

KRAMER LEVIN NAFTALIS & FRANKEL LLP

TRACI SANDERS
PARALEGAL
PHONE 212-715-7519
FAX 212-715-8000
TSANDERS@KRAMERLEVIN.COM

June 25, 2012

Via Messenger

Hon. Scott Stringer
Office of the Manhattan Borough President
Municipal Building
1 Centre Street, 19th Floor
New York, NY 10007

RECEIVED

JUN 25 2012

BY COMMUNITY BOARD 8

Re: 31 East 74th Street
New York, New York
Block 1389, Lot 25 (formerly Lots 21, 22, 23, 24, 25)

Dear Borough President Stringer:

Enclosed please find our most recent submission to the Board of Standards and Appeals regarding the above-referenced application.

Sincerely,



Traci Sanders
Paralegal

cc: Manhattan Community Board 8
City Councilmember Daniel R. Garodnick
Department of Buildings Manhattan Borough Commissioner Derek Lee, R.A.
Department of City Planning – Edith Hsu-Chen, Director, Manhattan Office
Department of City Planning – Christopher Holme

Received this ____ day of _____, 2012

1177 AVENUE OF THE AMERICAS NEW YORK NY 10036-2714 PHONE 212.715.9100 FAX 212.715.8000

990 MARSH ROAD MENLO PARK CA 94025-1949 PHONE 650.752.1700 FAX 650.752.1800

47 AVENUE HOCHE 75008 PARIS FRANCE PHONE (33-1) 44 09 46 00 FAX (33-1) 44 09 46 01

WWW.KRAMERLEVIN.COM

KRAMER LEVIN NAFTALIS & FRANKEL LLP

GARY R. TARNOFF
PARTNER
PHONE 212-715-7833
FAX 212-715-7850
GTARNOFF@KRAMERLEVIN.COM

June 22, 2012

City of New York
Board of Standards and Appeals
40 Rector Street, 9th Floor
New York, NY 10006

Re: 31 East 74th Street
New York, New York
Block 1389, Lot 25 (formerly Lots 21, 22, 23, 24, 25)

Dear Chair Srinivasan and Commissioners:

In connection with an application on behalf of our client for a variance pursuant to Zoning Resolution Section 72-21 to allow an enlargement to the existing buildings at the referenced property, located in a C5-1(MP) and R8B (LH-1A) zoning district, which would contain Use Group 6 retail use and Use Group 2 residential use and require modification of various bulk and supplementary use regulations of the Zoning Resolution, please find enclosed the following:

- (1) Form BZ;
- (2) Objections issued by the Department of Buildings dated May 23, 2012;
- (3) Checks in the amounts of \$8,560 for the filing fee and \$13,660 for the City Environmental Quality Review;
- (4) Affidavit of Ownership;
- (5) Statement of the Applicant;
- (6) BSA Zoning Analysis;
- (7) Radius Diagram;
- (8) Plans depicting "Existing Building", "Complying Building", and "Proposed Development";
- (9) Zoning Map 8c;
- (10) Tax Map, Block 1389 (current and as of May 31, 2012);
- (11) Environmental Assessment Statement, prepared by Philip Habib & Associates;

KRAMER LEVIN NAFTALIS & FRANKEL LLP

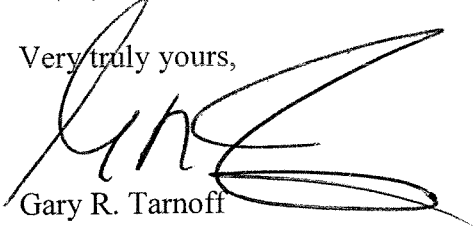
City of New York

June 22, 2012

Page 2

- (12) Grubb & Ellis Feasibility Study;
- (13) List of Surrounding Owners and Tenants;
- (14) Photographs and photograph location plan;
- (15) Certificates of Occupancy No. 41045, dated April 16, 1953, No. 24579, dated April 3, 1939, indicates storage use in the cellar, store use on the 1st and 2nd floors and apartments on the 3rd through 5th floors. The CO for 933 Madison Avenue (Lot 24), No. ___, dated 1919, and No. 119608, dated June 1, 2000; and
- (16) Department of Buildings printout.

Very truly yours,


Gary R. Tarnoff

Enclosures

cc: Community Board 8
City Councilmember Daniel R. Garodnick
Manhattan Borough President Scott Stringer
Department of Buildings Manhattan Borough Commissioner Derek Lee, R.A.
Department of City Planning – Edith Hsu-Chen, Director, Manhattan Office
Department of City Planning – Christopher Holme



City of New York
Board of Standards and Appeals
40 Rector Street, 9th Floor
New York, NY 10006-1704
Phone: (212) 788-8500
Fax: (212) 788-8769
www.nyc.gov/bsa

ZONING (BZ) CALENDAR
Application Form

RECEIVED

JUN 25 2012

BSA APPLICATION NO. _____

CEQR NO. _____

BY COMMUNITY BOARD 8

Section A

**Applicant/
Owner**

Kramer Levin Naftalis & Frankel LLP

NAME OF APPLICANT

1177 Avenue of the Americas

ADDRESS

New York NY 10036

CITY STATE ZIP

(212) 715-7833

AREA CODE TELEPHONE

(212) 715-7850

AREA CODE FAX

gtarnoff@kramerlevin.com

EMAIL

JZS Madison, LLC

OWNER OF RECORD

P.O. Box 269

ADDRESS

Fort Lee NJ 07024

CITY STATE ZIP

LESSEE / CONTRACT VENDEE

ADDRESS

CITY STATE ZIP

Section B

**Site
Data**

933-943 Madison Avenue, 31-33 East 74th Street

STREET ADDRESS (INCLUDE ANY A/K/A)

10021

ZIP CODE

Block bounded by Madison and Park Avenues, East 74th and East 75th Streets

DESCRIPTION OF PROPERTY BY BOUNDING OR CROSS STREETS

1389 25

BLOCK LOT(S)

Manhattan

BOROUGH

8

COMMUNITY DISTRICT

Upper East Side

LANDMARK/HISTORIC DISTRICT

Daniel Garodnick

CITY COUNCIL MEMBER

C5-1(MP), R8B(LH-1A)

ZONING DISTRICT

(include special zoning district, if any)

8c

ZONING MAP NUMBER

Section C
**Dept of Building
Decision**

BSA AUTHORIZING SECTION(S) 72-21 for ☒ VARIANCE ☐ SPECIAL PERMIT (Including 11-41)

Section(s) of the Zoning Resolution to be varied _____

DOB Decision (Objection/ Denial) date: _____ Acting on Application No: _____

Section D

Description

(LEGALIZATION ☐ YES ☒ NO ☐ IN PART)

Application for variance pursuant to ZR Section 72-21 to allow construction of an enlargement to the existing buildings, which would contain Use Group 6 retail and Use Group 2 residential use, and require modification of various bulk and supplementary use regulations.

Section E

**BSA History
and
Related Actions**

If "YES" to any of the below questions, please explain in the STATEMENT OF FACTS

YES NO

1. Has the premises been the subject of any previous BSA application(s)?..... ☒ ☐

PRIOR BSA APPLICATION NO(S): 334-05-BZ

2. Are there any applications concerning the premises pending before any other government agency?..... ☒ ☐

3. Is the property the subject of any court action?..... ☐ ☒

Section F

Signature

I HEREBY AFFIRM THAT BASED ON INFORMATION AND BELIEF, THE ABOVE STATEMENTS AND THE STATEMENTS CONTAINED IN THE PAPERS ARE TRUE.

Signature of Applicant, Corporate Officer or Other Authorized Representative

SWORN TO ME THIS 21st DAY OF June 2012

Gary Tarnoff

Print Name

Partner

Title

Anita Rose

NOTARY PUBLIC

ANITA ROSE

NOTARY PUBLIC, State of New York

No. 03R04755325

Qualified in Dutchess County
Commission Expires April 30, 2014

STATEMENT OF THE APPLICANT

Re: 31 East 74th Street
New York, New York
Block 1389, Lot 25 (formerly Lots 21, 22, 23, 24, 25)

This is an application pursuant to Section 72-21 of the Zoning Resolution of the City of New York (the "ZR") and Section 666 of the New York City Charter to allow an enlargement of an existing complex of brownstone buildings located partly in a C5-1(MP) zoning district and partly in an R8B(LH-1A) zoning district. The buildings were previously owned by and used in conjunction with the adjoining Whitney Museum of American Art (the "Whitney"). The enlarged building would not comply with a number of the applicable bulk and supplementary use regulations set forth in the Zoning Resolution. A variance of these regulations is requested in this application.

As explained below, the need for the requested variance arises from several factors related to the existing built condition of the zoning lot and the history of development. In particular, the constraints of the existing structures and the historic district in which they are located make it impossible to use or convert the buildings in an economically feasible way, and make it impossible to redevelop the site in compliance with the applicable bulk regulations.

The properties were acquired by the Whitney Museum beginning in 1968, and all of them had been acquired by the Whitney by 1980, except for the former Lot 25, which was acquired in 1994.¹ They were acquired with the intention that they would be incorporated into the Whitney complex, and over the years, most of the buildings have been used by the Whitney for administrative functions, with the ground floors and in some cases the second floor leased for retail uses. As a result of this history of use and development, the existing structures suffer from a number of functional deficiencies that prevent conversion to residential use in their current form, and conversion to a mix of retail and office uses would not be economically feasible. Moreover, structural changes made to the 31 East 74th Street and 33 East 74th Street buildings to facilitate connection with and use by the Whitney pose an additional burden on a potential residential conversion.

