influence height when floor area ratio is concerned.

The floor area ratio concept, which limited how much square footage a building could contain, was one major tool to limit bulk. To further control population density, the Resolution also implemented "required lot area per dwelling unit or per room" in buildings with residential uses.²¹² At the same time, the 1961 Zoning Resolution was able to use these new concepts to incentivize developers to provide public amenities by offering greater FAR or reducing the required lot area per room in exchange. In certain districts, developers could gain density and lot area bonuses by constructing acceptable plazas, plaza-connected open areas, or arcades on their lots.²¹³ For example, for each 1% of total lot area provided as a plaza or plaza-connected open area or 2% of total lot area covered by an arcade in an R10 district, the required lot area per dwelling unit or per room was reduced by 0.6% up to a maximum of 17%.²¹⁴ This, the City hoped, would incentivize developers to provide "open plazas and attractive arcades."²¹⁵ The City hoped to make the streets more welcoming and pedestrian-friendly as a result.

A. Case Studies

Although both cases studies in this section concern buildings proposed well after the adoption of the 1961 Zoning Resolution, the approval processes for the two could hardly be more different. 432 Park Avenue in the Central Park South neighborhood is a paradigmatic example of an as-of-right development that has elicited massive controversy. In contrast, One Vanderbilt,

²¹¹ N.Y.C., N.Y., ZONING RESOLUTION § 23-65 *et seq.* (1961).

²¹² See N.Y.C., N.Y., ZONING RESOLUTION §§ 23-22, 35-42 (1961).

²¹³ See *id.* §§ 23-23, -26, 24-22, 35-42.

²¹⁴ *Id.* § 23-23.

²¹⁵ N.Y.C. BD. ESTIMATE, *Board of Estimate Resolution on 1961 Zoning Resolution Proposal*, 15575, 15583 (1960), https://www1.nyc.gov/assets/planning/download/pdf/about/city-planning-history/board_of_estimate_resolution.pdf.

a colossal commercial building under construction in East Midtown, underwent months of the arduous review per the Uniform Land Use Review Procedure and illustrates the benefits to be gained from incentive zoning.

1. 432 Park Avenue



Figure 6: Courtesy of *Building: 432 Park Avenue*, STREETEASY (last visited April 26, 2017), http://streeteasy.com/building/432-park-avenue#tab_building_detail=2. Photograph of 432 Park Avenue.

“The icons of the New York skyline have a new companion,” state the promotional materials for 432 Park Avenue, the controversial luxury condo located along East 57th Street.²¹⁶ Controversial it is—the minimalist structure is the “tallest residential tower in the Western Hemisphere.”²¹⁷ Measured by roof height, 432 Park Avenue surpasses One World Trade Center,

²¹⁶ *Residences*, 432 PARK AVE, <http://www.432parkavenue.com/#residences>. (last visited Feb. 16, 2017).

²¹⁷ *Id.*

the tallest building in New York City.²¹⁸ To the ire of many New Yorkers, 432 Park Avenue casts a long, skinny shadow over Central Park.²¹⁹ Viewed from the outer boroughs or New Jersey, 432 Park Avenue noticeably stands above the rest of the Manhattan skyline. But how did 432 Park Avenue come to be? In particular, how could a building so disruptive of the skyline pass muster under the City's zoning laws?

While the 1961 Zoning Resolution introduced complex regulations for each district, the new Resolution simultaneously simplified the zoning process in other ways. Development in New York City may proceed in two ways. A proposed development which "complies with all applicable zoning regulations" will be reviewed by the City Planning Commission only for accuracy. The City Planning Commission takes no discretionary action and the Board of Standards and Appeals, as well as the public, plays no role in the process.²²⁰ This kind of development is referred to as "as-of-right." In contrast, developments that request variances, rezoning amendments, or otherwise require special review or approval²²¹ must go through the unpredictable and unwieldy Uniform Land Use Review Procedure (ULURP).²²²

432 Park Avenue is the brainchild of Harry Macklowe, the founder and chairman of

²¹⁸ Standing at 1,396 feet tall, 432 Park Avenue's roof surpasses One World Trade Center's by 28 feet. Harry Macklowe, *The Complex Path to Simple Elegance: The Story of 432 Park Avenue*, 2015 COUNCIL TALL BUILDINGS & URBAN HABITAT (Global Interchanges: Resurgence of the Skyscraper City conference), at 49.

²¹⁹ See, e.g., Evan Bindelglass, *New Yorkers Slam Central Park's Shadow-Casting Megatowers*, CURBED: N.Y. (Apr. 29, 2015, 10:02 AM), <http://ny.curbed.com/2015/4/29/9965998/new-yorkers-slam-central-parks-shadow-casting-megatowers>; Jenna McKnight, *Wave of Super-Tall Towers in Manhattan Sparks Protests Over Shadows*, DEZEEN (Nov. 11, 2015), <https://www.dezeen.com/2015/11/11/supertall-skinny-skyscrapers-towers-manhattan-new-york-shop-architects-robert-stern-rafaely-vinoly-jean-nouvel-portzamparc-controversy-protest/>; Paul Owen, *New York's Skyline: Soon the Super-Rich will Literally Cast a Shadow over Ordinary New Yorkers*, GUARDIAN (May 12, 2015, 4:04 PM), <https://www.theguardian.com/global/2015/may/12/bite-of-the-apple-new-york-skyline-432-park-avenue-nordstrom-tower>.

²²⁰ *Glossary of Planning Terms*, N.Y.C. DEP'T CITY PLAN., <http://www1.nyc.gov/site/planning/zoning/glossary.page>. (last accessed February 16, 2017).

²²¹ For example, developments that try to take advantage of landmarks transfers must go through ULURP. See *infra* Section IV, Part 2.

²²² *Application Process Overview*, N.Y.C. DEP'T CITY PLAN., <http://www1.nyc.gov/site/planning/applicants/applicant-portal/application-process.page>. (last accessed February 16, 2017).

Macklowe Properties. At a 2015 conference hosted by the Council on Tall Buildings and Urban Habitats, Macklowe presented a paper describing the project as a “complex path to simple elegance.”²²³ The path to 432 Park Avenue was quite complex and long, yet also relatively straightforward as an as-of-right development. The project relied heavily on the zoning lot merger concept (ZLM). ZLMs exploit the definition of “zoning lot,” which the Resolution defines only as “a tract of land, either unsubdivided or consisting of two or more lots of record contiguous for a minimum of 10 linear feet, which at the time of filing for a building permit . . . is declared to be a tract of land to be treated as one zoning lot.”²²⁴ Importantly, the definition does not require a developer to be the fee owner of all the parcels comprising the zoning lot. Recall that the 1961 Zoning Resolution imposed maximum floor areas on each zoning lot. ZLMs allow a developer to contract with her neighbors for any unused floor area on their lots. To consummate the transaction, the parties simply have to submit their signed Zoning Lot Development Agreement (abbreviated ZLDA and pronounced “Zelda”) to the Department of Finance.²²⁵ Since the zoning lot merger relies on a loophole in the definition of zoning lot, it complies with the text of the Zoning Resolution and may proceed as-of-right.

The developers of 432 Park Avenue also relied on special provisions exclusive to the Special Midtown District. In an effort to meet the constantly shifting demands of New York City, the City Planning Commission has declared a number of special districts across the City “to achieve specific planning and urban design objectives in defined areas with unique characteristics.”²²⁶ Special districts overlay existing district designations and may vary use,

²²³ Macklowe, *The Complex Path to Simple Elegance*, *supra* note 218.

²²⁴ N.Y.C., N.Y., ZONING RESOLUTION § 12-10 (1961) (amended 2011). As 432 Park Avenue will demonstrate, the developer may continue to add or subtract parcels from the zoning lot throughout the application process. The Resolution does not specify *which* building permit the zoning lot declaration must accompany.

²²⁵ A SURVEY OF TRANSFERABLE DEVELOPMENT RIGHTS MECHANISMS IN NEW YORK CITY, *supra* note 38, at 5.

²²⁶ DEP’T CITY PLANNING, ZONING HANDBOOK 75 (2011) [hereinafter ZONING HANDBOOK (2011)].

height, and/or bulk regulations.²²⁷ Rather than follow the regular height and setback requirements for buildings in the underlying commercial districts, the developers followed an alternative “daylight evaluation” method provided in the Special Midtown District.²²⁸

On February 1, 2006, Macklowe formed 440 Park Avenue Owner Associates LLC²²⁹ (hereinafter “440 Park LLC”).²³⁰ Over the next two years, the LLC embarked on a multi-hundred-million-dollar shopping spree for property and transferable development rights. On March 31, 2006, it purchased Lot 33 of Block 1292 in Manhattan, a wide L-shaped lot fronting East 56th Street encompassing about 24,200 square feet, for \$418,352,789.²³¹ On the same day, it also purchased Lot 41 of Block 1292, a thin rectangular lot fronting East 57th Street containing just over 2,500 square feet for \$20,000,000.²³²

²²⁷ See *id.* at chapter 6 for a summary of the different districts.

²²⁸ See N.Y.C., N.Y., ZONING RESOLUTION § 81-27 (1961) (amended 1982).

²²⁹ The name 432 Park Avenue came later after Macklowe and his team realized the name “440 Park Avenue” might deter Asian buyers due to its inauspicious reference to the number 4. Interview by Chris Bentley with Harry Macklowe, Chairman, Macklowe Prop., in New York, N.Y. (Oct. 26, 2015), available at <https://www.youtube.com/watch?v=K-wP8l0H7kY>.

²³⁰ *Search Our Corporation and Business Entity Database*, DEP’T STATE: DIVISION CORP., https://appext20.dos.ny.gov/corp_public/CORPSEARCH.ENTITY_SEARCH_ENTRY (search “440 Park Avenue Owner Associates, LLC” in entity name).

²³¹ Deed of Mar. 31, 2006 (recorded Apr. 12, 2006), Document ID: 2006040301033001, available at https://a836-acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc_id=2006040301033001.

²³² Deed of Mar. 31, 2006 (recorded Apr. 12, 2006), Document ID: 2006040301033002, available at https://a836-acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc_id=2006040301033002.

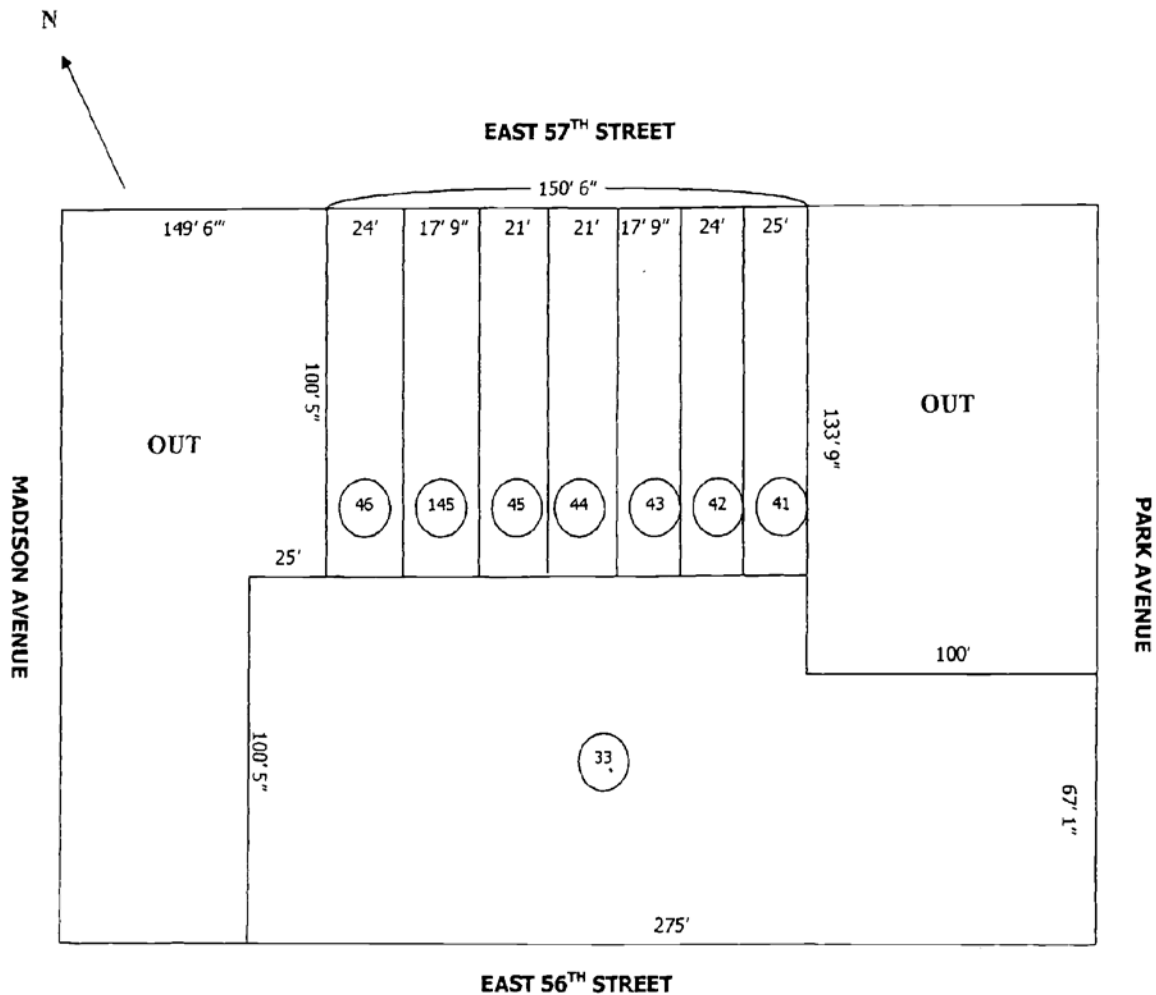


Figure 7: Courtesy of the New York City Department of Buildings. Illustration of the lots comprising 432 Park Avenue's zoning lot in Exhibit I of its zoning documents.

