

Kramer Levin



Paul D. Selver
Partner
T (212) 715-9199
F (212) 715-8231
pselver@kramerlevin.com

1177 Avenue of the Americas
New York, NY 10036
T 212.715.9100
F 212.715.8000

November 1, 2021

BY HAND

Office of the City Clerk
City of New York
141 Worth Street
New York, NY 10013

BY E-MAIL

Land Use Division of the City Council
Att'n Julie M. Lubin, Esq., Counsel
250 Broadway, 16th Floor
New York, NY 10007
(jlubin@council.nyc.gov)

Re: Protests Against Applications by New York Blood Center, Inc.
(Applications Nos. C 210351 ZMM, N 210352 ZRM, C 210353 ZSM)

Dear Sirs or Madams:

This law firm represents New York Blood Center, Inc. ("NYBC"), the owner of the property located at 310 East 67th Street (Block 1441, Lot 40) in Manhattan, and the applicant on the above-referenced applications. These applications are currently pending before the City Council.

We have obtained copies of protests against the City Planning Commission's resolutions approving NYBC's applications. The protests were filed with the Office of the City Clerk, ostensibly pursuant to § 200(a)(3) of the City Charter, by or on behalf of the Board of Managers of The 301 East 66th Street Condominium and various unit owners in that condominium, and by or on behalf of 333 East 66th Street Corp., which claims to be a cooperative apartment corporation.

We submit this letter to object to the protests and to explain why they are ineffective and do not require approval of NYBC's applications by a three-fourths vote of the City Council.

RECEIVED L. M. LUBIN
ATTORNEY AT LAW
OFFICE OF THE CITY CLERK
2021 OCT 31 A 11:25
2021 NOV -3 A 11:27



I. A Section 200(a)(3) protest cannot challenge a Zoning Map Amendment or a Zoning Special Permit.

Each of the two building representatives filing protests has filed multiple protests, challenging the zoning map amendment (C 210351 ZMM), the zoning text amendment (N 210352 ZRM), and the special permit (C 210353 ZSM), respectively. The protests against the zoning map amendment and the special permit are nullities that have no legal effect. Charter § 200(a)(3) does not authorize protests against zoning map amendments or special permits. It only authorizes protests against amendments to the text of the Zoning Resolution.

Section 200 provides that it is applicable to:

"any existing resolution or regulation of the council, the board of estimate or of the city planning commission to regulate and limit the height and bulk of buildings, to regulate and determine the area of yards, courts and other open spaces, to regulate density of population or to regulate and restrict the locations of trades and industries and location of buildings designed for specific uses or creating districts for any such purpose, including any such regulation which provides that the board of standards and appeals may determine and vary the application of such resolutions or regulations in harmony with their general purpose and intent and in accordance with general or specific rules contained in such regulations" Charter § 200(a).

The "resolution or regulation" referred to in the foregoing language is the Zoning Resolution.

Charter § 200(a)(1) confirms by its text that it applies to "a resolution to amend the text of the zoning resolution." Similarly, § 200(a)(2) states that it is applicable to "[a]ny resolution by the commission approving a change in the text of the zoning resolution"

Charter § 200(a)(3) authorizes a protest "against *such a resolution* approved by the city planning commission . . . within thirty days from the date of the filing of *such resolution* with the council " [emphasis added]. The "such a resolution" referenced in § 200(a)(3) can only be the resolution described in § 200(a)(1) and (a)(2): "a resolution to amend the text of the zoning resolution."

Accordingly, the protests against the zoning map amendment and the special permit are nullities and should be disregarded in their entirety. The balance of this letter solely addresses the protests against the amendment to the text of the Zoning Resolution.

II. The entities filing the protests have not demonstrated that they have the authority to act on behalf of the land owners.

Charter § 200(a)(3) authorizes the filing of a protest "duly signed and acknowledged by the owners of ... land." The pending protests were filed in the name of the Board of Managers of the 301 East 67th Street Condominium as owner of the Condominium's land (as well as some self-described unit owners) and by the 333 East 66th Street Corp., respectively. However, no evidence of their authority to act on behalf of the actual owners of the land has been submitted.