¹ The properties are currently known as Lot 25, but were until recently five separate tax lots, Lot 21 (943 Madison Avenue), Lot 22 (939-941 Madison Avenue), Lot 23 (937 Madison Avenue), Lot 24 (933-935 Madison Avenue) and Lot 25 (31-35 East 74th Street).

The complex is also located within the Upper East Side Historic District (the “Historic District”); the Landmarks Preservation Commission (the “LPC”) has determined that all but one of the six buildings that comprise the complex are contributing buildings to the district. Any proposal to enlarge the complex for residential use would require a certificate of appropriateness from the LPC and would have to preserve major portions of these contributing buildings and create a cohesive ensemble that is appropriate to the surrounding context of the Historic District. Thus, the physical constraints of the multiple buildings that constitute the complex make it impossible to use or convert the buildings in an economically feasible way, and the constraints of the Historic District make it impossible to redevelop the site in a way that complies with the applicable zoning regulations and the requirements of a certificate of appropriateness.

The enlargement that is planned (the “Enlarged Building”) would include demolition and infill of portions of two of the buildings in the complex and construction of a new 6th, 7th and 8th floor set back from the Madison Avenue and East 74th Street street lines. The Enlarged Building would rise to a height of 89 feet 5 inches (100 feet 5 inches with mechanical screen wall). As enlarged, it would have a total of 72,191 square feet of floor area, including 14,706 square feet of commercial retail use and 58,138 square feet of residential use, including 12 dwelling units.

The Enlarged Building is both economically feasible and meets the standards of a certificate of appropriateness – it has been under review by the LPC, and a decision by the LPC is expected to be issued shortly. However, the design is inconsistent with the building envelope that is mandated under the applicable zoning regulations, particularly the regulations governing the Special Madison Avenue Preservation District, in which most of the complex is located.

The Zoning Lot and Applicable Regulations

The zoning lot on which the complex is located (the “Zoning Lot”) consists of Lot 25, formerly known as Lots 21, 22, 23, 24 and 25, within Manhattan Block 1389. It is located on the western portion of the block bounded by Madison Avenue, Park Avenue, East 74th Street and East 75th Street. The Zoning Lot has a total lot area of 12,621 square feet, with 100.67 feet of frontage along Madison Avenue and 125 feet of frontage along both East 74th Street and East 75th Street. The portion of the Zoning Lot that extends 100 feet east of Madison Avenue is located in a C5-1 zoning district and also lies within the Special Madison Avenue Preservation District (the “MP”, or the “Special District”). The remainder of the Zoning Lot is located within an R8B(LH-1A) district.

The building envelope that is mandated for the Zoning Lot is chiefly a function of the regulations that govern the Special District, which was created in 1973. These regulations, which are set forth at ZR Section 99-00, *et seq.*, essentially require relatively tall rectilinear buildings built to the Madison Avenue street line. ZR Section 99-051 thus requires new construction within the Special District to be located on the Madison Avenue street line and, generally, to rise without setback to a height of at least 110 feet. Pursuant to amendments adopted after the designation of the Upper East Side Historic District, Section 99-051 provides that, for zoning lots located in a historic district, the minimum height of the building’s street wall may, instead, match the street wall height of an adjacent building. Within the portion of the Special District located between 70 feet and 100 feet from the Madison Avenue street line,

known as the “Midblock Transition Portion,” the height of a building must gradually decline in order to avoid penetrating a diagonal plane that descends to a height of approximately 80 feet when it reaches a distance of 100 feet from Madison Avenue.

The R8B(LH-1A) zoning district, where the easternmost 25 feet of the Zoning Lot is located, is a contextual district in which buildings are subject to a 60-foot height limit. See ZR Section 23-691.

The entire Zoning Lot is located within the Upper East Side Historic District, which was established by the LPC in 1981. This is one of New York City’s largest and most diverse historic districts, covering more than 60 blocks and containing over 1000 buildings. These buildings vary in size and represent a range of historical periods and architectural styles. Consistent with this varied development pattern, the major avenues within the Historic District, particularly Madison Avenue, create an irregular skyline that typically consists of tall apartment houses, four and five story rowhouses and small to medium size commercial buildings.

The Existing Buildings

The buildings in the complex originally consisted of eight separate structures, all of which were built as residences – six contiguous five-story brownstones located at 933 through 943 Madison Avenue, a four-story brownstone at 31 East 74th Street, and a five-story townhouse at 33 East 74th Street. As a result of subsequent alterations and combinations, the Zoning Lot is currently comprised of five buildings – standard-width brownstones at 937 and 943 Madison Avenue, double-width brownstones at 933-935 and 939-941 Madison Avenue, and a combined structure at 31-33 East 74th Street. The Madison Avenue brownstones are street wall buildings with a uniform height of approximately 57 feet, 2 inches. The combined East 74th Street building has a street wall height of 58 feet, 6 inches, and an overall height of 71 feet, 5 inches.

The certificate of occupancy (“CO”) for 943 Madison Avenue (former Lot 21), No. 41045, dated April 16, 1953, indicates storage use in the cellar, store use on the 1st and 2nd floors and apartments on the 3rd through 5th floors. The CO for 937 Madison Avenue (former Lot 23), No. 24579, dated April 3, 1939, indicates storage use in the cellar, store use on the 1st and 2nd floors and apartments on the 3rd through 5th floors. The CO for 933-935 Madison Avenue (former Lot 24), dated 1919, indicates storage use in the cellar, store use on the 1st floor, office use in the mezzanine and bachelor apartments on the 2nd floor and above. The CO for 33 East 74th Street (former Lot 25), No. 119608, dated June 1, 2000, indicates storage and office uses in the cellar and subcellar and museum office uses on the 1st through 5th floors. 939-941 Madison Avenue (former Lot 22) has no certificate of occupancy.

Although the COs for former Lots 21, 23 and 24 indicate residential use on the upper floors of those buildings, those buildings have not been occupied for residential use for many years. Thus, the current (or most recent) uses in the buildings are retail, museum office and apartments in former Lot 24, retail and museum office in former Lot 23, retail and apartments in former Lot 22, retail, office and apartment in former Lot 21.

The Breuer Building, which is the main building of the Whitney Museum, is located immediately to the north of the complex at 945 Madison Avenue, on the corner of Madison

Avenue and East 75th Street. The properties in the complex were acquired by the Whitney Museum beginning in 1968, and all of them had been acquired by the Whitney by 1980, except for 33 East 74th Street, which was acquired in 1994. They were acquired with the intention that they would be incorporated into the Museum, and over the years, most of the buildings have been used by the Whitney for administrative functions, with the ground floors and in some cases the second floor leased for retail uses. As a result of this history of use and development, the existing structures suffer from a number of functional deficiencies that prevent conversion to residential use in their current form, and conversion to a mix of retail and office uses would not be economically feasible. Moreover, structural changes made to the 31 East 74th Street and 33 East 74th Street buildings to facilitate connection with and use by the Whitney pose an additional burden on a potential residential conversion. In particular, the 31 East 74th Street building was converted to a circulation core that established a physical connection between the Whitney's Breuer Building and 33 East 74th Street. In the 33 East 74th Street building, the Whitney constructed a two-story high library in the building's rear yard and also added an additional floor to the rear. These changes required extensive alterations to the rear of the 33 East 74th Street building.

In its designation report for the Upper East Side Historic District, the LPC identified each of the rowhouses, with the exception of the building located at 943 Madison Avenue, as a contributing building to this historic district. Under the New York City Landmarks Law (Administrative Code Section 25-301, et seq.), the LPC must issue a certificate of appropriateness before any of these contributing buildings may be altered or demolished.

Previous Board Action Concerning the Zoning Lot

On July 25, 2006, the Board granted a zoning variance pursuant to ZR Section 72-21 to facilitate the expansion of the Whitney Museum complex. The variance (which was based on a zoning lot that included the Breuer Building) allowed modifications of zoning requirements for street wall height, street wall recess, height and setback, mandatory use, and sidewalk tree regulations, contrary to ZR Sections 24-591, 99-03, 99-051, 99-052, 99-054 and 99-06.

In that approval, the Board found that the existing built condition in combination with the LPC-imposed requirements (and the programmatic needs of the Whitney) constituted unique physical conditions on the Zoning Lot. The Board approved an enlargement that increased the height of the buildings to 178 feet, substantially higher than the 89 feet 5 inches (100 feet 5 inches with mechanical screen wall) in the Enlarged Building. Although somewhat less floor area would have been constructed on the Zoning Lot under that scheme than under the Enlarged Building (of the 128,176 square feet total proposed in that application, approximately 68,412 square feet of floor area was to be constructed on the Zoning Lot portion), the floor-to-ceiling heights were much taller and that proposal had a more massive appearance from the street than would the Enlarged Building.

(The Whitney subsequently abandoned its plans for the Madison Avenue complex and is currently developing a new main building on Gansevoort Street in the Meatpacking District, which is expected to be completed by 2015. In May 2011, it was reported that the Metropolitan Museum of Art had entered into an agreement to occupy the Breuer Building for at least eight years starting in 2015.)

The Enlarged Building

Beyer Blinder Belle Architects & Planners LLP (“BBB”), a New York City-based architecture firm with extensive experience in renovating and enlarging historic structures, is the architect for the project. BBB was charged with designing an enlargement that would create a unified, architecturally distinguished complex that would preserve the integrity of the contributing rowhouses and be appropriate to the surrounding historical context.

