MEMORANDUM

To: New York City Council

From: Roderick M. Hills, Jr.

Regarding: Application of MIH requirements to section 74-711 Special Use Permits that do not increase allowable residential floor area

Date: September 7, 2016

This memo examines whether the requirements for affordable housing contained in Zoning Resolution (ZR) §74-32 are applicable to a special use permit that does not increase the amount of residential floor area above that which is permitted by the zoning of the zoning lot for which the permit is sought. This question is raised by 42 West 18th Realty Corp's application for a special permit to modify setback and height requirements for a zoning lot located at 38-42 West 18th Street (hereinafter the "Adorama Application").[1]

To summarize, I conclude that special use permits do not "allow a significant increase in #residential floor area#" within the meaning of ZR §72-32 if they do not increase the amount of residential floor area above that which is permitted by the zoning of the zoning lot for which the permit is sought. Applications for such special permits, therefore, do not fall within the Mandatory Inclusionary Housing provisions governed by §72-32. Such a conclusion is required not only by the common usage of the phrase "allow an increase" but also by basic principles of statutory construction and administrative law commonly applied to local zoning laws. These principles include the anti-derogation canon's requirement that any ambiguities in a zoning law be construed to favor the property rights of the landowner, the prohibition on conditions unrelated to the purposes of the land-use regulation from which relief is sought, and the principle of deference to the Planning Commission's interpretation of ambiguous zoning terms.

I. The common usage of the phrase "allow a significant increase" indicates that a special use permit does not "allow a significant increase in #residential floor area#" unless the permit allows residential floor area that the applicable land use regulations would otherwise prohibit.

ZR §74-32 provides that "[w]here a special permit application would *allow a significant increase* in #residential floor area# …, the City Planning Commission, in

[1] *In the Matter of an application submitted by 42 West 18th Realty Corp*., New York City Planning Commission, Land Use Application ID C 160082 ZSM (August 15th, 2016) ("Adorama Application").

establishing the appropriate terms and conditions for the granting of such special permit, shall apply such requirements where consistent with the objectives of the Mandatory Inclusionary Housing program as set forth in Section 23-92 (General Provisions)." (emphasis added). ZR §74-32's requirement that ZR §154(d)'s mandatory inclusionary housing (MIH) requirements be applied to an application for a special permit, therefore, turns on the meaning of the phrase "allow a significant increase." That meaning ought to be determined by the phrase's natural and most obvious sense.[2]

ZR §74-32's phrase "allow a significant increase" is most naturally construed to mean "allow a significant increase *above that which is otherwise legally permitted*." When used as a transitive verb unaccompanied by any preposition, the verb "allow" is most naturally construed to mean "permit or enable," not "make more likely to occur" or "render practically feasible."[3] This interpretation of "allow" is especially apt when "allow" is used as a transitive verb referring to the modification of otherwise applicable legal prohibitions.[4] Ordinary usage, for instance, construes the sentence "the City allows residential uses in commercial zones" to mean "the City *permits* residential uses in commercial zones," not "the City makes residential uses more likely to occur in commercial zones." Likewise, ZR §74-32's provision that MIH requirements apply where "a special permit application would allow a significant increase in #residential floor area#" is most naturally read to mean that MIH requirements apply where a special permit would permit residential floor area that would otherwise be forbidden, not that would otherwise be impractical to build.

The Manhattan Community Board Five and the Manhattan Borough President have suggested an alternative reading of "allow a significant increase" under which a special permit application "allow[s] … a[n] increase" of residential floor area whenever the modification sought by the application would practically facilitate the full development of residential floor area, even if such floor area is already legally permitted without the permit.[5] This suggested reading, however, is inconsistent with common usage, because it would deem a permit to "allow a[n] … increase" in residential floor area even when the

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[2] McKinney's Statutes § 94 ("The legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction"); Patricia Salkin, American Law of Zoning § 41:14 (common usage ordinarily governs meaning of zoning laws); *Drew v. Schenectady County*, 88 N.Y.2d 242, 246, 666 N.E.2d 1344, 1346-47 (1996)(invoking ordinary usage of the noun "facilities" to define "facilities" to include parking facilities for employees).

[3] Oxford English Dictionary , entry for "allow," Definition IV(10)-(12) (3rd Edition 2012), available at http://www.oed.com/view/Entry/5460?rskey=pBtZWu&result=1#eid

[4] As the Oxford English Dictionary notes, the verb "allow" can also mean "[t]o … facilitate" if it is coupled with the preposition "of" or "for" (as in "[t]he family kitchen would be planned to allow for individual preparation of meals"). *Id.*, definition IV(13)(a). Used as an intransitive verb, "allow" can also mean "to provide the opportunity or right conditions for something; to make something possible," as in "[w]hen her health allowed, she would continue to practise her sports." *Id*., definition IV(13)(b).

[5] Manhattan Borough President, *Recommendation re C 160082 ZSM – In the Matter of an application submitted by 42 West 181h Realty Corp*. (June 15th 2016), available at http://www.cb5.org/cb5/projects/adorama/Borough_President_Gale_Brewer_Recommendation:en-us.pdf

special use permit being sought makes no mention whatsoever of residential floor area. For instance, under this reading, a special use permit to construct additional parking spaces would "allow a[n] … increase in residential floor area" if the extra parking increased the economic feasibility of residential development by allowing the developer to market residential units to buyers desiring an off-street space for their car. The semantic oddity of the interpretation urged by the Community Board Five and the Manhattan Borough President is apparent from the example above. No one would say that the City "allowed" more residential floor area because the City allowed more off-street parking. Likewise, the granting of a special use permit does not "allow" any "increase" of residential floor area merely because that permit incidentally facilitates the construction of residential units that are already "allow[ed]" by the zoning law.

The Urban Justice Center ("UJC") offers a variety of technical textual arguments that the term "#residential floor area#" in ZR §74-32 should be construed to mean "the actual amount of residential floor area that can be built on a zoning lot, taking into account available FAR, bulk rules, and all other zoning constraints."[6] These arguments, although ingenious, are directed at the wrong phrase in the statute. The question to be answered is whether an application for a special permit would, if granted, "allow a[n]…increase" in actual residential floor area above some baseline of permissible residential floor area. The definition of "#residential floor area#" offered by the UJC does nothing to shed light on this baseline. By contrast, the common understanding of the term "allow" suggests that, if some quantity of actual residential floor area is already legally permissible under the applicable zoning classification, then it is contrary to common usage to say that the granting of a special permit "allows" an "increase" of residential floor area.

II. **ZR §74-32 should be construed to apply only where a special use permit allows residential floor area that the applicable land use regulations would otherwise prohibit in order to avoid practical inconvenience** in the **administration of zoning laws**

The interpretation of the phrase "allow a significant increase" to mean "allow an increase above that which is otherwise permitted" is reinforced by the obligation to construe zoning laws, if possible, to avoid inconvenience in the administration of the law.[7] The amount of residential floor area permitted as of right by a zoning classification is an objective and easily verifiable quantity. Assessing whether a special use permit would increase residential floor area quantity above some legally specified level is, therefore, an administratively simple task. By contrast, it is an exercise in speculative guesswork to determine whether a special use permit that otherwise makes no

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[6] Letter from Urban Justice Center to New York City Planning Commission, re: Adorama Special Permit, July 22nd, 2016, at pages 2-4, available at http://www.cb5.org/cb5/projects/adorama/Urban_Justice_Center_Letter:en-us.pdf .

