

People v. Nunez, Docket No. 2011 NY 082891

Memorandum of Law of *Amicus Curiae*
New York Civil Liberties Union

Exhibit A


This page is located on the NYC.gov Web site at
<http://www.nyc.gov/html/dcp/html/priv/priv.shtml>

Projects & Proposals > Privately
 Owned Public Space

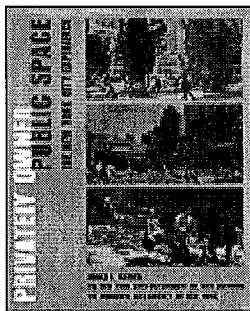


PRIVATELY OWNED PUBLIC SPACE

Update October 17th, 2007:

On October 17, 2007, the City Council adopted a zoning text amendment related to design and operational standards for Privately Owned Public Plazas, as modified by the City Planning Commission. Zoning text changes are now in effect. View the  [adopted zoning text amendment](#).

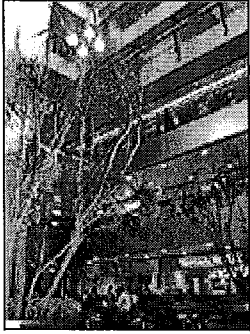
Download the Public Space symbol: In [pdf format](#) or [Adobe Illustrator format](#).



The Department of City Planning, the Municipal Art Society and Harvard professor Jerold S. Kayden joined forces several years ago to develop an electronic database with detailed information about every one of the public spaces created as a result of the city's incentive zoning program. The database findings led to the publication of "**Privately Owned Public Space: The New York City Experience**".

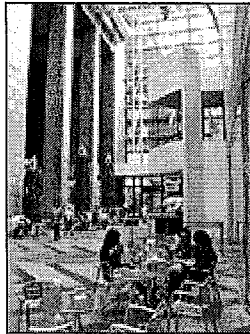


This book describes the evolution of incentive zoning in New York City and profiles each of the 503 public spaces at 320 buildings that were granted additional floor area or related waivers in exchange for providing these spaces. Copies of the book may be



ordered from Urban Center Books, 457 Madison Avenue, New York, NY 10022 (212 935 3959) or online at www.urbancenterbooks.org.

The spaces are concentrated in Manhattan's midtown and downtown business centers, although a substantial number are in east midtown and the upper east side. Three buildings in Brooklyn and one in Queens have privately owned public space. Choose a community district to view maps and tables of all spaces in the district:



[Downtown](#) -- Manhattan District 1
[Greenwich Village](#) -- Manhattan District 2
[Clinton and the Upper West Side](#) -- Manhattan Districts 4 & 7
[Central Midtown](#) -- Manhattan District 5
[East Midtown](#) -- Manhattan District 6
[Upper East Side](#) -- Manhattan Districts 8 & 11
[Downtown Brooklyn](#) -- Brooklyn District 2
[Long Island City](#) -- Queens District 2

The 1961 Zoning Resolution inaugurated the incentive zoning program in New York City. The program encouraged private developers to provide spaces for the public within or outside their buildings by allowing them greater density in certain high-density districts. Since its inception, the program has produced more than 3.5 million square feet of public

space in exchange for additional building area or other considerations such as relief from certain height and setback restrictions.

At first, the program was limited to a few types of spaces like plazas and arcades, but over the years many other types with differing standards were added. Experience with the early spaces shaped standards for the later spaces, which were more precisely defined and subject to greater public scrutiny than the first-generation spaces. Plazas built to the original 1961 standards account for one-third of the 503 spaces surveyed, the largest single category.

The results of the program have been mixed. An impressive amount of public space has been created in parts of the city with little access to public parks, but much of it is not of high quality. Some spaces have proved to be valuable public resources, but others are inaccessible or devoid of the kinds of amenities that attract public use. Approximately 16 percent of the spaces are actively used as regional destinations or neighborhood gathering spaces, 21 percent are usable as brief resting places, 18 percent are circulation-related, four percent are being renovated or constructed, and 41 percent are of marginal utility.

In response to the perceived failure of many

of these spaces and to community opposition, the types of spaces permitted and their locations have been curtailed in recent years. And now, with this book and the comprehensive information available in the database, owners will be better aware of their obligations and the city will be better able to pursue enforcement where obligations are not being met. Only with increasing public awareness, further refinement of design standards, and diligent regulatory review and enforcement can New Yorkers be assured of high-quality privately owned public spaces.

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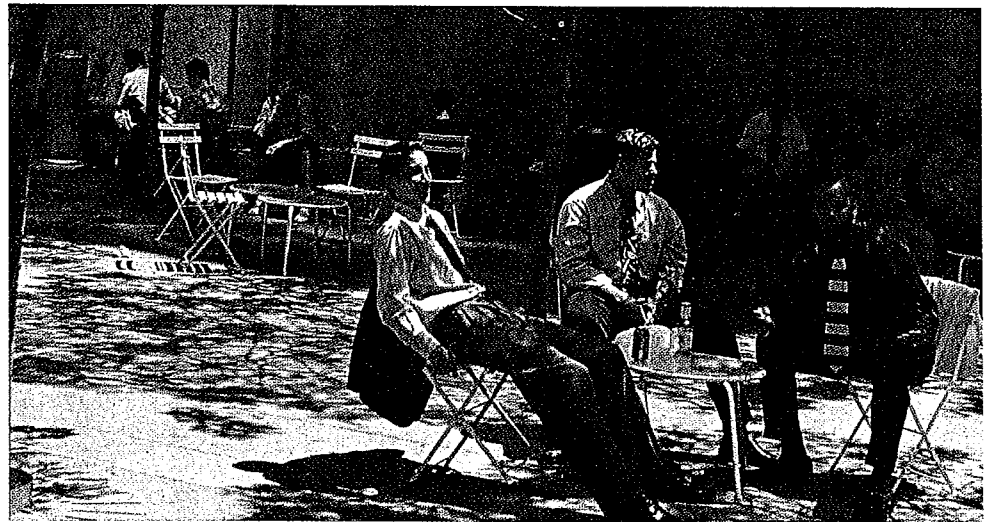
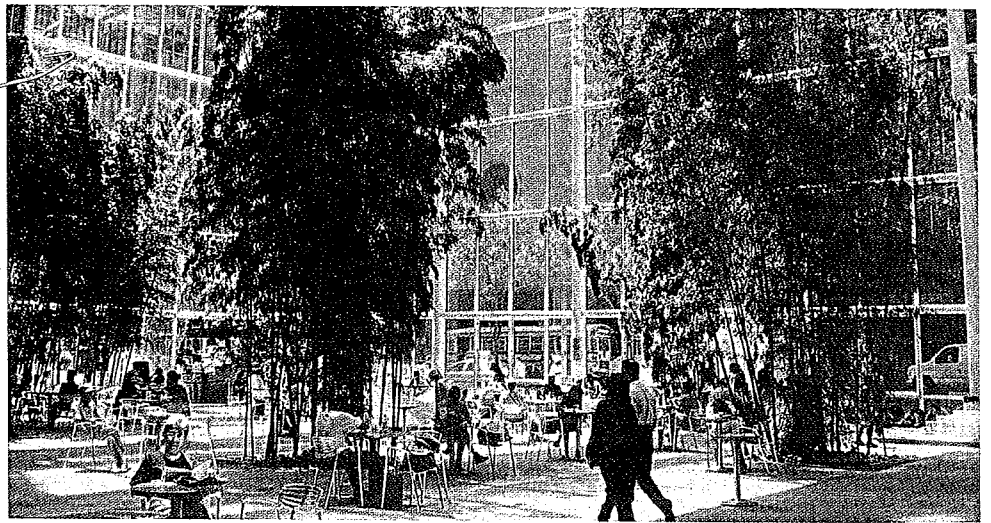
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Exhibit B

PUBLIC SPACE

THE NEW YORK CITY EXPERIENCE



JEROLD S. KAYDEN
THE NEW YORK CITY DEPARTMENT OF CITY PLANNING
THE MUNICIPAL ART SOCIETY OF NEW YORK

The financial mechanics of incentives are conceptually simple. To attract developers, incentives must convey a financial benefit sufficient at least to cover the costs incurred in providing the privately owned public space. Floor area bonuses and non-floor area incentives benefit developers either by increasing their income or reducing their costs. For example, the floor area bonus increases a building's cash flow or value through rental or sale of the extra space. Frequently, the ability to develop extra space allows the building to be taller, and the higher-story floors may be rented or sold at higher rates. Height, setback, and tower coverage incentives may allow a building design that is more in keeping with the tastes of the developer or the market, or may decrease construction costs.