The Enlarged Building would consist of the following elements: (1) demolition of the existing building at 943 Madison Avenue (a non-contributing building within the historic district) and replacement of it with a new 5-story element, (2) an expanded subcellar level, (3) an infill to the existing 2-story portion of the rear of 933/935 Madison, which fronts on East 74th Street, to a height of 5 stories or approximately 56 feet, approximately matching the heights of that building and the adjacent 31 East 74th Street building, (4) reconfiguration of the third, fourth and fifth floors to create residential units on each of those floors, (5) demolition of portions of the rear of 33 East 74th Street to extend the existing court to the ground level and regularize it at the second floor level, thereby undoing the changes made by the Whitney when it converted the building to community facility use in 1994, (6) construction of a new 6th floor set back 15 feet from Madison Avenue and 15.25 feet from East 74th Street, (7) construction of a new 7th floor set back 52.46 feet from Madison Avenue and 19.42 feet from East 74th Street, (8) construction of a new 8th floor set back 52.46 feet from Madison Avenue and 23.59 feet from East 74th Street, (10) construction of a new mechanical penthouse, and (9) restoration of the historic facades of the buildings.

The new 6th floor would, as noted, be set back 15 feet from Madison Avenue and 15.25 feet from East 74th Street, and would rise to a height of 66.21 feet. The new 7th floor would be set back 52.46 feet from Madison Avenue and 19.42 feet from East 74th Street, and would rise to a height of 77 feet 10 inches. The new 8th floor would be set back 52.46 feet from Madison Avenue and 23.59 feet from East 74th Street, and would rise to a height of 89 feet 5 inches. The screen wall of the mechanical penthouse would rise to a height of 100 feet 5 inches. The Enlarged Building would increase the floor area in the buildings from 50,034 square feet to 72,191 square feet, including 14,706 square feet of commercial retail use and 58,138 square feet of residential use. The residential portion of the Enlarged Building has been designed and would be sold as a 12-unit condominium.

The Enlarged Building has been designed to be architecturally compatible with the existing buildings and the Historic District. BBB has selected exterior façade materials and fenestration systems that would harmonize with the historic structures on the site and the neighborhood context in terms of color palette and scale. The infill facades and the 6th and 7th floors of the enlargement would be clad with a rich brown terracotta rain-screen system. In order to create shadow and depth on the façade, textured flat panel and a horizontal ‘reveal’ panel terracotta units would be utilized. The 8th floor and roof-top mechanical screen wall would be clad with ‘weathered’ grey zinc panel systems.

As previously noted, because the Enlarged Building will involve alterations to buildings that are located within, and contribute to, the Upper East Side Historic District, this project requires a certificate of appropriateness from the LPC. The design of the Enlarged Building,

therefore, must be sensitive and appropriate to both the existing development on the Zoning Lot and the built context of the surrounding Historic District.

The design of the Enlarged Building satisfies this mandate and knits the buildings into an efficient and architecturally harmonious complex. As noted, the Enlarged Building retains all of the contributing buildings on the Zoning Lot while adding a new 21st Century element to it. The infill portion of the Enlarged Building reinforces the streetwall on East 74th Street and the new construction at the 6th, 7th and 8th floors is set back a respectful distance from the other building elements. The Enlarged Building rises to a height of only 89 feet 5 inches (100 feet 5 inches with mechanical screen wall), significantly less than the maximum height of 210 feet for new development within the Special District. In addition, with the Enlarged Building, the Zoning Lot would contain only 72,191 square feet of floor area, which is significantly less than the floor area (110,886 square feet) permitted on the Zoning Lot. In short, the Enlarged Building will produce a sensitive composition of varied but respectful elements, which will allow all of the contributing buildings to be read as separate structures. This composition will be consistent with the irregular Madison Avenue skyline that prevails in the Upper East Side Historic District, which, as previously discussed, has evolved over time into a neighborhood with buildings that vary greatly in age, style and size.

As noted, the Enlarged Building has been under review by the LPC, and a decision on the application is expected to be issued shortly.

Complying Development

Also submitted with this application are plans for a complying development (the “Complying Development”). The Complying Development would consist of an infill to the existing 2-story portion of the rear of 933/935 Madison, which fronts on East 74th Street, to a height of 5 stories or approximately 56 feet, approximately matching the heights of that building and the adjacent 31 East 74th Street building. The Complying Development would consist of retail uses on the first and second floors and in the cellar of the Madison Avenue buildings, commercial office uses on the upper floors of the Madison Avenue buildings and community facility office use in 33 East 74th Street. The Complying Development would not increase the height of the existing buildings, but it would increase the floor area from 50,034 square feet to 58,188 square feet. In total, the Complying Building would have approximately 15,226 square feet of retail use, 23,203 square feet of commercial office use and 19,759 square feet of community facility office use.

As set forth in the Report from Grubb & Ellis submitted with this application (the “G&E Report”), the Complying Development would not be a financially feasible project. This is because the proposed commercial and community facility office uses would not generate sufficient income to cover the acquisition and construction costs.

Although residential use on the upper floors and in the 33 East 74th Street building would provide more value than the uses in the Complying Development, residential use would not be permitted on an as-of-right basis given the current configuration of the buildings. The COs for former Lots 21, 23 and 24 indicate residential use on the upper floors of those buildings, but those buildings have been occupied for office use for a number of years. Pursuant to the

Housing Maintenance Code, for any multiple dwelling that becomes untenanted for a period of 60 days or more, it is unlawful to cause or permit the same to be used in whole or in part for living purposes until such dwelling is made to comply with the applicable requirements of the administrative code and the multiple dwelling law and until a new certificate of occupancy is obtained. N.Y.C. Admin. Code 27-2089(a). In order to obtain a new certificate of occupancy for residential use, substantial alterations would be required to the rear wall of 33 East 74th Street to address, e.g., the non-complying rear yard, inner court and window-to-lot line conditions, and those alterations would not be permitted by the LPC because of the historic rear façade of that building. Therefore, a fully complying redevelopment of the Zoning Lot may only be used for commercial and/or community facility use.

Complying Enlargement

An enlargement of the existing complex of buildings would have to be located on the street line along its entire Madison Avenue frontage and along East 74th Street to a depth of 50 feet from its intersection with Madison Avenue. Such an enlargement would be required to rise without setback to at least the height of the adjacent Breuer Building, which stands 97 feet, 8 inches above curb level. Above this height, the enlargement would have to set back at least 10 feet along Madison Avenue and 15 feet along East 74th Street. Its maximum height would be 210 feet above curb level and the gross area of any story located more than 170 feet above curb level could not exceed 80 percent of the gross area of the story directly below it. Within a so-called “Midblock Transition Portion,” which is located between 70 feet and 100 feet from the Madison Avenue street line, a complying enlargement could not penetrate an imaginary plane that begins 70 feet from Madison Avenue at a height of 120 feet above curb level and descends to a height of 77.67 feet at a distance of 100 feet from Madison Avenue.

However, an enlargement that complied with all applicable zoning requirements would dominate and obscure the historic buildings that now comprise the complex. Furthermore, having the street wall enlargement directly about the Breuer Building would prevent this modernist icon from being viewed as a fully independent work of exceptional architecture. Consequently, such an enlargement would not receive the required LPC Certificate of Appropriateness.

In contrast, the Enlarged Building would be both historically appropriate and provide a reasonable return. It would set back from the Madison Avenue and East 74th Street street lines, and it would have a total height of only 89 feet 5 inches (100 feet 5 inches with mechanical screen wall), which would make it more compatible in scale with the other buildings in the surrounding neighborhood. A variance of a number of applicable zoning provisions is therefore needed to enable an enlargement that is both financially feasible and that satisfies the LPC’s mandate and is appropriate to the Upper East Side Historic District.

Department of Buildings Objections and the Requested Variances

The Department of Buildings has raised the following objections with respect to the Enlarged Building:

- **Proposed street wall location within 50' of Madison Avenue is contrary to ZR 99-051(a)(1)**

Zoning Resolution Section 99-051 is applicable to any developments or enlargements within the Special District. Section 99-051(a) provides that, along Madison Avenue and along a side street within 50 feet of its intersection with Madison Avenue, the entire base of any new construction shall be located on the street line and shall rise without setback to a height of between 110 feet and 120 feet above curb level. Above 120 feet, the new structure is required to set back from the street line at least 10 feet along a wide street and 15 feet along a narrow street. Section 99-051(b) provides that, along the portion of a side street located more than 50 feet from its intersection with Madison Avenue, the base of the new construction shall be located on the street line and shall rise without setback to a height of 60 feet above curb level. Above this 60 foot base, the new structure shall set back from the street line at least 10 feet along a wide street and 15 feet along a narrow street.

Section 99-051(c) relaxes this street wall requirement somewhat for a zoning lot located within a historic district. In such cases, the minimum base height of any street wall may vary between the street wall height of an adjacent building and the street wall height required under subsections (a) and (b), above. Under these provisions, new construction along the East 74th Street frontage may match the height of an existing adjacent structure, as does the infill portion of the Enlarged Building. However, new construction along the Madison Avenue frontage of the Zoning Lot would have to be located on the Madison Avenue street line up to a height of at least 97 feet, 8 inches, which is the street wall height of the adjacent Breuer Building.

In order to comply with the LPC's requirement that all of the contributing buildings located on the Zoning Lot read as distinct structures, the Enlarged Building would be set back at least 15 feet from the Madison Avenue street line and at least 15.25 feet from the East 74th Street street line.

By setting back from the street lines, the Enlarged Building does not comply with Section 99-051's requirement of a street wall building with a height of at least 97 feet, 8 inches along Madison Avenue and the first 50 feet of East 74th Street. An enlargement that complied with these street wall requirements would have required either the complete demolition of the contributing rowhouses, or construction of the addition at the street line. Neither of these approaches would have resulted in the issuance of a certificate of appropriateness for the Enlarged Building, as required under the Landmarks Law.