[7] McKinney's Statutes §142 ("The court may consider public inconvenience in construing a statute whose meaning is in doubt"); *Airequipt Mfg. Co. v. Gardner*, ., 235 N.Y.S.2d 610, 614 (Sup. Ct. Westchester Cty., 1962)(in construing "paved service area" for the purpose of defining required setback of parking lot, court adopts construction that "will not cause inconvenience, hardship or injustice, or lead to absurdity").

modification of the zoning law's limits on residential floor area might nevertheless increase the likelihood of more floor area being devoted to residential uses. Whether such permit might have such incidental effects on a developer's plans depends on economic, marketing, architectural, engineering, and other empirical conditions that no court or administrative agency can readily assess.

It is tempting but ultimately misguided to overcome these informational difficulties by relying on the Environmental Assessment Statement (EAS) accompanying a special use permit. The Manhattan Borough President, for instance, asserts that the Adorama application would "allow a significant increase" in residential floor area, because the EAS for the Adorama application contains a "no-action condition…allow[ing] for 40 residential units with 45,730 zoning square feet of residential floor area" and a "with-action condition…allow[ing] for 66 residential units with 68,097 zoning square feet of residential floor area."[8] The "no-action" scenario contained in an EAS, however, is far too uncertain an estimate by which to measure the development that would actually occur absent the granting of a special permit. Such estimates do not bind the applicant and cannot be assumed to be a certain prediction of what would actually occur if the special use permit were denied.[9]

III. Construing ZR §74-32 to impose MIH requirements on applicants seeking modifications of regulatory obligations that do not have the purpose of controlling residential uses violates principles of administrative rationality and fairness underlying zoning law.

Basic principles of administrative rationality and fairness suggest that MIH requirements should not be triggered by an applicant's request to modify regulatory obligations that do not have the purpose of limiting residential floor area. It is a basic principle of zoning rationality that conditions imposed on requests for administrative relief bear some minimally rational relationship to the regulatory requirement being modified.[10] If the condition is unrelated to that regulation's purpose, then the condition resembles an opportunistic effort to extort benefits from an applicant simply because of the fortuity that the applicant needs regulatory relief. For instance, the New York Court of Appeals has held that a zoning board of appeals could not make the grant of a use variance for one parcel conditional on the applicant's terminating a non-conforming use

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[8] Manhattan Borough President, *Recommendation re C 160082 ZSM*, *supra* at page 3.

[9] Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 Colum. L. Rev. 903, 928-29 (2002)(noting that "uncertainties pervade" the environmental assessment process and collecting studies showing that environmental impact statements have a mediocre track record of accurately predicting future impacts).

[10] Patricia Salkin, American Law of Zoning §14:17 (special permit conditions); *Rendely v. Town of Huntington*, 44 A.D.3d 864, 843 N.Y.S.2d 668 (2d Dep't 2007) ("A zoning board may, where appropriate, impose reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property, and aimed at minimizing the adverse impact to an area that might result from the grant of a variance or a special permit").

on an unrelated parcel, because the condition of terminating the non-conformity bore no relationship to mitigation of any burden imposed by the use variance.[11]

Imposing MIH requirements as conditions on special use permit applications when those applications seek only to reconfigure residential floor area that is already permitted under the applicable zoning fails this basic test of administrative rationality. Such a condition cannot be justified as an effort to mitigate adverse impacts of additional residential floor area, because that residential floor area, being permitted as of right by the zoning, cannot be regarded as harmful to the neighborhood.[12] The MIH condition also cannot be justified by the need to mitigate the adverse effects of modifying setback and height limits, because such limits protect against loss of light, air, or character of buildings that an MIH requirement does nothing to mitigate. Finally, the MIH requirement cannot be justified by any special development rights conferred on the applicant, because other landowners in the same zone enjoy precisely the same quantity of residential floor area zoning as the applicant burdened by the MIH requirement. In effect, the applicant's fortuitous need for a bulk modification to realize residential floor area that is generally permitted to other landowners is the only basis for imposing the MIH requirement.

It is a familiar principle of statutory construction that any ambiguities in a statute should be construed to avoid unjust discrimination.[13] To avoid imputing to the legislature an intent to impose arbitrary burdens on the applicant, ZR §74-32 should be construed to impose MIH requirements only on applications for special use permits that seek additional residential floor area otherwise prohibited by the underlying zoning. Such applications seek a special enlargement of building rights that bears a direct relationship to MIH obligations. By contrast, imposing MIH requirements on applications seeking only bulk modifications unrelated to residential uses arbitrarily discriminates against applicants who happen to be in need of such bulk modifications.

IV. Assuming that §74-32 is ambiguous, those ambiguities should be resolved in deference to the Planning Commission's reasonable interpretation to protect the applicant's rights to obtain a special use permit.

Even if the arguments based on common usage, convenience, and avoidance of arbitrary discrimination outlined above were inconclusive, two principles of statutory construction counsel in favor of a construction favoring the applicant's right to receive a conditional use permit. First, the anti-derogation canon suggests that ambiguities in a zoning law should be resolved in favor of the property owners' right to develop their land. Second, the principle of deference to administrative agencies' reasonable

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[11] *St. Onge v. Donovan*, 522 N.E.2d 1019, 1024, (N.Y. 1988).

[12] See Robert Ellickson, Vicki Been, Roderick Hills, & Christopher Serkin, *Land Use Controls: Cases and Materials* 222-223 (3rd ed. 2013)(noting that the baseline by which "adverse impact" is typically defined for the purpose of granting special use permits is the normal uses permitted by the underlying zoning).

[13] McKinney's Statutes §147 ("The court should adopt a statutory construction which will produce equal results and avoid unjust discrimination").

interpretation of zoning ambiguities suggests that the Planning Commission's consistent interpretation of ZR §74-32 should receive deference.

It is a familiar principle that, because zoning ordinances deprive an owner of property of a use thereof which would otherwise be lawful, they are in derogation of the common law and should, therefore, be strictly construed in favor of the property owner.[14] As argued above in Part I of this memo, the meaning of the phrase "allow a significant increase in #residential floor area#" is, at the very least, ambiguous, in that the baseline against which an "increase" should be measured is not spelled out in the statute. This language is reasonably construed to mean that an application for a special use permit does not "allow a significant increase in residential floor area" if it seeks no more residential floor area than that which is already permitted by the applicable zoning. Given that this construction favors the landowner's rights to develop their land, it should be preferred under the anti-derogation canon.

Likewise, it is a familiar principle that, if a zoning law is "susceptible of conflicting interpretations," then interpretation of a zoning law provided by a planning commission or other local agency charged with the zoning law's implementation ought to be followed.[15] The New York City Planning Commission has consistently construed ZR §74-32 not to apply to special permit applications that merely reconfigure residential floor area that is already permitted under the applicable zoning, without increasing the amount of residential floor area permitted. While such an administrative interpretation would not be controlling if it contradicted the provision's plain language,[16] there can be no serious argument that the phrase "allow a significant increase of residential floor area#" unambiguously preclude the Planning Commission's reading. To the contrary, as noted in Part I above, ordinary usage favors that reading. Even if those ordinary usage were more ambiguous, however, the Planning Commission can resolve the ambiguity.

In sum, common usage, administrative efficiency and rationality, and familiar canons of statutory construction favor reading ZR §74-32 to exclude a special use permit application from MIH requirements if that application does not seek any residential floor area beyond that which is already permitted by the applicable zoning.

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[14] Patricia Salkin American Law of Zoning § 41:4; See, e.g.,*DeTroia v. Schweitzer*, 87 N.Y.2d 338, 639 N.Y.S.2d 299, 662 N.E.2d 779 (1996) ("any ambiguity in the language used in such regulations must be resolved in favor of the property owner").

[15]Patricia E. Salkin, 4 Am. Law. Zoning § 41:10 (5th ed.); Beekman Hill Ass;n v. Chin, 274 AD2d 161, 167 (1st Dep't 20000).

