

Development Site Advisors®

# DEVELOPMENT WHITEPAPER SPRING 2023

*The Experts Take*



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# SPRING 2023 DEVELOPMENT WHITEPAPER – THE EXPERTS TAKE FOUNDERS LETTER

WRITTEN BY RUBIN ISAK & LEV KIMYAGAROV

Dear Readers,

It's with great excitement that we welcome you to our latest and much anticipated edition of the Development Whitepaper - The Experts Take. As the Founders of Development Site Advisors, it gives us immense pleasure to introduce our esteemed contributors who have come together to share their knowledge and insights on the most critical topics in the world of development sites, conversion properties and air rights in NYC.

As we head into Spring 2023, it's a time of renewal, change, and growth. This issue of the Development Whitepaper reflects just that, with cutting-edge insights and analysis from the top minds in the industry. From zoning variances and legal considerations to adverse position and office-to-residential conversions, our contributors have covered it all. You'll also find valuable information on the use of rescue capital for development projects, a topic that has become increasingly important in the current economic climate.

At Development Site Advisors, we're passionate about providing our clients with the most up-to-date information and guidance to help them make informed decisions. Our commitment to excellence is reflected in every page of this whitepaper. We believe that knowledge is power, and by sharing our expertise, we can help shape the future of the NYC development landscape.

We want to extend a special thanks to our contributors for their hard work and dedication in bringing this whitepaper to life. Eugene Travers, Esq. and Srinivasan Meenakshi,

Esq. from Kramer Levin Naftalis & Frankel LLP, William McManus, Esq. from Capell Barnett Matalon & Schoenfeld LLP, Peter Carrozzo, Esq. from Cornerstone Land Abstract, Panithi Tawethipong & Andrew Setiawan from our in-house architect team, Jennifer Lee and Pablo Castro of Obra Architects and Eric Brody of ANAX Real Estate Partners - your contributions have made this issue truly exceptional.

As always, we welcome your feedback and ideas for future topics. We hope you find this whitepaper to be a valuable resource in your work and look forward to continuing to serve as your trusted partner in the world of development sites and air rights in NYC.

Sincerely,



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# OFFICE TO RESIDENTIAL CONVERSION

by Andrew Setiawan & Panithi Tawethipong – In-house architect team - DSA

## Background

The office-to-residential conversion has become a hot real estate topic due to the changing economy and declining office demand resulting from the pandemic. The surplus supply of empty office buildings urges many property owners to opt for converting their buildings into residential spaces to take advantage of the ever-growing housing demand in the New York City. However, this type of conversion is nothing new and can be traced back to the 1970s when the city experienced a period of economic downturn, and many office buildings were left vacant. At the time, the city was struggling with high crime rates and declining populations, and many property owners saw converting their office buildings into residential spaces to generate income and revive the city. Over the next decades, the trend of office-to-residential conversion continued as the city's economy improved and the demand for housing increased. In the 1990s, the city's zoning laws were changed to allow for the conversion of commercial spaces into residential spaces, making it easier for property owners to make the transition. During this time, many loft, industrial and former office buildings in areas such as Lower Manhattan, SoHo and Tribeca were converted into luxurious apartments and condominiums, attracting wealthy residents and helping to revitalize these neighborhoods.

## 421-G

The 421-G tax abatement or Lower Manhattan Conversion Program provides incentives for the conversion of commercial and office spaces into residential spaces as businesses migrated to Midtown. The program was first introduced in the 1990s have helped in successful conversion of almost 13 million square feet of commercial spaces that created nearly 13,000 residential units. Qualified projects received 1 year construction-period tax exemption, 8-year post-construction tax exemption and 20% decreases in yearly exemption on the 9th to 13th year. This can result in significant savings for the property owner, making it financially feasible for them to invest in the conversion process and revitalize the building. However,

the program expired on June 15, 2008, and no similar program has been introduced to replace it since. 335,000 square feet 90 Washington Street and 540,000 square feet 127 John Street are one of the few examples that utilized the tax exemption conversion program.



## Office to Residential Conversion

Conversions continued after the program expired but the pace of conversion have slowed. The most recent example, 25 Water Street in Financial District secured \$535.8 million in loan to convert the existing building into 1,200 rental units. The nearly 1.1 million square feet, 22-story office-to-residential conversion is a joint venture project between GFP Real Estate, Metro Loft Management, and Rockwood Capital and is being designed by architect CetraRuddy. This will be one of the largest office-to-residential conversion projects in Manhattan only second the One Wall Street which was recently completed and has 1,165,645 total square feet which includes 566-unit residential condominium.

### *Zoning Consideration*

Under the New York City Zoning Resolution Article I Chapter 5, the conversion of an office building to a residential building is permitted in Manhattan Community Districts 1, 2, 3, 4, 5, and 6, Brooklyn Community Districts 1, 2, 6, and 8, and Queens Community Districts 1 and 2 for the building built prior to December 15, 1961, and before January 1, 1977, for the buildings in Manhattan Community District

1, in the area between the south of Murray Street and its easterly prolongation and the Brooklyn Bridge.

The conversion of the buildings in these areas is permitted providing that the building is zoned in residential districts "R - zoning" or commercial districts "C - zoning" which has a residential equivalent. The properties converted per this section will not be subjected to residential floor area limitations, open space ratio, rear yard requirements and minimum distance between windows or walls. Without the residential floor area limitations, commercial buildings with a total floor area on the zoning lot exceeds the maximum floor area of residences, such floor area excess may be converted to residences in its entirety. Light and Air Provisions states that every dwelling unit will be subjected to Section 277 of the Multiple Dwelling Law which requires less light and air for legal windows (less than 10 feet compared to 30 feet required under the residential zoning).

### *Architectural Consideration*

There are several key architectural criteria that must be considered during an office-to-residential conversion in order to ensure that the finished building is functional, safe, efficient, and aesthetically pleasing. Some of the most important architectural criteria to consider during an office-to-residential conversion include:

#### *Space utilization*

The conversion process must consider the different needs and requirements of residential living spaces, as opposed to commercial or office use. The space should be able to be adjusted in a way that makes efficient use of available square footage and provides for necessary amenities, such as kitchens, bathrooms, and bedrooms.

The challenge of space utilization is that office buildings and residential buildings have distinct floor plate designs which can impact the liveability of a converted building or sometimes the practicality of the conversion. Office buildings tend to have deeper floor plates of over 80 feet deep leading to less natural light and ventilation, whereas residential floor plates are typically shallower at around 50 – 60 feet deep for double loaded corridor to providing more natural light and ventilation.





### *Lighting and ventilation*

The regulation requires residential buildings to provide sufficient light and air for the health and well-being of residents. These requirements help to create liveable and healthy living environments for residents. To comply with these, the floor plates may need to be reconfigured, which can range from simply adding new windows and skylights to carving out parts of the building and creating a courtyard like 180 Water Street to increase natural light and ventilation.

This light and ventilation challenge makes a building on the corner lot more advantageous because of the amount of the building envelope surface facing the street. Therefore, a corner property or a C-shape building are generally a less difficult and more suitable candidate for conversion. A fixed floor to floor fully glazed commercial building would be a challenge to convert as those windows need to be replaced into operable windows for living spaces.

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### *Accessibility*

The building also must be designed to be accessible to residents of all ages and abilities, in accordance with relevant accessibility standards and guidelines. This includes providing ramps, elevators, and accessible bathrooms, among other features.

### *Aesthetic*

The conversion should also consider the visual appearance of the building, in order to ensure that it is aesthetically pleasing and harmonious with its surroundings. This may include the use of materials and colors that complement the building's existing architecture, as well as the use of lighting, landscaping, and other design elements to enhance the building's visual appeal. This aesthetic factor contributes to a better appearance and assists in marketing efforts for the development.

### *Conclusion*

The office-to-residential conversion is a trend that has helped revitalizing the city before and could help the city to meet the growing demand for housing now. The 421-G tax abatement program in New York City was an important tool to increase the feasibility of commercial to residential conversion. However, with the program being expired, and no similar program has been introduced yet, there are many challenges in the conversion process that the development team must consider. Various criteria include but not limited to zoning, building codes, and architectural considerations. The team and zoning regulators need to be more collaborative and creative in navigating through this comeback trend in the new market environment.