- **Required recesses for enlarged portion not provided; contrary to ZR 99-052(a)**

In order to create articulation within the mandated street wall envelope, Zoning Resolution Section 99-052(a)(3) requires recesses in the Madison Avenue street walls of buildings located within the Special District. Within the base of the Madison Avenue frontage, above a height of 20 feet or the second story, whichever is less, at least 25 percent of the length of the street wall must be recessed from the street line to a depth of at least 5 feet. Above the base, at least 20 percent of the length of the street wall shall be recessed at least 5 feet.

The Enlarged Building does not provide the required recesses for several reasons. The Madison Avenue base will be comprised of the existing rowhouses, which must be preserved. Above this base, the Enlarged Building will set back 15 feet from the Madison Avenue street line, and there would be a bay window on the 6th floor, thereby creating a form of building articulation. If recesses were required in the Enlarged Building itself, there would be a significant loss of usable space. A variance of the applicable recess requirement is therefore necessary.

- **Height exceeds maximum within Midblock Transition Portion; contrary to ZR 99-054(b)**

Zoning Resolution Section 99-054(b) is applicable to the portion of the Special District located between 70 feet and 100 feet from the Madison Avenue street line. ZR Section 99-054(b) provides that within this “Midblock Transition Portion,” a new development or enlargement shall not penetrate an imaginary plane that begins 70 feet from Madison Avenue at a height of 20 feet above the height of a street wall built pursuant to ZR Section 99-051(b) – in this case 77.67 feet – and rises a height of 120 feet above curb level at a distance of 70 feet from Madison Avenue.

The Enlarged Building sets back 15 feet from the Madison Avenue street line. The rear portion of the Enlarged Building lies within the Midblock Transition Portion and penetrates the applicable limiting plane. Locating the Enlarged Building at the Madison Avenue street line would allow the Enlarged Building to observe the Midblock transition plane. However, this would be inconsistent with the LPC’s requirement that the enlargement be set back from Madison Avenue so that the contributing rowhouses can be read as distinct structures.

- **Proposed street wall less than 45’-0” in width facing East 74th Street in C5-1(MP) portion exceeds height of 80’-0” (width of Madison Avenue); contrary to ZR 23-692(c) and ZR 99-053**

ZR Section 23-692 (the “sliver law”) and ZR Section 99-053 provides that on corner lots, bounded by at least one wide street, a street wall less than 45 feet in width shall not be permitted above a height equal to the width of the widest street on which it fronts or 100 feet, whichever is less. Since Madison Avenue is 80 feet wide, no street wall within 100 feet of the corner that is less than 45 feet in width may exceed a height of 80 feet. The 8th floor of the Enlarged Building has a street wall facing East 74th Street that is approximately 39.21 feet in width and it rises to a height of 89 feet 5 inches. This modification is necessary because of the need to maximize floor area to achieve a feasible project and because of the LPC’s requirement that new floor area be located away from Madison Avenue and be minimally visible from the street.

- **Lot coverage for interior lot portion in R8B district exceeds 70%; contrary to ZR 23-145**

Per ZR Section 23-145, the maximum permitted lot coverage on an interior lot in an R8B zoning district is 70 percent. As shown on existing conditions plan Z-001E, the interior lot portion currently has approximately 100 percent lot coverage and is therefore a pre-existing non-

complying condition. (Note that the applicable lot coverage for community facility use, which is the most recent use in the 33 East 74th Street building, is also 70 percent, per ZR Section 24-11.)

As shown on plan Z-002B, with the Enlarged Building, although the lot coverage would be reduced on the first and second floors, it would still be approximately 78 percent. This modification is necessary because of the existing built condition on the Zoning Lot and because the rear wall of 33 East 74th Street cannot be altered.

- **Proposed rear yard for interior lot portion is less than required 30'-0"; contrary to ZR 23-47**

Per ZR Section 23-47, a rear yard of 30 feet is required for an interior lot in an R8B zoning district. As shown on existing conditions plan Z-001E, the interior lot portion does not currently provide a rear yard on the ground floor and has a rear yard of less than 30 feet on the upper floors. As such, this is a pre-existing non-complying condition. (Note that the applicable rear yard requirement for community facility use, which is the most recent use in the 33 East 74th Street building, is also 30 feet, per ZR Section 24-36.)

As shown on plan Z-002B, with the Enlarged Building, this non-compliance would be reduced on the first and second floors and a rear yard of 25.33 feet would be provided on the first through fifth floors of the existing structure. The enlarged portion of the 33 East 74th Street building, the new 6th floor, would provide the required 30-foot rear yard. This modification is necessary because of the existing built condition and because the rear wall of 33 East 74th Street cannot be altered.

- **Proposed inner court (including the area of the non-compliant rear yard) measures less than 1200 sq. ft. and contains a dimension that is less than 30'-0"; contrary to ZR 23-851**

ZR Section 23-851 provides that the area of an inner court shall not be less than 1,200 square feet and the minimum dimension of such court shall not be less than 30 feet. The existing structures, although previously used for residential use, had a court (including the non-complying rear yard) on the 3rd, 4th and 5th floors with a dimension of 33.33 feet wide by 25.33 feet deep, or approximately 830 square feet. The Enlarged Building would expand the size of the non-complying court on the second floor, but maintain its dimensions on the 3rd through 5th floors. Further, although the court in the new floors of the building would have dimensions in excess of 30 feet by 30 feet, it would not have the required 1,200 square feet of area. The requested modification is necessary because of the existing built condition and because of the need to maximize usable space and to do so in a location that would not be visible from the public street.

- **Proposed legally required window-to-lot line condition is less than 30'-0"; contrary to ZR 23-861**

ZR Section 23-861 provides that the minimum distance between a legally required window and any wall, rear lot line or side lot line is 30 feet. While in residential use through 1994, the 33 East 74th Street building was non-complying with Section 23-861, as it had legally required windows with distances of 25.33 feet from the rear wall to the rear lot line. In 1995,

with the change of use to community facility, Section 23-861 no longer applied to the building. With the proposed conversion back to residential use and enlargement of the buildings, Section 23-861 would apply again. The existing rear wall of the 33 East 74th Street building would be maintained, as requested by the LPC, and the existing distance between that wall and the rear lot line would remain at 25.33 feet. This modification is necessary because of the existing built condition of the Zoning Lot and because the rear wall of 33 East 74th Street cannot be altered.

- **Proposed height in R8B (LH-1A) portion exceeds 60'-0"; contrary to ZR 23-691**

As noted, the easternmost 25 feet of the Zoning Lot is located within an R8B/LH-1A zoning district. Under Zoning Resolution Section 23-691, the maximum height of a building within this district is 60 feet above curb level.

The townhouse located at 33 East 74th Street, which was constructed before the adoption of Section 23-691 and previously housed Museum offices, currently has five stories and an overall height of approximately 68 feet. As part of the Enlarged Building, one additional story would be added to this structure, which would bring its height to approximately 79 feet, thereby increasing the degree of non-compliance with the applicable 60-foot height limit. This non-complying rooftop enlargement will provide approximately 1,290 square feet of additional usable space that is required to provide a reasonable return. Moreover, it will be set back 31.92 feet from the street line and, consequently, will be minimally visible from the street.

- **Required 10'-0" setback from rear yard line for portion of building that exceeds max base height on interior lot is not provided; contrary to ZR 23-663(b)**

ZR Section 23-633(b) requires that in R8B districts, no portion of a building that exceeds the applicable maximum base height of 60 feet shall be nearer to the rear yard line than 10 feet. The existing 33 East 74th Street structure exceeds 60 feet. Further, the building has a non-complying rear yard and it does not set back from the required rear yard. This non-complying condition would be continued in the Enlarged Building. Further, the enlarged portion of the 33 East 74th Street building, the new 6th floor, would be located at a distance of 30 feet from the rear lot line and therefore would not provide the required 10-foot rear setback. The encroachment within the rear setback will provide additional usable space that is needed to provide a reasonable return. Further, it would not be visible from the street and would back on to the Breuer, a non-residential building.

- **FAR exceeds maximum permitted of 4.0 in R8B portion; contrary to ZR 23-145**

Per ZR Section 23-145, the maximum FAR within R8B zoning districts is 4.0. The R8B portion of the Subject Property has a lot area of 2,554 square feet and a permitted floor area of 10,216 square feet. The Enlarged Building would have 12,301 square feet within the R8B portion, exceeding the maximum permitted by 2,085 square feet. This modification largely results from the need to locate residential use in the cellar of the 33 East 74th Street building because there is no other feasible use for this cellar space – retail use is not permitted in the R8B district -- and because of the need to maximize the usable area of the building. Since the cellar area (1,999 square feet) will be used for dwelling purposes, per ZR Section 12-10 ("floor area"), it counts as floor area.

Note also that the floor area of the Zoning Lot as a whole, 72,891 square feet, would be significantly less than the maximum permitted, 110,836 square feet.

- **Proposed location of commercial use above residential use is contrary to ZR 32-422**

The supplementary use regulations of ZR Section 32-422 provide that within C5 districts, in any building or portion of a building occupied by residential uses, commercial uses in Use Group 6 may be located only on a story below the lowest story occupied in whole or in part by such dwelling units. This limitation does not preclude the location of commercial use below the first story ceiling. However, the second floor of the Enlarged Building consists of both Use Group 6 retail use and Use Group 2 residential use.

Modification of the supplementary use regulations of ZR Section 32-422 is required because although the buildings in the complex are being converted and enlarged as a single building, the lower floors would function as two separate buildings, with commercial retail uses on the Madison Avenue frontage and residential use located in the R8B district on the side street. It would not be practical to locate residential use on the second floor of the Madison Avenue frontage and it would not be practical or permissible to locate commercial retail use in any portion of the 33 East 74th Street building, which is partially located in the R8B district.