[16] Raritan Dev. Corp. v. Silva, 91 N.Y.2d 98 (1997).

August 9, 2016

Via email to CalendarOffice@planning.nyc.gov and facsimile to (212) 720-3488
New York City Planning Commission
120 Broadway, 31st Floor
New York, NY 10271

Re: Adorama Special Permit, Land Use Application ID: C 160082 ZSM

Dear Commissioners:

I am submitting this letter into the record as you consider taking action on the Adorama Special Permit. In a memo dated June 20th, 2016 and a subsequent memo dated July 22nd, 2016, the Counsel Division of the Department of City Planning made a number of assertions that need to be closely examined. Upon review, you will see that the assertions used to justify the argument that MIH **cannot** be applied to the Adorama Special Permit are not supported by either the Zoning Resolution or the administrative record.

Assertion #1 [from June 20th 2016 Memo]:

"The zoning resolution and the CPC report are explicit that MIH applies only to special permits that increase permitted residential floor area."

Facts:

The Zoning Resolution does not say that MIH applies only to special permits that "increase permitted residential floor area." Rather, ZR Section 74-32 refers to only an increase in "#residential floor area#" and does not use the word "permitted." Elsewhere in the MIH text amendment, in ZR Section 23-911, the phrase "#residential floor area# permitted" is used. An interpretation that the phrase "#residential floor area#" as used in ZR Section 74-32 is synonymous with the "#residential floor area# permitted" of ZR Section 23-911 would render the word "permitted" in ZR Section 23-911 to be entirely meaningless.

Further, the CPC report does not say that MIH can only apply to special permits that increase "permitted" residential floor area. The only text in the CPC report on the applicability of MIH to special permits says the following:

> *"The Commission anticipates applying the MIH program to, for instance, zoning map changes that encourage the creation of substantial new housing in medium- and high-density districts, and to special permits that increase residential capacity. However, it also recognizes that the program should not discourage types of actions with a valid land use rationale that may facilitate residential development but would not themselves increase residential capacity. The program is not expected to be applied in conjunction with special permit applications that would reconfigure residential floor area that is already permitted under zoning, without increasing the amount of residential floor area permitted. Under this policy, for instance, a special permit that facilitates the transfer of floor area from one zoning lot to another without increasing FAR would not be subjected to an MIH requirement, while a special permit that converts non-residential floor area to residential floor area would be."*

The phrase "the program is not expected to be applied" is not identical, as Department of City Planning staff would have you believe, to "the program will not be applied" or "the program cannot not be applied." Even if the CPC report held the force of law on par with the Zoning Resolution, which it does not, nothing in the CPC Report would prohibit the Commission from applying the requirements of MIH to the Adorama Special Permit.

Assertion #2 [from June 20th 2016 Memo]:

"In the context of the Charter-mandated land use review process, a CPC Report is binding administrative record. Unless explicitly modified by Council pursuant to established procedure, the enacted law must comport with the law as represented by the Commission in the CPC Report accompanying the action."

Facts:

Administrative decisions made pursuant to a local law or the Zoning Resolution of the City of New York must be consistent with the words of the local law or the Zoning Resolution. If a phrase is not defined, then one may look to the administrative record to glean the meaning of unclear terminology. Because basic statutory interpretation of the ZR makes it evident that MIH applies to a special permit with the facts of the Adorama case, there is no need to consult the CPC Report. And, even if the Zoning Resolution were not explicit, the CPC report would not constitute the only record consulted to establish the meaning of the law.

Assertion #3 [from July 22nd 2016 Memo]:

"MIH applicability to special permits and the meaning of "significant increase in #residential floor area#" in ZR 74-32 were explicitly and consistently represented at certification, in the CPC Report, and in testimony by the Chairman of the City Planning Commission before City Council. In the context of the Charter-mandated land use review procedure, this constitutes a binding administrative record that defines and delimits the scope of the law; it is not mere legislative history."

Facts:

Even if the Commission had the discretion to pick and choose which portions of the administrative record it sought to consult (i.e. only considering the Department of City Planning presentation at certification, the CPC Report and the Chairperson's testimony at City Council while excluding from consideration the environmental assessment statement, the recommendation of Manhattan Borough President Gale Brewer, and the testimony of former Department of City Planning General Counsel David Karnovsky), there was not even one representation in the administrative record that MIH **could not be** applied to special permits such as the Adorama Special Permit. Portions of the below text are bolded for emphasis:

> *"Sometimes there's a...standalone special permit application that comes before the Commission. So for instance an application under 74-711 to modify use regulations to facilitate the preservation of a landmarked building – that type of special permit application, where it creates residential floor area where none existed previously, we would anticipate applying this policy to it. There are other types of special permits that might just modify height and setback, that apply to the existing floor area that's already allowed –* ***we're not anticipating applying this policy*** *where you're essentially reconfiguring the existing floor area that is allowed under zoning today."* – Department of City Planning Deputy Executive Director Howard Slatkin at the September 21, 2015 certification

"The Commission anticipates applying the MIH program to...special permits that increase residential capacity. [...] ***The program is not expected to be applied*** *in conjunction with special permit applications that would reconfigure residential floor area that is already permitted under zoning, without increasing the amount of residential floor area permitted. Under this policy, for instance, a special permit that facilitates the transfer of floor area from one zoning lot to another without increasing FAR would not be subjected to an MIH requirement, while a special permit that converts non-residential floor area to residential floor area would be."* – CPC Report

When a special permit is reshaping a building, that is, not creating new floor area, not creating any new housing opportunities, but simply moving around floor area that's already permitted, ***we would not apply MIH****. But where the special permit is creating substantial new floor area, we would apply MIH for special permits. The MIH options made available to the projects will be set forth in the restrictive declaration attached to the special permit and this, like the rest of the rest of the application, will be subject to the City Council's approval."* — City Planning Commission Chairperson Weisbrod's testimony at the City Council on February 9, 2016

Within City Planning Commission Chairperson Weisbrod's testimony at the City Council, the words "would not," do not mean "could not." Even if "would not" meant "could not," testimony at the City Council does not have the ability to delimit the law as written in the Zoning Resolution. Finally, there is no administrative rule, law, or case that causes a CPC Report or other communication from staff of the Department of City Planning in the ULURP process to become a "*binding administrative record that defines and delimits the scope of the law*" in a way that is contrary to the words of the Zoning Resolution.

Assertion #4 [from July 22nd 2016 Memo]:

"The Commission does not have the discretion to apply the law in a way contrary to explicit and consistent representations of the law to the City Council and the public during public review."

Facts:

The Commission is obligated to apply the law in a way that is consistent with the Zoning Resolution of the City of New York. If there is a discrepancy between the law as written in the Zoning Resolution and the law as summarized or otherwise described during public review by staff of the Department of City Planning, the Commission is obligated to apply the law as it is written. In the event where staff of the Department of City Planning had one intention when drafting the law but the law as written does not comport with that intention, the Zoning Resolution can be amended in accordance with the rules set forth in the City Charter.

Assertion #5 [from July 22nd 2016 Memo]:

"An increment identified by environmental review cannot serve as the basis for a threshold determination for MIH because an increment can vary widely depending on bulk assumptions embedded in the no- and with-action scenarios and the range of uses permitted within a project area. Neither the assumptions made in environmental review nor the terms of the special permit will commit the Adorama applicant team to particular

uses within the C6-4A district. If the Commission approves the proposed envelopes, the applicant can fill those envelopes with any permitted uses it chooses."