# OBTAINING A ZONING VARIANCE IN NEW YORK CITY

by Eugene Travers, Esq. and Meenakshi Srinivasan, Esq. Kramer Levin Naftalis & Frankel LLP

When it comes to zoning, one size does not always fit all. The zoning districts of the city's Zoning Resolution – within which regulations govern what and how much can be developed on a parcel of land – are often mapped broadly in the case of areawide rezonings, sometimes covering hundreds of blocks at a time. In these situations, it is simply not practicable for the city to evaluate the impact of the regulations on each individual parcel of land. The district's uniform rules thus apply to parcels that may differ drastically in terms of topography, lot size and shape, subsurface conditions, and existing uses or buildings. Sometimes, because of such unique conditions, the development of a particular property is unfairly burdened by the general application of the regulations, thereby preventing the property from generating a reasonable return. For example, a site may have an irregular shape that makes it impossible to provide required yards or unusual subsurface conditions that require a deeper and more expensive foundation, or perhaps a property in a manufacturing district is occupied by a vacant factory building that has become functionally obsolete for modern manufacturing use. In these situations, a zoning variance may offer relief.

Because the broad application of the Zoning Resolution can create situations where it is difficult or impossible to develop

a parcel of land on an as-of-right basis, the ability to apply for a zoning variance helps to insulate municipalities against claims of unconstitutional regulatory takings. In this regard, variances have been described as a constitutional “relief valve” because they protect the integrity of the overall zoning framework and safeguard the government's ability to regulate the use and development of private property.

Unlike a rezoning, a variance does not modify the zoning map or amend the zoning regulations that apply to a piece of property. Instead, a variance is a complete or partial waiver of one or more zoning regulations to alleviate a hardship associated with a particular site. In this regard, a variance can be considered a discretionary exception to the applicable zoning regulations. In New York City, applications for zoning variances are heard and decided by the Board of Standards and Appeals (“BSA”).

## *The Board of Standards and Appeals*

The BSA is an independent body that plays an integral part in the city's system for regulating land use. It is empowered to grant relief from the Zoning Resolution by issuing variances of the zoning regulations in certain



*The BSA is an independent body that plays an integral part in the city's system for regulating land use*

instances. In addition, the BSA also is responsible for, among other things, issuing certain special permits prescribed in the Zoning Resolution, deciding appeals to vest projects where a zoning change has occurred before construction is complete, and acting upon administrative appeals by property owners whose proposals have been denied by the Department of Buildings.

The Board itself consists of five full-time commissioners appointed by the mayor for a term of six years each. The composition of the Board must include at least one urban planner, one architect, and one engineer, and no more than two commissioners may reside in any one borough of the city. The Board is supported by a staff of urban planners, attorneys, and other professionals.

In reaching its decisions, including with respect to granting zoning variances, the BSA is limited to the specific findings and remedies set forth in state and local law, and the Zoning Resolution, including, where required by law, an assessment of potential environmental impacts.

### *The Five Findings*

In order to grant a variance, the BSA must determine that each of the five findings set forth in Section 72-21 of the Zoning Resolution has been satisfied. The five findings are referred to by the letter section that they appear under in the Zoning Resolution, as follow:

**"A Finding":** There are unique physical conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to and inherent in the particular zoning lot; and that, as a result of such unique physical conditions, practical difficulties or unnecessary hardship arise in complying strictly

## Obtaining A Zoning Variance In New York City

with the use or bulk provisions of the Zoning Resolution; and that such conditions that create practical difficulties or unnecessary hardship are unique and not generally found in the neighborhood or district. However, religious and educational institutions have a presumptive benefit to the communities that they serve and are entitled to rely on their “programmatic needs” to make this finding; case law holds that applications by such institutions should be granted unless they can be shown to have an adverse effect on the health, safety, or welfare of the community.

**“B Finding”:** That because of the physical conditions there is no reasonable possibility that the development of the zoning lot in strict conformity with the provisions of the Zoning Resolution will bring a reasonable return, and that the grant of a variance is therefore necessary to enable the owner to realize a reasonable return. However, this finding is not required for an application made by a non-profit organization.

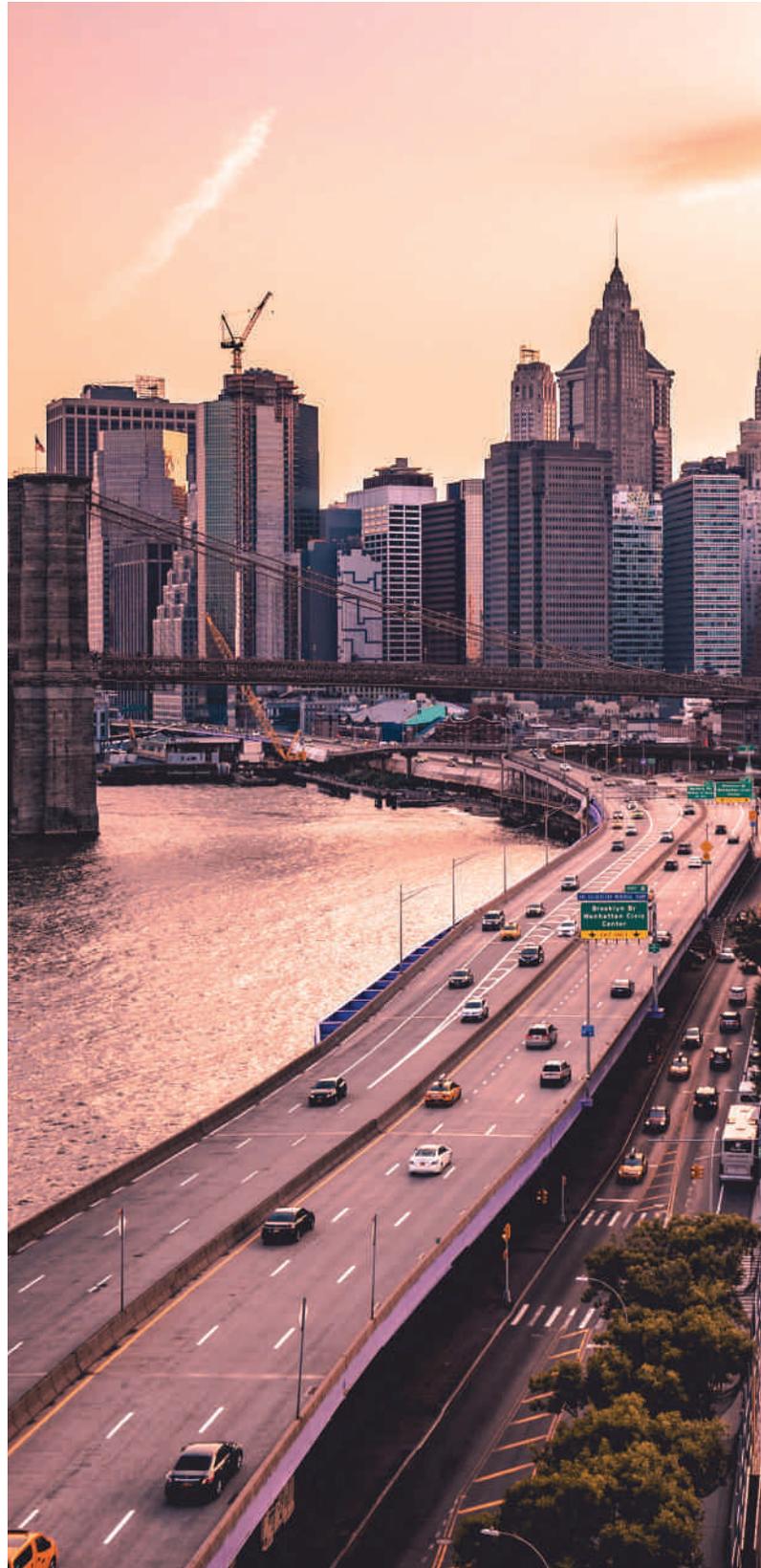
**“C Finding”:** The variance, if granted, will not alter the essential character of the neighborhood or district in which the zoning lot is located, will not substantially impair the appropriate uses or development of adjacent property, and will not be detrimental to the public welfare.