The protest filed in the name of the Condominium states that a special meeting of unit owners was held on October 20, 2021, at which a majority of unit owners adopted a resolution authorizing the protest, and that the Board of Managers held a special meeting on the same day and adopted a resolution consenting to the protest. Certified copies of both resolutions should have been included with the protest as proof of the Board's authority, but are missing. Nor has sufficient proof been submitted of the authority to act of the individual (Mark Epstein) who purports to have signed the protest on behalf of unit owners in his capacity as a corporate officer.

Similarly, the protest filed in the name of 333 East 66th Street Corp. states that a special meeting of the corporation's Board of Directors was held on October 14, 2021, and that the Board adopted a resolution authorizing the protest, but no certified copy of this resolution was included with the protest.

Requiring that a legislature act by more than a simple majority on a pressing public policy matter is an action of the utmost seriousness. Those that seek it should be held to the highest standard of proof in any determination as to whether they have met the statutory test for imposing such a requirement. We submit that the protesters have failed to do so here. In the absence of definitive proof conclusively establishing that these protests were filed with the authority of the actual owners of the relevant land, the protests are fundamentally defective and should be rejected on this basis. No title insurance company would issue a policy of title insurance without reviewing the actual underlying resolutions authorizing a board of directors or board of managers to act. The City should require no less. It should not rely solely on the uncorroborated documents that were filed with the City Clerk.

III. The protests are ineffective because they were not filed by the owners of 20% of the adjacent land within 100 feet of the area affected by the zoning text amendment.

Finally, the protests against the amendment to the text of the Zoning Resolution have not been filed on behalf of the owners of 20% of the land adjacent to and within 100 feet of the area affected by the text amendment, in a single protest. Therefore, the protests do not comply with Charter §200(a)(3), are ineffective and should be disregarded.

Charter § 200(a)(3) allows a protest to be filed against resolutions approving amendments to the text of the Zoning Resolution by owners of 20% of the "area of" any of three categories of land:

- "(1) the land included in changes proposed in such proposed resolution, or
- "(2) the land immediately adjacent extending one hundred feet therefrom, or
- "(3) the land, if any, directly opposite thereto extending one hundred feet from the street frontage of such opposite land."

On their faces, the two protests addressed to the zoning text amendment expressly specify that they have been filed "pursuant to § 200 subd. (a)(3)(2) of the New York City Charter" – *i.e.*, the subparagraph authorizing a protest by the owners of the area of 20% of "the land immediately adjacent [to the land included in changes proposed]



extending one hundred feet therefrom" – and, thus, not pursuant to either of the other two subparagraphs of § 200(a)(3).

The land "included in changes proposed in such proposed resolution" is only the Blood Center site, Block 1441, Lot 40. As approved by the City Planning Commission on September 21, 2021, the proposed text amendment would amend the text of Section 74-48 of the Zoning Resolution as follows:

74-48
Scientific Research and Development Facility

In C2-7 Districts within Community District 8 in the Borough of Manhattan, and in C6 Districts, the City Planning Commission may permit a scientific research and development facility containing as a commercial use, where such facility contains laboratories for medical, biotechnological, chemical or genetic research, including space for production, storage and distribution of scientific products generated through research and may modify height and setback regulations for the facility. Such facility shall conform to the performance standards applicable to M1 Districts and occupy a #zoning lot# that either contains a minimum #lot area# of 40,000 square feet or comprises an entire #block#. No #residential use# is to be located anywhere on a #zoning lot# containing such a facility, in conjunction with such facility, may allow the modifications set forth in paragraph (a) of this Section. For a special permit to be granted, applications shall comply with conditions in paragraph (b) and the findings of paragraph (c) of this Section. Additional requirements are set forth in paragraph (d)." CPC Report N 210352 ZRM.

Matter underlined is new, to be added;
Matter ~~struck-out~~ is to be deleted.

This text amendment is applicable in C2-7 zoning districts located in Community District 8. Furthermore, subsection (b)(2) of Section 74-48 as amended additionally limits its applicability to zoning lots of at least 40,000 square feet or occupying an entire block. The Blood Center's site is the only property that meets all of these criteria for the applicability of the text amendment.