Facts:

The EAS for the Adorama Special Permit has been accepted by City Planning and the City Planning-accepted assumptions that are a core part of the establishment of the reasonable worst case development scenarios result in an increment that has meaning for this discretionary land use review process. In the same way that the Commission may approve of a special permit after considering the facts as presented in environmental review, so too can it make decisions on MIH applicability based on data from environmental review. There is no legal or policy rationale as to why the Commission may make all sorts of land use decisions based on environmental review but shall be prohibited from using such environmental review from determining an increment for purposes of MIH applicability.

Further, ZR Section 74-32 does not say that MIH applies to a special permit that "results" in a significant increase in residential floor area. Rather, it says that MIH shall apply to special permits that "allow" for a significant increase in residential floor area. The Commission, in applying MIH to special permits, could ensure that the affordable housing, or contribution to an affordable housing fund, is only required at the time that Department of Building permits are issued for the portion of the residential floor area that can be built as a result of the bulk modifications of the special permit.

Assertion #6 [from July 22nd 2016 Memo]:

"Similarly, and consistent with CEQR, the Adorama applicant team could have presented the Commission with reasonable no-action and with-action scenarios with a mix of uses that produced a very low or even negative residential increment."

Facts:

The City of New York could not have accepted *no-action* and *with-action* scenarios that would have shown a very low or negative residential increment because accepting such scenarios would have only been possible if one accepted widely divergent baseline assumptions for the *no-action* and *with-action* scenarios regarding the likelihood of conservation of existing commercial space to residential use. In the EAS as presented by the applicant at the start of ULURP, both the *no-action* and the *with-action* scenarios maintain the existing commercial floor area of the building as commercial. The applicant team has sought to create confusion by presenting an alternative *no-action* scenario whereby they convert portions of the existing commercial space to residential use and do not receive the bulk modifications sought in the special permit application. The applicant claims that a newly contemplated *no-action* scenario (with conversion of significant existing commercial space to residential use but with no bulk modifications approved) allows for more residential floor area on the zoning lot than the *with-action* scenario presented to the Commission initially (where existing commercial space remains commercial and the bulk modifications allow for more residential floor area on the zoning lot).

If the applicant now states that it is feasible and reasonably likely that the existing commercial space could be converted to residential use, an additional *with-action* scenario needs to be contemplated showing the amount of residential floor area on the entire zoning lot in the reasonable worst case development scenario (i.e. the converted commercial space to residential floor area plus the residential floor area in the newly built

structures that would be achievable due to the bulk modifications). In other words, there are four scenarios that would need to be considered and scenario #4 is missing:

	No-Action	**With-Action**
Maintain existing built commercial floor area as commercial	Scenario #1: Included in EAS	Scenario #2: Included in EAS
Convert portion of existing built commercial floor area to residential	Scenario #3: Submitted to Manhattan Borough President Gale Brewer on June 10, 2016 ("ALTERNATIVE #2 AS-OF-RIGHT")	Scenario #4: Missing

The increment of residential floor area for environmental review purposes must be determined after this decision this key decision is made: under a reasonable worst case development scenario, will the existing built commercial floor area remain as is (Scenarios #1 and #2 as accepted by the City Planning Commission at certification), or, is it reasonable to assume that some of the built commercial floor area will be converted to residential use (as is put forth by the applicant for Scenario #3 though not presented in what should be Scenario #4) because residential use is generally considered to be more profitable for an owner than commercial use in this neighborhood? Staff of the Department of City Planning errs in arguing it is "reasonable" to calculate an increment by assuming conversion of commercial floor area to residential floor area in a *no-action* scenario and then assume the opposite for the *with-action* scenario. There must be an apples to apples comparison and what the applicant presents and the staff of the Department of City Planning argue should be accepted is in fact an apples to oranges to comparison.

Assertion #7 [from July 22nd 2016 Memo]:

"The indefiniteness of such an increment makes it unsuitable for MIH applicability determinations, even if using the increment in that way were permitted by the MIH law."

Facts:

First, nothing in the Zoning Resolution or elsewhere in the law prohibits the Commission from using an increment identified in environmental review for purposes of determining MIH applicability.

Second, environmental review is based on meaningful assumptions and once those assumptions are deemed appropriate, there is only to be one increment between the *no-action* scenario and the *with-action* scenario tied to a specific discretionary land use approval. This increment can be used to establish the increment for MIH applicability.

Assertion #8 [from July 22nd 2016 Memo]:

"It is not the case that #floor area ratio# always refers to regulatory limits on building size (or some other more abstract usage) and that #floor area# always refers to the size of existing buildings (or some other more concrete usage). Usage is typically made clear by context.[ii]

[ii] *For an example of #floor area# used to denote "permitted floor area" see:*
ZR 23-154I(1):
The #residential floor area# of a #development# or #enlargement# may

be increased by 0.833 square feet for each one square foot of #moderate income floor area#, or by 0.625 square feet for each one square foot of #middle income floor area#, provided that for square foot of such #floor area compensation# there is one square foot of #floor area compensation#, pursuant to paragraph (b) of this Section."

Facts:

The staff of Department of City Planning implies that the example given in the footnote is sufficient to prove that #residential floor area# can have the same meaning as "#residential floor area# permitted" but without the need for the word "permitted" to be written. In fact, when one deconstructs ZR Section 23-154, we see that the preceding portions of the ZR Section clearly defines an increase in #residential floor area# in this portion of ZR Section 23-154 as being an increase in #residential floor area# permitted on a zoning lot due to the "Maximum #Residential Floor Area Ratio#" regulations set forth in paragraph (b) of ZR Section 23-154.

(c) Special provisions for specified #Inclusionary Housing designated areas#

(1) Optional provisions for #large-scale general developments# in C4-6 or C5 Districts

Within a #large-scale general development# in a C4-6 or C5 District, the special optional regulations as set forth in this paragraph (c)(1), inclusive, modify the provisions of paragraph (b) of this Section:

(i) The #residential floor area# of a #development# or #enlargement# may be increased by 0.833 square feet for each one square foot of #moderate income floor area#, or by 0.625 square feet for each one square foot of #middle income floor area#, provided that for each square foot of such #floor area compensation# there is one square foot of #floor area compensation#, pursuant to paragraph (b) of this Section;

"Paragraph (b) of this Section" is the following:

(b) #Inclusionary Housing designated areas#

The #residential floor area# of a #zoning lot# may not exceed the base #floor area ratio# set forth in the table in this paragraph (b), except that such #floor area# may be increased on a #compensated zoning lot# by 1.25 square feet for each square foot of #low income floor area# provided, up to the maximum #floor area ratio# specified in the table, as applicable. However, the amount of #low income floor area# required to receive such #floor area compensation# need not exceed 20 percent of the total #floor area#, exclusive of ground floor non-#residential floor area#, or any #floor area# increase for the provision of a #FRESH food store#, on the #compensated zoning lot#.

Maximum #Residential Floor Area Ratio#

District	Base #floor area ratio#	Maximum #floor area ratio#
R6B	2.00	2.20
R6[1]	2.20	2.42
R6[2] R6A R7-2[1]	2.70	3.60
R7A R7-2[2]	3.45	4.60
R7-3	3.75	5.0
R7D	4.20	5.60
R7X	3.75	5.00
R8	5.40	7.20
R9	6.00	8.00
R9A	6.50	8.50
R9D	7.5	10.0
R9X	7.3	9.70
R10	9.00	12.00

[1] for #zoning lots#, or portions thereof, beyond 100 feet of a #wide street#

[2] for #zoning lots#, or portions thereof, within 100 feet of a #wide street#

If ZR Section 74-32 had a header of "Additional Considerations for Maximum Permitted Residential Floor Area Ratio Modifications" then the phrase "#residential floor area#" in ZR Section 74-32 would be construed to mean an increase in "permitted" "#residential floor area#." However, because the header and the text of ZR Section 74-32 does not modify the meaning of #residential floor area# in the same way that paragraph (b) and paragraph (c) (1) of ZR Section 23-154 does, one cannot use ZR Section 23-154 as an example of an instance where "#residential floor area#" by itself means "#residential floor area# permitted"

Sincerely,

Eric Edward Stern
Land Use, Housing and Zoning Committee Chair
Manhattan Community Board Five
office@cb5.org
(212) 465-0907

June 20, 2016

To: The City Planning Commission
From: Department of City Planning, Counsel Division
Re: MIH Applicability to Adorama Special Permit

The City Planning Commission has asked Counsel Division at the Department of City Planning to prepare a memo on the applicability of MIH to the Adorama 74-711 Special Permit.