**“D Finding”:** The practical difficulties or unnecessary hardship claimed as a ground for the variance have not been created by the owner or by the predecessor in title. However, where all other required findings are made, the purchase of a site subject to the restrictions sought to be varied does not itself constitute a self-created hardship.

**“E Finding”:** The variance, if granted, is the minimum variance necessary to afford relief. This finding ensures that the grant of the variance does not result in a windfall to the applicant.

### *The Variance Process*

The BSA can only act upon a variance application where an applicant has first received an objection from the Department of Buildings (“DOB”) for the proposed project. Prior to filing the application with the BSA, plans must be filed with the DOB to obtain a Notice of Objections setting forth the specific zoning non-compliances raised by the proposed project. These non-compliances will form the basis of the variance application.



The principal components of a variance application are sets of plans showing a conforming or as-of-right development and the proposed project identifying the required zoning waivers, a written statement that explains how the application satisfies the five findings, evidence in support of the findings (such as topographical surveys or geotechnical reports), and the materials necessary for the BSA to complete the required environmental review. The applicant team will typically include land use counsel, an architect, a financial consultant, and an environmental consultant. The public review process for a variance commences upon filing of an application with the BSA. The application must be filed within 30 days of the issuance of the DOB Notice of Objections; otherwise the applicant must obtain a fresh objection sheet from the DOB.

After filing, the application is referred by the applicant to the local Community Board, which has 60 days from its receipt of the application to hold a hearing and issue an advisory recommendation to the BSA. While the application is being reviewed by the Community Board, the staff of the BSA will review the application to determine if all of the required information has been provided and in the prescribed format. In most cases, the BSA staff requests one or more revisions to the application materials and/or additional information, which is communicated to the applicant in the form of a written Notice of Comments. The applicant must respond in writing to each comment. Staff review of the application materials and issuance of the Notice of Comments typically takes between 45 and 60 days.

After the Community Board has issued its recommendation (or 60 days have elapsed without a recommendation having been made) and BSA staff has determined that the application is complete, the application will be calendared for a public hearing before the Board. Under the BSA's rules, the hearing date must be at least 30 days after notice thereof is sent to the applicant. Within this period, the

**” The BSA variance process takes significantly less time and cost than a rezoning and is subject to less political risk**

applicant is required to provide written notice of the hearing to the Community Board, the affected Council Member, the Borough President, the City Planning Commission and all “affected property owners”, which is defined as the owners of all property within a 400-foot radius of the applicant’s property. The BSA may hold one or more public hearings in order to decide on the application. Its decisions are final and binding, and may be reversed only if challenged in the courts, which challenge must be filed within 30 days of the decision being issued. The courts have consistently deferred to the BSA’s interpretation of the Zoning Resolution in matters relating to its expertise, and will set aside a decision only if it is found to be arbitrary or capricious or unsupported by substantial evidence.

### *Sweet Relief*

Once a variance application is prepared and filed, the process can be expected to take between seven months and a year depending on the complexity of the application. Overall, an application for a variance takes significantly less time and cost than a rezoning and is subject to less political risk because the scope of review is tied to the specific statutory findings (and, unlike a rezoning, there is no City Council oversight). With this in mind, a zoning variance may provide an advantageous form of relief where an owner or developer has site-specific development hardships that prevent them from realizing a reasonable return on their investment. Armed with the right team of professionals, sophisticated parties may see opportunity where others see only a substandard or undevelopable parcel.



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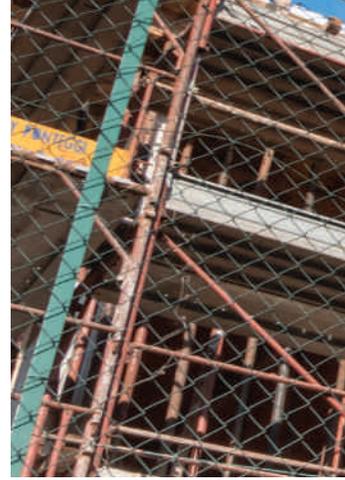
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# MAKING YOUR INVESTMENT DOLLARS GO FAR: EXPANDING FLOOR AREA RATIO FOR DEVELOPMENT SITES THROUGH ADVERSE POSSESSION

by Peter M. Carrozzo, Esq. Cornerstone Land Abstract



Most developers know that the amount of FAR (Floor Area Ratio) on a potential lot is a determinative factor of the financial success of a project. As defined in the NYC Department of City Planning Glossary of Zoning Terms, "FAR is the ratio of total building floor area to the area of its zoning lot." The size of your lot determines how much buildable floor area is permitted in your building by the building department. New York City is broken down into zoning districts that qualify as either Residence Districts, Commercial Districts or Manufacturing Districts. These three districts are further broken down based on a numerical code. So, Residence Districts can be numbered anywhere from R1 to R10 ranging from low density areas (R1) to high density (R10). The district designation is determinative of the amount of FAR allowable on your lot.

For example, a FAR of 1.0 on a 50 by 100 lot allows for 5,000.00 square feet of buildable floor area for a project. If a project is two floors, then 2,500 square feet of buildable floor area is allowed on each floor. Properties in suburban R1 districts usually have a FAR of 0.50. A 50 by 100 in an R1 with a FAR of 0.50 will allow for only 2,500.00 square feet of total buildable floor area. Take that same 50 by 100 lot and place it in a Commercial District, such as a C6 designation, with a FAR of 6, and your project allowance is 30,000 square feet of buildable floor area. The FAR of a property is significant in identifying potential development projects and the return on investment.

The NYC Department of Planning allows for developers to expand the FAR in a number of ways. The Inclusionary Housing Program expands FAR for projects that carve out a portion of dwelling units to be set aside for affordable housing; likewise adding a community facility, such as a senior center to a building, will increase FAR. Sometimes, the idiosyncrasies of a project can also lead to an expanded FAR. The ancient doctrine of adverse possession could play a role in increasing the FAR of your project.

Adverse possession is a legal concept dating back 1,000 years that allows a person who controls and possesses land owned by someone else to acquire valid title to it if certain requirements are met. These requirements include continuous (uninterrupted) possession, hostile to the rightful owner, through active use of the area in question where ownership is manifested in some overt way (e.g. a fence, cultivation of a garden, location of an air conditioning unit), open usage for all to see and exclusion of any other possessors. The adverse possessor must control the property continuously for a sufficient number of years. (In New York, this period is generally 10 years).

To show how adverse possession can frustrate development, a construction of a planned hotel in Manhattan's diamond district has been stalled for three years because a neighbor has claimed possession of an 18-inch strip of land on the planned hotel's site; specifically, the adjacent property's antennas, air conditioning units, and a ventilation unit overhang this strip. For our purposes, we are interested in how adverse possession can, in fact, enhance development.

During the due diligence phase of a project in lower Manhattan that we were insuring, our research found a rectangular area at the rear of the premises was not described in the last several deeds of record. Interestingly, said area (which was approximately 3 feet by 30 feet) was not described on any deeds of the contiguous lots either. Surveyors sometimes identify this sort of area as a "gore" which is defined in Black's Law Dictionary as "a small piece of land such as may be left between surveys that do not close." A gore is a "no man's land," described on no neighboring



*The FAR of a property is significant in identifying potential development projects and the return on investment*



deed and identified on no survey. Many times a gore will be a triangular piece since it is created by property lines whose angles have erroneously wandered over various deeds until the gore has been carved out through inexact descriptions. The reasons behind this gore did not reveal themselves at first and further inquiry was required.

We looked back through the history of tax maps and deed descriptions on the block hoping to identify the last owner of the seemingly abandoned strip of land would be the current owner, thus cementing the rightful ownership of the gore as part of the premises under examination. Looking back to tax maps from the late nineteenth century and descriptions as far back as the early nineteenth century, the gore was not shown as part of any of the lots on the block. We found one early map that showed an alley in the center of the block that seemed to have access to a public street at one time; the gore area behind the premises was all that remained of that alley. This mysterious alley, that appeared on no documents since the nineteenth century, appeared to have no identifiable owner. Remarkably, this orphaned 90 square foot area sat in southern Manhattan—one of the most expensive real estate markets in the world.