Neither of the protests was filed by an owner of land affected by the proposed text amendment, and so neither can satisfy the criteria of subparagraph 1 of § 200(a)(3). Neither protest was filed by an owner of land "directly opposite" (in other words, across a street from) the Blood Center site, and so neither can satisfy the criteria of subparagraph 3. As the protests themselves acknowledge, only subparagraph 2 can apply. However, the two protests fail to meet the required 20% threshold.

As shown in the attached diagram prepared by AKRF, the area of the land within 100 feet of the Blood Center site is 118,030 square feet. All of the land owned by the 301 East 67th Street Condominium (Block 1441, Lot 7501) is within this area; it comprises 20,083 square feet of land. Only a portion of the land owned by the 333 East 66th Street Owners Corporation (Block 1441, Lot 17) is within 100 feet of the Blood Center site; this portion of the Corporation's land comprises 2,546 square feet. These two parcels together thus comprise a total of 22,629 square feet of the adjacent land within 100 feet from the



Blood Center site, or only 19.2% of the 118,030 square feet of land within 100 feet of the Blood Center site. The protests therefore fail to meet the required 20% threshold and are ineffective.

In addition, Charter § 200(a)(3) authorizes the filing of "a protest" – a single protest – by owners of 20% of the relevant land area. Any protest, on its own, would need to satisfy the 20% threshold in order to meet the requirements of the Charter. A single protest could be filed on behalf of multiple land owners in order to meet this threshold, but the Charter, in its plain language, does not contemplate aggregating the land area represented by multiple protests. The protests filed here do not meet the 20% threshold, either individually or collectively.

The foregoing analysis includes the public streets around Block 1441 in the calculation of the amount of adjacent land within 100 feet of the Blood Center site. We submit that this analysis is the correct application of subparagraph (2) of Section 200(a)(3) of the City Charter. It is a fundamental principle of statutory interpretation that clear and unambiguous language must be applied as written. See, e.g., *Kuzmich v. 50 Murray St. Acquisition LLC*, 34 N.Y.3d 84, 91 (2019) ("As we have repeatedly explained, 'courts should construe unambiguous language to give effect to its plain meaning'" (quoting *DaimlerChrysler Corp. v. Spitzer*, 7 N.Y.3d 653, 660 (2006))). Here, the plain language of the City Charter defines the relevant property as "the land immediately adjacent extending one hundred feet" from the affected site. It includes no exceptions. In contrast, subparagraph 3 of § 200(a)(3) clearly directs that streets are to be excluded from the measurement of the applicable property by defining the relevant property as land "directly opposite thereto extending one hundred feet from the street frontage of such opposite land" [emphasis added]. Clearly, then, the drafters of § 200(a)(3) knew how to refer to streets when they intended to do so. Omitting the public streets from the area of land within 100 feet of the Blood Center site would amount to an impermissible re-writing of the Charter.

There are very few past examples of Charter § 200(a)(3) protests, and we are not aware of any protests filed since adoption of the ULURP amendments to the Charter in 1975. Nevertheless, there are other New York State statutes and local zoning ordinances containing similar protest provisions. See, e.g., Town Law § 265; Village Law § 7-708; General City Law § 83. We have researched the case law applying these provisions insofar as relevant to the present case.

In *Hitti v. Buckhout*, 13 Misc.2d 230 (Sup. Ct. Westchester Cty. 1958), *aff'd*, 10 A.D.2d 719 (2d Dept. 1960), the Supreme Court adopted a plain-language reading of similar protest provisions in the Village Law. The court therefore concluded that all immediately adjacent property should be included in calculating the area of adjacent property, including recreational property owned by the Village of Pleasantville and aqueduct-related property owned by the City of New York. According to the court, the statutory language was "clear and unambiguous," and "[t]he Legislature has provided for a certain percentage of the owners of adjacent land and has not restricted or limited the class so as to exclude property owned by a municipality" [emphasis in original]. The Appellate Division affirmed without opinion. 10 A.D.2d 719.