Issue: Does MIH apply to special permits that do not increase permitted residential floor area but that enable developments to achieve more already-permitted residential floor area than would be possible in the absence of the special permit?

Short answer: No. The zoning resolution and the CPC report are explicit that MIH applies only to special permits that increase permitted residential floor area. Applying MIH to a special permit that does not increase permitted residential floor area would go beyond the bounds of the law enacted by the Commission and City Council and would incur significant exactions risk.

Facts: The applicant seeks bulk modifications to facilitate construction of a new ~84,000sf mixed-use development with 15,300sf of commercial space and 68,100sf (66 units) of market-rate residential. The development site is within the Ladies Mile Historic District in a C6-4A district, which permits 10 FAR of residential or commercial, bonusable to 12 FAR through the R10 Inclusionary Housing program or the public plaza bonus. The proposed development will share a zoning lot with existing buildings that will be preserved through the special permit. Overall, the zoning lot will be developed to 8.6 FAR.

Text and Report: The text governing MIH applicability to Special Permits is found in 74-32, excerpted in part below:

> **Additional Considerations for Special Permit Use and Bulk Modifications**
> Where a special permit application would allow a significant increase in #residential floor area# and the special #floor area# requirements in #Mandatory Inclusionary Housing areas# of paragraph(d) of Section 23-154 (Inclusionary Housing) are not otherwise applicable, the City Planning Commission, in establishing the appropriate terms and conditions for the granting of such special permit, shall apply such requirements where consistent with the objectives of the Mandatory Inclusionary Housing program as set forth in Section 23-92 (General Provisions).

On page 38, the Applicability section of the CPC Report for MIH provides additional clarity:

> The Commission anticipates applying the MIH program to…special permits that increase residential capacity. […] The program is not expected to be applied in conjunction with special permit applications that would reconfigure residential floor area that is already permitted under zoning, without increasing the amount of residential floor area permitted. Under this policy, for instance, a special permit that facilitates the transfer of floor area from one zoning lot to

another without increasing FAR would not be subjected to an MIH requirement, while a special permit that converts non-residential floor area to residential floor area would be.

In the context of the Charter-mandated land use review process, a CPC Report is binding administrative record. Unless explicitly modified by Council pursuant to established procedure, the enacted law must comport with the law as represented by the Commission in the CPC Report accompanying the action.

This application does not seek an increase in permitted FAR. Applying MIH to this application would go beyond the bounds of the law as established and could be challenged as an exaction or as an instance of the Commission exceeding its authority under the zoning resolution.

July 22, 2016

MEMO

To: The City Planning Commission
From: Counsel Division, Department of City Planning
Re: MIH Applicability to Adorama Special Permit

At the City Planning Commission Review Session on July 11, 2016, the General Counsel of the Department of City Planning offered to provide a supplemental memo on the applicability of MIH to the Adorama 74-711 Special Permit. This memo will address the three points that arose at the follow up session.

First: MIH applicability to special permits and the meaning of "significant increase in #residential floor area#" in ZR 74-32 were explicitly and consistently represented at certification, in the CPC Report, and in testimony by the Chairman of the City Planning Commission before City Council.[i] In the context of the Charter-mandated land use review procedure, this constitutes a binding administrative record that defines and delimits the scope of the law; it is not mere legislative history. The Commission does not have the discretion to apply the law in a way contrary to explicit and consistent representations of the law to the City Council and the public during public review.

Second: An increment identified by environmental review cannot serve as the basis for a threshold determination for MIH because an increment can vary widely depending on bulk assumptions embedded in the no- and with-action scenarios and the range of uses permitted within a project area. Neither the assumptions made in environmental review nor the terms of the special permit will commit the Adorama applicant team to particular uses within the C6-4A district. If the Commission approves the proposed envelopes, the applicant can fill those envelopes with any permitted uses it chooses. Similarly, and consistent with CEQR, the Adorama applicant team could have presented the Commission with reasonable no-action and with-action scenarios with a mix of uses that produced a very low or even negative residential increment. The indefiniteness of such an increment makes it unsuitable for MIH applicability determinations, even if using the increment in that way were permitted by the MIH law.

Third: Section 74-32 requires the Commission to apply MIH "[w]here a special permit application would allow a significant increase in #residential floor area#". The Commission has asked whether the use of #floor area# (rather than #floor area ratio#) in ZR 74-32 denotes or implies that increases in practically buildable #floor area# are enough to trigger this requirement, or whether such requirements are triggered only by increases in permitted #floor area#.

As outlined above, the Department has consistently stated that only increases in permitted #floor area# trigger the requirement. The following discussion of #floor area# and #floor area ratio# will address the arguments that the plain language of 74-32 denotes or implies otherwise.

The concepts of #floor area# and #floor area ratio# are used in multiple ways throughout the zoning resolution, including:

1. To denote regulatory limits on building size – that is, “permitted floor area” or “permitted FAR”
2. To describe the size of existing buildings – that is, “built floor area” or “built FAR”.

It is not the case that #floor area ratio# always refers to regulatory limits on building size (or some other more abstract usage) and that #floor area# always refers to the size of existing buildings (or some other more concrete usage). Usage is typically made clear by context.[ii]

The definition of #floor area# begins with the assumption that any area within a building constitutes floor area and goes on to specify abstract categories of area within a building that are specifically included or specifically excluded from the definition of #floor area#. The definition of #floor area ratio# by necessity incorporates the definition of #floor area#, because FAR is simply #floor area# divided by the #lot area# of a #zoning lot#. Neither definition is necessarily more concrete or abstract than the other.

With respect to regulatory limits to building size: Use of #Floor area ratio# is appropriate when specifying regulatory limits to building size over geographies containing multiple zoning lots of varying size. This, for instance, is why zoning districts use FAR to denote regulatory limits on building size – maximum FAR remains constant even as lot size varies. Use of #floor area# is more appropriate when denoting regulatory limits on building size when such limits refer to individual projects on an identifiable zoning lot or lots, as is the case with special permits.

Because both #floor area# and #floor area ratio# can denote regulatory limits on building size – that is, permitted floor area or permitted FAR – and because ZR 74-32 is a section pertaining to special permits, the use of #floor area# in 74-32 should not be taken as evidence that MIH requirements are triggered by anything other than increases in permitted floor area.

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[i] At certification of the MIH special permit on September 21, 2015, City Planning Deputy Executive Director Howard Slatkin said:

> Sometimes there’s a…standalone special permit application that comes before the Commission. So for instance an application under 74-711 to modify use regulations to facilitate the preservation of a landmarked building – that type of special permit application, where it creates residential floor area where none existed previously, we would anticipate applying this policy to it. There are other types of special permits that might just modify height and setback, that apply to the existing floor area that’s already allowed – we’re not anticipating applying this policy where you’re essentially reconfiguring the existing floor area that is allowed under zoning today.”