These two purchases made 440 Park LLC the fee owner of almost 27,000 square feet of lot area. According to zoning maps, Lot 33 is divided between two commercial districts. A 175-foot by 100-foot eastern portion of the lot is districted as C5-2.5 while the rest of the lot is districted as C5-3.²³³ According to Section 77-02 of the Zoning Resolution, where a zoning lot is divided by a district boundary, “each portion of such zoning lot shall be regulated by all the

²³³ Zoning Map: 8c, DEP’T CITY PLANNING (2014), <https://www1.nyc.gov/assets/planning/download/pdf/zoning/zoning-maps/map8c.pdf>.

provisions applicable to the district in which such portion of the zoning lot is located.”²³⁴ Thus, the eastern portion of Lot 33 is governed by C5-2.5 regulations while the western portion is governed by C5-3 regulations. In mixed-use buildings containing both residential and commercial uses such as 432 Park Avenue, the residential portions and commercial portions of the building are subject to different bulk regulations. Lot 41 is wholly districted as C5-3.²³⁵

Recall, however, that 432 Park Avenue sits in the Special Midtown District and special districts may vary the underlying district’s regulation. Ironically, even though the Department of City Planning founded the Special Midtown District in 1982 “to shift future development further to the west and south in response to an over-concentration of development on the east side of Midtown,”²³⁶ the Special Midtown District regulations actually allocate 432 Park Avenue *more* floor area than would be allowed under regular commercial district regulations. While residential portions of the lot are allocated a FAR of 10.0,²³⁷ the same amount as in regular C5 districts, a developer in the Special Midtown District may increase the FAR to 12.0 by building qualifying recreational space for its residents on the lot.²³⁸ Additionally, while the FAR for commercial development in a regular C5-2.5 district is 10.0, the FAR is increased to 12.0 in the Special Midtown District. The FAR for commercial development in a C5-3 district remains the same at 15.0.²³⁹ Developers in the Special Midtown District may provide public amenities such as plazas to gain additional floor area, although the additional FAR that can be gained is capped

²³⁴ Section 77-02 applies to zoning lots which “did not exist on December 15, 1961, or any applicable subsequent amendment thereto.” N.Y.C., N.Y., ZONING RESOLUTION § 77-02 (1961) (amended 2011). For regulations governing zoning lots which existed prior to the adoption of the 1961 Zoning Resolution or applicable subsequent amendments, see Section 77-03. *Id.* § 77-03 (1961).

²³⁵ Zoning Map: 8c, *supra* note 233.

²³⁶ *Special Purpose Districts: Manhattan*, N.Y.C. DEP’T CITY PLAN., <https://www1.nyc.gov/site/planning/zoning/districts-tools/special-purpose-districts-manhattan.page>. (last accessed February 17, 2017). See also CITY PLAN. COMMISSION, MIDTOWN ZONING, N 820253 ZRM, DEP’T CITY PLAN. (1982), available at https://www1.nyc.gov/assets/planning/download/pdf/about/city-planning-history/midtown_zoning.pdf.

²³⁷ *Id.* § 81-241(b) (amended 2011).

²³⁸ *Id.* § 81-241(c) (amended 2011).

²³⁹ *Id.* § 81-211(b) (amended 2011).

at 1.0.²⁴⁰

In fact, it appears that many of the Special Midtown District's FAR regulations no longer help to accomplish the special purpose district's original objective. When the Special Midtown District was founded in 1982, the maximum FAR for many commercial districts was much higher. For example, buildings could reach a FAR of 21.6 along Fifth Avenue prior to the special purpose district's enactment.²⁴¹ Thus, the Special Midtown District lowered the available FAR in the area compared to what could be achieved in regular commercial districts at the time. Today, however, the Special Midtown District allows floor area ratios in many districts that are either equivalent to or even higher than what one could achieve outside of the special district.²⁴² If anything, the Special Midtown District encourages development in the already-saturated northern portion of Midtown. Indeed, a large stretch of 57th Street, running from Central Park West almost to Lexington Avenue is designated as a C5-3 district.²⁴³ At a FAR of 15.0, 57th Street contains some of the highest FAR in the Special Midtown District, which contains FARs ranging from 8.0 to 15.0.²⁴⁴ A 2010 Columbia Graduate School of Architecture study pointed to the street's high FAR as the reason why so many developers choose to build supertall buildings along 57th Street.²⁴⁵

Under the Special Midtown District regulations, a development on Lot 33 could include up to 310,500 square feet of commercial space, or about 35,000 square feet more than would be

²⁴⁰ *Id.* § 81-23 (amended 2011).

²⁴¹ MIDTOWN ZONING, *supra* note 236, at 9.

²⁴² For example, a C6-6 zoning lot in the Special Midtown District possesses a FAR of 15.0, N.Y.C., N.Y., ZONING RESOLUTION § 81-211(b) (1961) (amended 2015), the same as a C6-6 zoning lot outside of the special purpose district, *Id.* § 33-122 (amended 2012).

²⁴³ Zoning Map: 8c, *supra* note 233.

²⁴⁴ N.Y.C., N.Y., ZONING RESOLUTION § 81-211(b) (1961) (amended 2015).

²⁴⁵ See *Why 57th Street is the Supertall Tower Mecca of New York*, CURBED: N.Y. (Sep. 25, 2014, 1:35 PM), <http://ny.curbed.com/2014/9/25/10044152/why-57th-street-is-the-supertall-tower-mecca-of-new-york>. 432 Park Avenue is joined by One57, another luxury condo on 57th Street that is over 1,000-feet tall. Two other supertall buildings are planned along the street at 111 West 57th Street and 217 West 57th Street.

allowed if it were not in the Special Midtown District. If the developers chose to build at least 13 square feet of residential space for each rooming unit and 16.25 square feet for each dwelling unit, they could increase the residential floor area by over 50,000 square feet, up to 290,000 square feet. While the maximum commercial floor area of Lot 41, which was zoned as a C5-3 district, would remain the same, the residential floor area could be increased to 30,000 square feet if the developers built enough qualifying residential space.

But the developers wanted even more floor area. To achieve their goal, they entered into a number of Zoning Lot Development Agreements with surrounding lots (for a map of surrounding lots, see Figure 7). On September 13, 2006, 440 Park LLC signed a ZLDA with 44 East 57th St. Realty Corporation, the fee owner of Lot 44 in Block 1292. According to the agreement, “[t]he intended size of Developer’s [440 Park LLC] Prospective Building is greater than that which would be permitted by the Zoning Resolution . . . assuming Developer’s Property remained a zoning lot separate from the zoning lot in which Seller’s Land is located.”²⁴⁶ Thus, 440 Park LLC paid 44 East 57th St. Realty \$5,543,000 for its unused development rights,²⁴⁷ consisting of 22,172 square feet of floor area.²⁴⁸ Per the agreement, “Seller . . . grant[ed], transfer[red] and convey[ed] to Developer an exclusive perpetual easement for light and air within the portion of Seller’s Property located above the Upper Horizontal Plane [the highest elevation of the Seller’s current building].” Further, 44 East 57th St. Realty covenanted “that no building, structure, improvement, fixture or equipment [would] be constructed or allowed on Seller’s Property, at a height above the Upper Horizontal Plane” and that “at not time, shall . . .

²⁴⁶ Development Rights Transfer of Sep. 13, 2006 (recorded Oct. 25, 2006), Document ID: 2006091800165003, available at https://a836-acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc_id=2006091800165003.

²⁴⁷ Many ZLDAs do not include the purchase price of the development rights. But, the New York City Office of the City Register often records the purchase price in its Detailed Document Information page for each transaction. To access the Detailed Document Information page for the September 13, 2006, development rights transfer, navigate to <http://a836-acris.nyc.gov/CP/>, then click Search Property Records, then Document ID/City Register File Number, then search 2006091800165003.

²⁴⁸ Development Rights Transfer of Sep. 13, 2006, *supra* note 246.

the Seller's Improvements utilize a lot coverage that is greater than the lot coverage utilized by Seller's Existing Building.”²⁴⁹ Since Floor Area Ratio only indirectly affects height, 440 Park LLC actually received a two-for-one deal in the ZLDA. Not only did 440 Park LLC receive Lot 44's excess development rights, it also made sure 44 East 57th St. Realty would not obstruct its view by acquiring an easement for light and air above 44 East 57th St. Realty's existing building. If 44 East 57th St. Realty demolished its existing building, it would not be allowed to build a taller, narrower structure as a replacement even if the new building contained the same floor area as the existing one.

By the end of 2007, 440 Park LLC was the fee owner of three lots²⁵⁰ and a party to four ZLDAs in Block 1292 of Manhattan. Through the four ZLDAs, the developers of 432 Park Avenue received development rights from five neighboring lots in Block 1292: 42,²⁵¹ 44,²⁵² 46, and 145.²⁵³ Though the five lots remained separate for tax purposes, they were considered one single lot for zoning purposes. If the developers elected to build a commercial-use-only building on the site, they could have constructed a building containing over 440,000 square feet²⁵⁴ and received even more floor area for building qualifying public amenities.²⁵⁵ The

²⁴⁹ *Id.*

²⁵⁰ On March 6, 2007, 53 East 77th LLC, another company helmed by Harry Macklowe, transferred Lot 44 to 440 Park LLC. Deed of Mar. 22, 2007 (recorded April 3, 2007), Document ID: 2007032801684008, available at https://a836-acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc_id=2007032801684008.

²⁵¹ Development Rights Transfer of Dec. 4, 2006 (recorded Dec. 12, 2006), Document ID: 2006120700644010, available at https://a836-acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc_id=20061207006440108.

²⁵² Development Rights Transfer of Sep. 14, 2006 (recorded Oct. 25, 2006), Document ID: 2006091800165008, available at https://a836-acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc_id=2006091800165008.

²⁵³ Development Rights Transfer of Sep. 29, 2007 (recorded Oct. 29, 2007), Document ID: 2007100901391002, available at https://a836-acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc_id=2007100901391002.

²⁵⁴ The ZLDA with the fee owner of Lots 46 and 145 did not specify how much floor area 440 Park LLC would receive. It merely stated that 440 Park LLC would receive any excess rights. This may reflect the fact that Harry Macklowe presided over the company which owned Lots 46 and 145. *See id.* This calculation thus does not include the undisclosed development rights received from Lots 46 and 145. However, this calculation includes the possibility of 440 Park LLC demolishing any existing buildings on lots 33, 41, or 44 to utilize maximum floor area within a single building. This calculation is based on the scenario of 440 Park LLC building a commercial-use-only building because commercial-use receives the highest FAR in C5-2.5 and C5-3 districts. *See supra* text accompanying notes 244-249.

²⁵⁵ *See supra* text accompanying note 240.

process of compiling floor area had taken over one-and-a-half years and cost 440 Park LLC over \$450 million dollars. But trouble was on the horizon for 440 Park LLC and Harry Macklowe.

Macklowe ended up defaulting on the project's loans and selling the properties and development rights to the mysterious Los-Angeles-based CIM Group and its affiliates,²⁵⁶ although Macklowe stayed on as a partner in the project.²⁵⁷ On January 20, 2010, the CIM Group purchased Lots 33, 41, and 44 from 440 Park LLC and Lots 46 and 145 from Dakotah Travel Company LLC for a relative bargain at \$305,410,069.²⁵⁸ The CIM Group also continued to use ZLMs to gain further floor area. On December 23, 2010, they entered into a ZLDA for 19,600 square feet of additional floor area from Lot 43.²⁵⁹ Later that day, the First American Title Insurance Company filed a certificate with the Department of Buildings specifying that for zoning purposes, Lots 33, 41, 42, 43, 44, 45, 46, and 145 would be considered one lot.²⁶⁰

Developers must now include a Zoning Diagram (referred to as ZD1) as part of their new building application. According to the Department of Building's *Zoning Diagram Guide*, "[t]he ZD1 graphically summarizes the proposed zoning bulk, yards, and street plantings with detailed drawings, including site plans and projections describing vertical dimensions. Information regarding Variances and Special Permits, Use, and FAR is also required."²⁶¹

When SLCE architects filed the first ZD1 for the proposed building in April 2012, the CIM Group and its affiliates possessed 15,063.10 square feet of development rights in C5-2.5 land and

²⁵⁶ Craig Karmin, *New York Placing Tallest Order*, WALL STREET J., Oct. 19, 2011, <http://www.wsj.com/articles/SB10001424052970203658804576639543415136636>.

²⁵⁷ Alan Feuer & Charles V. Bagli, *Harry Macklowe Gambles Again*, N.Y. TIMES, Oct. 4, 2013, <http://www.nytimes.com/2013/10/06/nyregion/harry-macklowe-gambles-again.html>.

²⁵⁸ Deed of Jan. 20, 2010 (recorded Jan. 28, 2010), Document ID: 2010012601381001, available at https://a836-acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc_id=2010012601381001.