With no apparent legal owner of this strip of land, what was to become of it? One piece of evidence helping to attach this area was inclusion of this strip of land on the tax map of the premises in question. Frequently, when identifying ownership, an important question to ask is who is paying the taxes? Since the strip of land was included as part of the premises, owners of that lot had been paying real estate taxes on the land for decades. After asking who is footing the bill on the land, the next question is who is using the land. Here, air conditioning compressors were situated on the strip of land. Looking at the cables, it was clear these units serviced the building located on the premises. Once the date of installation was confirmed as being more than ten

years ago, with no neighbors manifesting control over the area and the usage by the current owners being open, the claim for adverse possession of the strip was strengthened. Usually, adverse possession works against a known owner of contiguous real property to allow a neighbor to claim superior ownership. In this case, it worked to thwart off any other claimants, although no other owners appeared to make a claim for the land.

Of course, with millions of dollars invested in a project both in capital and building loans, it may be uncomfortable to rely upon the concept of adverse possession in expanding the FAR. The facts revealed in the situation at hand establishes strong evidence that bringing an action to quiet title would provide a favorable judicial determination of the ownership of the area. Such a determination can be relied upon to expand the size of the lot and the corresponding FAR, thus increasing the profitability of the development site.

Real estate is unique, and every project has its own quirks and challenges. Not every potential development will have these distinct circumstances which lead to the increase of buildable area through the capture of land lost to history. However, meticulous analysis of a proposed project and outside the box thinking can allow a diligent developer to expand the potential FAR of a development site through this ancient real property concept.



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# NEW YORK NPCL 511/511-A & LEGAL CONSIDERATIONS WHEN TRANSFERRING REAL PROPERTY OWNED BY NOT-FOR-PROFIT CORPORATIONS AND RELIGIOUS CORPORATIONS

by William McManus, Esq. Capell Barnett Matalon & Schoenfeld LLP

Not-for-profit corporations and religious corporations own a considerable amount of real property in New York City and are increasingly more active in real estate transactions. These real property transactions are likely subject to regulations which impose unique considerations. These unique considerations are important for purchasers, real estate brokers, and legal counsel to understand in advance of executing transactional documents as they affect how the real property is valued and the overall structure and timing of the project.<sup>1</sup>

## *Applicability of the Regulations:*

Under Section 510 of the New York State Not-For-Profit Corporation Law and Section 12 of the New York State Religious Corporations Law, charitable not-for-profit corporations and religious corporations must often petition the New York State Supreme Court (“Supreme Court”) and/or the New York State Office of the Attorney General (“OAG”) for approval to transfer real property.<sup>2</sup>

Specifically, a charitable not-for-profit corporation<sup>3</sup> must seek approval when the real property asset, which is the subject of the transfer, is “all or substantially all” of the corporation’s assets and in contrast to religious corporations which must seek approval for a sale, lease, mortgage of any of its real property, excluding a purchase money mortgage or a lease with a term of less than five years.<sup>4</sup> Notably these statutory requirements apply even to those organizations formed outside of New York State which operate and seek to transfer real property in New York State.<sup>5</sup> Further, despite arising from different laws and different factual triggers for when

the statutory requirement for approval applies (noted above), not-for-profit corporations and religious corporations are held accountable to the same regulatory regime arising out of those statutes, despite some procedural nuances to approval. While not the subject of this article, these nuances may add additional steps to those which generally apply to both not-for-profits corporations and religious corporations, and such general requirements are discussed below. Hereafter the selling not-for-profit corporation or religious corporation will be referred to as the “Charity.”

These laws and corresponding regulations exist to protect New York Charities from entering into unwise bargains—which might harm their mission or cause waste to charitable assets—and to ensure that the Charity’s board members are complying with their fiduciary responsibilities under New York law.

## *Important Considerations*

### *When Filing a Petition*

When the Charity petitions the Supreme Court or OAG, the petition for approval of the transfer must include certain relevant facts about the Charity and the transaction, including its corporate documents, financial statements, and the executed transaction agreements. In addition, the petition must also state that the Charity reviewed the transaction in accordance with their governing documents and New York law and found the “consideration and terms” of the transaction to be (i) “fair and reasonable to the corporation” and (ii) “that the purposes of the corporation, or the interests of its members will be promoted thereby.”

Purchasers should be aware of the requirement that Charity must find an affirmative determination of these two prongs. This is especially true because such determination will be reviewed by the Supreme Court or OAG and without



***Not-for-profit and religious corporations in NY must get approval to transfer property from the Supreme Court or OAG***



an adequate affirmative finding of these prongs the contemplated transaction (regardless that the transactional documents are already executed) will not be approved, and the transaction will be unable to proceed. Neither prong is sufficient by itself to satisfy the regulatory requirements.

### *What is Fair & Reasonable?*

A potential purchaser must recognize that the finding of fair and reasonable is the most crucial component of this regulatory regime when transacting with a Charity as both the Supreme Court and OAG interpret this requirement to mean that the Charity must receive at least fair market value in consideration in exchange for the real property, and the fair market value must be supported by an appraisal valuing the real property no more than six months prior to the contract date.<sup>6</sup>

During the marketing and negotiations of the deal and prior to any contract being executed, the Charity should be negotiating with potential purchasers with an appraisal as a basis for its negotiating position on adequate consideration. In the event that marketing and negotiations take longer than six months, an update to the appraisal should be ordered prior to the execution of any agreement to ensure that the deal terms are still in accordance with the market value. If the purchase price is no longer at market value, the terms of the deal will need to be adjusted accordingly.

Another common pitfall arises when in-kind consideration is a portion of the consideration received by a Charity in development transactions. For instance, the Charity may transfer its real property to a purchaser who intends to develop the real property with a new structure on the site, and as a part of the Charity's consideration, the Charity will receive space in the completed development (e.g., a condominium unit). In those situations, the market value of the completed space should not be used in this consideration received analysis, rather the actual cost of constructing the space to be deeded back to the Charity should be utilized as if the Charity paid the purchaser directly to construct the space.

### *Promotion of the Mission and Interest of the Members*

The second finding requires that the Charity determine that the transfer of assets promotes its mission or the

# New York NPCL 511/511-a & Legal Considerations When Transferring Real Property Owned by Not-For-Profit Corporations and Religious Corporations

interest of its members. The mission is the charitable purpose for which the entity was formed. If the entity has members, the members are the equivalent of shareholders in the not-for-profit corporation or religious corporation context – they are the stakeholders in the Charity. While often less of a direct concern than the fair and reasonable prong for a potential purchaser, this prong impacts transactions, especially development projects where the Charity is receiving in-kind consideration and/or where the real property intended to be transferred is critical to the mission and members of the Charity (i.e., the property is the main or sole location for its mission). In these situations, the Charity will need a detailed plan in place for how they will replace the mission space in order to demonstrate successfully in the petition how the transfer promotes the mission and/or interest of the members. Any proposed in-kind consideration should be suitable for the actual needs of the Charity, and components of the space-back's design, like entrance to the space, parking, or size of the space in light of the membership of the Charity (both too much space or too little space), should be considered. As inadequate space or too extravagant space may not be deemed to promote the mission or interests of the Charity's members during the course of the OAG and/or Supreme Court's review of the petition.

## *Additional Considerations*

The timing effects of the petition process should also be noted. The petition approval process routinely takes several months (after the negotiation and execution of the transactional documents which must be attached to the petition) after the initial filing of the petition approval for

approval and often consists of multiple rounds of questions with the Supreme Court or OAG about the petition and facts surrounding the transaction in accordance with their regulatory responsibilities to protect New York Charities. It should also be noted that the real property which is the subject of the petition may not be transferred until the Charity receives Supreme Court or OAG approval, and, if the transaction contains in-kind consideration (space-back for the Charity), the transfer may only occur after the purchaser has secured adequate financing for the overall project, including any improvement in which the space-back will be located. A mere promise to finance that portion of the transaction is deemed insufficient by OAG.