In return for the incentive, the developer agrees to allocate a portion of its lot or building to be used as a privately owned public space, construct and maintain the space according to design standards articulated by the zoning and implementing legal actions, and allow access to and use of the space by members of the public. In effect, the developer "pays" for its bonus floor area or non-floor-area incentive by agreeing to these obligations. Although the privately owned public space continues, by definition, to be "privately owned," the owner has legally ceded significant rights associated with its private property, including the right to exclude others, and may no longer treat this part of its property any way it wishes. As de facto third-party beneficiaries, members of the public participate in the exchange by gaining their own rights to this private property, even as they endure whatever extra congestion and loss of light and air that may result from the grant of extra floor area or other regulatory concessions.

INCENTIVE ZONING'S ADMINISTRATIVE APPROVAL PROCESS

Depending on the type of privately owned public space, legally binding approval of the incentive-for-public space trade has been rendered through an "as-of-right," "discretionary," or "certification" administrative process.¹³ The Zoning Resolution expressly assigns the type of process to be utilized, generally reserving the discretionary process for public spaces thought to require the highest level of case-by-case review, the certification process for spaces requiring a middle level of review, and the "as-of-right" process for spaces requiring minimal review.

Employed in the past for plazas, arcades, residential plazas until 1996,¹⁴ and some special purpose zoning district public spaces,¹⁵ the "as-of-right" approval process requires the developer to demonstrate to the City's Department of Buildings that its proposed public space and zoning computations meet the express requirements announced in the Zoning Resolution, in which case the owner is entitled as a matter of right to the floor area bonus. For an "as-of-right" administrative process to suc-

ceed, the rules governing the space must be clear, simple, and objective. The developer files its architectural plans describing the proposed public space and zoning computations with the Department of Buildings, whose examiners conduct a ministerial review to ensure that the rules have been followed. These examiners are not authorized to exercise discretion and disapprove a proposed space because, in their opinion, the design could have been more felicitous. Once the plans are approved, the developer obtains its building permit and constructs the building with the bonus floor area and the public space. The document recording the terms of this "as-of-right" approval is the plan or plans filed at and approved by the Buildings Department.¹⁶ The City Planning Commission and other city agencies have no role in the "as-of-right" approval process.

In contrast, the discretionary approval process, conducted by the City Planning Commission and sometimes reviewed by the City Council or, previously, the Board of Estimate, is more substantive, judgmental, time- and staff-consuming, and consultative. Through block arcades, covered pedestrian spaces,¹⁷ through block gallerias, elevated plazas, sunken plazas, and open air concourses have been accorded discretionary review for reasons ranging from locational concerns about whether and where they should be situated, to law-drafting complexities of articulating in the abstract and in advance the criteria for their design. For example, the City might want to review a through block arcade to ensure that, where possible, it constitutes part of a multiblock network rather than exists as a maverick place, or that it truly reduces sidewalk congestion. Elevated or sunken plazas might be permitted only where they would not detract from street and sidewalk activity. Covered pedestrian spaces within buildings might need discretionary review because each one presents unique issues of potential privatization, related to their physical connection to the building lobby, that may be difficult to resolve through generic rules announced in advance. Compared to the "as-of-right" process, a nuanced case-by-case review tailored to fit each fact pattern by an expert body, it is thought, might best address these and other concerns.

To obtain discretionary approval, the developer files an application for a special permit or authorization with the City Planning Commission, including architectural plans that describe the proposed public space and zoning computations. When special permits are sought, the requirements of the City's Uniform Land Use Review Procedure (ULURP) attach.¹⁸ The Department of City Planning processes the application and provides professional staff assistance to the Commission for its substantive consideration. Meetings between the development team of designers, planners, and lawyers, and the City's staff of designers, planners, and lawyers are common. For special permits, civic organizations, professional and block associations, and members of the public participate in part

CHAPTER 2

LAW

DESIGN, OPERATION, AND ENFORCEMENT

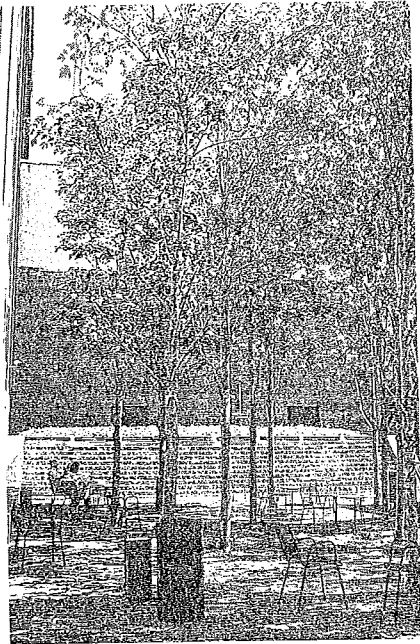
LEGAL FRAMEWORK

Privately owned public space is law's oxymoronic invention. To understand it, one must reduce the term to its two constituent parts. "Privately owned" refers to the legal status of the land and/or building on or in which the public space is located. The land and building are owned by private entities commonly associated with commercial and residential real estate in New York City, including limited liability companies, limited partnerships, cooperatives, unit owners of condominiums, and individuals. As owners, they enjoy at first blush the full exercise of that bundle of rights associated with "fee simple absolute" ownership of private property, including the rights to use, transfer, and exclude, as defined by the state's common and statutory property laws. To be sure, such rights are in fact not absolute. Private property is subject, for example, to land-use and environmental laws enacted under the state's "police power" to protect the public's health, safety, morals, and general welfare, and to common law rules of good neighborliness that command that property not be used in ways that unreasonably interfere with a neighbor's use.¹ Furthermore, private owners who openly invite "general" members of the public to enter and use their property might expose themselves to certain restrictions on their ability to exclude "specific" members of the public.² What is clear, however, is that privately owned public space as defined herein would not exist were conventional applications of private property law and government regulation the sole determinants. Owners would continue to control overall access and use of their private property, including the right to exclude the public, and the public as a whole could not secure rights of access and use without the owner's express permission.

In defining "public space," it is perhaps easiest to recognize first what it is not. Public space is not public prop-

erty — a city park, neighborhood library, street, or sidewalk — because it is not owned by the City on behalf of the people it represents. Nor has the City exercised its power of eminent domain to take private property and convert it to public space, after paying just compensation to the private owner.³ Public space also does not refer to privately owned property de facto devoted to public access and use, like a department store, movie theater, museum, or restaurant. Instead, public space means a physical place located on private property to which the owner has granted legally binding rights of access and use to members of the public, most often in return for something of value from the City to the owner. Since ownership continues to reside with the private owner, public space may be thought of as an easement held by the public on the owner's property, whose extent is defined by the City's Zoning Resolution and by implementing legal actions.