²⁵⁹ Development Rights Transfer of Dec. 23, 2010 (recorded Jan. 12, 2011), Document ID: 2011010400882002, available at https://a836-acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc_id=2011010400882002.

²⁶⁰ Certificate of Dec. 23, 2010 (recorded Jan. 12, 2011), Document ID: 2011010400882003, available at https://a836-acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc_id=2011010400882003. The certificate is also Exhibit I of 432 Park Avenue's zoning documents.

²⁶¹ N.Y.C. DEP'T BUILDINGS, ZONING DIAGRAM GUIDE 1 (2009).

24,328.60 square feet of development rights in C5-3 land for the project through lot purchases and zoning lot development agreements.²⁶² Since C5-3 districts have a maximum commercial FAR of 15.0 and a maximum residential FAR of 12.0, provided the residential space includes enough qualifying recreational space,²⁶³ the C5-3 development rights would allow the developers of 432 Park Avenue to build a maximum of 364,929.00 square feet of commercial space or 291,943.20 square feet of residential space.²⁶⁴ The C5-2.5 development rights, which had a maximum FAR of 12.0 for commercial space and residential space, would allow the developer to build a maximum of 180,756.00 square feet of either commercial space or residential space, again provided the residential space included enough qualifying recreational space. Altogether, 432 Park Avenue could have been built to include a maximum of 545,685.00 square feet of commercial space or 472,699.00 square feet of residential space.

The first ZD1 depicted four structures on the lot. Two small, short structures, flanked the

²⁶² ZD1 Zoning Diagram 1 of Apr. 20, 2012, BIN: 1088583, available at <http://a810-bisweb.nyc.gov/bisweb/bispi00.jsp> (in the Search by Property section, search for 432 Park Avenue in Manhattan; follow View Zoning Documents hyperlink; select the zoning diagram corresponding to the ES307925638 scan code). When SLCE Architects, the architects of record for 432 Park Avenue, *432 Park Avenue*, SKYSCRAPER CTR., <https://www.skyscrapercenter.com/building/432-park-avenue/13227> (last visited Feb. 26, 2017), first submitted zoning plans to the Department of Buildings in 2012, the zoning lot looked relatively the same, bar a few changes. In 2011, 440 Park LLC II decided to sell Lot 41. Deed of Nov. 2, 2011 (recorded Nov. 10, 2011), Document ID: 2011110801298005, available at https://a836-acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc_id=2011110801298005. In anticipation of the sale, 440 Park LLC II first transferred 5,943 square feet of the lot's remaining development rights to itself on November 2, 2011. Since the agreement granted "in perpetuity the Lot 41 Excess Developments Rights and all of Owner's right, title and interest in and to the Air Rights Parcels Excess Development Rights" to 440 Park LLC II and promised "an exclusive perpetual easement for light and air . . . above the Upper Horizontal Plane [of the existing building on Lot 41]," any future buyer of Lot 41 would receive a lot with severely curtailed development rights. Development Rights Transfer of Nov. 2, 2011 (recorded Nov. 10, 2011), Document ID: 2011110801298004, available at https://a836-acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc_id=2011110801298004. On the same afternoon, the CIM Group purchased Lot 45, a lot that 440 Park LLC had previously signed a ZLDA with. Deed of Nov. 2, 2011 (recorded Nov. 10, 2011), Document ID: 2011110901149001, available at https://a836-acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc_id=2011110901149001. The CIM Group now had control of the whole lot, not just the 23,189 square feet of development rights its predecessor had bargained for. Development Rights Transfer of Sep. 14, 2006 (recorded Oct. 25, 2006), Document ID: 2006091800165008, available at https://a836-acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc_id=2006091800165008.

²⁶³ For a description of the recreational space requirements, see N.Y.C., N.Y., ZONING RESOLUTION § 81-241(c) (1961) (amended 2011).

²⁶⁴ Throughout this paper, I use the term "developer" loosely. When speaking of developers and/or their actions, I may refer to any affiliates and/or partners (whether equity or not and whether majority or not) and their actions.

main portion of the building, rising eighty-four stories to 1,398-feet tall. Further east on the lot along Park Avenue stood a smaller 111-feet tall structure. Two broad swaths of residential-use-only recreational space fronted East 57th and East 56th streets. Altogether, the structures contained 452,713.42 square feet of residential space and 66,516.2 square feet of commercial space. Even when combined with the existing 25,897.50 square feet of commercial space already utilized by pre-existing buildings on the lot, the total proposed floor area came in at 545,127.1 square feet, just a few hundred feet shy of the maximum floor area allowed on the site.²⁶⁵ Because the floor area of the proposed building was below the maximum permitted floor area of the lot, the development would be able to proceed as-of-right, at least vis-à-vis floor area.

The layout of 432 Park Avenue changed several times afterwards, however, even after construction began in 2011. While the developers maintained the general theme of an exceptionally tall, thin building, the floor area of 432 Park Avenue continued to grow. In particular, the developers expanded the floor area of commercial space in the lower floors with each iteration. In order to ensure that the development could continue to proceed as-of-right, the developers acquired more land and development rights to increase the maximum permitted floor area of the lot. To that end, the developers purchased Lot 43,²⁶⁶ a lot they had previously obtained excess development rights from,²⁶⁷ and entered a ZLDA with Lot 47.²⁶⁸ In sum, the two transactions gave the developers 23,464 square feet more of development rights.

The additional lot area and ZLDA allowed the developers to develop the site to a maximum of 582,643.20 square feet. By the time SLCE Architects filed the last ZD1 on June 26,

²⁶⁵ See ZD1 Zoning Diagram 1 of Apr. 20, 2012, *supra* note 262.

²⁶⁶ Deed of Jan. 8, 2013 (recorded Jan. 18, 2013), Document ID: 2013010900749001, available at https://a836-acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc_id=2013010900749001.

²⁶⁷ See text accompanying *supra* note 259.

²⁶⁸ Development Rights Transfer of Dec. 10, 2015 (recorded Dec. 16, 2015), Document ID: 2015121100209004, available at https://a836-acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc_id=2015121100209004.

2016, 432 Park Avenue had grown to include 470,144.16 square feet of residential space and 122,637.02 square feet of commercial space, or a total of 592,781.18 square feet altogether (for an excerpt of the June 26, 2016, ZD 1, see Figure 8).²⁶⁹ Though the new plans exceeded the available floor area for the lot, the developers built a public plaza containing over 6,300 square feet of space which granted them an additional 38,044.41 square feet of floor area.²⁷⁰ Equipped with the plaza bonus, the new plans fell within the permitted maximum floor area for the lot, allowing the development to continue to proceed as-of-right in terms of bulk.

Floor area, however, only correlates partially with height. The floor area ratio establishes that a building height limit *exists*, but doesn't specify what the limit will be. Luxury residential developments tend to favor higher ceilings, so FAR provides less of a restraint on building height. To more effectively regulate height, the Zoning Resolution also implements direct height regulations. According to Section 81-262 which regulates street wall heights based on street widths, the street walls along 57th Street and Park Avenue, streets both 100-feet wide, could be built up to 150-feet tall while the street wall along 56th Street, a 60-feet wide street, could only be built up to 90-feet tall.²⁷¹ In any case, the developers decided to maintain a 90-feet tall street wall on all sides.

²⁶⁹ ZD1 Zoning Diagram 1 of June 26, 2016, BIN: 1088583, available at <http://a810-bisweb.nyc.gov/bisweb/bispi00.jsp> (in the Search by Property section, search for 432 Park Avenue in Manhattan; follow View Zoning Documents hyperlink; select the zoning diagram corresponding to the ES600226796 scan code) [hereinafter ZD1 of June 26, 2016].

²⁷⁰ See *id.* According to Section 81-22 of the Zoning Resolution, a developer in the Special Midtown District may receive an as-of-right floor area bonus for building a qualifying public plaza. N.Y.C., N.Y., ZONING RESOLUTION § 81-22 (1961) (amended 2007). Section 81-23 further elaborates that for each 1 square foot of public plaza space, the developer will receive an additional 6 square feet of development rights. *Id.* § 81-23 (amended 2011).

²⁷¹ *Id.*



²⁷² N.Y.C., N.Y., ZONING RESOLUTION § 81-263 (1961) (amended 2011).

wall on East 56th Street.²⁷³ Above the street wall on East 57th Street, the building would need to be set back at least 118 feet.²⁷⁴

On the other hand, the “daylight evaluation” method “measure[s] and evaluate[s] portions of sky blocked by a building as viewed from specified vantage points in the street.”²⁷⁵ A vantage point is established 250 feet from the far lot in the center of the street to evaluate the daylight score.²⁷⁶ “The building is [then] plotted on daylight evaluation charts representing the zoning lot’s available daylight from specified vantage points.”²⁷⁷ (For an example daylight evaluation chart, see Figure 9). The daylight evaluation chart is based on the perspective of a pedestrian standing at the vantage point and looking towards the building. The horizontal axis is measured in degrees of arc as the pedestrian sweeps her vision horizontally along the street, up to 90 degrees. Vertical lines intersect the horizontal axis which represent 25-foot increments along the street line. The vertical axis represents the pedestrian’s vision as she sweeps her vision upward. “The vertical axis is intersected by curved elevation lines representing elevation angles from the center line of the street at 10 degree intervals from zero degrees to 70 degrees and at two degree intervals from 70 degrees to 90 degrees.”²⁷⁸ A profile curve representing an elevation angle of 72 degrees traverses the grid. (The profile curve is the dotted curved line in the shaded area in Figure 9). The profile curve is based on the current character of buildings within the Special Midtown District which rise on average at an elevation angle of 70 degrees when measured from

²⁷³ Table A of Section 81-263 lists the setback requirements for buildings on streets that are 60-feet or less wide. According to the table, a building 710 feet tall would require a setback of 55.75 feet. For every 10 feet above 710 feet, the setback needed to be increased by 1 foot. *Id.*

²⁷⁴ Table C of Sec. 81-263 lists the setback requirements for buildings on streets that are 100-feet or more wide. According to the table, a building 710 feet tall would need a setback of at least 50 feet. For every 10 feet above 710 feet, the setback would be increased by one foot. *Id.*

²⁷⁵ *Id.*

²⁷⁶ “Vantage point” is defined in *id.* § 81-271 (amended 2011).

²⁷⁷ *Id.* § 81-251 (amended 2011).

²⁷⁸ *Id.* § 81-272(a) (amended 2011).

the street line.²⁷⁹

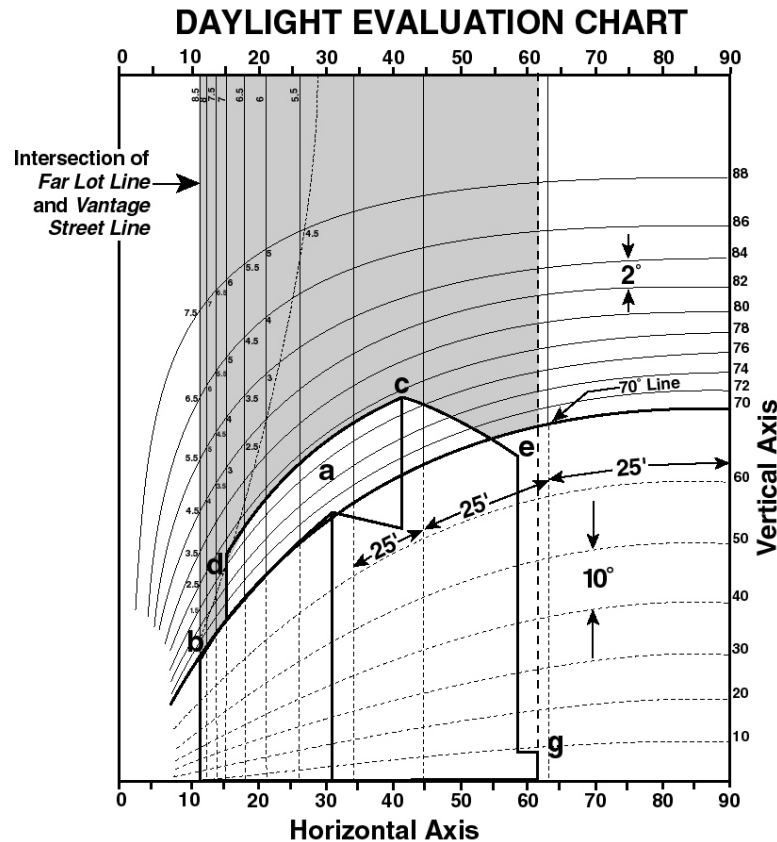


Figure 9: Courtesy of the New York City Department of Buildings. Excerpted from Section 81-271 of the 1961 Zoning Resolution (amended 2011).

Section 81-274 of the Zoning Resolution details the procedure for determining the daylight evaluation score of a building. The daylight evaluation score essentially measures how much sky the building blocks from the pedestrian's vantage point. If a building encroaches the profile curve, it is given an additional weighted value.²⁸⁰ To comply with the Special Midtown District's zoning, the building must receive a score of 75% or more.²⁸¹ In other words, the building may only block up to 25% of the sky when viewed from the vantage point.

²⁷⁹ *Id.* § 81-272(d) (amended 2011).

²⁸⁰ *Id.* § 81-274(a)(5) (amended 2011).

²⁸¹ *Id.* § 81-274(f) (amended 2011).