This principle was followed in *B.R.M. Realty Corp. v. Flynn*, 39 Misc.2d 1049 (Sup. Ct. Westchester Cty. 1963), *rev'd on other grounds*, 20 A.D.2d 798 (2d Dept. 1964), involving



a protest under the City of Yonkers zoning ordinance. There, the court held that streets should be included in calculating the land area within 100 feet. According to the court, it was "unable to see any distinction between this case and" the *Hittl* case, in that "there seems to be no distinction between a publicly-owned street and a publicly-owned recreation area." On appeal, the Appellate Division reversed and remanded the case to the trial court for an evidentiary hearing on the issue of whether the protests complied with any of the three categories of required land ownership, but nothing in the appellate court's decision indicates disapproval of the trial court's view that public streets should be included in the land to be taken into account. In fact, if the Appellate Division believed that the trial court was wrong to include the public streets in the area within 100 feet of the affected site, there would have been no reason for an evidentiary hearing as to whether this requirement was satisfied.

In *Biedermann v. Town of Orangetown*, 125 A.D.2d 465 (2d Dept. 1986), however, a case decided under Town Law § 265, the Appellate Division held that the land within 100 feet of the area affected by a zoning action should not include public streets. Contrary to basic principles governing the interpretation of a statute that is clear on its face, the court in *Biedermann* imported a limitation into the statutory language that does not appear in the statute itself. Nevertheless, the *Biedermann* decision has no binding precedential effect here, because it interpreted the Town Law, not the New York City Charter. Significantly, moreover, in *Biedermann* the court did not repudiate, criticize or disavow its affirmance in *Hittl* nor its implicit acceptance of the trial court's reasoning in *B.R.M. Realty*.

Determining the appropriate reading of the subparagraph (2) protest provision of the City Charter is not complicated. The fact that the land measurement should include all land within 100 feet of the site affected by the text amendment, regardless of ownership, is dictated by the plain language of the Charter. Moreover, it is more appropriate in the dense urban environment of New York City, where a higher proportion of land in many areas – particularly Manhattan – is dedicated to public streets. Such urban density was not present in the *Biedermann* case, which involved the proposed expansion of a suburban shopping center. The following link to Google Maps shows the shopping center at issue in *Biedermann* and demonstrates the non-urban, non-dense nature of the site at issue there and the immediately surrounding neighborhood:

https://www.google.com/maps/@41.0600391,-74.0110097,3a,75y,283.33h,89.03t/data=!3m6!1e1!3m4!1skS5AX11gz2HOonlZ3j_fwx!2e0!7i16384!8i8!9i2

Failing to include adjacent streets in the relevant land for the purpose of determining a protest's validity would give a small class of neighbors an artificial and outsized influence over land use decisions. It would privilege this small class of owners with close to veto power over local land use, without regard to the careful balancing of interests reflected in the ULURP process. Indeed, in New York City, unlike in other municipalities in New York State, the protest provisions of the City Charter sit alongside the ULURP process, codified in Charter §§ 197-c and 197-d, which affords all interested members of the public an opportunity to participate extensively in the land use review process, and make their opinions and concerns known to the Community Board, Borough President, City Planning Commission, and City Council.

Office of the City Clerk
November 1, 2021



For the reasons above, we believe that the protests are defective, and should be rejected.

Thank you very much for your attention to this submission.

Very truly yours,

A handwritten signature in cursive script, appearing to read "P. Selver", followed by a horizontal line.

