

## Manhattan Community Board Five

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August 28, 2023

James S. Oddo  
Commissioner  
Department of Buildings  
280 Broadway  
New York, NY 10007

**RE: 264 West 46th St/ 740 Eighth Avenue, Block 1017 Lot 1, Job 121208326**

Commissioner Oddo:

The Land Use, Housing and Zoning Committee of Manhattan Community Board Five (CB5) wishes to express to you our concerns about a recent Department of Buildings (DOB) decision that we think was made in error. Through press reports and correspondence from a group called the Committee for Environmentally Sound Development, we learned that DOB agreed to permit a 300-foot free-fall/drop ride, at 740 Eighth Avenue (aka 264 West 46th Street) in Manhattan (Block 1017, Lot 1, 64,050 square feet) which is in a C6-4 and C6-5 zoning district, as an Accessory Use to a new development that has the principal Use as a Transient Hotel.

The Land Use, Housing and Zoning Committee of Manhattan Community Board Five had interactions and discussions with the developer, Extell, in August and September 2022, when we recommended the approval of the transfer of 227,304 square feet of development rights from the Ambassador Theater to the 740 Eighth Avenue receiving site. As part of those discussions, the developer promised to show us the design for the new development before it was built. As to date, we have not seen any designs yet. We are attaching that 2022 resolution.

After learning the latest news, we contacted Extell and asked to speak with them about this matter. Extell provided their attorney, Paul Selver, to discuss the issue with CB5's Land Use, Housing, and Zoning (LUHZ) Committee at our monthly committee meeting on June 21, 2023.

At that meeting, we learned that the developer is planning for a 300-foot drop-ride with seating for 12 passengers that will be enclosed within a portion of the stem/core that starts at the 32<sup>nd</sup> Floor, rises 300 feet, and has an observation deck and restaurant above the top of the drop-ride. The developer's attorney also asserted that:

1. the ride is Accessory to the Use as a Transient Hotel;
2. the ride does not fall into Use Group 15 for Amusement Parks because the ride is fully enclosed and not open to the air;
3. unless the Zoning Resolution (ZR) explicitly prohibited the ride, the ride is permitted;
4. if the building's principal Use was as an Amusement Park, the ride would not be permitted at Eighth Avenue;
5. other rides were and are permitted before in the Times Square area;

6. there are court precedents for allowing Accessory Use by looking at examples of what is “customary” from other jurisdictions in the United States;
7. DOB, the Zoning Resolution, and the courts should also look at Accessory Use examples as to what is “customary” from other jurisdictions around the world; and
8. because of all of the above reasons, DOB was obligated to permit an enclosed amusement park-style ride as an Accessory Use.

Additionally, at the June 21st LUHZ committee meeting, we also heard from the President of the Committee for Environmental Sound Development, Olive Freud, who said that the group hired George Janes, an urban planner to challenge the DOB decision to permit the drop ride and their challenge was submitted to DOB on May 26, 2023.

We ask you to please have DOB staff carefully review these differing interpretations of Accessory Use.

Accessory Use is defined in the Zoning Resolution in Article 12-10 as:

An “accessory use”:

- (a) is a use conducted on the same zoning lot as the principal use to which it is related (whether located within the same or an accessory building or other structure, or as an accessory use of land), except that, where specifically provided in the applicable district regulations or elsewhere in this Resolution, accessory docks, off-street parking or off-street loading need not be located on the same zoning lot; and
- (b) is a use which is clearly incidental to, and customarily found in connection with, such principal use; and
- (c) is either in the same ownership as such principal use, or is operated and maintained on the same zoning lot substantially for the benefit or convenience of the owners, occupants, employees, customers, or visitors of the principal use.

CB5’s LUHZ Committee believes that the drop-ride does not meet the definition of section (b). CB5’s LUHZ Committee was unable to clearly establish that section (c) definition is met as the developer’s representative could not confirm that the drop ride would be in the same ownership as the hotel, or would be operated and maintained on the same zoning lot substantially for the benefit or convenience of the owners, occupants, employees, customers, or visitors of the principal use, as the drop ride will be available and promoted to the public at large and not specifically for hotel patrons.