Understanding the regulatory process described above and preparing in advance for its requirements is the best way for Charities and purchasers to work together on real property transactions; thereby, maximizing the benefits to all parties and reaching a closing of the transaction as quickly as possible. Therefore, it is paramount that Charity retains their own attorney and other consultants, who are familiar with the intricacies of this approval process, and purchasers should confirm these consultants have been retained prior to undertaking detailed negotiations.



**WILLIAM McMANUS**  
Associate

**CBM&S**  
ATTORNEYS AT LAW

1 Many readers may be more familiar with the term 501(c)3 rather than the corporate terms used herein. 501(c)3 is a tax determination made by the United States Internal Revenue Service which is accompanied by its own host of regulations. The regulations discussed herein arise from New York State not-for-profit and religious corporate law, specifically New York State Not-for-Profit Corporation Law Sections 510, 511, 511-a and Religious Corporations Law Section 12.

2 Not-For-Profit corporations and religious corporations have a choice between petitioning the Supreme Court on notice to OAG or petitioning OAG directly. In situations involving in-kind consideration or public complaint, OAG may also require the not-for-profit to petition the Supreme Court after OAG has provided its "no objection." In some instances, religious corporations associated with certain denominations specifically identified in the Religious Corporations law are exempt from OAG oversight but must still file with the Supreme Court.

3 All subsequent references to not-for-profit corporations will refer to charitable not-for-profit corporations which under Section 510 of the New York Not-for-Profit

Corporation Law are required to submit petitions to OAG and/or the Supreme Court as opposed to non-charitable not-for-profit corporation.

4 To note, the bifurcation is helpful for discussions about real property but inexact. The statutory application for not-for-profit corporations is provided by Section 510 of the Not-For-Profit Corporation Law and the statutory application for religious corporations is set forth in Section 12 of the Religious Corporations Law. Nevertheless by virtue of Religious Corporations Law Section 2-B, the not-for-profit corporation law applies to religious corporations as well. Therefore, it is likely that, regardless of what Section 12 provides, that religious corporation may also need to seek approval when it "transfers all or substantially all" of its property.

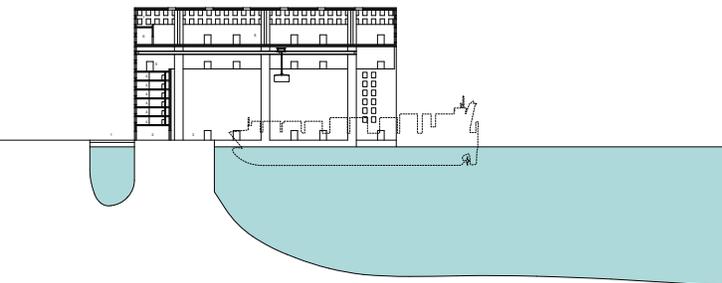
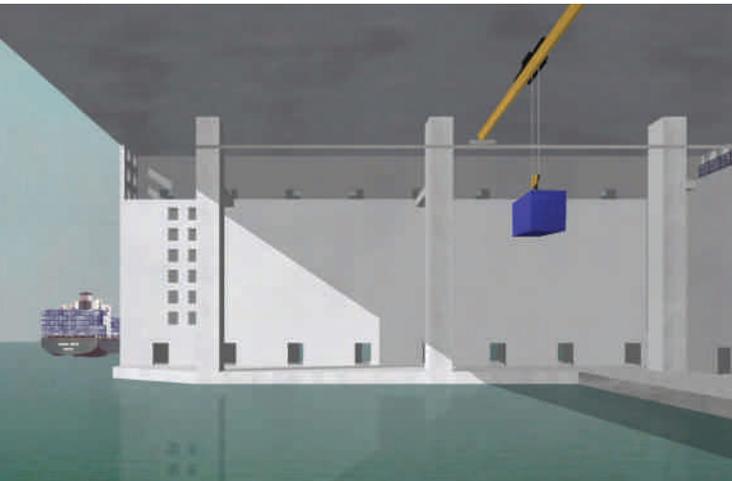
5 While this article focuses on transactions in the New York City area, New York not-for-profit corporations or religious corporations must also seek approval for transfers outside New York state if the factual triggers otherwise apply.

6 Appraisal Guidance from OAG: <https://www.charitiesnys.com/pdfs/AppraisalGuidance.pdf>.



# THREE NEW WAYS TO THINK ABOUT HOUSING IN THE CITY

by Pablo Castro FAIA and Jennifer Lee AIA LEED AP, Obra Architects



Longitudinal Section  
Scale: 1/100

- 1 Bridge to Giudecca
- 2 Bridge
- 3 Office/Workshop
- 4 Apartments
- 5 Container Loading Dock
- 6 Classroom
- 7 Warehouse
- 8 Production Floor

## LOST CITY POLY-PRODUCTIVE UNITS

THE LOST CITY VENICE HOUSING TO BE BUILT ON THE SURFACE OF THE LAGOON ON THE FAR SIDE OF THE ISLAND OF LA GIUDECCA IS CONCEIVED AS A CITY IN MINIATURE THAT INCLUDES HOUSING, MANUFACTURING, COMMERCIAL SPACES, RECREATIONAL, AND URBAN PUBLIC SPACE. THE BUILDING CONTAINS AT ITS CORE A HOLLOW CUBE OF INUNDATED SPACE ABOVE WHICH AN INDUSTRIAL NAVE FOR FREE PUBLIC USE IS SUSPENDED. A SORT OF "MAKERS LIBRARY" OF THE FUTURE, THIS VAST SPACE IS EQUIPPED WITH STATE-OF-THE-ART FABRICATION CAPABILITIES. CARGO SHIPS CAN SAIL INTO THE CAPTURED SECTION OF THE LAGOON AND CAN BE LOADED OR UNLOADED BY A BEAM CRANE RUNNING ON RAILS SUSPENDED FROM THE FLOOR OF THE MANUFACTURING SPACE ABOVE.

## 1. THE POLYFUNCTIONAL BUILDING

For the most part today, multifamily housing is designed to contain almost only residences. When a mixed-use design is considered for multifamily housing, the commercial or community component is almost always confined to the ground level. This programmatic monoculture of housing buildings as they are usually developed separates them from the polyfunctional logic of the city itself, which is as open to change as it is to multiple uses. The polyfunctionality of the city makes it also indeterminate and therefore open to social change and lifestyle experimentation.

*A PROGRAMMATIC MONOCULTURE OF HOUSING SEPARATES BUILDINGS FROM THE POLYFUNCTIONAL LOGIC OF THE CITY*

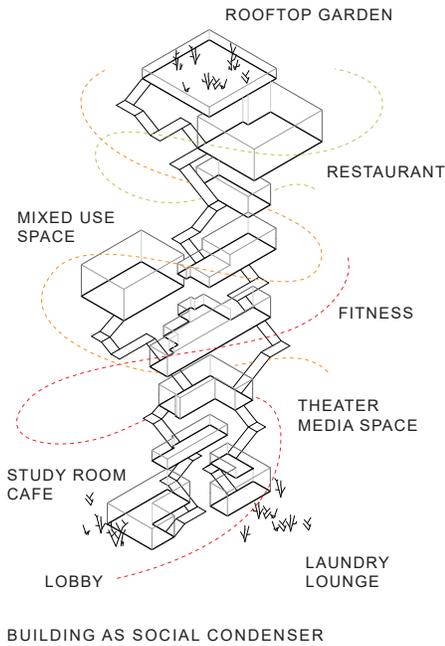
We can understand the lack of a priori determination of the city not as a defect but as an asset. The city's inherent flexibility allows conditions of recombinatory behavior resulting in a richer anthropological mix typical of large urban concentrations. The result is the possibility in society of more fluid lifestyles, one that may encourage a richer set of role models to empower people's imagination with the prospect of unprecedented possibilities for being and doing. It could be said then that, for design, the lack of formal determination that conditions use equates, perhaps paradoxically, to increased functional freedom.

The specialization of housing buildings into monofunctional entities in the city results in a social splitting of the urban whole. What is normally viewed as public space is confined to the level of the street, while the upper floors of any residential structure are considered to be almost exclusively private space.