The basic law governing the design and operation of privately owned public space in New York City, as well as the law enforcing public space compliance with applicable standards, is codified in the City's 1961 Zoning Resolution, as originally enacted and as amended from time to time over the past 39 years. As discussed in Chapter 1, that Resolution regulates the use, size, and shape of all buildings constructed in the City's five boroughs and lays out an administrative framework within which private developers are able to seek and gain approval for their proposed buildings. Over the past 39 years, it also has introduced and defined 12 legally distinct types of privately owned public space, as well as spaces geographically tailored to specific needs in some of the City's special purpose zoning districts, and spaces customized for individual buildings. While the law governing many of these spaces has been amended or, in some cases, fully repealed since the spaces were initially provided, the original, as well as current, law remains relevant in determin-



Customized public space at One East River Place (271)

mission report recording the action, as well as in the plans approved as part of that action. For example, the report issued by the City Planning Commission that announces the granting of the special permit may refer explicitly to the public space, or may state that the special permit application is approved "subject to the following conditions," among them, that the "premises shall be developed in size and arrangement substantially as proposed and as indicated on the plan filed with this application."³⁰⁹ The plan submitted by the developer will show the space, thus making the space required by the special permit approval. For example, the McGraw-Hill building (97) on Sixth Avenue between West 48th and 49th Streets provides a "sunken plaza" that was shown on its plans filed for and approved as part of a height and setback special permit. Furthermore, the name for a space, for example, glass-enclosed urban plaza equivalent,³¹⁰ additional plaza,³¹¹ or vest pocket park,³¹² is taken from the text or plans recording such actions taken by the City Planning Commission or the Board of Standards and Appeals.

LEGAL STANDARDS FOR THE OPERATION OF PRIVATELY OWNED PUBLIC SPACES

Compared to the detailed articulation of design standards for some, although not all, privately owned public spaces, the Zoning Resolution is far less explicit and precise in enumerating standards for their ongoing operation. For certain spaces, the zoning stipulates an express requirement of maintenance including but not limited to

Appeals variance or special permit, or a City Planning Commission special permit, even though such spaces are not described specifically in the Zoning Resolution itself. As such, each of these public spaces has unique legal parentage, and the standards governing their design and operation are found in the Board of Standards and Appeals resolution or the City Planning Commission

litter control, care of vegetation, and oversight of permitted obstructions.³¹³ Occasionally the owner will have signed a "maintenance and operating agreement" that further describes the owner's obligation to keep the space clean, the vegetation healthy, and the materials in good repair.³¹⁴ More generally, of course, the owner must operate the space in ways that assure satisfaction of the basic access and design standards. For example, the owner must keep the space open and accessible to the public during required hours of access, including unlocking and opening gates at the appropriate times. The provision of required amenities in good repair is implicit in the legal obligations, in that an amenity in bad repair is no amenity at all. For example, drinking fountains and water features fail to satisfy their required status if they exist but do not function. The owner must also ensure that amenities that move, such as seating and tables, are provided in the correct numbers. Plaques must be affixed to the walls as promised, and replaced if stolen. The owner may have responsibilities for amenities that inherently involve an ongoing operational component, such as a food stand, kiosk, museum, rotating art exhibit, or weekly concert series. The owner may be obliged to make the space available to private, non-profit organizations several times a year, at no rental charge to the group.

The Zoning Resolution is silent, however, when it comes to the owner's "management" of use by members of the public within the privately owned public space. To what extent may an owner craft and apply its own rules of conduct for members of the public? A number of spaces already display signs posted by the owner listing a substantial number of forbidden activities.³¹⁵ The Zoning Resolution requires privately owned public spaces to host "public use," but never expressly defines what limits, if any, an owner may impose upon such public use. The Department of City Planning has taken the position that an owner may prescribe "reasonable" rules of conduct. In determining the definition of reasonable, the Department has looked to the rules of conduct applicable in City-owned parks for general guidance.³¹⁶ Thus, for example, the Department has considered a dog leash requirement, a ban on the consumption of alcoholic beverages, or a prohibition on sleeping in an indoor space to be reasonable. On the other hand, suggestions by owners that they be allowed to exclude "undesirable" persons on some basis other than improper conduct, or to set limits on the amount of time a member of the public may sit in or otherwise use a space, have been considered unreasonable.³¹⁷ Other fact patterns have and will arise to help sharpen the notion of reasonableness. For example, may an owner prohibit a member of the public from taking a photograph or speaking into a cassette recorder at a space? What about rules against listening to a radio, playing a musical instrument, or in-line skating? May an owner bar political candidates, organi-

to put the results in a form usable by members of the public, City agencies, local community boards, private non-profit civic organizations, design and planning professionals, and scholars, as a means of encouraging public space use, increasing legal compliance, and enhancing consideration of public policy issues. The partners agreed to combine intellectual, informational, staff, and financial resources to research all privately owned public spaces, develop a conceptual framework to present the research, and create and maintain a centralized record.

HOW THE RESEARCH WAS CONDUCTED

Following a three-and-a-half-year research project best characterized as a variant of forensic accounting, the partnership completed at the end of 1999 the task of preparing the centralized record and putting it in the format of a computer-based database. Although it is easiest to describe the steps taken in researching and creating the record in a sequential fashion, it should be emphasized that the process was necessarily iterative.

The first step of the research project was to assemble a group of experts for a wide-ranging scoping session about goals and products. Representatives of various constituencies connected with the production, operation, and use of privately owned public space, including individuals from civic organizations, the private real estate community, and the public sector, joined by professional designers and planners, attended the session and agreed with the project goal of assembling a publicly accessible record.

The next step was to select research methodologies and the ultimate format within which research results would be placed. Research methodologies were divided into data collection and data analysis phases. Data collection included the preparation of a list of all privately owned public spaces and the assembly of all legal documents and supporting material underlying them. Data analysis involved the determination of the legal basis and requirements for all 503 privately owned public spaces, based on the assembled legal documents and supporting material. The team conceived an analytical framework, converted to a database template, to guide the space-by-space inquiry, with sections devoted to legal basis, zoning computations, required size, required hours of access, required and permitted amenities, compliance and enforcement history, and sources of information. The analytical framework and template are described more fully later in this chapter.⁴ Given the various purposes sought to be achieved by the project, the team chose the vessel of a relational computer-based database to hold the results of this work.⁵

The third step of the research project involved the preparation of a preliminary comprehensive list of buildings with privately owned public space. Some of this information would come from lists compiled years earlier

in independent efforts undertaken by the Department of City Planning and Kayden,⁶ and some would be newly prepared. The project used base map analysis, field surveys, and review of citywide real estate information to cast as wide a net as possible, even if it resulted in ensnaring buildings ultimately stricken from the list. Maps dividing the city into numbered blocks and lots were examined to detect outdoor spaces located on lots with large commercial and residential buildings constructed since 1961.⁷

Field surveys placed surveyors in commercial and residential neighborhoods likely to have privately owned public space. The surveyors walked up and down every street and recorded every outdoor and indoor space that looked like privately owned public space. In the case of urban and residential plazas, the task would be easiest in that the Zoning Resolution required the posting of public space plaques or signs at the space. In the case of "as-of-right" plazas and arcades, however, surveyors would have to examine visual clues, such as the size and apparent date of the host building, and the size, dimensions, location, and quality of the apparent public space, to help with initial identification. For example, buildings constructed in the 1950s, or buildings four stories tall and occupying most of the zoning lot, would not be sponsors of privately owned public space, even if a space that otherwise resembled privately owned public space actually existed on the lot. Conversely, spaces at buildings constructed in the late 1960s with a height of 35 stories would be likely public space candidates. The project also compared lists of commercial and residential buildings compiled by private real estate brokerage firms, real estate research organizations, and commercial real estate publishers, with the information culled from base map analysis and field surveys. Although the initial list had more than 360 buildings, it was eventually reduced to 320.