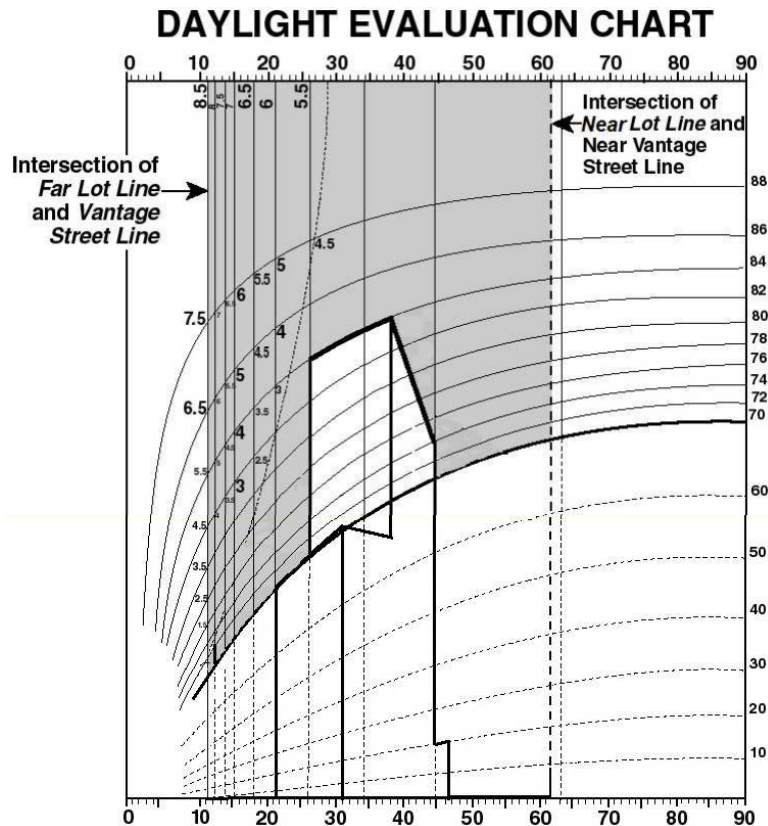


Figure 10: An edited version of Figure 7 by the author illustrating how a thinner building would more easily comply with the alternative daylight evaluation height and setback regulations

The developers of 432 Park Avenue elected to use the daylight evaluation method rather than the daylight compensation method. The daylight compensation method would have required a building with awkwardly deep setbacks. In any case, the daylight evaluation method was perfect for a tall, thin building like 432 Park Avenue. Compare Figure 9 with Figure 10, where the building depicted is taller and thinner. Under the daylight evaluation method, a tall, thin building may rise much higher than a shorter, wider building before it encroaches the profile curve. Above its 90-foot-tall street walls, 432 Park Avenue rises 1,306 feet as a narrow tower measuring just 93-feet by 93-feet in floor area.²⁸² Since 432 Park Avenue complied with the daylight evaluation method, it was also able to proceed as-of-right in terms of height. The public

²⁸² ZD1 of June 26, 2016, *supra* note 269.

would have no say throughout its zoning approval process.

Construction on 432 Park Avenue finished on December 23, 2015.²⁸³ Public opinion over the new building split dramatically both during construction and after completion. Many architectural critics praised the minimalist design of the building, designed by Rafael Viñoly and inspired by a luxury waste basket.²⁸⁴ Although Paul Goldberger decried the shadows cast by 432 Park Avenue and other supertall towers south of Central Park, he described the building as “an essay in pure geometric form.”²⁸⁵ Aaron Betsky of *Architecture Magazine* similarly worried that 432 Park Avenue “represents the transformation of this and every other city into a place for the wealthy to live and play . . . but . . . it does so with an elegance, borne out of its simplicity as much as its height, that make it clear that it is still possible to make an [sic] beautiful skyscraper.”²⁸⁶ Jonathan Margolis of the *Financial Times* likewise acknowledged how the building may represent wealth inequality, but argued “432 is still . . . a marvellous [sic] object.”²⁸⁷

A common theme is evident: even those who praise 432 Park Avenue recognize the building’s problematic symbolism. With units selling for tens of millions of dollars, 432 Park Avenue represents the growing gap between the rich and the poor and the crowding out of natives by wealthy foreigners who spend but a few weeks per year in the City. Many New

²⁸³ *World Reaches 100 Supertall Skyscrapers with Completion of 432 Park Avenue*, COUNCIL TALL BUILDINGS & HABITATS (Jan. 13, 2016), <http://www.ctbuh.org/News/GlobalTallNews/tabid/4810/Article/3488/language/en-US/view.aspx>.

²⁸⁴ Zoe Rosenberg, *A \$225 Trash Can Inspired NYC’s Tallest Residential Tower*, CURBED: N.Y. (June 1, 2015, 11:30 AM), <http://ny.curbed.com/2015/6/1/9954820/a-225-trash-can-inspired-nycs-tallest-residential-tower>.

²⁸⁵ Paul Goldberger, *Too Rich, Too Thin, Too Tall?*, VANITY FAIR (May 2014), <http://www.vanityfair.com/culture/2014/05/condo-towers-architecture-new-york-city>.

²⁸⁶ Aaron Betsky, *432 Park Avenue and the Importance of Being There and Being Square*, ARCHITECT MAG. (Oct. 16, 2014), http://www.architectmagazine.com/design/buildings/432-park-avenue-and-the-importance-of-being-there-and-being-square_o.

²⁸⁷ Jonathan Margolis, *Manhattan’s Latest Tower Gives Critics the Needle*, FIN. TIMES (Apr. 24, 2016), <https://www.ft.com/content/468bb632-0887-11e6-b6d3-746f8e9cdd33>.

Yorkers are upset by the tower. Some even refer to it as the “Middle Finger Tower.”²⁸⁸ One Native New Yorker excoriated a fellow metropolitan who admitted affinity for the building’s design. He responded, “432 Park is a horrible, no-good, evil building It is the distillation, in physical form, of everything that is wrong with our late-capitalist society . . . a grotesque middle fingered erected by the rich and pointed at everyone else.”²⁸⁹ One writer for the popular political blog Daily Kos even went as far as describing 432 Park Avenue as “everything wrong with wealth in America.”²⁹⁰

432 Park Avenue’s symbolism is especially troublingly, because it casts a three-quarters-long shadow onto Central Park, one of the City’s most beloved public spaces. The public’s last great refuge for sunlight and fresh air in the concrete jungle is under attack. On November 8, 2015, protestors took to the streets to protest the construction of supertall buildings along 57th Street. Stand Against the Shadows, the civic group which organized the protest, sees the erection of supertall structures like 432 Park Avenue as a failure of zoning.²⁹¹

That so many critics of 432 Park Avenue fixate on the building’s shadows is unsurprising, for 432 Park Avenue actually does not pose much of a danger towards the traditional issues of concern in zoning law. When the Commission on Building Districts and Restrictions proposed the 1916 Zoning Resolution in the early twentieth century, it was concerned with issues such as “bridge crush,” whereby occupants of a building exited at the same time and overloaded the

²⁸⁸ See, e.g., *Ask a Native New Yorker: Is it Wrong to Like that Middle Finger Tower?*, GOTHAMIST (Jul. 29, 2016, 1:25 PM), http://gothamist.com/2016/07/29/supertall_towers_nyc.php; John Massengale, *Honestly, Isn’t this Building Giving New Yorkers the Finger?*, JOHN MONTAGUE MASSENGALE AIA: BLOG (May 11, 2015), <http://blog.massengale.com/2015/05/11/finger/>;

²⁸⁹ *Ask a Native New Yorker*, *supra* note 288.

²⁹⁰ Walter Eienkel, *432 Park Avenue is Everything Wrong with Wealth in America*, DAILY KOS (Jan. 7, 2015, 10:57 AM), <http://www.dailykos.com/story/2015/1/7/1356105/-432-Park-Avenue-is-everything-wrong-with-wealth-in-America>.

²⁹¹ Jenna McKnight, *Wave of Super-Tall Towers in Manhattan Sparks Protests over Shadows*, DEZEEN (Nov. 11, 2015), <https://www.dezeen.com/2015/11/11/supertall-skinny-skyscrapers-towers-manhattan-new-york-shop-architects-robert-stern-rafaely-vinoly-jean-nouvel-portzamparc-controversy-protest/>.

public transit system, and the lack of space between buildings, leading to insufficient air and light to the building's inhabitants and dark streets below.²⁹² 432 Park Avenue does not pose a significant risk to any of these concerns. First, 432 Park Avenue contains just over 140 dwelling units, so the number of people occupying the building is already few.²⁹³ With so few occupants, it is unlikely that the building's residents will overcrowd the streets. (I would also hazard to guess that 432 Park Avenue's ultra-wealthy inhabitants probably will not be monopolizing public transportation in the area). Furthermore, many critics oppose luxury condos like 432 Park Avenue precisely because they claim that foreign buyers only purchase the units as investment properties and do not actually live in the units for most of the year.²⁹⁴ But if the buyers of 432 Park Avenue are absentee foreigners, the likelihood that they will choke the streets with traffic is further decreased. Second, Midtown Manhattan is already filled with high-rise buildings. Many of the side streets are already enveloped in shadows for much of the day. The presence of 432 Park Avenue is not going to noticeably darken the already-dark 57th Street. If anything, the

²⁹² See *supra* Part II.

²⁹³ The developers altered the number of dwelling units in 432 Park Avenue multiple times throughout the zoning process. In the first ZD1 they submitted, the developers claimed 144 dwelling units. See ZD1 Zoning Diagram 1 of Apr. 20, 2012, *supra* note 262. In January of 2013, the number of dwelling units dropped to 130. ZD1 Zoning Diagram 1 of Jan. 5, 2013, BIN: 1088583, available at <http://a810-bisweb.nyc.gov/bisweb/bispi00.jsp> (in the Search by Property section, search for 432 Park Avenue in Manhattan; follow View Zoning Documents hyperlink; select the zoning diagram corresponding to the ES991159121 scan code). In its last ZD1, the developers claimed 146 units. ZD1 of June 26, 2016, *supra* note 269. This likely reflects the fluctuating market for luxury condominiums. In late 2015, for example, the developers split up a number of full-floor units into smaller, half-floor units to reflect slowing sales. See Tanay Warerker, *Some 432 Park Avenue Condos Get Split Up Amid Slowing Sales*, CURBED: N.Y. (Nov. 10, 2015, 12:50 PM), <http://ny.curbed.com/2015/11/10/9901918/some-432-park-avenue-condos-get-split-up-amid-slowng-sales>.

²⁹⁴ See, e.g., Hana R. Alberts, *Shocker: Half of Midtown's Super Luxury Condos Sit Vacant*, CURBED: N.Y. (Oct. 24, 2014, 5:55 PM), <http://ny.curbed.com/2014/10/24/10031340/shocker-half-of-midtowns-super-luxury-condos-sit-vacant>; Armin Rosen, *A Third of the Most Expensive Apartments in New York are Empty Most of the Time*, BUS. INSIDER (Jan. 22, 2016, 2:29 PM), <http://www.businessinsider.com/expensive-new-york-apartments-empty-2016-1>. As the differences in the two aforementioned titles suggest, it is hard to empirically ascertain the nationalities of luxury condo owners because many buyers, if not most, create LLCs to purchase luxury properties for privacy reasons. But see, Hiten Samtani & Tess Hoffman, *Saudi Billionaire Said to be Buyer of \$95M Penthouse at 432 Park*, REAL DEAL (May 28, 2015, 4:25 PM), <https://therealdeal.com/2015/05/28/saudi-billionaire-said-to-be-buyer-of-95m-penthouse-at-432-park/> (reporting that the buyer of 432 Park Avenue's penthouse is a Saudi Arabian retail magnate).

shadows of thinner buildings move more quickly across a particular spot on the ground.²⁹⁵ Since 432 Park Avenue is such a tall, thin structure on a relatively large lot, there is virtually no risk that it will significantly block air or sunlight from neighboring buildings. Finally, although there is currently too little evidence to determine what effect supertall buildings in New York City will generally have on surrounding property values, there is anecdotal evidence that the supertall structures along 57th Street are a boon to property owners.²⁹⁶

Some New Yorkers are optimistic that 432 Park Avenue will one day join the ranks of New York City's most iconic buildings.²⁹⁷ After all, the Flatiron Building once received mixed reviews, including criticisms that it ostentatiously symbolized wealth and greed,²⁹⁸ but is now firmly lodged in just about every journalist's top list of iconic buildings in New York City.²⁹⁹ One significant feature, however, distinguishes 432 Park Avenue from other iconic tall buildings such as the Flatiron and Empire State buildings. The latter two were designed as office buildings.

²⁹⁵ See *The Latest Generation of Towers: Tall, Slender and Mostly Residential*, REAL ESTATE BOARD OF N.Y. (2015), available at https://www.rebny.com/content/rebny/en/newsroom/research/real_estate_policy_reports/Latest_Generation_Towers.html. The Real Estate Board of New York compares the shadows of tall, thin towers to sun dials.

²⁹⁶ "While the 57th Street corridor's transformation from less-than-prime residential strip to Billionaire's Row has been a source of great frustration for existing residents—bringing construction noise, obstructed views and even a few mandatory evacuations—it has also stoked giddy fantasies of financial windfalls . . . [I]ndeed, recent data suggests that local property values have enjoyed a bump beyond city averages . . . Condos, typically, have seen more appreciation than co-ops, given their greater openness to investors and pieds-a-terre, but the new amenities and burnished residential allure of the strip have bolstered co-op prices as well." Kim Velsey, *Rising Tide: 57th Street Residents May Lose a View, But At Least Resale Values Soar*, OBSERVER (Mar. 4, 2015, 11:15 AM), <http://observer.com/2015/03/rising-tide-57th-street-residents-may-lose-a-view-but-at-least-resale-values-soar/>.