In testimony before City Council on February 9, 2016, City Planning Director Carl Weisbrod said:

> When a special permit is reshaping a building, that is, not creating new floor area, not creating any new housing opportunities, but simply moving around floor area that’s already permitted, we would not apply MIH. But where the special permit is creating substantial new floor area, we would apply MIH for special permits. The MIH options made available to the projects will be set forth in the restrictive declaration attached to the special permit and this, like the rest of the rest of the application, will be subject to the City Council’s approval.

Finally, the CPC report reads:

> The Commission anticipates applying the MIH program to…special permits that increase residential capacity. […] The program is not expected to be applied in conjunction with special permit applications that would reconfigure residential floor area that is already permitted under zoning, without increasing the amount of residential floor area permitted. Under this policy, for instance, a special permit that facilitates the transfer of floor area from one zoning lot to another without increasing FAR would not be subjected to an MIH requirement, while a special permit that converts non-residential floor area to residential floor area would be.

[ii] For an example of #floor area# used to denote "permitted floor area" see:

> **ZR 23-154I(1):**
>
> The #residential floor area# of a #development# or #enlargement# may be increased by 0.833 square feet for each one square foot of #moderate income floor area#, or by 0.625 square feet for each one square foot of #middle income floor area#, provided that for square foot of such #floor area compensation# there is one square foot of #floor area compensation#, pursuant to paragraph (b) of this Section.

For an example of #floor area ratio" used to denote "built floor area ratio" see:

> **ZR 43-17**
>
> **[…]**
>
> Mezzanines are allowed within individual quarters, in #buildings# with an existing #floor area ratio# of 12.0 or less, and only between floors, or between a floor and a roof, existing on January 22, 1998, that are to remain, provided that such mezzanines do not exceed 33 and 1/3 percent of the gross #floor area# of such individual quarters. Such mezzanines shall not be included as #floor area# for the purpose of calculating minimum required size of a #joint living-work quarters for artists#.

KRAMER LEVIN NAFTALIS & FRANKEL LLP

VALERIE CAMPBELL
SPECIAL COUNSEL
PHONE 212-715-9183
FAX 212-715-8252
VCAMPBELL@KRAMERLEVIN.COM

MEMORANDUM

TO: Manhattan Borough President's Office
James Caras, Director of Land Use, Planning & Development
Basha Gerhards, Deputy Director of Land Use, Planning and Development
Jefferson Mao, Urban Planner

CC: Michele de Milly - Geto & de Milly, Inc.
Morris Adjmi - Morris Adjmi Architects
Elliot Neumann - Acuity Capital Partners

FROM Valerie Campbell

DATE June 10, 2016

RE: 42 West 18th Street (C-160082 ZSM)

A. Introduction

We have prepared this memorandum to respond to the questions you raised at our June 1, 2016 meeting. We look forward to discussing these issues with you and appreciate your continued consideration of the application.

B. As-of-Right Alternatives

The assertion in the Community Board No. 5 resolution that there is an increase in residential floor area is based on the erroneous assumption that the increase in residential floor area is calculated on the basis of the difference in the residential floor areas shown in the "as-of-right" scenario and the proposed scenario analyzed for Environmental Assessment Statement ("EAS"). This is not consistent with the City Planning Commission's statement that the increase in residential floor area refers to an increase in residential capacity. Moreover, the "as-of right" scenario in the EAS is just one of many possible as-of-right scenarios. We have attached a comparison of the Proposed Scheme with the As-of-Right Alternative analyzed in the EAS and with two alternative As-of-Right schemes to illustrate the range of potential results.

If the Proposed Scheme is compared to the EAS As-of-Right-Scheme, the Proposed Scheme has 23,793 square feet ("sf") more residential floor area and 26 more dwelling units. If the same dwelling unit factor (1053 sf./du) is applied to both schemes, the Proposed Scheme has only 23 more dwelling units. However, it should be noted that the 2,881 sf of floor area within the rear setback on the south wing of the building is now permitted as-of-right as the result of the ZQA amendments. This adjustment would reduce the differential between the Proposed and the EAS As-of-Right Schemes to 20,912 sf and 21 dwelling units.

In the Alternative As-of-Right Scheme # 1 (which has a taller south wing) the difference is only 18,709 sf. of residential floor area and 18 units. In comparison to the Alternative As-of-Right Scheme # 2 (which reflects a conversion of current retail floor area on floors 2-6 of Lot 14 to residential use), the Proposed Scheme actually has 4,215 less sf. of residential floor area and 4 fewer units. Finally, as previously discussed, a purely commercial building identical to the Proposed Scheme in massing could be developed with fewer bulk waivers and an even larger 10 FAR commercial scheme could be developed on an as-of right basis. Drawings showing the commercial alternative options are attached.

C. Residential Floor Area in North Wing

We have attached a diagram that illustrates the residential floor in the north wing of the proposed building above the 60 foot height limit. This residential floor area accounts for a total of 14,630 sf that is equivalent to 11 dwelling units or 1.06 FAR. Please note that the Proposed Scheme has only 8.71 FAR which is less than the 10 FAR allowed in this Zoning District. If the north wing residential floor area above 60 feet was not included in the project, the Proposed Scheme would only have a 7.65 FAR.

D. Conclusion

We believe that these diagrams illustrate that the proposed bulk waivers do not result in any increase in residential capacity but merely allow the applicant to utilize some of the available residential floor area in an LPC-approved, appropriate new building that respects the historic buildings on the zoning lot and the Ladies Mile Historic District.

EAS As-of-Right

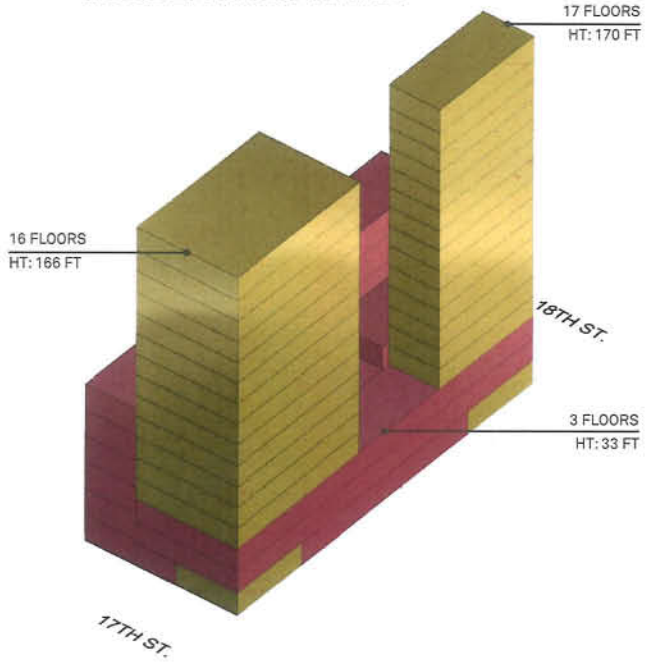
DISTRICT: C6-4A (R10A EQUIVALENT)
ALLOWABLE FAR: 10.0 (138,000 SF)