The fourth step of the research project was the assembly of all documents and supporting materials necessary to determine the legal basis and requirements for every privately owned public space in the city. These documents divided into three categories: large-format, blueprint plans containing zoning computations and site plans submitted in support of an application for approval by a City agency; text-based documents recording special permits, authorizations, modifications, certifications, variances, and other actions taken by the approval-granting agency; and text-based documents filed by the owner, including restrictive declarations and performance bonds, affecting its private property. Although the project had some information collected over the years by the Department of City Planning and, to a lesser extent, by Kayden, it treated the research effort as if it were starting anew. As part of this "wide net" approach, the project conducted numerous research expeditions to relevant public agencies and their archives to retrieve all available information on privately owned public spaces. At the Department of Buildings, where developers and owners file applications

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Exhibit C

March 20, 1968

is an element in the formal process of discontinuing and closing unnecessary street areas.

The City Planning Commission recommends that the map under consideration be approved after adoption of the related map change (CP-20223).

DONALD H. ELLIOTT, Chairman, LAWRENCE M. ORTON, Vice-Chairman,
HARMON H. GOLDSTONE, ELINOR C. GUGGENHEIMER, WALTER
McQUADE, BEVERLY M. SPATT, JAMES G. SWEENEY, Commissioners.

ZONING

BOROUGH OF MANHATTAN

No. 4

(CP-20222)

IN THE MATTER OF an application dated February 15, 1968 pursuant to Sections 74-741 and 74-742 of the Zoning Resolution from U. S. Steel Corporation for a special permit for the following authorizations on a development including more than one block:

(a) To permit the total floor area to be distributed without regard for zoning lot lines;

(b) To permit the building comprising the development to be located without regard for all the applicable height and setback regulations; and

(c) To permit a tower to occupy more than 40 per cent of the lot area of the zoning lot on which it is located, but not more than 40 per cent of the entire site.

The development is on property bounded by Broadway, Cedar Street, Church Street and Cortlandt Street, Borough of Manhattan.

Plans for this proposed development are on file with the City Planning Commission and may be seen in Room 1500, 2 Lafayette Street, New York, N. Y.

(On February 29, 1968, Cal. No. 3, the Commission fixed March 13, 1968 for a hearing; on March 13, 1968, Cal. No. 36, the hearing was closed.)

On motion, the following favorable report was unanimously adopted:

March 20, 1968.

To Secretary, Board of Estimate from City Planning Commission:
On February 16, 1968, a representative of United States Steel Corporation filed an application, pursuant to Sections 74-741 and 74-742 of the Zoning Resolution, for a special permit for the following authorizations on a development including more than one block:

(a) To permit the total floor area to be distributed without regard for zoning lot lines;

(b) To permit the building comprising the development to be located without regard for certain of the applicable height and setback regulations; and

(c) To permit a tower to occupy more than 40 per cent of the lot area of the zoning lot on which it is located, but not more than 40 per cent of the entire site.

The development is on property bounded by Broadway, Cedar Street, Church Street and Cortlandt Street, Borough of Manhattan.

The property involved consists of two blocks, both in the fee ownership of the applicants. The northerly block is bounded by Broadway, Cortlandt Street, Church Street, and Liberty Street. The southerly block is bounded by Broadway, Liberty Street, Church Street, and Cedar Street.

The applicants propose to erect a 54-story office building on the northerly block. The floor area will exceed that which would be permitted by right for this block alone in the existing C5-5 District, but will not exceed the total floor area permitted for the two blocks as a whole. The building will comply with the applicable setback regulations on Broadway, Cortlandt Street, and Church Street, but will encroach on the setback required from Liberty Street. The building will constitute a tower occupying more than the 40 per cent of the area of the northerly block which would be permitted by right under the provisions of Section 33-45 of the Zoning Resolution, but will not exceed 40 per cent of the two blocks as a whole.

The application was the subject of a public hearing duly held by the Commission on March 13, 1968, Cal. No. 4.

No opposition to the application developed, and the hearing was closed. The application was considered further at a meeting of the Commission held on March 20, 1968, Cal. No. 4.

The Commission is of the opinion that this project makes a significant contribution to the development of the Lower Manhattan business area. By concentrating all of the office development on a single block the other block can be freed for ultimate development as a large and useful plaza of about 27,000 sq. ft. The proposed design by the architects shows an open landscaped area with trees, sitting areas and the necessary lighting. Thus

the City will gain what amounts to a permanent open park in the heart of one of the most densely built-up areas in the world. It is principally because of this public benefit that the Commission has viewed this application with favor.

The applicants have proposed a handsome office building of 54 stories with all service trucking below grade. They have developed an outstanding site plan, taking maximum advantage of the slope down of ten feet from Broadway to Church Street with a series of wide and shallow steps.

On the concourse levels of the building below the plaza they will provide a passageway that will link an extension of the Fulton Street station platform of the IRT Lexington Avenue Line to Cortlandt Street with the BMT at Cortlandt Street. At Church Street the passageway will connect into a tunnel under the BMT directly into the World Trade Center. Thus, a direct link between two subways and the PATH station will be achieved. This will result in some relief of the congested street, system particularly during the peak morning and evening rush hours.

The owners of the building have agreed to continue consultation with the City Planning Commission in the detailed development of its plans, and to make no substantive changes without the approval of the Commission.

Subsequent to the hearing, the applicant submitted plans "Z-1," and "Z-2" and "Plaza Level," dated March 15, 1968, showing a minor modification of the plans originally submitted. The Commission does not consider these plans to constitute a substantive change.

As a condition for the consideration of this application by the Commission, the following minimum requirements are found to be satisfied, in accordance with Section 74-741 of the Zoning Resolution:

(a) The zoning lots comprising the site for the development include land in more than one block, and are designated by their owner as a site all of which is to be developed as a unit;

(b) The total lot area of the zoning lots comprising the site is not less than 60,000 square feet, and each zoning lot occupies an entire block;

(c) The lot area of any zoning lot to be occupied by a building having more than the maximum floor area permitted as a matter of right is not less than 40,000 square feet; and

(d) Each zoning lot within the development has a regular or approximately regular shape, and for a distance of at least 190 feet is directly across the street from the other zoning lot included in the development.

As a result of investigation and study, the Commission has determined that the proposed development conforms with the findings required under Section 74-742 of the Zoning Resolution, as follows:

(a) That the distribution of floor area and location of the building will result in better site planning and better architectural relationships of the building and open spaces to adjacent streets and surrounding development and will thus benefit both the neighborhood and the City as a whole;

(b) That the distribution of floor area and location of the building will not unduly increase the bulk of the building in any one block or unduly obstruct access of light and air, to the detriment of the occupants or users of buildings in nearby blocks or of people using the public streets; and

(c) Although the tower will occupy more than 40 per cent of the lot area of the zoning lot on which it is located, at least 50 per cent of the entire site will be developed as a plaza.

Consequently, the Commission approves the application, subject to the conditions enumerated in the following resolution:

Resolved, By the City Planning Commission, that the application dated February 15, 1968, with plans entitled "Service Level" and "Concourse Level" dated February 1, 1968, and plans "Z-1," "Z-2" and "Plaza Level" dated March 15, 1968, of United States Steel Corporation for a special permit for the following authorizations on a development including more than one block:

(a) To permit the total floor area to be distributed without regard for zoning lot lines;

(b) To permit the building comprising the development to be located without regard for certain of the applicable height and setback regulations; and

(c) To permit a tower to occupy more than 40 per cent of the lot area of the zoning lot on which it is located, but not more than 40 per cent of the entire site, for a development on property bounded by Broadway, Cedar Street, Church Street, and Cortlandt Street, Borough of Manhattan, be and hereby is approved.