²⁹⁷ See, e.g., Matt A.V. Chaban, *The New Shapes of New York*, N.Y. TIMES: N.Y. REGION (Nov. 17, 2016), https://www.nytimes.com/2016/11/20/nyregion/new-york-city-buildings-skyline.html?_r=0 ("The buildings outlined above, however, may someday be worthy of appearing in a Times Square souvenir snow globe . . . You may not recognize these silhouettes, but in time, you will." Chaban lists 432 Park Avenue first.); *The Latest Generation of Towers*, *supra* note 295 ("We are confident that over time, the latest generation of towers—like their predecessors—will become beloved members of our skyline.").

²⁹⁸ Recall Charles Lamb's description of the Flatiron Building as an "an example of . . . greed." GILMARTIN, *supra* note 12, at 139.

²⁹⁹ See, e.g., Sophie Harris, Jeremy Winograd, & Alex Schechter, *The 40 Most Beautiful NYC Buildings*, TIME OUT: N.Y. (July 27, 2016), <https://www.timeout.com/newyork/things-to-do/the-most-beautiful-nyc-buildings>; *New York City's Most Iconic Buildings, Mapped*, CURBED: N.Y. (Sep. 28, 2015, 11:45 AM), <http://ny.curbed.com/maps/new-york-citys-most-iconic-buildings-mapped>; Elise Taylor, *New York's Most Iconic Buildings, Free from the City's Frenzy*, VANITY FAIR (last accessed Mar. 3, 2017), <http://www.vanityfair.com/culture/photos/2016/10/secret-life-of-buildings-new-york> (listing the Flatiron Building as number one).

While 432 Park Avenue is a mixed-use building with commercial space on its lower floors, all of its upper floors are designated for residential use and the upper floors are the ones that cast shadows on Central Park. Moreover, office buildings house companies which provide jobs and otherwise contribute significantly to the economy. The same cannot be said about residential buildings, which provide at most a handful of jobs to service workers who maintain the buildings' amenities. 432 Park Avenue may one day become a recognizable name, but I find it hard to believe that it will be readily accepted as one of New York's adored monuments.

2. One Vanderbilt

If all goes as planned, 432 Park Avenue will no longer be the tallest building in Midtown Manhattan by 2021. It will be supplanted by One Vanderbilt, a massive commercial building containing almost 1.3-million square feet of office space, trading floors, retail, restaurant, transit access, and public space adjacent to Grand Central Terminal.³⁰⁰ Its roof height, at 1,414-feet tall, will surpass 432 Park Avenue's. A spire atop the building will bring One Vanderbilt's total height to 1,514-feet tall.³⁰¹ Like 432 Park Avenue, the developers of One Vanderbilt, which include SL Green Realty Corporation and its affiliated special purpose entities, began by amassing plenty of land.³⁰² But the similarities between the zoning approval processes of the two buildings ceases thereafter. While the developers of 432 Park Avenue were able to proceed as-of-right and thus encountered no public involvement and only non-discretionary City involvement, the developers of One Vanderbilt had no option but to apply for landmark transfers and rezoning in order to achieve permission to build to their desired bulk, both of which required

³⁰⁰ CITY PLANNING COMM'N, 14DCP188M, VANDERBILT CORRIDOR AND ONE VANDERBILT: FINAL ENVIRONMENTAL IMPACT STATEMENT 1-3 (2015), available at <https://www1.nyc.gov/site/planning/applicants/env-review/vanderbilt-corridor-one-vanderbilt.page> [hereinafter FINAL ENVIRONMENTAL IMPACT STATEMENT].

³⁰¹ *Id.* at 1-13.

³⁰² For a list of key players involved in the development of One Vanderbilt, see *One Vanderbilt*, SKYSCRAPER CTR., <https://www.skyscrapercenter.com/building/one-vanderbilt/15833> (last visited Mar. 4, 2017).

undergoing the Uniform Land Use Review Process and City Environmental Quality Review (CEQR) process. Despite the procedural hurdles, the developers of One Vanderbilt spectacularly succeeded in amassing hundred of thousands of square feet of development rights.

On May 27, 2015, One Vanderbilt Owner LLC purchased Lots 20, 27, 46, and 52, all of the lots comprising Block 1277 in Manhattan, bounded by East 43rd Street, Madison Avenue, East 42nd Street, and Vanderbilt Place.³⁰³ But the whole block only contained 43,313 square feet of lot area altogether.³⁰⁴ Located in a C5-3 district within the Grand Central Subdistrict of the Special Midtown District, the block had a maximum as-of-right FAR of 15.0.³⁰⁵ Thus, even if the developers demolished all of the existing buildings on the site, they could only construct up to 649,695 square feet of floor area as-of-right, an amount woefully inadequate for their proposed development.

Unlike 432 Park Avenue, zoning lot mergers were not an option. Recall that zoning lot mergers exploit the definition of “zoning lot,” which requires that the lots comprising the zoning lot be contiguous for at least 10 feet.³⁰⁶ The developers of One Vanderbilt already owned all of the lots in the block; there were no other contiguous lots to draw floor area from. To construct a building with some 1.3-million square feet of commercial space, the developers had to turn to zoning tools that require ULURP approval. Additionally, due to the discretionary nature of their

³⁰³ See Deed of May 27, 2015 (recorded June 9, 2015), Document ID: 2015052700411003, available at https://a836-acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc_id=2015052700411003 (deed for the purchase of block 1277, lot 20); Deed of May 27, 2015 (recorded June 9, 2015), Document ID: 2015052700411001, available at https://a836-acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc_id=2015052700411001 (deed for the purchase of block 1277, lot 27); Deed of May 27, 2015 (recorded June 9, 2015), Document ID: 2015052700411002, available at https://a836-acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc_id=2015052700411002 (deed for the purchase of block 1277, lot 46); Deed of May 27, 2015 (recorded June 9, 2015), Document ID: 2015052700411004, available at https://a836-acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc_id=2015052700411004 (deed for the purchase of block 1277, lot 52).

³⁰⁴ FINAL ENVIRONMENTAL IMPACT STATEMENT, *supra* note 300, at 1-3.

³⁰⁵ N.Y.C., N.Y., ZONING RESOLUTION § 81-211 (1961) (amended 2015). Further, buildings in the Grand Central Subdistrict are not eligible for public plaza floor area bonuses. *Id.* at § 81-61 (amended 2015).

³⁰⁶ *Id.* § 12-10 (amended 2011).

land use requests, the project also had to pass the City Environmental Quality Review process. Though CEQR is only a disclosure process, it entails public hearings as well.³⁰⁷

During ULURP, the Department of City Planning first forwards the development's application and related documents to the relevant community board. The community board then holds a public hearing and submits a written recommendation to the City Planning Commission, the developer, and the Borough President (and occasionally the Borough Board) within sixty days.³⁰⁸ Within thirty days of receipt of the community board's recommendation, the Borough President must submit a written recommendation to the City Planning Commission.³⁰⁹ The application then returns to the City Planning Commission, which holds a public hearing on the proposed development and casts votes either to "approve, approve with modifications, or disapprove the application within 60 days of the expiration of the Borough President's review period."³¹⁰ Generally, a decision requires the affirmative votes of at least seven commissioners.³¹¹ But even if an application pasts muster at the City Planning Commission level, it may still be reviewed by the City Council under certain circumstances. For example, the City Council must review all zoning map changes and may choose to review zoning special permits within fifty days of receiving the City Planning Commission's report.³¹² Finally, although the mayor need not review the process, the mayor retains the power to veto City Council decisions as well as decisions that the City Council did not act on within its fifty-day

³⁰⁷ *Environmental Review Process*, N.Y.C. DEP'T OF PLANNING, <https://www1.nyc.gov/site/planning/applicants/environmental-review-process.page> (last visited Mar. 5, 2017).

³⁰⁸ *Step 5: Uniform Land Use Review Procedure (ULURP)*, N.Y.C. DEP'T CITY PLAN., <https://www1.nyc.gov/site/planning/applicants/applicant-portal/step5-ulurp-process.page>. (last accessed February 16, 2017).

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

review period.³¹³ Altogether, the ULURP process may take over half a year and cost over a half million dollars in expert advice.³¹⁴

During the last term of the Bloomberg administration, city officials had pushed to rezone East Midtown. The proposed plan aimed to encourage new commercial development in East Midtown. City officials feared that companies might relocate to other world capitals, such as London or Tokyo, as the commercial building stock in Manhattan aged. The plan sought to incentivize developers by raising the maximum as-of-right FAR of the area, creating transfer districts where landmarks could transfer floor area as-of-right, and offering additional FAR in exchange for funding infrastructure development.³¹⁵

The developers of One Vanderbilt began talks with the City Planning Commission in late 2012 to discuss the proposed rezoning. In November of 2013, however, the City withdrew its proposal before it could reach vote before the City Council despite being approved by the City Planning Commission two months earlier.³¹⁶ Though comprehensive rezoning of East Midtown stalled, the developers of One Vanderbilt found a powerful ally in the City. Negotiation with the City would be a key element of One Vanderbilt's success.

That the developers incorporated many of the ideals of the East Midtown Rezoning proposal in their plans undoubtedly helped them garner support amongst City officials. They drastically needed City support as well, for the developers' floor area requests were manifold and

³¹³ *Id.*

³¹⁴ Hiten Samtani, *Developers, Wary of Cost and Delay, Spurn City's Landmark Transfers Program for Air Rights*, REAL DEAL (Jan. 29, 2013, 2:00 PM), <https://therealdeal.com/2013/01/29/developers-spurn-citys-landmark-transfers-air-rights-program/>. See also DEP'T CITY PLANNING, *A Survey of Transferable Development Rights Mechanisms in New York City* 12 (2015), available at <https://www1.nyc.gov/assets/planning/download/pdf/plans-studies/transferable-development-rights/research.pdf> [hereinafter *A Survey of TDRs*] (quoting Samtani).

³¹⁵ See *East Midtown Rezoning*, DEP'T CITY PLAN. (2013), available at https://www1.nyc.gov/assets/planning/download/pdf/plans/east-midtown/east_midtown.pdf; FINAL ENVIRONMENTAL IMPACT STATEMENT, *supra* note 300, at 1-5 to 1-6; Laura Kusisto & Eliot Brown, *Midtown's New Look Unveiled*, WALL STREET J. (July 11, 2012, 10:17 PM), <https://www.wsj.com/articles/SB10001424052702303919504577521411010664218>.

³¹⁶ FINAL ENVIRONMENTAL IMPACT STATEMENT, *supra* note 300, at 1-6.

consequential. As noted, the maximum as-of-right FAR for the block was 15.0. But the developers' proposed plan for a 1.3-million-square-foot building would require a FAR of about 30.0. There is no limit to the amount of development rights a developer may receive from a landmark through a Section 74-79 transfer, but developers are usually constrained by the availability of qualifying landmarks,³¹⁷ for developers may only receive development rights from "adjacent" landmark sites, which the Resolution defines as being either contiguous or located across the street.³¹⁸ Of course, all of this depends on whether the City Planning Commission grants the developer and the landmark owner a special permit necessary for the transfer, a process which involves passing ULURP.³¹⁹

Alternatively, if the developers could not find enough qualifying landmarks nearby, they could have used a Section 81-63 transfer, a special type of landmark transfer in the Grand Central Subdistrict. Unlike in the case of Section 74-79 transfers, the development site need not be adjacent to the landmark for a Section 81-63 transfer. Any receiving lot located at least 50% within the Grand Central Subdistrict could receive development right transfers from any landmark located at least 50% within the Subdistrict.³²⁰ There is a catch, however: transfers received through certification by the City Planning Commission, which again involves going through ULURP, can only increase the receiving lot's FAR by 1.0.³²¹

Bulk was not the only obstacle to the proposed One Vanderbilt plan. The proposed development also "would not conform to regulations relating to streetwall [*sic*] heights and distance from the street line, sidewalk widenings, retail continuity, building entrance recess areas

³¹⁷ Buildings in C5-3 districts may received an unlimited amount of floor area through Section 74-79 transfers. N.Y.C., N.Y., ZONING RESOLUTION § 81-211 (1961).

³¹⁸ *Id.* § 74-79 (amended 2011).

³¹⁹ *Id.*

³²⁰ *Id.* § 81-63 (amended 1992).

³²¹ *Id.* § 81-634 (last amended 2016).

and entrances, required pedestrian circulation space, and curb cut widths.”³²² One Vanderbilt clearly needed strong allies in order to gain multiple variances to sustain its project.

Luckily for the developers, the incoming de Blasio administration had not forgotten about the Bloomberg administration’s rezoning efforts. Indeed, upon taking office in 2014, Mayor de Blasio reiterated the City’s commitment to developing a new zoning plan for East Midtown.³²³ Like his predecessor, Mayor de Blasio worried about East Midtown’s competitiveness as a global commercial center in the coming years. He saw the need to incentivize “the development of modern, sustainable, Class-A office space.”³²⁴ At the same time, he understood that the area’s transportation infrastructure would need to be updated if more employers were to move to East Midtown.³²⁵

The One Vanderbilt project allowed the de Blasio administration to experiment with the East Midtown area. A new state-of-the-art office building would certainly be a boon in East Midtown and serve as a preview of what East Midtown could become. Thus, a symbiotic relationship developed between the City and One Vanderbilt’s developers. The story of One Vanderbilt cannot be understood without reference to the City’s concurrent zoning amendment proposals. The City, through the Department of City Planning, filed a joint City Environmental Quality Review application with One Vanderbilt’s developers in June of 2014.³²⁶ In it, the City

³²² *Id.* at 1-14.