Statement of Findings Pursuant to Z.R. Section 72-21

The following is a statement of how each of the five variance findings required under Section 72-21 of the Zoning Resolution is satisfied in this case:

A. There are unique physical conditions or exceptional topographical conditions peculiar to and inherent in the Zoning Lot which create practical difficulties and unnecessary hardship in complying with the use or bulk limitations of the Zoning Resolution which are not due to circumstances created generally by the strict application of the provisions of the Zoning Resolution in the neighborhood or district in which the Zoning Lot is located.

The uniqueness finding of Section 72-21(a) is satisfied by the unique circumstances associated with the existing built condition and history of development on the Zoning Lot. The Board has frequently found that existing development constitutes a “unique physical condition” inherent in a zoning lot causing a practical difficulty or unnecessary hardship. On July 25, 2006, in an application concerning the Zoning Lot itself, together with the Breuer Building, your Board granted a zoning variance pursuant to ZR Section 72-21 to facilitate the expansion of the existing Whitney Museum complex. The variance allowed modifications of zoning requirements for street wall height, street wall recess, height and setback, mandatory use, and sidewalk tree regulations; contrary to Z.R. §§ 24-591, 99-03, 99-051, 99-052, 99-054, 99-06. In that approval, your Board found that the existing built condition in combination with the LPC-imposed requirements (and the programmatic needs of the Whitney) constituted unique physical conditions on the Zoning Lot. Your Board approved an enlargement that increased the height of

the buildings to 178 feet, substantially higher than the 89 feet 5 inches (100 feet 5 inches with mechanical screen wall) in the Enlarged Building.

Application of the Solomon R. Guggenheim Museum, 1071 Fifth Avenue, Manhattan (BSA Cal. No. 540-85-BZ), involved an enlargement, which had to be constructed in a manner that preserved the integrity of the original facility. In that case, the Guggenheim Museum sought to construct a 6-story addition atop an existing 4-story annex located adjacent to the Museum's signature facility, the Frank Lloyd Wright building on Fifth Avenue. The proposed addition did not comply with several applicable bulk regulations, including a mandatory street wall requirement imposed pursuant to the Special Park Improvement District regulations. In its resolution approving the requested zoning waivers, the Board found that "the existing building and its placement on the lot constitute a unique physical condition which creates practical difficulties in meeting the Museum's programmatic needs in a complying manner."

Other cases where the Board has found that existing development has satisfied the uniqueness requirement of Section 72-21(a) include: Columbia University School for Children and Faculty Housing, 2824-2834 Broadway (BSA Cal. No. 306-00-BZ) (variance from height and setback, lot coverage, rear yard equivalent, supplementary use, minimum window distance and zoning room requirements granted on lot with existing buildings); Polytechnic University, 101 Johnson Street, Brooklyn (BSA Cal. No. 164-00-BZ) (variance from sky exposure plane regulations granted on lot with existing buildings because layout of college dormitory to be constructed would otherwise be inefficient); Actors' Fund of America, 469-475 West 57th Street (BSA Cal. No. 116-94-BZ) (area variance modifying alternate front setback regulations granted for proposed 30-story community facility where programmatic needs foreclosed removing 10 feet from front of existing church on the zoning lot); 142-148 East 57th Street, Manhattan (BSA Cal. No. 74-97-BZ) (area variance modifying alternate front setback regulations granted for proposed residential development where removing 10 feet in front of existing MTA substation on Zoning Lot would have been contrary to MTA's programmatic needs); The American Baptist Churches of Metropolitan New York, 527-31 West 22nd Street, Manhattan (BSA Cal. No. 217-92-BZ) (non-profit organization granted variance to partially demolished existing, obsolete 100-year-old warehouse building for conversion to residence for homeless persons with AIDS); 50 East 69th Street, Manhattan (BSA Cal. No. 1070-84-BZ) (in residential district, obsolete four-story school building allowed to be converted to medical office); 744-746 Greenwich Street, Manhattan (BSA Cal. No. 9-95-BZ) (pre-existing non-conforming vacant garage building on split lot allowed to be enlarged into a residential district to accommodate non-conforming photographic studio); 86th Street East Theaters, 210 East 86th Street, Manhattan (BSA Cal. No. 62-96-BZ) (office/theater building with non-conforming theater allowed to be enlarged to accommodate two additional screens in residential district).

The courts have, on a number of occasions, upheld the Board's reliance on existing development to satisfy the uniqueness requirement. See, e.g., Guggenheim Neighbors v. Board of Estimate, Index No. 29290/87, (N.Y. Sup. Ct. Jun. 10, 1988) (affirming grant of variance, discussed above, and stating "the appropriateness of looking to such factors as developmental and zoning history and improvements to the property is supported by case law"), aff'd, 145 A.D.2d 998 (1st Dep't 1988), lv. to app. denied, 74 N.Y.2d 603 (1989); 260 West Broadway Associates v. Board of Estimate of the City of New York, N.Y.L.J., June 7, 1979, at 11, col. 5 (Sup. Ct. N.Y. Co.) (affirming grant of a variance, court upholds the Board's finding of

uniqueness based, in part, upon the fact that the “unusual shape of the building, its stairways and its service cars make it unsuitable” for proposed commercial use); 97 Columbia Heights Housing Corp. v. Board of Estimate of the City of New York, N.Y.L.J., Oct. 9, 1984, at 12, col. 5 (Sup. Ct. N.Y. Co.), aff’d, 111 A.D.2d 1078 (1st Dep’t 1985), aff’d, 67 N.Y. 2d 725 (1986) (reinstating variance, court affirms Board’s finding that the subject parcel “presented unique physical characteristics owing to the demolition of a ninety-year old fire-gutted building whose foundation was initially excavated in a less sophisticated age”).

The need for the requested variance arises from several factors related to the existing built condition of the zoning lot and the history of development. The properties were acquired by the Whitney Museum beginning in 1968, and all of them had been acquired by the Whitney by 1980, except for 33 East 74th Street, which was acquired in 1994. They were acquired with the intention that they would be incorporated into the Museum complex, and over the years, most of the buildings have been used by the Whitney for administrative functions, with the ground floors and in some cases the second floor leased for retail uses. As a result of this history of use and development, the existing structures suffer from a number of functional deficiencies that prevent conversion to residential use in their current form, and conversion to a mix of retail and office uses would not be economically feasible. Moreover, structural changes made to the 31 East 74th Street and 33 East 74th Street buildings to facilitate connection with and use by the Whitney pose an additional burden on a potential residential conversion. In particular, the 31 East 74th Street building was converted to a circulation core that established a physical connection between the Whitney’s Breuer Building and 33 East 74th Street. In the 33 East 74th Street building, the Whitney constructed a two-story high library in the building’s rear yard and also added an additional floor to the rear. These changes required extensive alterations to the rear of the 33 East 74th Street building.

The complex is also located within the Upper East Side Historic District; the LPC has determined that all but one of the six buildings that comprise the complex are contributing buildings to the district. Any proposal to enlarge the complex for residential use would require a certificate of appropriateness from the LPC and would have to preserve major portions of these contributing buildings and create a cohesive ensemble that is appropriate to the surrounding context of the Historic District. In order to obtain a new certificate of occupancy for residential use, substantial alterations would be required to the rear wall of 33 East 74th Street to address, e.g., the non-complying rear yard, inner court and window-to-lot line conditions, and those alterations would not be permitted by the LPC because of the existing historic rear façade of that building.

These historic conditions are also in conflict with the building envelope mandated under the Special District regulations. These regulations were adopted in 1973, almost 100 years after the Madison Avenue rowhouses were built. The Special District regulations also predate the designation of the Upper East Side Historic District by eight years. The prevailing form that they mandate is, essentially, a tall apartment building, with ground floor retail uses, built to the Madison Avenue street line, with a required street wall of between 110 and 120 feet, or, within a historic district, a street wall that at least matches the height and location of an adjacent building, and a maximum overall height of 210 feet. The normative form is that of a contextual Quality Housing building with a high street wall.

Any enlargement that complied with these street wall requirements would have dominated and obscured the rowhouses. Such an enlargement would, therefore, have been inconsistent with the LPC's mandate that any enlargement retain and be respectful of the contributing rowhouses as distinct structures. Constructing the enlargement set back from the rowhouses satisfies the conditions imposed by the LPC, but results in non-compliance with the street wall and Midblock Transition Portion requirements of the Special District regulations.

Thus, all of the requested modifications are directly tied to either the pre-existing condition of the buildings (regarding lot coverage, rear yard, inner court and legal window regulations), the conflicts between the Special District regulations and the requirements of the LPC (regarding the streetwall location and recess regulations), the need to develop the buildings as a single complex within the confines of the existing structures and the C5-1(MP)/R8B split lot condition (regarding the supplementary use regulations), or the need to maximize the floor area of the building in a way that would be consistent with the requirements of the LPC and the Historic District (regarding the sliver law, R8B floor area, R8B/LH-1A height, rear setback and recess regulations).

In short, the physical constraints of the buildings that constitute the complex make it impossible to use or convert the buildings in an economically feasible way, and the constraints of the historic district make it impossible to redevelop the site in a way that complies with both the applicable zoning regulations and the requirements of a certificate of appropriateness.

The requested variance results from these unique historical, physical and regulatory conditions, which create practical difficulties and unnecessary hardship in complying with the bulk and supplementary use regulation of the Zoning Resolution.

B. Because of such physical condition 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 the grant of a variance is therefore necessary to enable the owner to realize a reasonable return from such zoning lot, except that this finding shall not be required for the granting of a variance to a non-profit organization.