LEGEND

- COMMERCIAL
- RESIDENTIAL

PROPOSED SCHEME

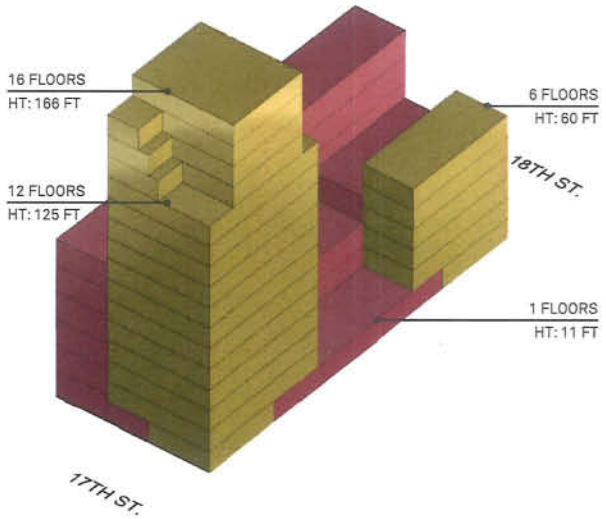
BULK WAIVERS
RESIDENTIAL & RETAIL



FAR:	**8.71**
TOTAL AREA:	**120,257 ZSF**
RETAIL:	50,734 ZSF
RESIDENTIAL:	69,523 ZSF
DWELLING UNITS:	**66***

BASE CASE

AS-OF-RIGHT
RESIDENTIAL & RETAIL



FAR:	**6.63**
TOTAL AREA:	**91,537 ZSF**
RETAIL:	45,807 ZSF
RESIDENTIAL:	45,730 ZSF
DWELLING UNITS:	**40 (OR 43*)**

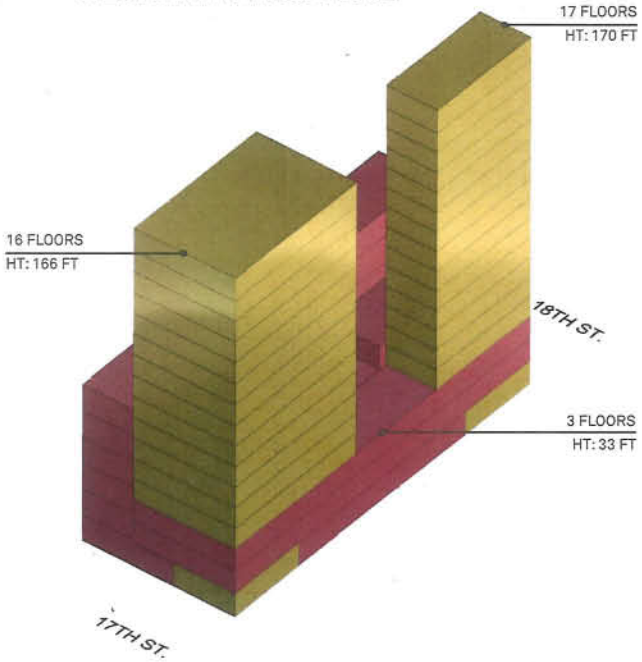
* CALCULATION BASED ON
1053 ZSF/DWELLING UNIT

Alternative As-of-Right #1

DISTRICT: C6-4A (R10A EQUIVALENT)
ALLOWABLE FAR: 10.0 (138,000 SF)

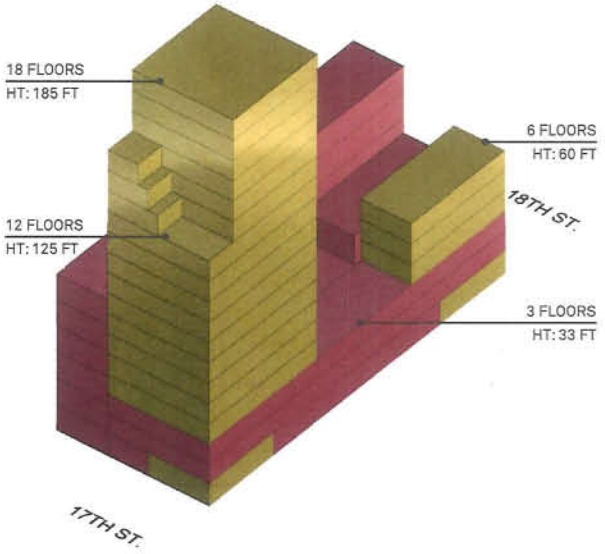
LEGEND
- COMMERCIAL
- RESIDENTIAL

PROPOSED SCHEME
BULK WAIVERS
RESIDENTIAL & RETAIL



FAR:	**8.71**
TOTAL AREA:	**120,257 ZSF**
RETAIL:	50,734 ZSF
RESIDENTIAL:	69,523 ZSF
DWELLING UNITS:	**66***

ALTERNATIVE #1
AS-OF-RIGHT
RESIDENTIAL & RETAIL



FAR:	**7.36**
TOTAL AREA:	**101,548 ZSF**
RETAIL:	50,734 ZSF
RESIDENTIAL:	50,814 ZSF
DWELLING UNITS:	**48***

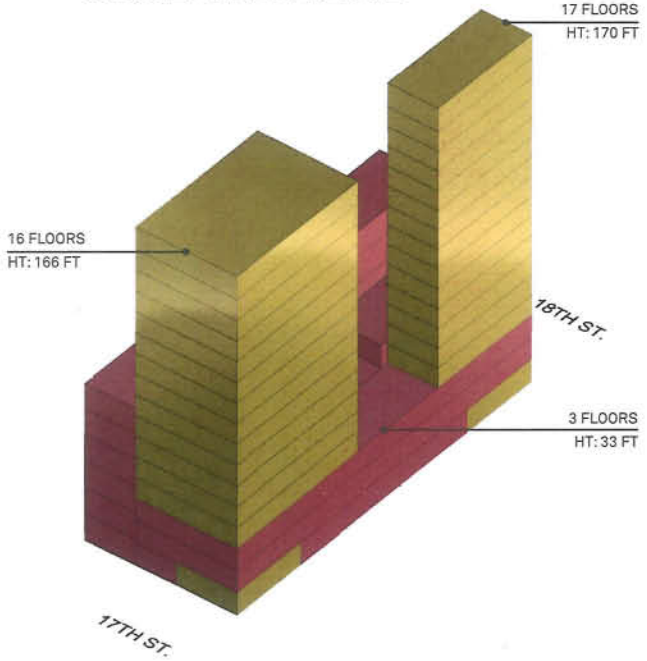
* CALCULATION BASED ON
1053 ZSF/DWELLING UNIT

Alternative As-of-Right #2

DISTRICT: C6-4A (R10A EQUIVALENT)
ALLOWABLE FAR: 10.0 (138,000 SF)

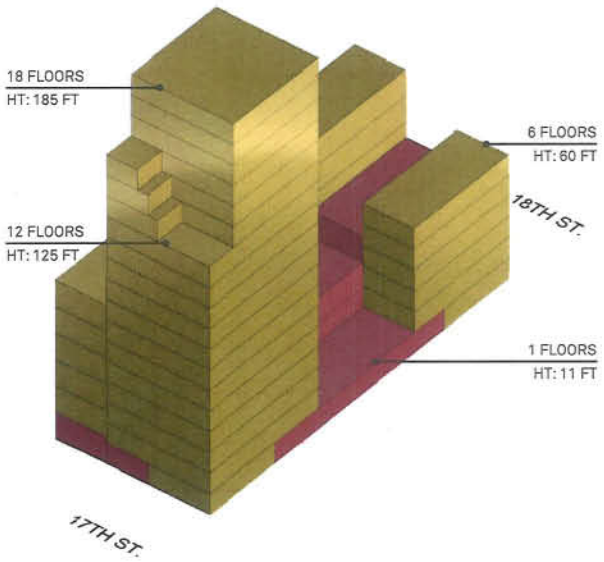
LEGEND
COMMERCIAL
RESIDENTIAL

PROPOSED SCHEME
BULK WAIVERS
RESIDENTIAL & RETAIL



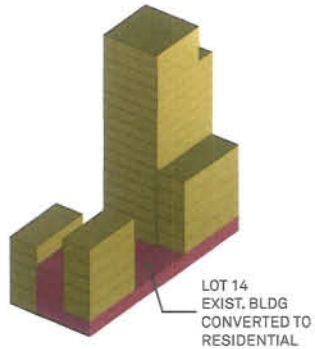
FAR:	**8.71**
TOTAL AREA:	**120,257 ZSF**
RETAIL:	50,734 ZSF
RESIDENTIAL:	69,523 ZSF
DWELLING UNITS:	**66***

ALTERNATIVE #2
AS-OF-RIGHT
RESIDENTIAL & RETAIL



FAR:	**6.55**
TOTAL AREA:	**90,350 ZSF**
RETAIL:	16,612 ZSF
RESIDENTIAL:	73,738 ZSF
DWELLING UNITS:	**70***

VIEW FROM 18TH ST.