The developer’s attorney repeatedly told M-CB5’s LUHZ committee that the principal use of the building is as a Transient Hotel. The term Transient Hotel is defined in the Zoning Resolution and within the definition for Transient Hotel examples of Accessory uses are listed that don’t include Amusement Parks. Additionally, the Zoning Resolution classifies Transient Hotels as a Use Group 5. Whereas, the Amusement Parks fall into Use Group 15. Use Group 15 is currently only permitted in certain areas of Brooklyn that are in and close to Coney Island. Use Group 15 is not zoned in any other parts of the city, including Manhattan Community District 5.

However, we are very concerned that DOB has not sufficiently reviewed the “customary” portion of section (b) of the Accessory Use definition. Furthermore, we believe that a 300-foot drop-ride at a Transient Hotel cannot meet the “customary” portion of the current definitions of Accessory Use at a building that has a principal Use as a Transient Hotel. We believe the plain language of the Zoning Resolution must be applied to any location in New York City, including the C6-4 or C6-5 zoning districts of 740 Eighth Avenue.

Currently, neither we nor the developer can show a prior precedent for a 300-foot ride at any hotel in New York City. Instead, the developer has pointed to examples that either involve buildings with principal Uses other than Hotels, or they point to hotels in localities where New York City’s Zoning Resolution does not have jurisdiction and where localities zoning rules don’t apply to New York City.

Of all the examples that the developer gave that were, are, or will be located in New York, none were/are on top of a building that had/has a principal use as a Transient Hotel. If no previously operating hotel in New York City and no currently operating hotel in New York City has ever been permitted a Use Group 15 style ride within it or on top of it, we fail to see how these examples can help this proposed ride meet the “customary” portion of the definition of Accessory Use.

Also, CB5’s LUHZ Committee would like to point out that zoning rules in non-overlapping government jurisdictions should not have any bearing over DOB’s decision making. Zoning is a local power and is not a federal power. Each state and its local divisions have their own rules and case law. We would ask DOB to review the permit for a drop ride at 740 Eighth Avenue in light of the precedents that were set by the 2014 Board of Standards and Appeals (BSA) decision 128-14-A, which was based on the underlying decisions by the New York State court system that include the 1973 decision of Gray v. Ward, 75 Misc-2d 50 and affirmed in the decision 44 Ad 597 (2d Dept 1974).

Additionally, because zoning is a local issue. CB5’s LUHZ Committee would like to highlight some of the differences in the localities of the non-New York examples the developer also cited:

1. Las Vegas Strat Hotel, Casino & Tower has four rides on top of the 1000-foot free-standing tower that is a part of the campus of adjacent buildings and is located in the city proper of Las Vegas just north of Paradise, Nevada. The population of the metropolitan area of Las Vegas is around 2.2 million. However, the City of Las Vegas has a population around 660,000 and has a population density of around 5,050 per square mile.
2. Circus Circus has an indoor amusement park that is a separate 5-acre building called the Adventuredome on their campus of three hotel towers, five motel buildings, three parking garages, a RV parking area, a permanent circus “tent”, a casino, and a slot hall. Circus Circus is located in Winchester, NV (between Las Vegas proper and Paradise). Winchester has a population density of around 7,400 per square mile in its 4.3 square miles of area.
3. The Gaylord Palms in Kissimmee, FL has a permanent outdoor water park on its campus that also includes a 4.6-acre glass-enclosed atrium that is surrounded by a hotel that is divided into 4 themed-sections, and a convention center. A 20,000 square-foot temporary ice park is created in the winter time in a refrigerated, temporary enclosure that maintains the ice carvings at 9 degrees Fahrenheit. From press photos and from its website, there has been an ice slide that seems to be around 10-12 feet in height and there have been inner-tube slides that seem to be around 2 stories in height. There is a plausible argument that these two TEMPORARY rides are within the building structure of a hotel. Kissimmee, FL has a population density of around 4,000 per square mile.
4. JW Marriott Turnberry Resort in Aventura, FL has an outdoor water park. This resort does not have any indoor rides. Aventura, FL has a population density of around 14,400 per square mile.
5. Studio City Hotel and Entertainment Center in Cotai, Macau, China has a figure-eight pod-car Ferris wheel at 425 above the ground built between two towers. Cotai is a 2.2 square mile strip of land that now connects the formerly separated islands of Coloane and Taipa. Macau has a population around 670,000 and has the world’s highest population density at 56,200 people per square mile. Although, the majority live on the peninsula. Cotai is one of 7 parishes (or municipal subdivisions) of Macau. The population density of the three parishes of Taipa, Cotai, and Coloane that make up the enlarged island have a combined population density of around 17,775 per square mile. However the Cotai parish alone has a population of only around 500 people and a population density of around 240 people per square mile. Studio City Hotel is located less than a quarter mile from the 135-acre Cotai Ecological Reserve, the 175-acre Caesar’s Golf Club, a large