As discussed above, the Subject Property is subject to a unique confluence of factors -- the physical condition of the buildings, the need to develop the buildings as a single complex within the confines of the existing structures and the split lot condition, and the conflicts between the Special District and the LPC requirements. As a result of these conditions, there is no reasonable possibility that the development of the Subject Property in strict conformity with the provisions of the Zoning Resolution will bring a reasonable return. The physical constraints of the buildings that constitute the complex make it impossible to use or convert the buildings in an economically feasible way, and the constraints of the historic district make it impossible to redevelop the site in a way that complies with both the applicable zoning regulations and the requirements of a certificate of appropriateness.

As shown on the plans for the Complying Development, the Complying Development would consist of retail uses on the first and second floors and in the cellar of the Madison Avenue buildings and commercial and community facility office uses on the upper floors of the

Madison Avenue buildings and community facility office use in 31-33 East 74th Street. The Complying Development would not increase the height of the existing buildings, but it would increase the floor area from 50,034 square feet to 58,188 square feet (by infilling within the existing structures). The Complying Development would have approximately 15,226 square feet of retail use, 23,203 square feet of commercial office use and 19,759 square feet of community facility office use.

The G&E Report includes a thorough analysis of the financial return likely to be produced by each of the above-mentioned development scenarios. The G&E Report utilizes the direct capitalization of income method to evaluate the value and feasibility of the different schemes. This method capitalizes the net operating income, which is the sum of the office and retail rents less vacancy and credit loss, commission and expenses. A capitalization rate of 6.0% was utilized, based on reported capitalization rates in the New York City area for retail, office and mixed use project, and includes both lender and investor expectations.

The capitalized net operating income (less commissions and concessions) determined by the analysis for commercial spaces in the Complying Development is \$68,144,401. The total development cost, including estimated acquisition cost, hard construction costs and soft costs, for the Complying Development is estimated to be \$115,910,699. The difference between the value of the capitalized net operating income and the development cost is a significant negative (\$47,800,000). The Complying Development contains significantly less value than the total development cost and is not considered feasible, as a lender would not finance the project cost.

The G&E Report also reviewed the feasibility of the Enlarged Building, which, as noted, would include a residential condominium component. Using the capitalization of income method, the capitalized value determined by the analysis for the retail space is \$52,309,100. The value of the residential condominium sales is \$102,498,563. Thus, the total value of the Enlarged Building project is \$154,807,663. The total development cost, including estimated acquisition cost, hard construction costs and soft costs, for the Enlarged Building is estimated to be \$146,475,054. The rounded net profit is \$8,300,000, such that the Enlarged Building would represent an acceptable investment opportunity.

The Enlarged Building would be a much more valuable project than the Complying Development because, with the requested waivers, the complex may be converted and enlarged for residential use.

In summary, the G&E Report demonstrates that, because of significant, site-specific impediments, the Complying Development would not provide the Owners with a reasonable return. However, the Enlarged Building, with the requested modifications, would yield a profit that would make the Enlarged Building a feasible project.

C. The variance, if granted, would not alter the essential character of the neighborhood or district in which the Zoning Lot is located, would not impair the appropriate use and development of adjacent property, and would not be detrimental to the public welfare.

The neighborhood in which the Zoning Lot is located contains a mix of residential, retail and institutional uses. Madison Avenue in this area is a lively shopping corridor and is

predominantly occupied by both large and small residential buildings, with the ground floors, and frequently the first two floors, devoted to boutiques, galleries, restaurants and spas. The proposed use would not alter the essential character of the surrounding neighborhood.

As previously discussed, the size of the buildings in the area surrounding the Zoning Lot are extremely varied, ranging from one and two story carriage houses to high-rise residential buildings. The building directly to the west of the Breuer Building, at 14 East 75th Street, is an 11-story structure with a height of 166 feet, while the building directly to the north, at 35 East 75th Street, has 16 stories and a height of 192 feet. The building located southwest of the Zoning Lot, at Madison Avenue and East 74th Street is a 15-story, 192-foot high apartment building, while the 40-story, 394-foot high Carlyle Hotel lies one block to the north, at Madison Avenue and East 76th Street. In addition, the easterly end of the block on which the Zoning Lot is located contains a 14-story and a 19-story residential building. The Enlarged Building, which will have 8 stories and rise to a height of 89 feet 5 inches (100 feet 5 inches with mechanical screen wall), will therefore be comparable in height with a number of surrounding buildings, and will be significantly lower than the maximum height of 210 feet for new development within the Special District.

The infill portion of the Enlarged Building would reinforce the streetwall on East 74th Street and the new construction at the 6th, 7th and 8th floors is set back a respectful distance from the other building elements. This massing would be consistent with the built context of the surrounding neighborhood because many of the taller buildings within this area are located in the midblocks rather than along the major avenues. For example, within the Upper East Side Historic District, which runs along both sides of Madison Avenue from East 61st Street to East 77th Street, 15 buildings of 13 stories or higher are located mid-block, immediately east and west of Madison Avenue. In fact, two large midblock apartment buildings located near the Zoning Lot – the 15-story building at 23 East 74th Street and the 16-story building at 20 East 76th Street – offer a Madison Avenue perspective very similar to the Enlarged Building in that they sit directly behind low-rise commercial buildings that front on Madison Avenue.

In addition, with the Enlarged Building, the Zoning Lot would contain only 72,191 square feet of floor area, which is significantly less than floor area (110,886 square feet) permitted on the Zoning Lot. In short, the Enlarged Building will produce a sensitive composition of varied but respectful elements, which will allow all of the contributing buildings to be read as separate structures. This composition will be consistent with the irregular Madison Avenue skyline that prevails in the Upper East Side Historic District, which, as previously discussed, has evolved over time into a neighborhood with buildings that vary greatly in age, style and size. As noted, the Enlarged Building has been under review by the LPC, and LPC approval is expected to be issued shortly.

As discussed in the Environmental Assessment Statement (the “EAS”) prepared for this application by Philip Habib & Associates the proposed project would not alter the setting or visual context of any historic resource in the area, nor would it eliminate or screen publicly accessible views of any resources. Moreover, the proposed exterior restoration, renovation, and preservation work would contribute to the improvement of contributing historic resources compared to existing conditions, and would therefore significantly benefit the pedestrian perception of the subject building and adjacent streetscape. The proposed action would facilitate

a development that is consistent with the prevailing forms in the surrounding historic district and the building types in the immediate vicinity at Madison Avenue and East 74th Street. Therefore, no significant adverse impacts on urban design and visual resources are expected to occur as a result of the proposed action. Further, the Enlarged Building will not produce excessive vehicular or pedestrian traffic in the surrounding area or any other negative community impacts.

Therefore, the Enlarged Building will not alter the essential character of the surrounding neighborhood, impair the appropriate use and development of adjacent property or be detrimental to the public welfare.

D. The practical difficulties and unnecessary hardship have not been created by the owner or its predecessor in title.

The need for the requested variance arises from several factors related to the existing built condition of the zoning lot and the history of development. The properties were acquired by the Whitney Museum beginning in 1968, and all of them had been acquired by the Whitney by 1980, except for 33 East 74th Street, which was acquired in 1994. They were acquired with the intention that they would be incorporated into the Museum complex, and over the years, most of the buildings have been used by the Whitney for administrative functions, with the ground floors and in some cases the second floor leased for retail uses. As a result of this history of use and development, the existing structures suffer from a number of functional deficiencies that prevent conversion to residential use in their current form, and conversion to a mix of retail and office uses would not be economically feasible. Moreover, structural changes to the 31-33 East 74th Street building to facilitate connection with and use by the Whitney pose an additional burden on a potential residential conversion.

The complex is also located within the Upper East Side Historic District; the LPC has determined that all but one of the six buildings that comprise the complex are contributing buildings to the district. Any proposal to convert or enlarge the complex for residential use would require a certificate of appropriateness from the LPC and would have to preserve major portions of these contributing buildings, including the rear wall of 33 East 74th Street, and create a cohesive ensemble that is appropriate to the surrounding context of the Historic District. These historic conditions are in conflict with the building envelope mandated under the Special District regulations, which were adopted in 1973, almost 100 years after the Madison Avenue rowhouses were built. The Special District regulations also predate the designation of the Upper East Side Historic District by eight years.

Thus, the practical difficulties and unnecessary hardship result from the physical constraints of the multiple buildings that constitute the complex, which make it impossible to use or convert the buildings in an economically feasible way. Further, the constraints of the historic district make it impossible to redevelop the site in a way that complies with both the applicable zoning regulations and the requirements of a certificate of appropriateness.

It is therefore apparent that the practical difficulties that necessitate this application have not been created by the owner or a predecessor in title.

E. Within the intent and purposes of the Zoning Resolution, the variance, if granted, is the minimum variance necessary to afford relief.

As discussed, the variance requested in this application involves a set of discrete zoning waivers that are dictated by the need for a project that is both economically feasible and that satisfies LPC's standards for a certificate of appropriateness. All of the requested modifications are directly tied to either the pre-existing condition of the building (regarding inner court, rear yard, lot coverage and legal window regulations), the need to develop the buildings as a single complex within the confines of the existing structures and the split lot condition (regarding the supplementary use regulations), or for the need to maximize the floor area of the building in a way that would be consistent with the requirements of the LPC and the Historic District (regarding the sliver law, R8B floor area, R8B/LH-1A height and rear setback regulations).