³²³ *Greater East Midtown*, DEP’T CITY PLANNING, <https://www1.nyc.gov/site/planning/plans/greater-east-midtown/greater-east-midtown.page> (last visited Mar. 5, 2017).

³²⁴ *Id.*

³²⁵ The rezoning process is again under way. “On January 3rd, 2017, the Department of City Planning certified the Uniform Land Use Review Procedure (ULURP) applications (N 170186 ZRM and C 170187 ZMM) for Greater East Midtown.” If successful, the application will establish a new East Midtown Subdistrict to help the City achieve its goals. *Id.*

³²⁶ “This Final Environmental Impact Statement (FEIS) considers the series of proposed discretionary actions proposed by the New York City Department of City Planning (DCP) and a private applicant—Green 317 Madison LLC (317 Madison) [an affiliate of SL Green]—that would facilitate commercial development between Madison and Vanderbilt Avenues in East Midtown Manhattan, improve pedestrian circulation within Grand Central Terminal and its vicinity, and allow greater opportunity for area landmarks to transfer their unused development rights.” FINAL ENVIRONMENTAL IMPACT STATEMENT, *supra* note 300, at 1-1.

proposed the following:

- Zoning text amendment to: (1) create the Vanderbilt Corridor and a new special permit under which the City Planning Commission (CPC) may approve bonus floor area up to a maximum floor area ratio (FAR) of 30.0 . . . in connection with public space and transit improvements related to development within the Vanderbilt Corridor; (2) increase the maximum FAR of 21.6 to 30.0 for sites in the Vanderbilt Corridor utilizing the existing Landmark transfer special permit available in the Grand Central Subdistrict; and (3) modify the uses permitted in the Vanderbilt Corridor to allow the development, conversion, or enlargement of hotels only by a new special permit established by the proposed text amendment
- City Map amendment to designate the portion of Vanderbilt Avenue between East 42nd and East 43rd Streets as a “public place” dedicated to pedestrian uses, to remain under the ownership of the City under the jurisdiction of the New York City Department of Transportation (DOT).³²⁷

Simultaneously, the developers of One Vanderbilt requested:

- Special permit³²⁸ . . . for the transfer of development rights from the landmarked Bowery Savings Bank building.
- Special permit³²⁹ . . . to grant a floor area bonus in connection with on-site and off-site above and below-grade improvements to the pedestrian and mass-transit network in the Grand Central Subdistrict.

³²⁷ *Id.*

³²⁸ Pursuant to Section 81-635 of the Zoning Resolution, as modified by the simultaneous proposed zoning amendment.

³²⁹ Pursuant to the Section 81-64 to be created by the simultaneous proposed zoning text amendment.

- Special permit³³⁰ . . . to modify streetwall [*sic*] regulations, height and setback regulations, and mandatory district plan elements.³³¹

If One Vanderbilt was to receive additional floor area and the variances necessary for its approval, then the City’s zoning amendment proposals needed to pass muster. At the same time, the City needed One Vanderbilt’s promises of funding in order to convince ULURP actors of the benefits that could be derived from the zoning amendment.

On June 25, 2014, the Department of City Planning filed a ULURP application for a city map amendment to close Vanderbilt Avenue between East 42nd Street and East 43rd Street and establish a public space (known as “Vanderbilt Corridor”) in its stead.³³² The City’s proposals met some bumps as it passed along different actors in the ULURP process. Community Board 5 recommended denial unless the Department of City Planning limited the amendment. The Board worried that the “massive FAR bonus[es]” for transit improvements within the Vanderbilt Corridor might lead to massive overdevelopment resulting in canyon-like streets. Additionally, they feared that the FAR bonuses might encourage developers to demolish beloved nearby buildings, such as the Yale Club, that were not formally landmarked in order to redevelop the sites.³³³ Manhattan Borough President Gale Brewer also had concerns about the project, although she issued a conditional favorable recommendation.³³⁴ She insisted that the One Vanderbilt developers reiterate their commitment to provide ongoing maintenance to the

³³⁰ Pursuant to the new ZR Section 81-642 created under the above-referenced zoning text amendment.

³³¹ *Id.* at 1-1 to 1-2.

³³² For a timeline of the ULURP process, see *Land Use Application Record (Land Use Application ID: C 140440 MMM)*, N.Y.C. DEP’T CITY PLANNING, <http://a030-lucats.nyc.gov/lucats/PrintULURP.aspx?ULURP=140440> (last visited Mar. 5, 2017) [hereinafter *Land Use Application Record (ID: : C 140440 MMM)*].

³³³ Letter from Dan Miner, District Manager, Manhattan Community Board Six, to Carl Weisbrod, Chairman, New York City Planning Commission (Dec. 29, 2014), available at http://www1.nyc.gov/assets/planning/download/pdf/applicants/cb-bb-bp/140440_M06.pdf.

³³⁴ Gale A. Brewer, *Recommendation on ULURP Application Nos. C 150128 ZSM, C 150129 ZSM, and C150130 ZSM . . . and Nos. N 150127 ZRM and C140440 MMM*, DEP’T CITY PLANNING (Jan. 28, 2015), http://www1.nyc.gov/assets/planning/download/pdf/applicants/cb-bb-bp/140440_MBP.pdf.

Vanderbilt Corridor and use every effort to preserve the decorative façade elements of the existing buildings on the One Vanderbilt site, amongst other promises.³³⁵ In any case, the community board and borough president's recommendations are *only* recommendations and not dispositive. On March 30, 2015, the City Planning Commission approved the City's proposal. The City Council voted to adopt the map amendment on May 27, 2015.³³⁶

In October of 2014, the Department of City Planning filed a ULURP application for the zoning text amendments suggested in the CEQR application. The amendments entailed the creation of a new special permit (Section 81-64) which would allow developers to acquire up to 30.0 FAR in exchange for transit and public realm improvements in the Grand Central Subdistrict; a revision of the existing Section 81-635 special permit to allow a developer to acquire up to 30.0 FAR through a special landmark transfer; and finally, a restriction on the development, conversion, or enlargement of hotels in the Vanderbilt Corridor in order to promote the development of new full-service hotels in East Midtown.³³⁷ The City Planning Commission expressed many of the same concerns as Community Board 5 in the City's map amendment application to establish the Vanderbilt Corridor.³³⁸ On March 30, 2015, the Commission voted 39-0³³⁹ to deny the application, *unless* the amendment was limited to sites for which the City and MTA had coordinated plans; provided guidelines for which types of improvements would qualify for FAR improvements; required any building granted a bonus to surpass current energy conservation laws; specifically required the Landmarks Preservation Commission to issue a letter advocating the harmonious relationship of any proposed building to

³³⁵ *Id.* at 30-31.

³³⁶ *Land Use Application Record (ID: : C 140440 MMM)*, *supra* note 332.

³³⁷ N.Y.C. CITY PLANNING COMM'N, N 150127 ZRM REPORT 15-16 (March 30, 2015), available at <http://www1.nyc.gov/assets/planning/download/pdf/about/cpc/150127.pdf>.

³³⁸ See *supra* note 333 and accompanying text.

³³⁹ One council member abstained from voting.

Grand Central Terminal; and be limited to sites fronting more than one street, overlooking Grand Central, adjacent to a subway station, and possessing access to the pedestrian circulation system of Terminal City and other sites.³⁴⁰ A revised version of the zoning text amendment reflecting these demands came before the City Council near the end of May. The City Council adopted the amendment on May 27, 2015.³⁴¹

All of the tools were thus in place. Now, the developers only needed to acquire the necessary special permits to attain the additional floor area and variances. To do so, they submitted their own applications to ULURP.³⁴² The applications faced considerable opposition. On December 29, 2014, Community Board 5 recommended disapproval of the applications, *unless* certain conditions were met. The Community Board was concerned that One Vanderbilt's proposed public improvements would not actually improve access to the 7 and Lexington Avenue subway lines; were too ambiguous about the maintenance of the new Vanderbilt Corridor public space; and inadequately widened the sidewalk along East 43rd Street leading to Grand Central Terminal, amongst many other concerns.³⁴³ They were particularly vexed that “with the entire site to be excavated, this . . . once in a lifetime opportunity to find solutions that will best serve the public at this dense and vital crossroads” might be lost.³⁴⁴ The Manhattan Borough Board also recommended disapproval of the applications, “unless a responsible conclusion is reached on issues of public access and public space relating to the Grand Central

³⁴⁰ N 150127 ZRM REPORT 15-16, *supra* note 337.

³⁴¹ See N.Y.C. CITY COUNSEL, Res. No. 723 (2015).

³⁴² Though the developers filed separate applications for the special permit to receive transferable development rights from landmark buildings (application C 150128 ZSM); special permit to receive additional floor area for the proposed 81-641 Grand Central Public Realm Improvement bonus application (C 150129 ZSM); and a special permit pursuant to the proposed 81-642 for modification of certain zoning regulations application (C 150130 ZSM), the actors in the ULURP process considered all three applications jointly. In this section, I will thus refer to the “applications” to refer to all three applications.

³⁴³ For the rest of Community Board 5's concerns, see Letter from Dan Miner, District Manager, Manhattan Community Board Six, to Carl Weisbrod, Chairman, New York City Planning Commission (Dec. 29, 2014), available at http://www1.nyc.gov/assets/planning/download/pdf/applicants/cb-bb-bp/150128_M06.pdf.

³⁴⁴ *Id.*

Terminal circulation network, the environmental sustainability requirements of the proposed zoning text . . . , and language of the zoning text relating to . . . significant FAR bonuses.”³⁴⁵

Nevertheless, the City Planning Commission approved the applications on March 30, 2015,³⁴⁶ and the City Council approved the special permits on May 27, 2015.³⁴⁷

The developers had achieved the near-impossible. They had amassed several-hundred-thousand square feet of development rights in Manhattan. But the rights did not come cheap. The developers had to promise countless public improvements to pass ULURP. For example, they promised to build a new ground-level entrance on East 42nd Street to the 42nd Street Shuttle and a new street-level subway entrance at the intersection of East 42nd Street and Lexington Avenue leading to a below-grade passageway to Grand Central Terminal. They also promised to consult with the Department of Transportation and Department of City Planning regarding improvements and public amenities to the newly established Vanderbilt Corridor (for a proposed rendering of the new Vanderbilt Corridor public space, see Figure 11).³⁴⁸ Furthermore, the

³⁴⁵ MANHATTAN BOROUGH BD., Res. Recommending Conditional Disapproval of . . . C150128 ZSM, C150129 ZSM and C150130, N150127 ZRM . . . and . . . C 140440 MMM (Jan. 22, 2015), available at http://www1.nyc.gov/assets/planning/download/pdf/applicants/cb-bb-bp/150128_MBB.pdf.

³⁴⁶ See N.Y.C. CITY PLANNING COMM’N, C 150128 ZSM REPORT (March 30, 2015), available at <http://www1.nyc.gov/assets/planning/download/pdf/about/cpc/150128.pdf> (approving application no. C 50128 ZSM); N.Y.C. CITY PLANNING COMM’N, C 150129 ZSM REPORT (March 30, 2015), available at <http://www1.nyc.gov/assets/planning/download/pdf/about/cpc/150129.pdf> (approving application no. C 50129 ZSM); N.Y.C. CITY PLANNING COMM’N, C 150130A ZSM REPORT (March 30, 2015), available at <http://www1.nyc.gov/assets/planning/download/pdf/about/cpc/150129.pdf> (approving application no. C 50130 A ZSM—note the “A” toward the end of the application number indicating the applicant filed an amended application materials.)

³⁴⁷ See N.Y.C. CITY COUNSEL, Res. No. 725 (2015), available at <http://legistar.council.nyc.gov/ViewReport.ashx?M=R&N=Text2&GID=61&ID=2322111&GUID=1BBBE941-1A79-4B28-A610-4487023FF58F&Mode=Inline&Title=> (approving application no. C 50128 ZSM); N.Y.C. CITY COUNSEL, Res. No. 726 (2015), available at <http://legistar.council.nyc.gov/ViewReport.ashx?M=R&N=Text2&GID=61&ID=2322111&GUID=1BBBE941-1A79-4B28-A610-4487023FF58F&Mode=Inline&Title=> (approving application no. C 50129 ZSM). Note that the City Planning Commission’s approval for application number C 50130 A was final and did not require further approval from the City Counsel.