*MORE FLUID SPATIAL ORGANIZATION OF PUBLIC AND PRIVATE SPACE COULD FACILITATE RICHER DIVERSITY OF INTERPERSONAL DYNAMICS REVITALIZING THE CITY SOCIALLY AND COMMERCIALY*

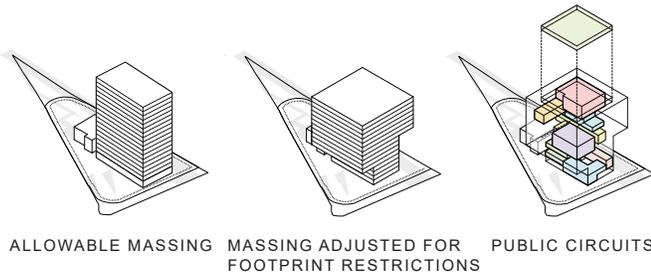
Considering a more fluid spatial organization of public and private space might facilitate a richer diversity of interpersonal dynamics and revitalize the city both socially and commercially. Interrogating the usual programmatic specialization of buildings in the city could





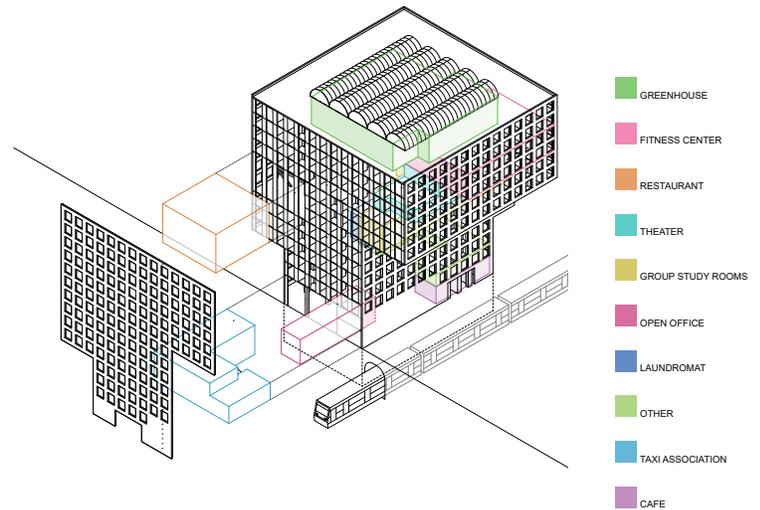
### JEUNGSAN PUBLIC HOUSING COMPLEX

THIS RESIDENTIAL BUILDING OCCUPIES A SITE LOCATED ABOVE JEUNGSAN SUBWAY STATION IN THE CITY OF SEOUL, A COMPLEXITY THAT REDUCES THE USABLE FOOTPRINT AT GROUND LEVEL FORCING THE BUILDING INTO A RELATIVELY SMALL IMPRINT AT GROUND LEVEL. TO MAXIMIZE ALLOWABLE POTENTIAL OFFERED BY THE FAR, THE BUILDING CANTILEVERS INTO LARGER FOOTPRINTS AS IT RISES, ADOPTING THE PROFILE OF AN "UPSIDE-DOWN" BUILDING. THE DEVELOPMENT INCLUDES ENHANCED AMENITIES THAT SUGGEST A CITY IN MINIATURE: A THEATER, A MULTI-PURPOSE HALL, A LIBRARY, A GYM, AND A PUBLIC GREENHOUSE AT THE TOP.



mean not only extending the range of what is considered to be public space, expanding opportunities for commercial interaction and social exchange into the heart of buildings, and also potentially gradually alleviating a condition of personal loneliness in the city that is logically related to the structural separation between public and private encouraged by the current models of programmatic specialization.

Two experimental projects can help illustrate the potential of extending the poly-functionality of the city deep into the heart of buildings: **The Lost City Poly-productive Residential Units** for the city of Venice and **Jeungsan Public Housing Complex** for the city of Seoul.





## 2. FROM PLAN TO SECTION

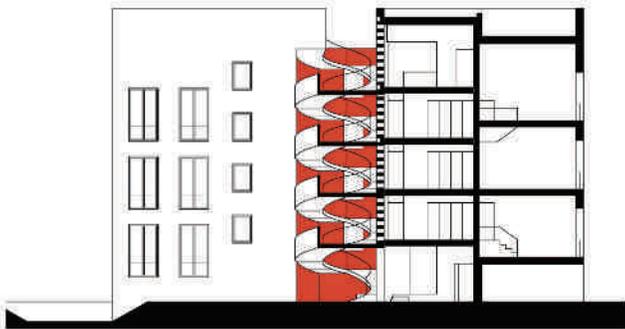
Objections to the possible expansion of the polyfunctionality of the street into the interior of multi-storey buildings are based on skepticism about the capacity of design to change behavioral patterns that, deeply rooted in collective habit, condition the way we use space. The argument is that people expect public and commercial spaces to be on the ground floor of buildings and that it is hard or even undesirable to attempt to change those expectations. Successful typological inventions such as the multi-storey shopping mall, for example, seem to disprove this theory by having already effected expansions of de facto “public space” into the interior of buildings.

### *THE MULTI-STOREY SHOPPING MALL ACHIEVES A VERTICAL EXPANSION OF URBAN PUBLIC SPACE INTO THE INTERIOR OF BUILDINGS*

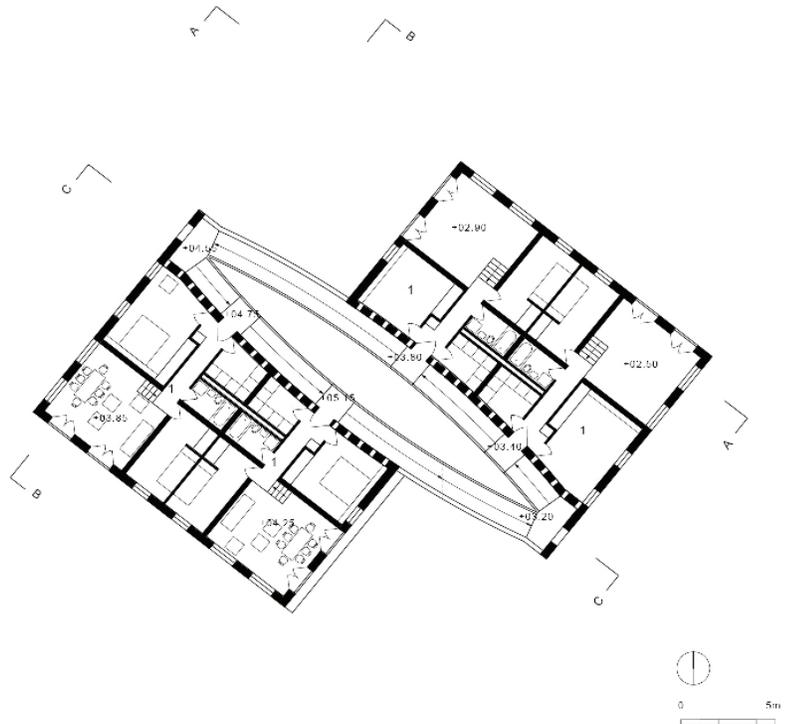
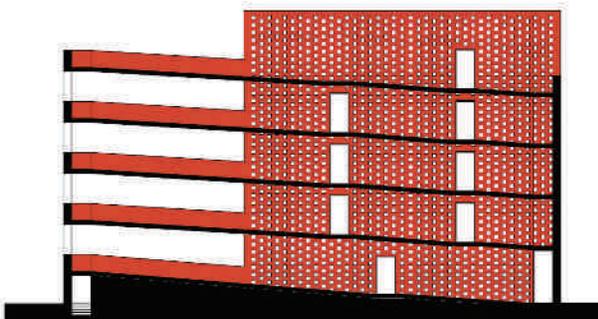
Setting aside for a moment non-architectural explanations—for example the influence of consumerist advertising which would make shopping a special case—we could argue that shopping malls have been able to pull people off the street and into the heart of buildings. Architecturally, shopping malls have done this using a design recipe of interconnected multiple-level atriums and sequences of escalators that expand the visitor’s gaze diagonally upwards and invite the possibility of movement.