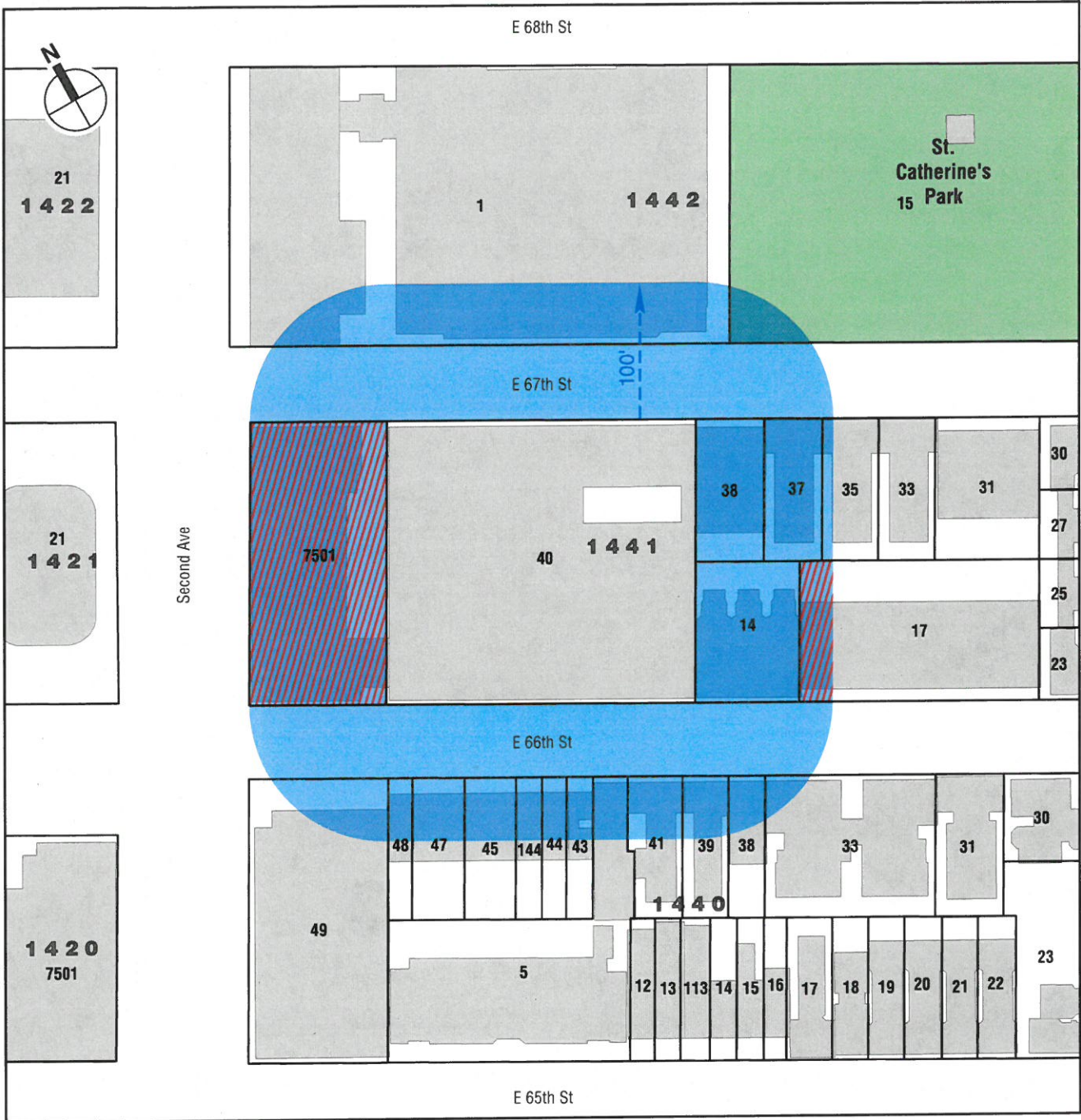
Paul D. Selver
Partner

cc (by e-mail): Stephen Louis, Esq. (slouis@law.nyc.gov)
Hilary Meltzer, Esq. (hmeltzer@law.nyc.gov)
Sheryl Neufeld, Esq. (sneufeld@law.nyc.gov)

Exhibit

Land Area Calculation Within 100 Feet

10.28.21



○○○○ Tax Block Number

□ Tax Lot

Land immediately adjacent extending 100 feet from the project site (total area: 118,030 sq ft)

Portions of Block 1441 Lot 7501 (Condo No. 693) and Lot 17 within 100 feet of project site (total combined area: 20,083 sq ft + 2,546 sq ft = 22,629 sq ft)

Lots 7501 and 17 represent 22,629 / 118,030 or approximately 19.2% of the land immediately adjacent extending 100 feet from the project site.

Area totals provided in the legend are approximate, derived using best available publicly-accessible digital data and industry-standard software, and do not represent survey-level accuracy. Tax lot data source (including square footage): NYC Dept. of City Planning MapPLUTO Release 21v3 (Sept. 2021) containing data from NYC Dept. of Finance Property Tax System and Digital Tax Map. Area calculations performed using ArcGIS Pro software and rounded to the nearest square foot.