March 20, 1968

pursuant to Section 74-74 of the Zoning Resolution, subject to the following conditions:

1. The premises shall be developed in size and arrangement substantially as proposed and as indicated on the plans filed with this application;

2. The development shall comply with all applicable provisions of the Zoning Resolution, except for the modifications herein granted;

3. No certificate of occupancy for the proposed office tower shall be issued until the existing building at 135 Broadway shall be reduced to a one-story building with mechanical penthouse, 135 Broadway, as so reduced, must be demolished within six (6) months after United States Steel Corporation or its successors or assigns obtains exclusive possession of 135 Broadway and in no event later than June 30, 1980.

Any certificate of occupancy for the proposed office tower shall be limited to a maximum floor area of 1,809,562 square feet, as long as the present three-story building at 139 Broadway continues to stand (in addition to the one-story building with mechanical penthouse at 135 Broadway), 139 Broadway must be demolished no later than June 30, 1972, to be replaced with open plaza space in accordance with the tentative plan entitled "Plaza Level" dated March 15, 1968, filed with the application of United States Steel Corporation.

After the total demolition of 135 Broadway and 139 Broadway, the southerly block of the development including what is now Temple Street, will be completely devoted to plaza use.

4. No building or other structure above the plaza grade will ever be erected on the southerly block of the development including what is now Temple Street, without the prior consent of the City Planning Commission and the Board of Estimate.

5. The premises shall be developed by the applicants to improve the southerly block of the development including what is now Temple Street (when fee title to Temple Street is obtained by United States Steel Corporation) as a plaza with tree planting and landscaping, and paving and seating, substantially in accordance with the tentative plan entitled "Plaza Level" dated March 15, 1968, filed with the application of United States Steel Corporation.

6. The applicants shall construct a passageway under the Building from its easterly property line to its westerly property line as set forth in plans on file with the Commission in accordance with the plans entitled "Concourse Level" and "Service Level" dated February 1, 1968 filed with the application of United States Steel Corporation.

7. The special permit herein approved shall not take effect until the related city map changes (CP 20228 and CP 20229), which are the subject of separate reports dated March 20, 1968, Cal. Nos. 2 and 3, respectively, are approved by the Board of Estimate together with suitable agreement between the City and the developers, which agreement shall be recorded, run with the land, and bind all successors and assigns to United States Steel Corporation.

The above resolution, duly adopted by the City Planning Commission on March 20, 1968, Cal. No. 4, together with a copy of the application and plans of the proposed building are herewith filed with the Secretary of the Board of Estimate pursuant to Section 74-10 of the Zoning Resolution.

DONALD H. ELLIOTT, Chairman, LAWRENCE M. ORTON, Vice-Chairman, HARMON H. GOLDSTONE, ELYNOR C. GUGGENHEIMER, WALTER McQUADE, BEVERLY M. SPATT, JAMES G. SWEENEY, Commissioners.

On motion, the Commission adjourned at 9.40 a. m. to meet Wednesday, March 13, 1968, at 10 a. m., in Room 16, City Hall Manhattan.

SALVATORE C. GAGLIARDO, Acting Secretary.

People v. Nunez, Docket No. 2011 NY 082891

Memorandum of Law of *Amicus Curiae*
New York Civil Liberties Union

Exhibit D

The New York Times

Archives

A Public Realm on Private Property; New study identifies and rates hundreds of spaces that earned zoning bonuses.

By DAVID W. DUNLAP
Published: October 15, 2000

THERE is a realm of public space in New York City more than 80 acres in extent -- greater, that is, than Battery Park, Carl Schurz Park, Morningside Park and Tompkins Square Park combined -- of which the public knows almost nothing.

The city paid for this space through a 39-year-old incentive program that has permitted developers who furnished plazas, arcades, walkways and atriums to build 16 million square feet more floor area than would ordinarily have been allowed. That is roughly seven Empire State Buildings above and beyond normal zoning limits.

But no methodical records were kept of the diverse, dispersed public spaces that resulted. So while community groups struggled over this ill-kempt plaza or that padlocked arcade, no one had a comprehensive inventory of privately owned public space: where it was, what it was, who owned it, how they had benefited, what amenities were required, how many are actually offered and whether the space was being kept truly public.

That is about to change. A book analyzing every one of the city's 503 privately owned public spaces at 320 buildings in Manhattan, Brooklyn and Queens is to be published Friday. It rates all the spaces. Fifteen were found to be of such high quality (what the book terms destination spaces) that they draw visitors from across the city, while 66 neighborhood spaces attract people from the community. But 207 marginal spaces, to use the authors' words, are poorly enough designed or maintained that they actually deter the public from using them.

The study, by Jerold S. Kayden of Harvard University, the City Planning Department and the Municipal Art Society, involved three and a half years of field surveys and what Mr. Kayden called "forensic accounting," reconstructing a broken trail of approvals, permits and agreements. It has already made news with its conclusion that more than half the spaces have failed in some way.

The Giuliani administration has announced an enforcement effort including three civil lawsuits against the owners of public spaces that city officials believe have been illegally stripped of amenities, illegally closed to the public or illegally annexed by commercial interests.

A more enduring consequence of the study, however, is likely to be its enumeration of all 3,584,034 square feet of privately owned public space. In essence, it opens New Yorkers' eyes to the amenities to which they are entitled and informs landlords of their obligations. The book, "Privately Owned Public Space: The New York City Experience" (John Wiley & Sons), will later be supplemented with a database on the planning agency's Web site.

What makes this census of so much potential use to open-space advocates is that it casts light on many public areas that, by design or maintenance, are not self-evident. It is almost impossible to demand unimpeded access or to enforce requirements for amenities like seating, plantings, drinking fountains and bicycle racks when neither citizens nor city officials know that a space is designated for public use in the first place.

Frequently, there are no signs to say the public is welcome. Sometimes, owners or tenants implicitly assert that spaces are private by installing doors, gates, fences and barricades, or by allowing restaurants and stores to take over areas set aside for the public, a phenomenon that Mr. Kayden, an associate professor in the Harvard Graduate School of Design, describes as "cafe creep."

Few New Yorkers, for example, realize that the four-story limestone-clad atrium in the Henri Bendel store at 712 Fifth Avenue, between 55th and 56th Streets, is technically part of a "permanent passageway," 2,100 square feet of public space that extends to the midblock lobby of the adjoining office tower. This particular space did not yield a development bonus but was required under the terms of a special permit granted to the project.

The new study states that the Fifth Avenue atrium "at all times shall be restricted to unobstructed lobby use and may not be used for any retail sales activity." However, on Wednesday, six tables, eight chairs and eight stools were set up in the atrium for demonstrating Laura Mercier cosmetics. A representative of Laura Mercier in the store said that no selling was done in the atrium, only brief makeovers for customers interested in sampling products.

But the book calls it a "commercial takeover." And Kent L. Barwick, president of the Municipal Art Society, said the problem recurs. "What Bendel keeps doing is wrong," he said. "They're bringing the department store into the temple. That activity diminishes the grandeur of that space."

Also at issue is the ability of visitors to view the Lalique windows that date to 1910, when the landmark building was a Coty perfumery. Anthony Hebron, a spokesman for the Limited Inc., which owns Bendel, said the company was committed to assuring "continued public viewing access," although he acknowledged that "there have been some times when a little of the space was briefly occupied." The Lalique windows are being refurbished, he said.

Bendel is scarcely alone in appropriating open space for its own use. In one instance, the city government itself has done so.

"It stands as a perfect example of the lack of information that existed and of the value of the book," said David Karnovsky, counsel to the planning department.

Along the Washington Street facade of the 40 Rector Street office building, a sliver of plaza -- really no more than a wide place in the sidewalk -- has been taken over by a one-story scooter shed for the Police Department Downtown Center. It was built in cooperation with the Alliance for Downtown New York, which manages the lower Manhattan business improvement district.