It should be stressed that the height of the Enlarged Building falls well below the applicable overall height limit of 210 feet and is also well below the height of a number of nearby buildings. Following the Enlarged Building, the Zoning Lot will contain a total of only 72,191 square feet of floor area, which is significantly less than the 110,836 square feet of floor area permitted on the Zoning Lot under the applicable C5-1(MP)/R8B regulations.

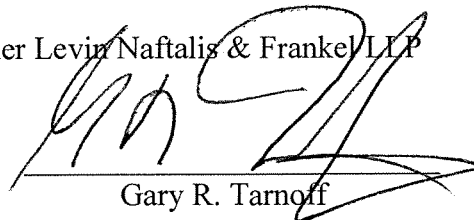
As discussed above, the difference between the capitalized net operating income and the development cost of the Complying Development is a significant negative (\$47,800.00). With respect to the possibility of a lesser variance scenario that would entail only the waivers required to convert the existing buildings to residential use, the renovation costs that would be associated with such a project would at least equal, and would likely exceed, those required for the Complying Development, and it is clear that any such project would not provide enough sellable residential area to cover those development costs and result in a feasible project. As discussed, the Proposed Building, with the requested modifications, would result in a rounded net of \$8,300,000, such that the Enlarged Building would represent an acceptable investment opportunity.

In conclusion, the requested variance is the minimum necessary to satisfy the preservation obligations imposed by the LPC.

Respectfully submitted,

Kramer Levin Naftalis & Frankel LLP

By:

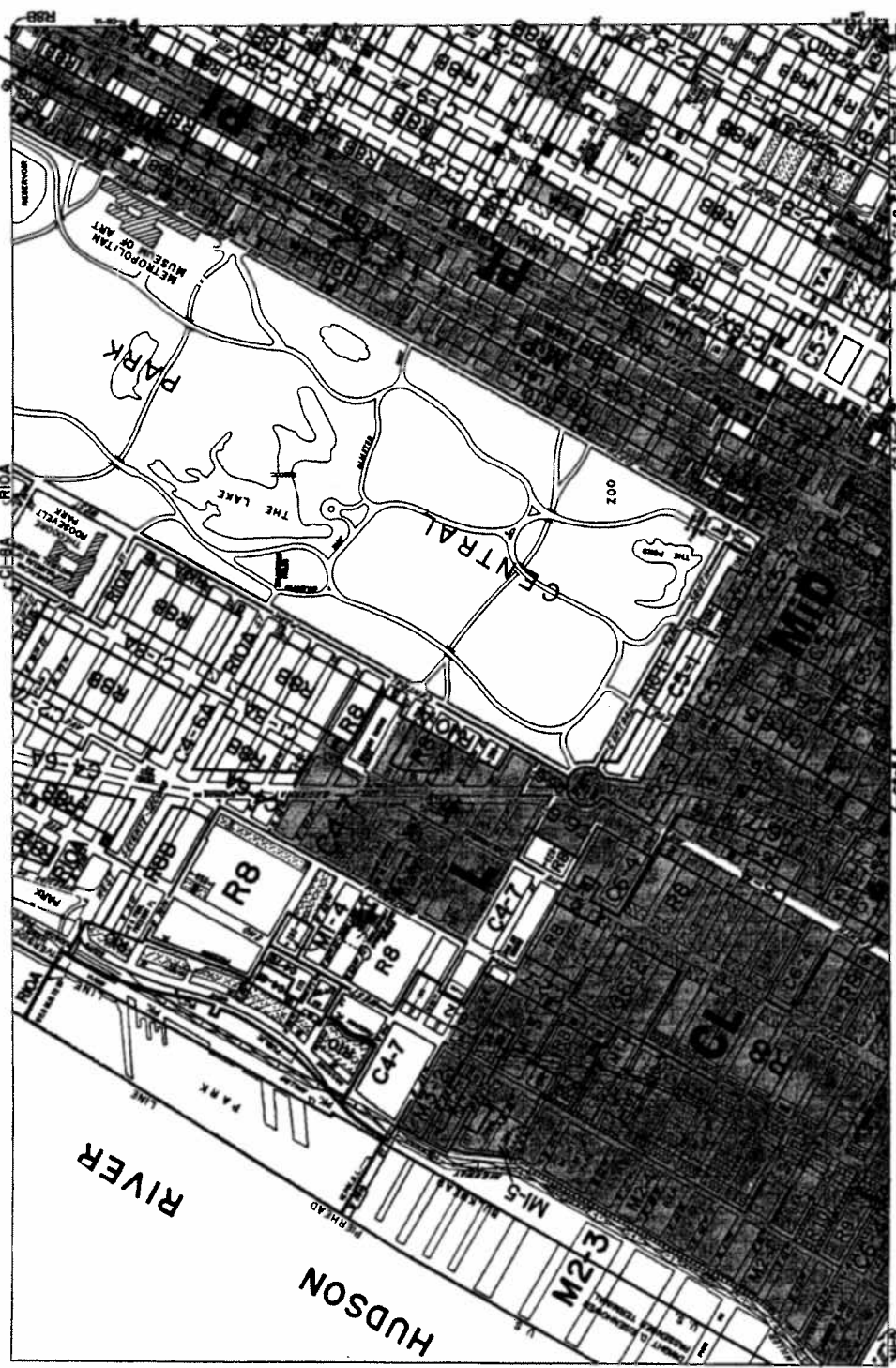


Gary R. Tarnoff

New York, New York
June 22, 2012

PROPERTY SITE

Click blue box on map to view sketch map of proposed map change



ZONING MAP

THE NEW YORK CITY PLANNING COMMISSION

Major Zoning Classifications:
The number(s) and/or letter(s) that follows on R, C or M District designations indicates use, bulk and other controls as described in the text of the Zoning Resolution.

- R - RESIDENTIAL DISTRICT
- C - COMMERCIAL DISTRICT
- M - MANUFACTURING DISTRICT

SPECIAL PURPOSE DISTRICT
The letter(s) within the shaded area designates the special purpose district as described in the text of the Zoning Resolution.

..... AREA(S) REZONED

Effective Date(s) of Rezoning:

* 06-14-2011 C 110177 ZMM
04-06-2011 C 110125 ZMM

Special Requirements:

For a list of lots subject to CEQR environmental requirements, see APPENDIX C.
For a list of lots subject to "D" restrictive declarations, see APPENDIX D.
For Inclusionary Housing designations, see APPENDIX E.
For other special requirements, see APPENDIX F.

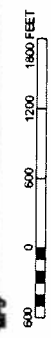
ZONING MAP 8c

MAP KEY

5d	6b
8a	8c
8b	8d
9a	9b

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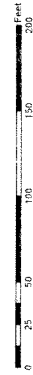
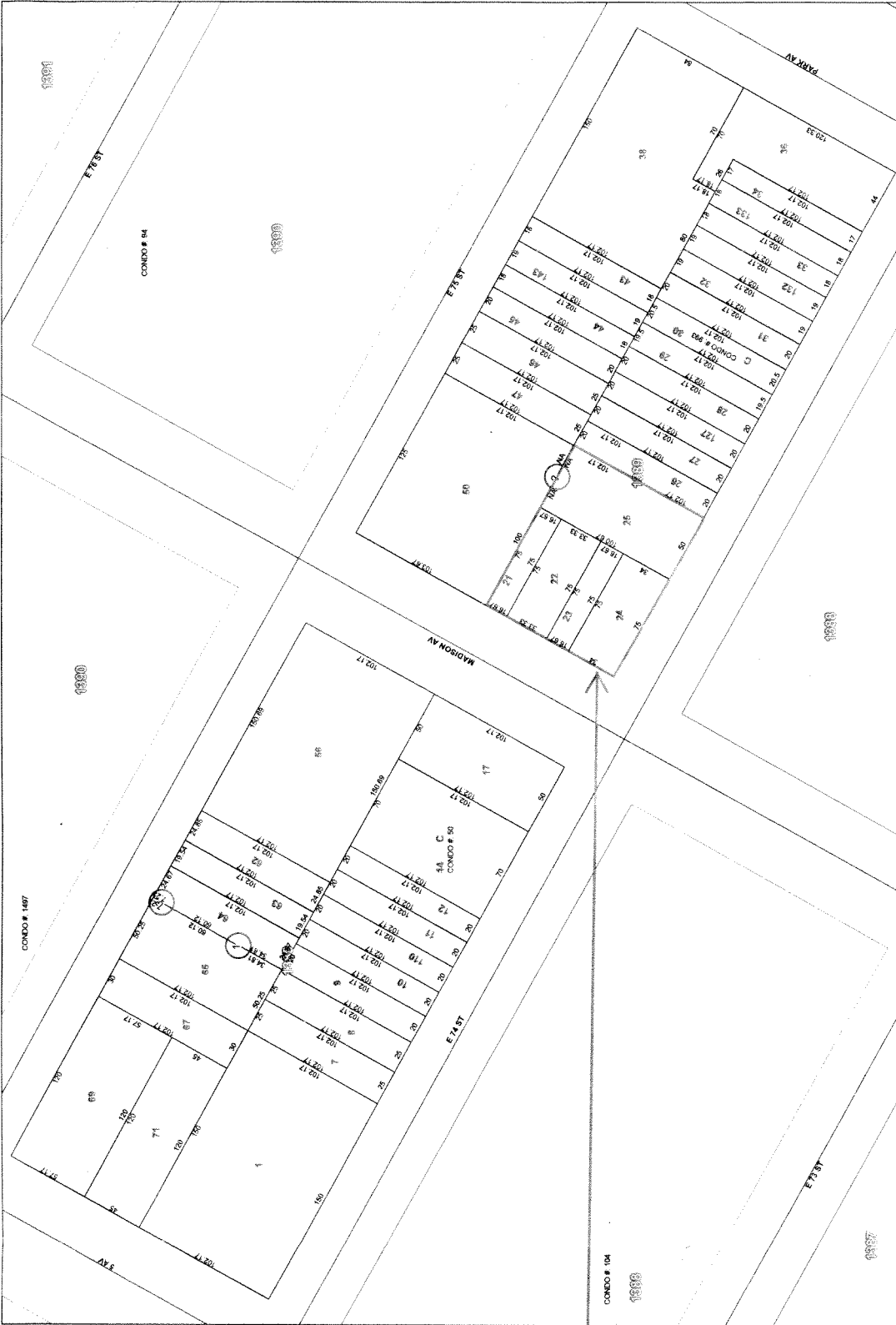
NOTE: Zoning information as shown on this map is subject to change. For the most up-to-date zoning information for the map, visit the Zoning website of the Department of City Planning website: www.dcp.nyc.gov/zoning or contact the Zoning Information Desk at (212) 720-5201.