The atrium/escalator strategy suggests a change of the imaginative register that drives design from plan to section. In general, this move implies reaching a moment of expansion of the logical basis for a project. Moving from plan to section can unlock the imaginative possibilities of a project, challenging the project’s

SCHNITT B-B



SCHNITT C-C



### IBA SPIRAL HOUSING: AN EXHIBIT OF EVERYDAY LIFE

THIS RESIDENTIAL BUILDING IN THE ISLAND OF WILHELMSBURG, IN THE CITY OF HAMBURG OFFERS VARIABLE CEILING HEIGHTS THAT ENHANCE SPATIALITY AND MAKE EACH APARTMENT UNIQUE WITHIN A REGULAR AFFORDABLE CONSTRUCTION SYSTEM. A SPIRAL ACCESS RAMP CONNECTS ALL APARTMENTS CREATING VERTICAL SPACE OF SOCIAL INTERACTION.



#### YEONGSU-GU YOUTH CENTER

THE INTERIOR OF THIS 8,000 SQUARE METER YOUTH CENTER IS DESIGNED WITH A UNIQUE SECTION CONFIGURATION OF STAGGERING FLOORS THAT, WHILE PRESERVING THE ECONOMIES PROVIDED BY STRUCTURAL AND SPATIAL REGULARITY, OFFER DEEP VISUAL ACCESS TO MULTIPLE SIMULTANEOUS ACTIVITIES THROUGHOUT. THE BUILDING'S POLY-OPTIC SECTION ALLOWS FOR EVERYONE THE POTENTIAL SIMULTANEOUS PRESENCE OF MULTIPLE COLLECTIVE EXPERIENCES, INVITING PARTICIPATION AND GIVING THE BUILDING PROGRAMMATIC COHESIVENESS AND UNIQUE ORIGINAL IDENTITY: A NEW BUILDING TYPOLOGY TO QUENCH YOUNG PEOPLE'S THIRST FOR NEW EXPERIENCE AND COMRADERY IN BELONGING AND PARTICIPATION.

capacity to embody functional space and potentially opening up new and better ways of inhabiting it.

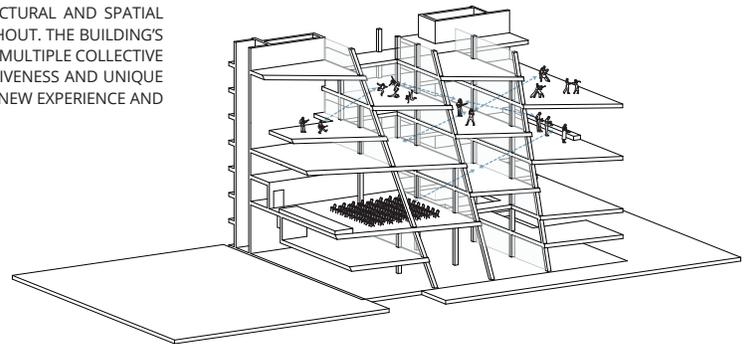
#### *MOVING FROM PLAN TO SECTION CAN UNLOCK THE IMAGINATIVE POSSIBILITIES OF A PROJECT*

Gravity effectively demands a separation between floors, typically organizing them into stacked layers that condition our mental maps of space. The possibility of going beyond the normative arrangement of layered space suggests vertical connection and physical continuity and the potential for friction between unrelated uses that might generate the emergence of new functions and programs. Moving from plan to section has the potential to expand the logic of design from a stratified condition of stacked floors to the building as a three-dimensional whole potentially delivering the benefits of richer and freer modes of movement and inhabitation.

Two examples, Spiral Housing in Hamburg and the Yeonsu-gu Youth Center in Incheon, South Korea, seek to expand the possibilities of inhabitation of a given architectural assembly by making the section, not the plan, the primordial organizational element of the design.

### 3. BACKGROUND IS FIGURE

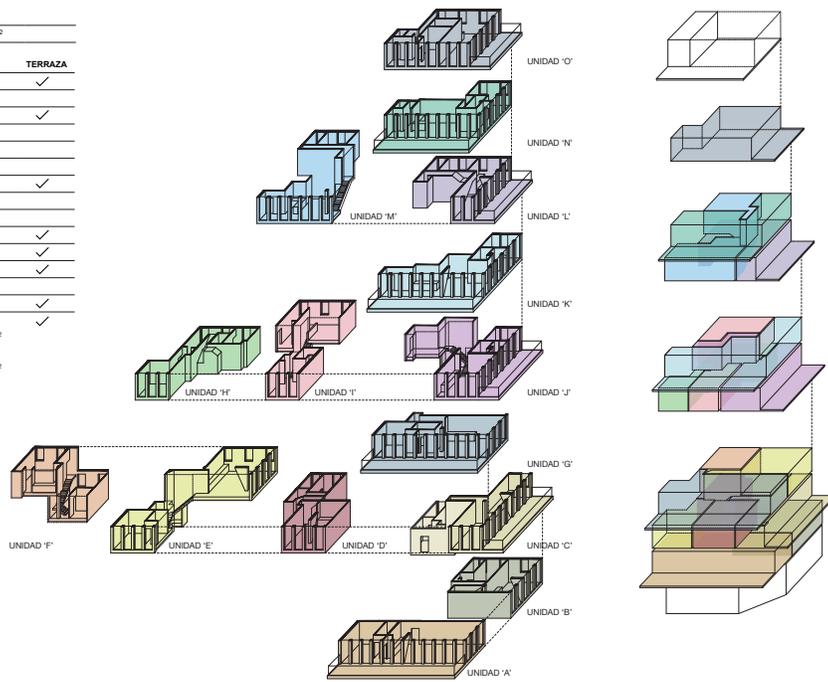
The city's formal indeterminacy and capacity for self-contradiction could become objectives of architectural design, extending adaptability and the possibility for the unexpected into the design of buildings themselves. The indeterminacy and imperfectly controlled formal chaos of the city developed historically with the dissolution of the traditional



SECTIONAL DIAGRAM OF STACKED FLOORS



PISO		AREA	
SALON	PLANTA BAJA	165 m <sup>2</sup>	
UNIDAD	PISO	AREA	TERRAZA
A	1	65 m <sup>2</sup>	✓
B	1	60 m <sup>2</sup>	
C	1-2	65 m <sup>2</sup>	✓
D	2	55 m <sup>2</sup>	
E	2-3	60 m <sup>2</sup>	
F	2-3	50 m <sup>2</sup>	
G	3	55 m <sup>2</sup>	✓
H	4	45 m <sup>2</sup>	
I	4-5	50 m <sup>2</sup>	✓
J	4-5	50 m <sup>2</sup>	✓
K	5	50 m <sup>2</sup>	✓
L	6	50 m <sup>2</sup>	✓
M	6-7	50 m <sup>2</sup>	✓
N	7	45 m <sup>2</sup>	✓
O	8	60 m <sup>2</sup>	✓
SUPERFICIE TOTAL (APARTEMENTOS)		810 m <sup>2</sup>	
SUPERFICIE TOTAL		975 m <sup>2</sup>	



**THE SPHINX RESIDENTIAL COMPLEX**

THIS RESIDENTIAL DEVELOPMENT IN ARGENTINA IS LOCATED AT THE INTERSECTION OF A TRADITIONALLY GRIDDED LATIN AMERICAN CITY FACING BOTH STREETS. IT IS DEFINED WITH EXTERIOR SIMPLICITY AND INTERIOR COMPLEXITY, ENCLOSED IN A SIMPLE RHYTHMIC FAÇADE THAT GRADUALLY SETS BACK TOWARDS THE TOP OF THE BUILDING CREATING GENEROUS TERRACES TO THE NORTH AND THE EAST (PREFERRED ORIENTATIONS IN THE SOUTHERN HEMISPHERE). THE BUILDING HAS TEN FLOORS AND A RELATIVELY SMALL FOOTPRINT OF APPROXIMATELY 144 SQUARE METERS OR 1,550 SQUARE FEET, OFFERING 15 UNIQUE RESIDENCES.

logic of city form. The city was originally articulated into an arrangement of figure and background. Palace or temple played the role of figure or monument in the context of a background of otherwise undifferentiated residential fabric.