"Neither I nor, indeed, anyone here had any idea that this little area was a bonused plaza," said Carl Weisbrod, president of the Alliance, in an e-mail message. In its days as a restaurant, he said, the space was hidden from the street by a high fence.

"The building owner suggested that we use this area for the First Precinct scooters and we were only too happy to do so," Mr. Weisbrod said. "In fact, one might say that the area is more public now than at any time in the recent past."

Joseph B. Rose, director of the planning agency and chairman of the City Planning Commission, noted that the police substation proposal had gone through public review, even though no one involved realized at the time that it was being built on 795 square feet of bonus-generating space.

Another public space that eludes recognition is the midblock plaza behind the Westvaco Building, 299 Park Avenue, from 48th to 49th Street. It looks like the driveway that nearby signs declare it to be. Gates at either end declare: "Not a Walkway."

BUT according to the survey, this "Private Driveway" is in fact part of a 15,313-square-foot plaza around the building that generated a development bonus of 153,130 square feet for Fisher Brothers, which built and still owns the tower. The midblock part of the plaza is roughly 7,000 square feet. At a bonus rate of 10 square feet of floor area for every square foot of plaza, that would mean it accounted for 70,000 square feet of office space, or almost three floors in the 42-story building.

The survey reports statements from the owner that the plaza is used by the Secret Service. (The Waldorf-Astoria Hotel is across the street.) However, one car parked there on a recent afternoon was registered to Fisher Brothers. Telephone and e-mail messages seeking comment on the plaza from Fisher Brothers were not returned.

One space that partly disappeared even before the new study could draw it to the attention of passers-by is the arcade on the Lexington Avenue side of 245 Park Avenue.

The 14,098-square-foot arcade generated a bonus of 42,294 square feet, more than a full floor of the 44-story tower. Now, about 65 feet of the arcade along Lexington Avenue, at the 46th Street corner, have been filled in. The owner, Brookfield Financial Properties, may put a restaurant there.

According to city planners, the rationale began with a calculation by Brookfield that mechanical space had increased in the building. Because mechanical space is not counted by zoning rules as floor area, that would technically have reduced the overall square footage of the building, thereby reducing the zoning bonus needed and, in turn, the commensurate amount of public space the owner is obliged to provide.

Brookfield said in a statement that it had to enlarge mechanical space in the 33-year-old building to meet tenants' needs for electric power and air-conditioning. "While that step decreases the amount of usable office space in the building and the public space allotment," the statement said, "it was essential to ensuring 245 Park's future as a Class A property and significant contributor to the city's tax rolls."

It is not the first time that such an alteration has been made to public space without public review. Speaking generally of the practice, Mr. Rose said: "Public space cannot vanish overnight because of a recalculation of floor area. These were agreements between the public and private sector.

"It's not hard to imagine such modifications to existing space serving the public interest," Mr. Rose said, "but the important thing is that the public have the right to review and approve such modifications."

The City Planning Department has filed three civil lawsuits and issued eight violation notices with the Environmental Control Board, an administrative tribunal.

The lawsuits are against 40 Broad Street, an office building downtown with a plaza from which the required benches, planters and trees have been removed; Parc East Tower, an apartment building at 240 East 27th Street, which has locked a midblock passageway to its mini-park and waterfall; and Worldwide Plaza on Eighth Avenue, between 49th and 50th Streets, where city officials say that the required chairs and tables have been appropriated by restaurants on the edge of the plaza.

Open-space advocates believe the study can be put to use at a grassroots level. Thomas Balsley, a landscape architect who has designed numerous public spaces, envisions a "plaza posse" of citizens and community groups that would monitor spaces and report problems to the city.

Complaints about plazas that are not open or that fail to provide required amenities can be made to the Buildings Department at (212) 227-7000, Monday through Friday, 8 a.m. to 5 p.m. The caller should press 2 at the prompt, refer to "public space" and be as specific as possible about the address and problem.

On Oct. 28, the Municipal Art Society will send out volunteers to update the field surveys, in an operation dubbed the Holly Watch, after the late William H. (Holly) Whyte, a student of urban open space. This event is tied into the society's exhibition, "The World's Most Expensive Public Space," at the Urban Center, 457 Madison Avenue, between 50th and 51st Streets.

Some results may be surprising. M. Barry Schneider, the chairman of Community Board 8 on the Upper East Side, has long been vexed by the locked gate to the garden of the Concorde, 220 East 65th Street. "It's a lovely plaza with a pool and rushing water and you can't get there from here," he said.

A glimpse at the survey, however, reveals that it is not the garden but a garage driveway that constitutes the public space.

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People v. Nunez, Docket No. 2011 NY 082891

Memorandum of Law of *Amicus Curiae*
New York Civil Liberties Union

Exhibit E



CITY PLANNING COMMISSION

September 19, 2007 | Calendar No. 21

N 070497 ZRY

IN THE MATTER OF an application submitted by the Department of City Planning pursuant to Section 201 of the New York City Charter for an amendment of the Zoning Resolution of the City of New York to revise provisions related to privately owned public plazas, Community District 4, Borough of the Bronx; Community District 2, Borough of Brooklyn; Community Districts 1, 2, 3, 4, 5, 6, 8, 10, 11, and 12, Borough of Manhattan; and Community Districts 2 and 12, Borough of Queens.

The application for an amendment of the Zoning Resolution was filed by the Department of City Planning on May 31, 2007, to revise and update design and operational standards related to privately owned public plazas.

BACKGROUND

The first zoning regulations permitting floor area bonuses in exchange for the construction of privately owned public plazas were adopted in 1961 and, since that time, over 250 such spaces have been created in Manhattan, Brooklyn, and Queens. While each of these spaces provides much-needed public open space in the dense commercial and residential districts of New York City, many of these plazas are deficient in their configuration, elevation, amenities, or other design features. These deficiencies are at least partially attributable to the lack of specific design guidelines or outdated criteria regarding the design of successful public spaces.

Public plazas, the subject of this application, are a subset of a class of open spaces commonly termed Privately Owned Public Spaces (POPS). This term collectively refers to several types of

PROPOSED ZONING TEXT AMENDMENT

The Department of City Planning has maintained detailed records of all bonus plazas created under the various zoning provisions and has continued to visit plazas and document their successes and shortcomings. This ongoing analysis of bonus plazas has revealed that, while the introduction of residential and urban plaza standards and gradual refinement of these guidelines has improved the quality of plazas, there are still numerous instances of plazas that lack basic amenities or exhibit design features that inhibit public use and enjoyment. For example, it is not unusual to find plazas that provide limited seating options, deliberately inhibit seating with spikes, and have obstructions that block visibility within the plaza area. These types of deficiencies are at least partially attributable to outdated and inconsistent standards in the existing zoning text.

In addition, the zoning emphasizes a distinction between residential and urban plazas that is no longer meaningful or useful. Residential plazas, while originally envisioned for residential buildings in residential zoning districts, are increasingly provided in commercial districts that have developed a strong mixed-use character such as Ladies' Mile and eastern Chelsea. Therefore, regulations that were intended to distinguish between the unique needs of residential and commercial user populations are no longer justified or appropriate.

The Department therefore proposes revisions to the standards for 1961 plazas, urban plazas, and residential plazas and the creation of a new plaza type: the "public plaza". The proposed text

People v. Nunez, Docket No. 2011 NY 082891

Memorandum of Law of *Amicus Curiae*
New York Civil Liberties Union

Exhibit F

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CITY COUNCIL

CITY OF NEW YORK

-----x

THE TRANSCRIPT OF THE MINUTES

of the

SUBCOMMITTEE ON ZONING

And FRANCHISES

-----x

October 9, 2007
Start: 10:05 a.m.
Recess: 12:04 p.m.