³⁴⁸ Due to space constraints, the scope of One Vanderbilt’s public improvement promises cannot be encompassed here. To see more of One Vanderbilt’s promised improvements, see N.Y.C. DEP’T CITY PLANNING, *Notice of Completion Final Environmental Impact Statement: Vanderbilt Corridor and One Vanderbilt* (Mar. 20, 2015), available at https://www1.nyc.gov/assets/planning/download/pdf/applicants/env-review/vanderbilt/noc_feis.pdf.

developers agreed to construct an approximately 4,000-square-foot transit hall on the ground floor of the building which will serve as a waiting area for Grand Central riders.³⁴⁹ Altogether, the improvements amount to around \$220 million.³⁵⁰

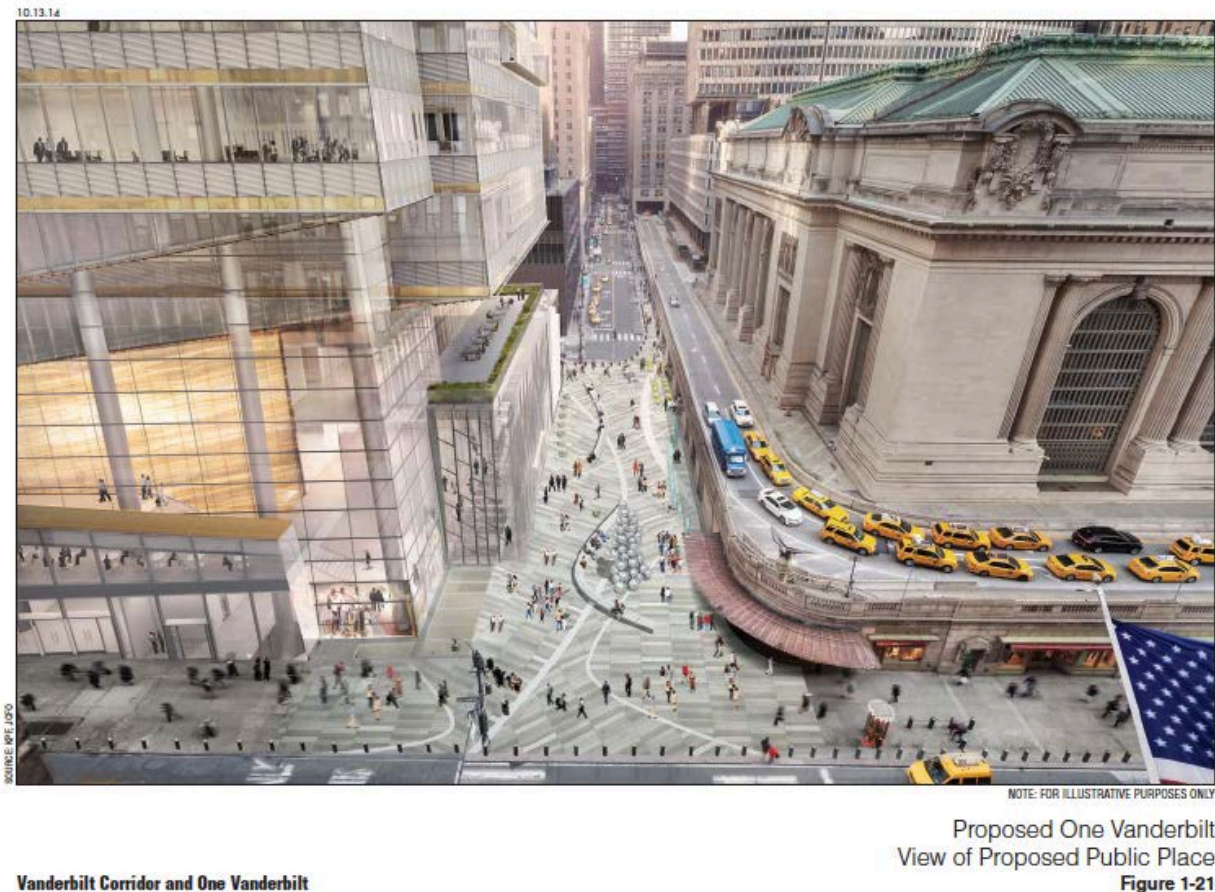


Figure 11: Courtesy of the New York City Department of Buildings. Excerpted from VANDERBILT CORRIDOR AND ONE VANDERBILT: FINAL ENVIRONMENTAL IMPACT STATEMENT (2015). Proposed rendering of the Vanderbilt Corridor public space. One Vanderbilt stands to the left while Grand Central stands to the right.

Besides pledging public improvements, the developers also tweaked the design of One Vanderbilt. For example, to assuage Community Board 5’s fears that increasing the maximum possible FAR along Vanderbilt Avenue might result in “development that is not harmonious or

³⁴⁹ FINAL ENVIRONMENTAL IMPACT STATEMENT, *supra* note 300, at 1-14.

³⁵⁰ Mayor de Blasio, *SL Green, Local Officials Break Ground on New Office Tower, \$220 Million in Transit Upgrades for Riders at Grand Central*, N.Y.C. OFFICE MAYOR (Oct. 18, 2016), <http://www1.nyc.gov/office-of-the-mayor/news/827-16/mayor-de-blasio-sl-green-local-officials-break-ground-new-office-tower-220-million-in#/0>.

contextual to the adjacent Grand Central Terminal,”³⁵¹ the developers implemented several subtle design cues in the building’s architecture. For example, “bronze screens were added to the office lobby wall, with the belief that this decorative relief would recall some of the metal subdivisions in the finest ration of the Terminal’s arched openings.”³⁵² The building’s glass-enclosed atrium would also allow pedestrians to see Grand Central Terminal from the west, a view which is currently blocked by the existing masonry buildings on the site.³⁵³

Construction of One Vanderbilt broke ground on October 18, 2016.³⁵⁴ Since construction is still in such an infant phase, public opinion regarding the project is sparse. Nevertheless, what few opinions do exist seem relatively favorable, especially when compared to the furious backlash against 432 Park Avenue. The *New York Times* hypothesized that Mayor Bloomberg’s East Midtown rezoning plans had given potential critics an early heads-up, which allowed tempers to cool by the time the project actually emerged. “When SL Green’s plans for the block emerged, there was little outcry from preservationists, who knew change was coming.”³⁵⁵ Additionally, although the location of One Vanderbilt fronting Grand Central Terminal presented some challenges, the location proved much less controversial than 432 Park Avenue’s.

The fact that One Vanderbilt went through ULURP and was thus subject to public hearings may have assuaged critics. Indeed, the Municipal Arts Society, a civic group we have seen with a long history of opposition against tall construction, testified at various hearings regarding One Vanderbilt’s development. According to testimony given by Kate Slevin, vice

³⁵¹ Letter from Dan Miner, District Manager, Manhattan Community Board Six, to Carl Weisbrod, Chairman, New York City Planning Commission (Dec. 29, 2014), available at http://www1.nyc.gov/assets/planning/download/pdf/applicants/cb-bb-bp/140440_M06.pdf.

³⁵² James von Kemplerer, *One Vanderbilt: Approving Midtown’s Tallest Office Building*, 2015 COUNCIL TALL BUILDINGS & URBAN HABITAT (Global Interchanges: Resurgence of the Skyscraper City conference), at 58.

³⁵³ *Id.*

³⁵⁴ *Groundbreaking Ceremony Held for One Vanderbilt Avenue*, CBS LOCAL: N.Y. (Oct. 18, 2016, 12:08 PM), <http://newyork.cbslocal.com/2016/10/18/one-vanderbilt-avenue-groundbreaking/>.

³⁵⁵ Matt A.V. Chaban, *Future Neighbor Will Tower Over Grand Central, but Allow It to Shine*, N.Y. TIMES, Oct. 16, 2016, https://www.nytimes.com/2016/10/17/nyregion/tower-grand-central.html?_r=0.

president of policy and planning at MAS, during an early public meeting at the beginning of the CEQR process, MAS “[g]enerally . . . supports this project.”³⁵⁶ Layla Law-Gisiko, the chairwoman of the landmarks committee for Community Board 5, explained that while she thought the building’s setbacks at grade on Madison Avenue and East 42nd Street could have been pushed even further back to allow for greater views of Grand Central from street level, she was happy that the developers had compromised. “It’s not often that a developer respects the wishes of the community,” she explained.³⁵⁷

That the developers invested so much in public improvements also helped them gain supporters. In Slevin’s statement, MAS stated that it appreciated the “worthy and necessary public improvements” proposed by the developer, though they requested greater clarity in terms of the benefits to be derived from the improvements.³⁵⁸ The Straphangers Campaign, a civic group concerned with improving subway experiences, thought the promised improvements to the 4, 5, and 6 subway lines were “desperately needed.”³⁵⁹ Finally, the commercial use of One Vanderbilt helped it gain supporters. Compared to the largely residential mixed-use 432 Park Avenue, One Vanderbilt “will . . . create thousands of good-paying middle class jobs.”³⁶⁰

V. CONCLUSION

Zoning law celebrated its 100th-year anniversary in New York City last year. While zoning law originated as a way to control the proliferation of skyscrapers in the City, zoning law

³⁵⁶ *Testimony on One Vanderbilt Draft Scope*, MUN. ARTS SOC’Y (Jul. 16, 2014), http://www.mas.org/wp-content/uploads/2014/07/2014.07.16_MAS_Testimony_One_Vanderbilt_Draft_Scope.pdf.

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ Emma G. Fitzsimmons, *Plan to Build Tower at Grand Central in Exchange for Transit Upgrades is Approved*, N.Y. TIMES, May 27, 2015, <https://www.nytimes.com/2015/05/28/nyregion/plan-to-build-tower-at-grand-central-in-exchange-for-transit-upgrades-is-approved.html>.

³⁶⁰ FINAL ENVIRONMENTAL IMPACT STATEMENT, *supra* note 300, at 23-17 (consolidating the comments of Hensley, Lempin, Slattey, Sanchez, Tucker, Johnson, Tritt, Contreras, Newman, various leaders and members of civic and industry groups in New York City).

has also permitted the construction of numerous tall, if not record-breaking, structures.³⁶¹ In this paper, we have examined the new building approval processes for four tall iconic Manhattan buildings: the Flatiron Building, the Empire State Building, 432 Park Avenue, and One Vanderbilt. By examining case studies from before the advent of zoning until after comprehensive rezoning, this paper has endeavored to show not only how much New York City zoning law has changed but also how much has stayed the same. The question, then, is: where are we now and where do we want to be?

A preliminary question, however, is whether we even need zoning law in the first place. Many scholars have debated the question.³⁶² Tall building construction in New York City adds fodder to the debate. Though there is reason to believe that market forces would deter some egregious offenses vis-à-vis zoning law, market forces would not effectively deter all offenses when it comes to supertall construction. For example, proponents of zoning law often sound the alarm of “dark canyons” developing along city streets. Canyons develop when too many tall buildings arise along *both* sides of the street, resulting in a dark street with reduced air flow that feels out-of-scale. Though several supertall buildings like 432 Park Avenue dot 57th Street, 57th Street probably will not develop into a canyon. The reason developers choose to build on 57th Street is to capitalize the views of Central Park.³⁶³ Consequently, developers will not allow competitors to construct supertall buildings across the street which may obstruct treasured views. For example, a 1,500-square feet mixed-use tower known as the “Nordstrom Tower” after its

³⁶¹ The reader may notice that New York City’s tallest building, the almost 1800-feet-tall One World Trade Center (One WTC), is curiously absent from this paper. As it turns out, One WTC was developed by the Port Authority of New York and New Jersey, which is not subject to local laws. “State (and the State’s Authorities like the MTA and Port Authority) and Federal projects are not subject to ULURP.” *About Community Boards – The Land Use Process*, N.Y.C. QUEENS CMTY BD. 3, <http://www.cb3qn.nyc.gov/1649> (last visited Mar. 7, 2017).

³⁶² See ELLICKSON & BEEN, *supra* note **Error! Bookmark not defined.**, at 607-14 for an overview of the literature.

³⁶³ Carol Willis, *The Logic of Luxury 2.0*, 2015 COUNCIL TALL BUILDINGS & URBAN HABITAT (Global Interchanges: Resurgence of the Skyscraper City conference), at 25 (“More than anything, their location is predicated on views of the park.”).

anchor tenant is under construction four blocks west of 432 Park Avenue.³⁶⁴ Early in its development process, however, the developers of Nordstrom Tower ran into trouble. Another developer was planning a 950-foot-tall condo two streets north on Central Park South which would have seriously obstructed Nordstrom Tower's Central Park views. To delay the day of reckoning, Nordstrom Tower's developers purchased the lease rights to a six-floor garage below the property of the proposed Central Park South development which needed to be demolished for construction to commence.³⁶⁵ Eventually, the parties settled. The Central Park South developers purchased a small parcel owned by the Nordstrom Tower developers at a whopping \$1,400 per buildable square foot and agreed to shift the location of the tower to prevent obstruction of Nordstrom Tower's views.³⁶⁶

Additionally, sales for luxury apartments have significantly slowed in New York City due to a range of factors, from volatile financial markets to China's restrictions on capital outflows to the Treasury Department's new requirement that title insurers name the "beneficial owner" behind special purpose entities which many wealthy purchasers use to mask their identities.³⁶⁷ Considering how prohibitively expensive it is to purchase the necessary parcels and air rights, only developers constructing luxury apartments can expect to turn a profit on supertall residential or mixed-use buildings. Consequently, as luxury apartment sales slow, developers may decline to build taller.

³⁶⁴ Nikolai Fedak, *Renderings Surface for Central Park Tower, 217 West 57th Street*, NEW YORK YIMBY (June 16, 2016, 8:00 AM), <http://newyorkyimby.com/2016/06/renderings-surface-for-central-park-tower-217-west-57th-street.html>.

³⁶⁵ *220 Central Park South*, REAL DEAL: N.Y. REAL ESTATE NEWS, <https://therealdeal.com/new-research/topics/property/220-central-park-south/> (last visited Mar. 7, 2017).