The aspiration to democratic self-rule and modern science have reduced both the palace and the temple to relative irrelevance. Saint Patrick's Cathedral in New York City, for example, occupies an urban block like many others in the city, and the imposing structure exerts no significant influence on the city's form. Today the undifferentiated residential fabric dominates over the formerly significant urban element. The fabric has replaced the monument creating a city for which the background has become the figure.

**TODAY THE UNDIFFERENTIATED RESIDENTIAL FABRIC DOMINATES OVER THE FORMERLY SIGNIFICANT URBAN ELEMENT—THE FABRIC HAS REPLACED THE MONUMENT CREATING A CITY FOR WHICH THE BACKGROUND HAS BECOME THE FIGURE**

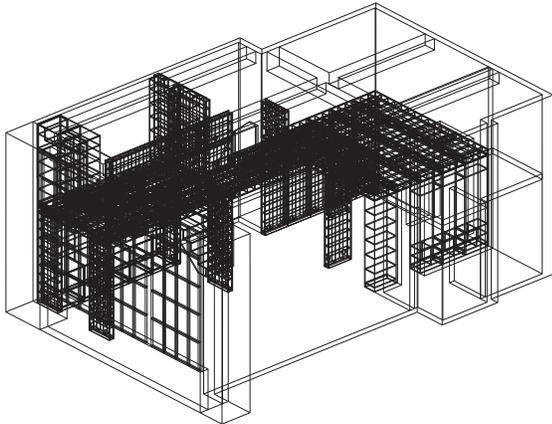
For the city it is an exciting moment that could be understood as a drift towards free form, where alternative means of urban organization compatible with the desires for personal freedom implicit in democratic hopes (diversity, equity, inclusivity) could be pursued. In a similar way, new modes of form-making in architectural design can also seek alternatives to the whims of what could be considered personal subjectivity of the designer and to the usually dispiriting results of design by committee. For example, one could explore indirect design strategies by which the will to form is run through processes that are only imperfectly controlled by the designer.

Similar strategies allowing design to evade the sameness of foretold results could be considered for the interior of residential units. It is often assumed that the market "knows" what customers want: familiar configurations of apartments into assortments of living rooms and bedrooms. This unchanging situation seems to overlook the evident freedom with which the many forms of emotional associations between people are challenging the hegemony of the traditional family today. Residential unit layouts equipped with flexibility of configuration and adaptability to the

changing conditions of life might allow us to respond appropriately to the different and the new in response to evolving forms of the social conditions that structure society.

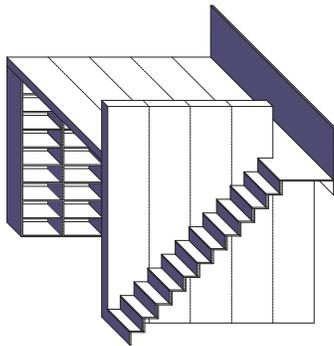
**The Sphinx Apartments** in San Juan, Argentina, implements a process of indirect form-giving by following a set of rules that attempt to replace the designer's subjectivity with more broadly-based forms of consensus.

**The Urbia Furniture System**, New York, proposes a design dialectic between architectural and interior design facilitating prefabricated simplicity and flexible customization and adaptability.

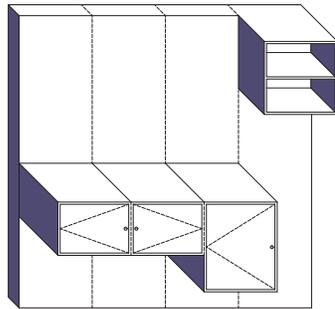


URBIA SYSTEM OF FURNITURE EXPANSION FOR SMALL APTS IN BIG CITIES

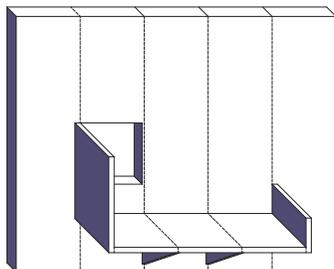
THE URBIA SYSTEM REEVALUATES THE AGE-OLD PROBLEM OF TRYING TO MAKE THE MOST WITH THE LEAST, WHILE IMAGINING WHAT AN URBAN EXISTENCE OF MINIMAL POSSESSIONS WOULD FEEL LIKE WHILE AFFORDING ALSO THE POSSIBILITY OF "DISASSEMBLING YOUR HOUSE AND TAKING IT WITH YOU." THE CONCEPT IS A FURNITURE-BASED INTERIOR CONSTRUCTION SYSTEM THAT ALLOWS FLEXIBILITY OF DOMESTIC CONFIGURATION AND RATIONAL SHOP CNC FABRICATION TO ACHIEVE HIGHER STANDARDS OF FINISH QUALITY AND ASSEMBLY PRECISION.



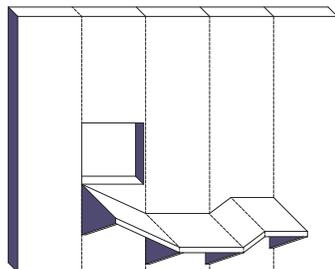
URBIA STAIR



URBIA STORAGE



URBIA BED



URBIA DAYBED



**PABLO CASTRO, FAIA**

*Principal*

**OBRA**  
ARCHITECTS



**JENNIFER LEE, AIA LEEDAP**

*Principal*

**OBRA**  
ARCHITECTS



DEVELOPMENT WHITEPAPER

# SPRING 2023



## DEVELOPERS HELPING DEVELOPERS:

# THE USE OF RESCUE CAPITAL IN TODAY'S ECONOMIC CLIMATE

Given today's current rate environment, many borrowers will be unable to fulfill their loan requirements. To survive, property owners have to come up with strategic ways to complete, recapitalize and operate their assets. While December 2022 showed its first signs that the Federal Reserve's decision to methodically increase interest rates is slowing down inflation, there is a long way to go until we see an easing policy environment. This creates a challenging environment for property owners, especially those with maturing debt in the next 12 to 18 months.

One of the key challenges facing the NYC real estate market is the amount of debt maturing in 2023, which is 30% higher than last year's \$12.7B worth of maturities according to the Trepp data report[1]. Generally speaking, property owners can opt for an extension, but many property owners have already exhausted those options by extending their loans over the last three years. For lenders not willing to grant additional extensions, they will be expecting to be paid back in full once the note reaches maturity. When an economy is in its growth and peak cycles, the property owner can pay the lender its final payment by refinancing the asset. Unfortunately, for the owners whose debt is maturing in the next year, they have landed in the contraction phase of the economic cycle, where the standard refinancing practices are more expensive.

Despite these challenges, however, there are also a number of innovative solutions and strategies that property owners can utilize to navigate the capital markets and secure their financial futures. One such solution is the concept of rescue capital, which has emerged as a critical tool for investors looking to manage risk and achieve their investment goals in a challenging environment.

Rescue capital is a type of investment that is designed to

provide support to struggling properties and help them overcome financial strain. This can take the form of equity investments, debt financing, or a combination of both, and is typically provided by a specialized company such as ANAX Real Estate Partners who has 30 years of experience developing ground-up properties throughout Manhattan and Brooklyn. We have the capital and expertise to navigate the complex economic landscape, resulting in properties receiving the resources they need to recover from financial stress and regain stability, while also generating attractive returns.

There are several factors that must be considered when evaluating rescue capital opportunities. One of the most important is the financial health of the property and the nature of the obstacles that it is facing. Careful assessment of the properties financials, including its balance sheet, income statement, and cash flow, are key to ensuring that it is a viable investment and has a strong chance of recovery. Then comes the experience and expertise of the management team, as well as the properties location, market position, and competitive advantages, to ensure that the investment is well-positioned for success. Finally, is the structuring of the rescue capital investment. Evaluate the terms of the investment, including the size, the amount of equity or debt that is being provided, and the terms and conditions of the financing. Understand the risk profile of the investment and assess the likelihood of success, both in terms of the company's ability to recover from its financial difficulties and the investor's potential returns.

In conclusion, the current distressed real estate market in NYC presents a complex landscape, with both challenges and opportunities. To navigate this market effectively, real estate owners should focus on seeking out the right team to support in restructuring the capital stack, project completion, and/ or operation.



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