roundabout interchange, and the 13-acre Le Jardin open-air park developed by Sands Casinos as part of Phase II of Cotai development.

We have enclosed some photos of these locations for you to compare to 740 Eighth Avenue.

Please note that the examples the developer has given us are either:

not permanent (Gaylord),

not indoor (Turnberry),

not inside of, directly above, or directly below a hotel's structure (Strat, Circus, Turnberry),

or not in the United States (Studio City).

We cannot understand how one example in the entire world of a single building containing both a permanent hotel and a permanent ride makes something "customary" in New York.

At our committee meeting, a large number of members of the public testified against the approved use and objected to the use being deemed accessory to hotel use. The president of Manhattan Plaza Tenants' Association, representing over 3000 tenants testified in strong opposition to the drop ride and to the DOB's interpretation.

Furthermore, New York City has a population density of around 29,000 per square mile. Manhattan has a population density of around 72,000 per square mile. Midtown Manhattan community districts 4 and 5 have a combined population density of 45,000 per square mile within our combined 3.4 square miles. And, Manhattan Community District 5 alone has a population density of at least 30,000 per square mile in our 1.6 square miles.

The cities of Las Vegas, Winchester, Kissimmee, Aventura, and the enlarged Macanese island of Cotai, Taipa, and Coloane have nowhere near the amount of urbanization density, traffic density, or population density that this proposed development is inserting itself into. We note all of these points to demonstrate one of the main reasons for the existence of our city's Zoning Resolution: a systematic way to control and to organize development and growth for the safety and health of the area's current and future residents and workers.

None of the examples that were provided by the developer are comparable to the locality of 740 Eighth Avenue. More importantly, the examples are not legally binding on DOB's decision making. CB5's LUHZ Committee believes that if DOB allows the permit for the drop-ride to stand, there is a very high likelihood that all of the legal precedence on this topic could be overturned. Moreover, DOB is opening the door for unbridled expansion of the definition of Accessory Use. Expanding or limiting what is an Accessory Use or what is "customary" should be debated and authorized through the Zoning Resolution amendment process. Furthermore, it is inappropriate for changes of this magnitude to be done through any DOB permitting process.

The Land Use, Housing & Zoning Committee of Manhattan Community Board Five is especially concerned that if this determination by the DOB stands, it will create a loophole that may be used to permit a casino use, circumventing the need for proper public review and amendment to the Zoning Resolution. This issue is of particularly acute concern as casino operators have expressed interest in securing a casino license for a number of locations within CB5.

Instead, The Land Use, Housing & Zoning Committee of Manhattan Community Board Five (CB5) asks you to please have all of DOB's senior legal staff revisit this particular permit for a drop ride at 740 Eighth Avenue. We also ask that you please instruct your staff to follow the letter and spirit of the Zoning Resolution, the BSA decision, and the New York State court precedents as to what is Accessory and what is "customary" to a Hotel-Use Group 5.

We hope that DOB will correct this matter effectively and efficiently. If there is anything that you or your staff need from us to help in this review process, please contact us at your convenience.

Sincerely,



Vikki Barbero  
Chair

Layla Law-Gisiko  
Chair, Land Use, Housing and Zoning Committee

cc:

Manhattan Community Board Four Chair Jeffrey LeFrancois  
DOB Deputy Commissioner of Operations Leena Panchwagh  
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