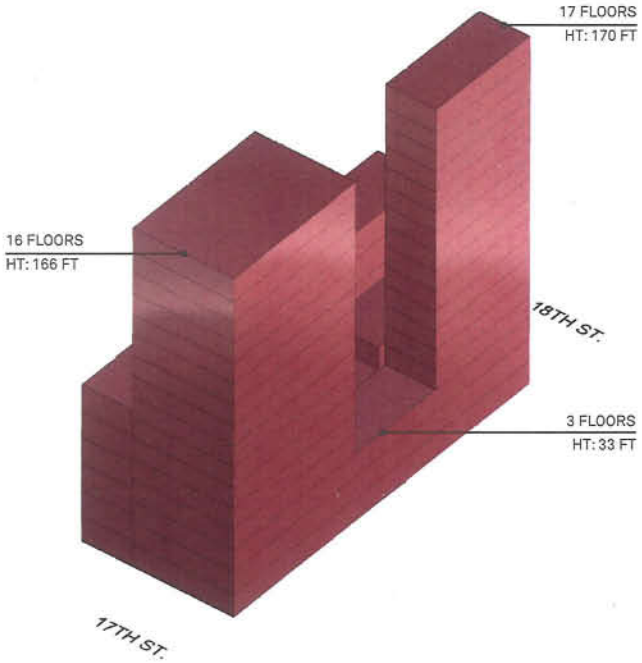
* CALCULATION BASED ON
1053 ZSF/DWELLING UNIT

Commercial Alternatives

DISTRICT: C6-4A (R10A EQUIVALENT)
ALLOWABLE FAR: 10.0 (138,000 SF)

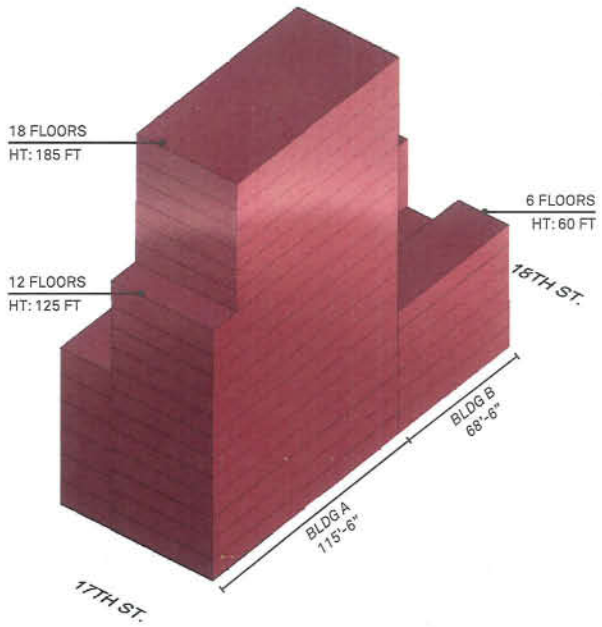
LEGEND
- COMMERCIAL
- RESIDENTIAL

74-711 COMMERCIAL ALTERNATIVE



FAR:	**8.71**
TOTAL AREA:	**120,257 ZSF**
RETAIL:	50,734 ZSF
OFFICE/HOTEL:	69,523 ZSF

AS-OF-RIGHT COMMERCIAL ALTERNATIVE



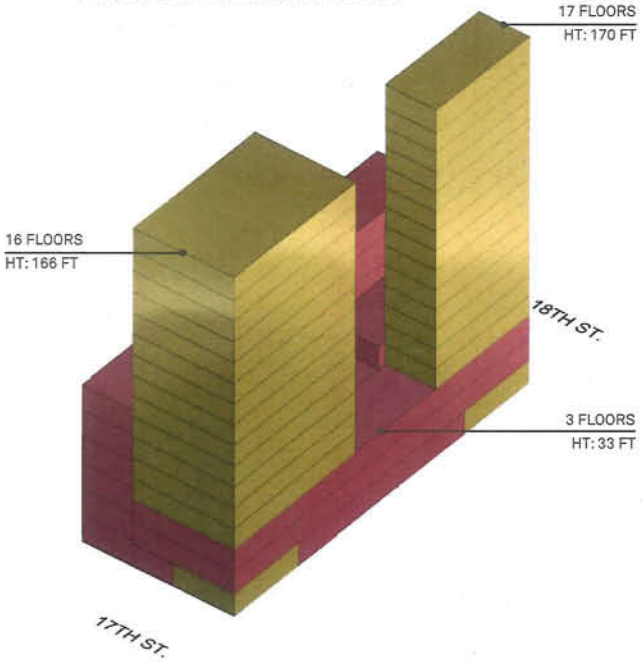
FAR:	**10.0**
TOTAL AREA:	**138,000 ZSF**
RETAIL:	50,734 ZSF
OFFICE/HOTEL:	87,266 ZSF

Residential Floor Area in North Wing

DISTRICT: C6-4A (R10A EQUIVALENT)
ALLOWABLE FAR: 10.0 (138,000 SF)

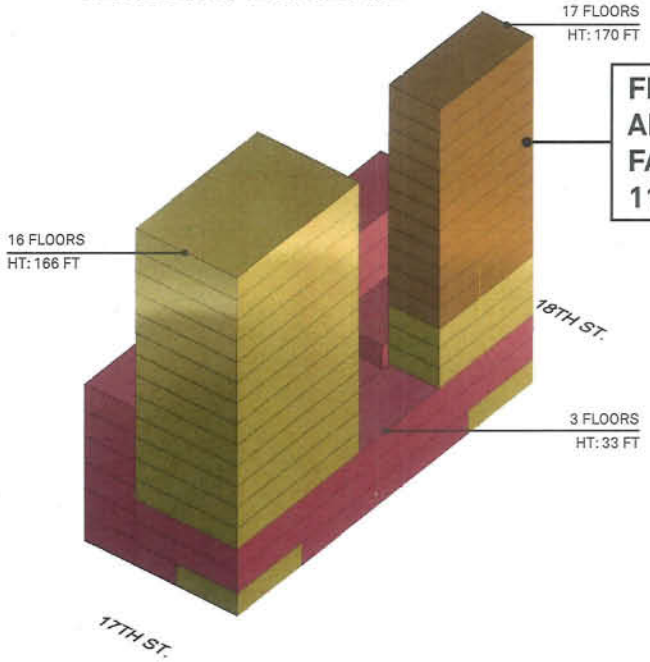
LEGEND
- COMMERCIAL
- RESIDENTIAL

PROPOSED SCHEME
BULK WAIVERS
RESIDENTIAL & RETAIL



FAR:	**8.71**
TOTAL AREA:	**120,257 ZSF**
RETAIL:	50,734 ZSF
RESIDENTIAL:	69,523 ZSF
DWELLING UNITS:	**66***

PROPOSED SCHEME
BULK WAIVERS
RESIDENTIAL & RETAIL



FAR:	**8.71**
TOTAL AREA:	**120,257 ZSF**
RETAIL:	50,734 ZSF
RESIDENTIAL:	69,523 ZSF
DWELLING UNITS:	**66***

* CALCULATION BASED ON
1053 ZSF/DWELLING UNIT