City Hall
Committee Room
New York, New York

B E F O R E:

TONY AVELLA

Chairperson,

COUNCIL MEMBERS: Simcha Felder
Eric Gioia
Robert Jackson
Melinda Katz

LEGAL-EASE COURT REPORTING SERVICES, INC.
17 Battery Place - Suite 1308
New York, New York 10004
(800) 756-3410

14 maintained, less well used and frequently these are
15 the spaces that come to us with applications for
16 night time closing because of safety issues. The
17 lobby, for example, doesn't front on these spaces.

18 COUNCIL MEMBER KATZ: What is the out
19 provision? Let's just say that a building is
20 designed -- and I'm worried about this more in
21 other boroughs besides Manhattan. What are the out
22 provisions? A developer wants to put an open air
23 area in there. It would be good for the building.
24 The residents of the building think it's a good --
25 you know the future residents -- It would up the

15

1 ZONING AND FRANCHISES

2 value for them. What's the out provision?

3 MR. BOTSFORD: The ultimate out
4 provision is a special permit which is available to
5 modify any of the design standards of public plazas
6 due to unique site conditions, for example. So if
7 there is an extraordinary circumstance where the
8 building entrance would need to be located elsewhere
9 that could be achieved via special permits.

10 COUNCIL MEMBER KATZ: Any
11 extraordinary circumstances are defined by whom?

12 MR. BOTSFORD: Well the extraordinary

13 circumstances -- That's not actually in the zoning
14 regulation, that specific language. That was my
15 language.

16 COUNCIL MEMBER KATZ: Really? You
17 know I kind of thought that.

18 So it would be a special permit
19 basically to the Council and have to go through the
20 whole process?

21 MR. BOTSFORD: Yes. Yes, full
22 process.

23 I'd also like to note that this isn't
24 also required that this be the only building
25 entrance. For example, there could be other

16

1 ZONING AND FRANCHISES

2 entrances that front on other streets.

3 COUNCIL MEMBER KATZ: I'm just
4 thinking that sometimes you want a plaza, even if
5 it's not in the perfect location.

6 The second thing that we talked about
7 is the barriers of the open air cafe. I understand
8 the idea of not wanting to cut it off, but my
9 concern came more so with the idea of painting the
10 ground in order to see that there's no creep out
11 into the plaza. Is that a requirement, or is that

People v. Nunez, Docket No. 2011 NY 082891

Memorandum of Law of *Amicus Curiae*
New York Civil Liberties Union

Exhibit G



NYCLU

NEW YORK CIVIL LIBERTIES UNION

125 Broad Street
New York, NY 10004
212.607.3300
212.607.3318
www.nyclu.org

Taylor Pendergrass
Senior Staff Attorney
Direct Line: 212.607.3344
tpendergrass@nyclu.org

HAND DELIVERED AND SENT VIA FIRST CLASS MAIL

January 9, 2012

Commissioner Robert LiMandri
Department of Buildings
280 Broadway, 7th floor
New York, NY 10007

Re: Violations at 1 Liberty Plaza

Dear Commissioner LiMandri:

The New York Civil Liberties Union, the Center for Constitutional Rights, and the National Lawyers Guild's New York City chapter write regarding the ongoing violations of city law at 1 Liberty Plaza (165 Broadway), owned and managed by Brookfield Office Properties. Since November 15, 2011, metal barricades have encircled the perimeter of Liberty Plaza. In addition, members of the public are subject to *ad hoc*, arbitrary and inconsistent rules and conditions restricting their use of the park. These practices have substantially modified Liberty Plaza, making it a wholly inhospitable space for the public. Putting aside for the moment the serious constitutional concerns raised by these practices, it is abundantly clear that such restrictions are in direct conflict with zoning laws, Brookfield's legal obligations under a 1968 special zoning permit, and longstanding City policy. These restrictions significantly interfere with the public's use of Liberty Plaza on an ongoing and daily basis, and should be ended immediately.

A. Laws governing Liberty Plaza require unobstructed public access and prior approval of design modifications.

By the terms of a March 20, 1968 special zoning permit, the owner of 1 Liberty Plaza gained valuable zoning concessions in exchange for constructing and maintaining what is now Liberty Plaza as a "permanent open park" for the "public benefit."¹ Under City zoning laws, Liberty Plaza is defined as a "public plaza," and one over five hundred privately owned public spaces ("POPS") in New York City.² Under these laws, at least 50% of the sidewalk frontage of a public plaza must be free of obstruction, and circulation paths must connect to each of the street

¹ City of New York Special Zoning Permit, CP-20222, No. 4, p.215 (March 20, 1968).

² NYC Zoning Resolution § 12-10.

frontages.³ In addition, any proposed modifications to public plaza's design must first go through an approval process before those changes can be made.⁴

Furthermore, an owner's ability to restrict the public's use of a public plaza is constrained by zoning laws and by City policy. An owner of a public plaza may not, of course, forbid conduct in public plazas that is otherwise protected by the constitution. In addition, an owner "shall not prohibit behaviors that are consistent with the normal public use of a public plaza."⁵ Any other restrictions an owner seeks to impose on the public's ability to use or access a public plaza must be "reasonable," pursuant to long established City policy.⁶ Finally, any prohibition on conduct in a public plaza must be clearly posted in writing.⁷

B. Blocking Access to Nearly All of Liberty Plaza Violates City Zoning Law and Brookfield's Legal Obligations.

For nearly two months public ingress and egress to Liberty Plaza has been blocked by metal barricades encircling the public plaza. The public is only able to enter and exit Liberty Plaza at two gaps, and at these points members of the public have been subject to searches of their personal belongings by security personnel.⁸

As noted above, to ensure the public's ability to freely enter and exit public plazas, zoning law requires that at least 50% of Liberty Park's frontage be unobstructed, and also mandates unrestricted access to and from circulation paths. The metal barricades encircling Liberty Plaza enclose far more than 50% of the frontage and block access to major nearby walkways, in violation of zoning laws.

In addition, a barricaded encirclement patrolled by security personnel seriously interferes with the public's use and enjoyment of Liberty Plaza, in violation of Brookfield's legal obligation to maintain the space as a permanent open park. Any member of the public would be reluctant or unwilling to enter an area closed in by metal barricades with only two exits. This modification presents even more serious safety concerns when large numbers of people are attempting to enter or exit the park through two narrow gaps in the barricades. The barricades have all but ended Liberty Plaza's role as a functioning public plaza.

³ NYC Zoning Resolution §§ 37-721; 37-723; 37-726.

⁴ NYC Zoning Resolution §§ 37-62 et. seq; 37-78; 74-91.

⁵ NYC Zoning Resolution § 37-752.

⁶ The New York City Department of City Planning, Jerold S. Kayden, and the Municipal Art Society of New York, *Privately Owned Public Space: The New York City Experience* (John Wiley & Sons, 2000), p.38 ("The Department of City Planning has taken the position that an owner may prescribe 'reasonable' rules of conduct").

⁷ NYC Zoning Resolution § 37-73 et. seq.

⁸ Security personnel at Zuccotti Park at various times have included NYPD officers, off-duty NYPD officers employed by Brookfield, and private security staff employed by Brookfield, who often act in concert with, take direction from, and rely upon, NYPD officers.

Finally, the barricades constitute a major design modification to Liberty Plaza—and as their presence at the park approaches two months, a seemingly permanent one—that circumvented the approval process required before the design of a public plaza can be altered. The barricades should be removed immediately.

C. Constantly-Changing Unwritten Rules Unreasonably Restrict the Public's Use of Liberty Plaza in Violation of City Law.

Brookfield has purported to adopt written “rules of conduct” governing Liberty Plaza. The manner in which these rules were adopted raise serious constitutional concerns, as do the rules themselves.⁹ Even assuming these regulations could be validly enforced, however, security personnel go far beyond these written rules by selectively enforcing ever-shifting and unwritten *ad hoc* prohibitions. These unjustifiable restrictions are a serious, ongoing and daily infringement on use of the public plaza.