³⁶⁶ Eliot Brown, *Deal Settles Dispute Between Extell, Vornado*, WALL ST. J. (Oct. 15, 2013, 8:56 PM), <https://www.wsj.com/articles/SB10001424052702304106704579137944007415688>.

³⁶⁷ See, e.g., Oshrat Carmiel, Prashant Gopal, & Bill Faries, *Luxury-Home Market Seen Threatened by Scrutiny in NYC, Miami*, BLOOMBERG (Jan. 24, 2016, 5:00 AM), <https://www.bloomberg.com/news/articles/2016-01-14/luxury-home-market-seen-threatened-by-transparency-in-nyc-miami>; Michelle Higgens, *In New York, a Falling Market for Trophy Homes in the Sky*, N.Y. TIMES, July 11, 2016, <https://www.nytimes.com/2016/07/12/realestate/luxury/slow-times-on-billionaires-row-as-the-8-digit-boom-fizzles.html>.

While these factors deter the overdevelopment of supertall residential and mixed-use buildings, they likely will not stop the development of supertall commercial buildings. Though views may be a cherry-on-top, they are not the main selling point of commercial buildings. Thus, commercial developers do not have the same incentive to zealously guard views as residential developers. Moreover, unlike the glut of luxury condos, the City still has a dearth of office space. The demand for commercial leases remains strong,³⁶⁸ so much that the de Blasio administration has prioritized the construction of more commercial buildings in the City.³⁶⁹ Overdevelopment of supertall office buildings poses a much more real risk. Enter zoning law. While supertall residential buildings may not lead to super-deep canyons, commercial districts could become super-deep canyons in the absence of zoning law.

Furthermore, while deep canyons are unlikely to result from the construction of supertall residential and mixed-use buildings, market forces are not likely to deter developers from building a “wall” of adjacent supertall buildings. While developers along 57th Street may be willing to pay big bucks to prevent others from blocking their Central Park views, they may not care if buildings block their eastern or western views. Transferable development rights and the FAR prevent this worst case scenario from occurring. Since developers of supertall buildings must either purchase very large parcels or development rights of nearby contiguous lots (if not both), other supertall buildings may not be built in immediate proximity.

Zoning law thus appears necessary to reign in the development of supertall buildings in

³⁶⁸ See, e.g., Greg David, *City's Office-Building Boom Won't Be Enough to Meet Demand*, CRAIN'S NEW YORK BUSINESS (Sep. 15, 2015, 12:01 AM), <http://www.crainsnewyork.com/article/20150915/BLOGS01/150919934/new-york-city-needs-more-than-20-million-square-feet-of-office-space>; Keiko Morris, *Demand Increasing for Third Avenue Office Space*, WALL ST. J. (Oct. 20, 2014, 9:08 PM), <https://www.wsj.com/articles/demand-increasing-for-third-avenue-office-space-1413853723>; *Year-End 2016 Manhattan Office Market Report*, COLLIERS INT'L, <http://www.colliers.com/-/media/files/united%20states/markets/new%20york%20city/4q2016manhattanmarketreport.pdf> (last visited Mar. 7, 2017) (“Leasing in 2016 not only bested 2015, it also surpassed full year leasing from eight of the last ten years.”).

³⁶⁹ See *supra* notes 323-324 and accompanying text.

New York City. Whereas the controversy in legal scholarship tends to surround when zoning law goes too far, public opinion in New York more loudly decries that zoning law does not go far enough. Norman Marcus has written about how the countless amendments to the 1961 Resolution has led to an “ad-hoc, convoluted, chaotic non-plan for the City” which fails to effectively regulate development.³⁷⁰ The case studies in this paper corroborate that some zoning regulations fail to meet their stated goals. As seen in our study of 432 Park Avenue, the Special Midtown District was established to shift development to the East and South in Midtown but now allows developers to build taller with more square footage in the north-eastern portion of the area than would otherwise have been allowed in the absence of the special district.

The problem is not just that the voluminous number of amendments to the 1961 Zoning Resolution fail to efficiently accomplish their goals. The problem is also the structure of the 1961 Zoning Resolution itself. Unlike the 1916 Building Zone Resolution which separated the City into separate height, use, and area districts, the 1961 Zoning Resolution attempts to jam-pack all regulations into single district designations. The structure encourages the unfettered creation of districts. If one wants to adjust the height regulations along one street but otherwise keep the previous use and yard regulations, it is not enough to simply alter the height district governing the area. One must create a whole new district. As a result, the number of districts with unique height, use, and area districts has abounded.³⁷¹ The Zoning Resolution currently

³⁷⁰ Norman Marcus, *New York City Zoning—1961-1991: Turning Back the Clock, But with an Up-to-the-Minute Social Agenda*, 19 FORDHAM URB. L.J. 707, 707 (1991). See also Roderick M. Hills, Jr. & David Schleicher, *The Steep Costs of Using Noncumulative Zoning to Preserve Land for Urban Manufacturing*, 77 U. CHI. L. REV. 249 (2010) (suggesting that zoning policies in Brooklyn which exclude residential development in industrial areas leads to inefficient land use).

³⁷¹ For example, the original C-1 through C-8 districts have since been subdivided to C1-6, C1-6A, C1-7, C1-7A, C1-8, C1-8A, C1-8X, C1-9, C1-9A, C2-6, C2-6A, C2-7, C2-7A, C2-7X, C2-8, C2-8A, C3, C3A, C4-1, C4-2, C4-2A, C4-3, C4-3A, C4-4, C4-4A, C4-4D, C4-4L, C4-5, C4-5A, C4-5D, C4-5X, C4-6, C4-6A, C4-7, C4-7A, C5-1, C5-1A, C5-2, C5-2A, C5-3, C5-4, C5-5, C6-1, C6-1A, C6-2, C6-2A, C6-3, C63-A, C6-3D, C6-3X, C6-4, C6-4A, C6-4X, C6-5, C6-6, C6-7, C6-8, C6-9, C7, C8-1, C8-2, C8-3, and C8-4. For an overview of each commercial district, see *Commercial Districts: C1 & C2*, N.Y.C. DEP'T OF PLANNING,

numbers in at over 4,200 pages.³⁷² The proliferation of districts undermines one's ability to understand how each district interacts with others. Take zoning map portion 8c (reproduced as Figure 12) for example. The map shows the area carved into countless zoning districts, overlaid at times by special districts which are further carved into subdistricts. From glancing at the map, it is impossible to imagine how the districts fit together in practice. No wonder the 1961 Zoning Resolution often fails to achieve its goals.



Figure 12: Courtesy of the New York City Department of Buildings. Excerpt of portion 8c of the current zoning map.

<https://www1.nyc.gov/site/planning/zoning/districts-tools/c1-c2.page> (last visited Mar. 8, 2017); *Commercial Districts: C3 & C3A*, N.Y.C. DEP'T OF PLANNING, <https://www1.nyc.gov/site/planning/zoning/districts-tools/c3-c3a.page> (last visited Mar. 8, 2017); *Commercial Districts: C4*, N.Y.C. DEP'T OF PLANNING, <https://www1.nyc.gov/site/planning/zoning/districts-tools/c4.page> (last visited Mar. 8, 2017); *Commercial Districts: C5*, N.Y.C. DEP'T OF PLANNING, <https://www1.nyc.gov/site/planning/zoning/districts-tools/c5.page> (last visited Mar. 8, 2017); *Commercial Districts: C6*, N.Y.C. DEP'T OF PLANNING, <https://www1.nyc.gov/site/planning/zoning/districts-tools/c6.page> (last visited Mar. 8, 2017); *Commercial Districts: C7*, N.Y.C. DEP'T OF PLANNING, <https://www1.nyc.gov/site/planning/zoning/districts-tools/c7.page> (last visited Mar. 8, 2017); *Commercial Districts: C8*, N.Y.C. DEP'T OF PLANNING, <https://www1.nyc.gov/site/planning/zoning/districts-tools/c8.page> (last visited Mar. 8, 2017). If the law were not complicated enough, numerous special districts which are further subdivided into subdistricts which overlay the multitudinous residential, commercial, and manufacturing districts and vary the regulations governing the underlying districts.

³⁷² See *The Zoning Resolution*, DEP'T CITY PLANNING, <https://www1.nyc.gov/site/planning/zoning/access-text.page> for an up-to-date version of the Zoning Resolution. Funnily enough, when the author began looking at the 1961 Zoning Resolution in September of 2016, it had “only” been 3,955 pages long.

There is another unexplored danger implicit in the Zoning Resolution's Byzantine form. The Zoning Resolution's complexity may interfere with procedural justice. When 432 Park Avenue emerged, many New Yorkers felt that zoning law seriously failed to reflect their desires, or even their wellbeing.³⁷³ City planners retort that the public had an opportunity to speak up during the zoning or amendment processes but failed to do so. Indeed, New York's city planners have always solicited public input during the zoning process and the law continues to require public hearings prior to the adoption of any zoning amendments. True, interest groups have occasionally dominated zoning law—recall that zoning law was largely born as a result of the Fifth Avenue Association's demands³⁷⁴ and that the objection of the Metropolitan Real Estate Board Association contributed to the failure of comprehensive rezoning in the early 1950s³⁷⁵—but city planners have also demonstrated their commitment to public input. When the Board of Standards and Appeals considered the Waldorf Astoria Office Building's first variance request, it specifically considered the single objection raised against the building.³⁷⁶ More recently, the City Planning Commission responded to every concern raised at public hearings regarding One Vanderbilt.³⁷⁷

But, from a practical standpoint, the complex structure of the law interferes with the public's ability to effectively exercise its voice. When amendments proposing new districts or special districts come up for approval, one can barely fathom how they will fit into the context of the rest of the City. One can hardly blame the public for failing to speak up against the proposed amendments. Trying to envision how a C5-2.5 district is going to interact with a neighboring

³⁷³ See *supra* note 291 and accompanying text.

³⁷⁴ See *supra* text accompanying notes 42 to 47.

³⁷⁵ See *supra* note 187 and accompanying text.

³⁷⁶ See *supra* note 122 and accompanying text.

³⁷⁷ FINAL ENVIRONMENTAL IMPACT STATEMENT, *supra* note 300, ch. 23.

C6-6 district, only a portion of which is in the Special Midtown District, is difficult. Only when offending structures actually pop up does the public notice something is seriously wrong with zoning. The problem is particularly salient when the development proceeds as-of-right. The public blames the City for failing to stop the development while the City blames the public for failing to speak against the zoning amendments allowing the development in the first place.

Whether individuals view the rulemaking process as fair has several significant implications. First, when individuals view the process as fair, they are more likely to be satisfied by the law themselves.³⁷⁸ Thus, zoning law is at risk of losing legitimacy in the public's eye if the public believes the law ignores their preferences. The case studies in this paper also anecdotally suggest that the public is more satisfied by the built environment when they see they have an opportunity to offer input. The reactions to the Empire State Building and One Vanderbilt were generally more favorable than those to the Flatiron Building and 432 Park Avenue. Second, individuals are more likely to adhere to laws which they believe have been fairly formulated, lowering enforcement costs.³⁷⁹ Developers may likewise be less inclined to comply with zoning laws. Although the City Planning Commission may reject a project application, rogue developers may forge forward regardless.³⁸⁰ Finally, the presence or absence of fair rulemaking procedures may signal to individuals whether they are respected members of the group.³⁸¹ That many New Yorkers feel aggrieved by the new supertall structures south of Central Park is troubling.

³⁷⁸ See Tyler, *Social Justice: Outcome and Procedure*, *supra* note 9, at 119.

³⁷⁹ *Id.* See also Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003).

³⁸⁰ Paul Goldberger notes that when developers build in violation of zoning laws, the City often negotiates for some kind of benefit from the developer rather than order the developer to tear down the building. Some developers may strategically choose to build in violation of zoning laws and then negotiate with the City afterward. Goldberger argues that the disadvantages resulting from violation of zoning laws often far outweigh any benefits derived from the deals. Paul Goldberger, *When Developers Change the Rules During the Game*, N.Y. TIMES, Mar. 19, 1989.

³⁸¹ See Tom Tyler, Peter Degoey, and Heather Smith, *Understanding Why the Justice of Group Procedures Matters: A Test of the Psychological Dynamics of the Group-Value Model*, 70 J. PERSONALITY & SOC. PSYCHOL. 913 (1996).

It is not enough for city planners to say that New Yorkers had a chance to speak up against zoning amendments but failed to do so. The structure, and subsequent explosion of amendments, prevents both individuals and City officials from recognizing the true impact of proposed amendments. This has led not only to inefficient regulations, but also issues of procedural justice. What New York City needs now is not more amendments to an already too-complex law, but a comprehensive overhaul. New York City should consider comprehensive rezoning. It should adopt a new zoning resolution with a simpler structure in mind so that residents and City officials will know how different districts throughout the City actually interact. One simple but significant solution would be to return to the structure of the 1916 Building Zone Resolution, whereby the City was zoned into separate height, use, and area districts. The structure would no longer require the creation of a new, unique district every time city planners or residents desired to vary, say, the height regulations of a given block. The zoning map for height districts (or use or yard districts) would look significantly simpler, because the district designations would only need to account for height differences, not unique combinations of height, use, and yard regulations. Glancing at the map, residents and City officials would be able to better compare how a given amendment might affect an existing neighborhood in terms of height, use, or yard regulation. Then, individuals and City officials could better recognize potential problems *during* the amendment stage and prevent them, rather than *after* offending buildings have arisen.