At the heart of these restrictions is the assertion of security personnel that certain items are prohibited in the park. The written “rules of conduct” do not, of course, prohibit any particular item from entering Liberty Plaza. Instead, consistent with zoning laws, the written rules forbid only conduct. These rules do not, and could not, entitle security personnel to turn an individual away from a public plaza simply because he or she has a personal item that security personnel speculate might be potentially used to engage in prohibited conduct sometime in the future.

Nevertheless, security personnel have declared that certain personal possessions are prohibited in Liberty Plaza. The unwritten list of prohibited items varies daily and is wildly inconsistent. Individuals have been refused entry for possessing food, musical instruments, yoga mats, cardboard signs, shawls, blankets, “prohibited containers,” chairs, bags of varying sizes, and numerous other personal items. To effectuate the enforcement of the unwritten list of “prohibited items,” security personnel have stopped individuals attempting to enter Liberty Plaza and forced them to submit to a search of their personal belongings. Individuals who refused to permit their personal belongings to be searched have been prohibited from entering the public plaza.

Almost all the items that have been prohibited in Liberty Plaza—signs, bags, containers, food, musical instruments, etc.—have also been allowed to enter the park at other times. Who is searched and what is prohibited is arbitrary and inconsistent. It varies by the day, the type of activity in the park at the time, the attire of the person attempting to enter, and the caprice of security personnel.

The inconsistent and selective enforcement of unwritten and constantly changing rules, and preemptive searches of individuals attempting to enter the park, violates the terms of the special zoning permit which obligates Brookfield to maintain Liberty Plaza as a permanent open park for the public benefit. These practices also violate zoning laws by prohibiting behavior that

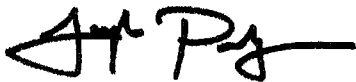
⁹ In addition, as written and posted by Brookfield, the rules appear to violate City zoning laws governing the manner and form for “prohibition signs”. See N.Y. Zoning Resolution §§ 37-747; 37-751; 37-752.

is normally permitted in public plazas. Finally, selectively enforcing unwritten rules is patently unreasonable, and therefore violates longstanding New York City policy constraining the type of regulations on conduct an owner may adopt in a public plaza.

Metal barricades, preemptive searches, and selectively enforcing ever-changing unwritten rules have become established features of Liberty Plaza. These practices infringe on clearly established constitutional rights, and they also violate zoning laws, Brookfield's legal obligations under the 1968 special zoning permit, and City policy. As the Mayor has noted with regard to Liberty Plaza, "we must never be afraid to insist on compliance with our laws."¹⁰ These practices violate city law and should be ended immediately, restoring Liberty Plaza to its place as a permanent open park that is open and accessible to all members of the public on an equal basis.

We request a prompt final determination from the Department of Buildings¹¹ and/or any other appropriate New York City agency, in writing, with regard to this complaint.

Sincerely,



Taylor Pendergrass
Senior Staff Attorney
New York Civil Liberties Union

Baher Amzy
Legal Director
Center for Constitutional Rights

Gideon Orion Oliver
President
National Lawyers Guild, New York City Chapter

¹⁰ Statement of Mayor Michael R. Bloomberg on Clearing and Re-Opening of Zuccotti Park (Nov. 15, 2011).

¹¹ NYC Charter § 643 (Department of Buildings "shall administer and enforce" zoning laws); NYC Zoning Resolution § 71-00 (same); NYC Zoning Resolution § 37-78(d) (an owners' failure to comply with requirements applicable to public plazas "shall constitute a violation" of zoning laws and Department of Buildings may enforce the violation by revocation of building permit, revocation of certificate of occupancy, or any "other applicable remedies").

People v. Nunez, Docket No. 2011 NY 082891

Memorandum of Law of *Amicus Curiae*
New York Civil Liberties Union

Exhibit H

COMMUNITY BOARD #1 – MANHATTAN
RESOLUTION

DATE: OCTOBER 25, 2011

COMMITTEES OF ORIGIN: QUALITY OF LIFE AND FINANCIAL DISTRICT

QUALITY VOTE

COMMITTEE VOTE: 8 In Favor 0 Opposed 0 Abstained 0 Recused

FINANCIAL DISTRICT

COMMITTEE VOTE: 5 In Favor 0 Opposed 0 Abstained 0 Recused

PUBLIC MEMBERS: 2 In Favor 0 Opposed 0 Abstained 0 Recused

BOARD VOTE: 33 In Favor 3 Opposed 1 Abstained 0 Recused

RE: Occupy Wall Street protest in Zuccotti Park

WHEREAS: Community Board 1 (CB 1) supports Occupy Wall Street's (OWS) First Amendment right to protest, and

WHEREAS: CB 1 supports OWS's First Amendment right to free assembly, and

WHEREAS: CB 1 has previously been on record twice as supporting extension of the "millionaire's tax" to offset budget cuts to education, an issue that has also been raised by many in OWS, and

WHEREAS: CB 1 opposes the use of excessive and unnecessary force by the City of New York and/or Brookfield Office Properties to address this situation, and

WHEREAS: CB 1 believes that preserving Constitutional rights and also proactively addressing the increasing frustration among many local residents and small businesses regarding health, public safety, noise, sanitation and other community concerns are in no way mutually exclusive, and indeed both can be accomplished, and

WHEREAS: CB1 is concerned that the magnitude of the situation at Zuccotti Park is not being fully documented because calls to 311 have been turned away on the grounds that the NYPD is already aware of the situation; now

THEREFORE
BE IT
RESOLVED

THAT: CB 1 calls on OWS, the City of New York, all elected officials representing Lower Manhattan, Brookfield Properties and all major stakeholders to come together to address the following issues which are adversely affecting quality of life in this community:

- 1) Limit use of drums, trumpets, tambourines, bugles, air horns, shouting and chanting, and all other sources of noise to two hours per day, in midday.
- 2) Arrange access to bathrooms off-site, and eliminate use of retail shops and residential building doorways as bathroom facilities.
- 3) Enforce previously declared commitments by OWS to adopt all of the provisions of the Good Neighbor Policy (attached) that have been previously agreed to in eight prior meetings with OWS over the past four weeks.
- 4) Work with local small businesses to address economic impacts.
- 5) CB 1 requests a meeting with NYPD as soon as possible to discuss the necessity for extensive deployment of pedestrian barricades in the central Financial District, and the removal of all except those deemed absolutely necessary for security and public safety.
- 6) CB1 urges the NYC Department of Information Technology and Telecommunications to establish a consistent policy of accepting, recording, tracking and referring to the appropriate city agencies all 311 calls regarding disturbances in and around Zuccotti Park.

People v. Nunez, Docket No. 2011 NY 082891

Memorandum of Law of *Amicus Curiae*
New York Civil Liberties Union

Exhibit I

Office of Manhattan Borough
President Scott M. Stringer
1 Centre Street, 19th Floor
New York, NY 10007

ph. 212-669-8300
fax. 212-669-4305

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Press Releases

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Statement by BP Stringer, Congressman Nadler, and State Senator Squadron upon Passage of a Community Board 1 Resolution Regarding Occupy Wall Street

Last week, we called on Brookfield to delay its clean-up of the park to allow for dialogue and, ultimately, a long-term solution that works for the community and protects the First Amendment rights of OWS.

Tonight's Community Board resolution is an attempt to establish a sensible framework that respects the protesters' fundamental rights while addressing the very real quality of life concerns for residents and businesses around Zuccotti Park. Protecting the needs of Lower Manhattan and the rights of OWS do not need to be mutually exclusive.

We must all work together to make that framework a reality.

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