- Legend**
- Street
 - Manhole
 - Manhole Text
 - Position Hooks
 - Boundary Lines
 - Lot Face Possession Hooks
 - Regular
 - Underwater
 - Tax Lot Polygon
 - Condo Number
 - Tax Block Polygon

PROPERTY SITE





NYC Digital Tax Map

Effective Date : 05/31/2012 10:10:49
End Date : Current
Manhattan Block 1389



Legend

- Streets
 - Miscellaneous Text
 - Possession Hooks
 - Boundary Lines
 - Lot Face Possession Hooks
 - Regular
- Underwater
 - Tax Lot Polygon
 - Condo Number
 - Tax Block Polygon

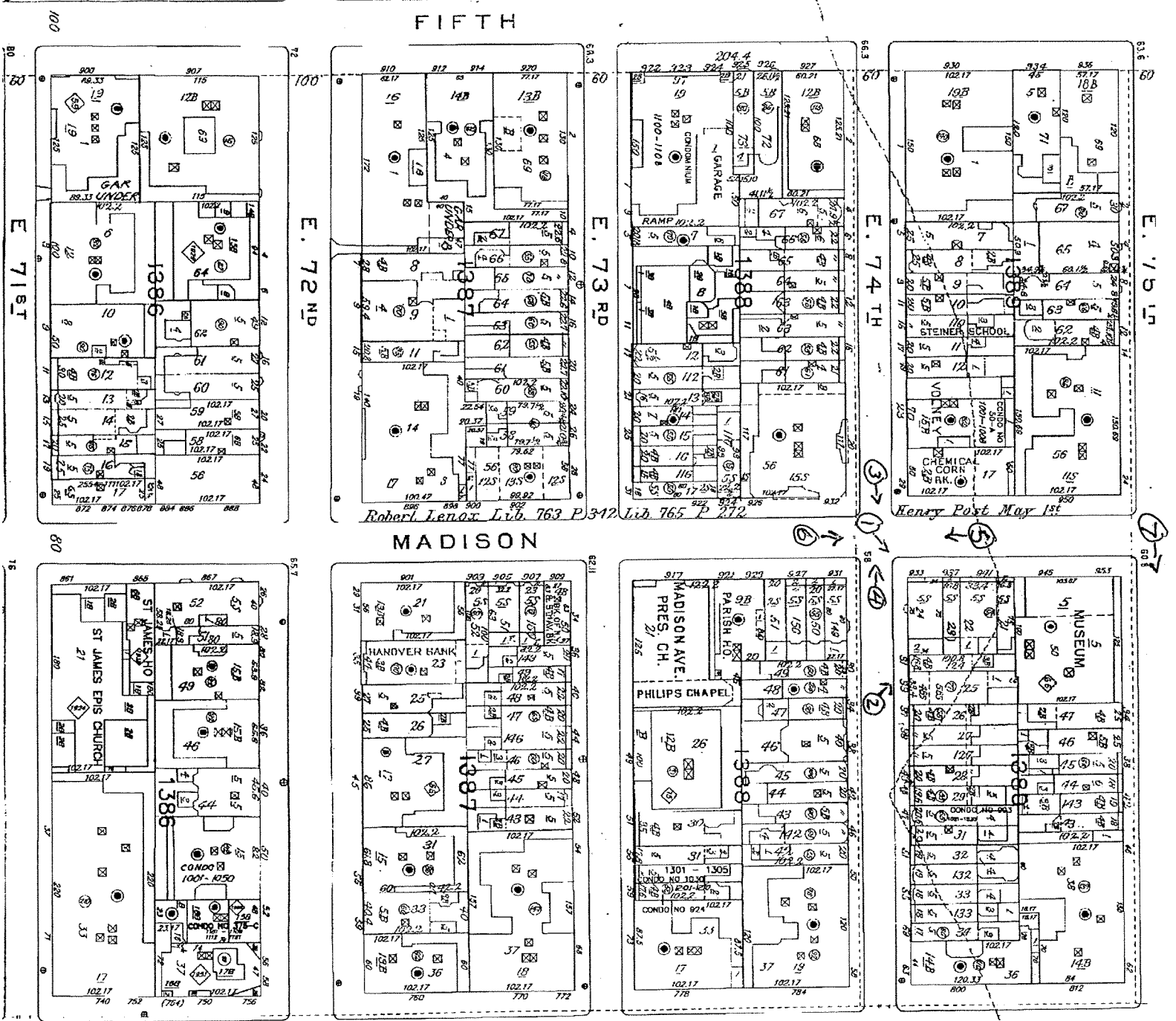
CONTRACT 1389



0 5 10 20 30 40 Feet

CENTRAL

FIFTH

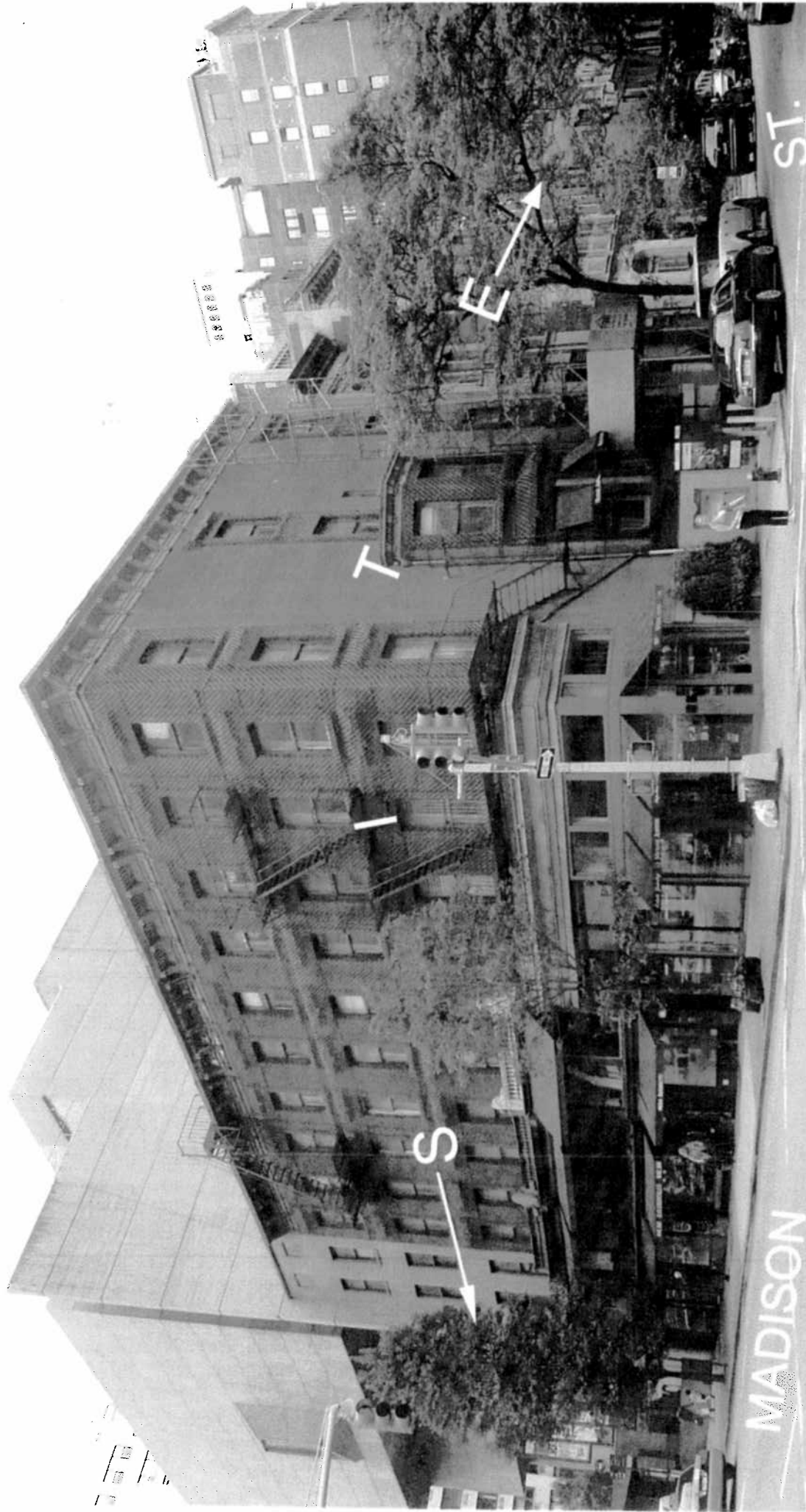


Robert Lenz Lb. 763 P 312 Lib 765 P 272

Henry Post May 1st

MADISON

PARK



933-943 MADISON AVE.
NEW YORK, NY

VIEW - 1 5-22-12

E. 74th

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MADISON

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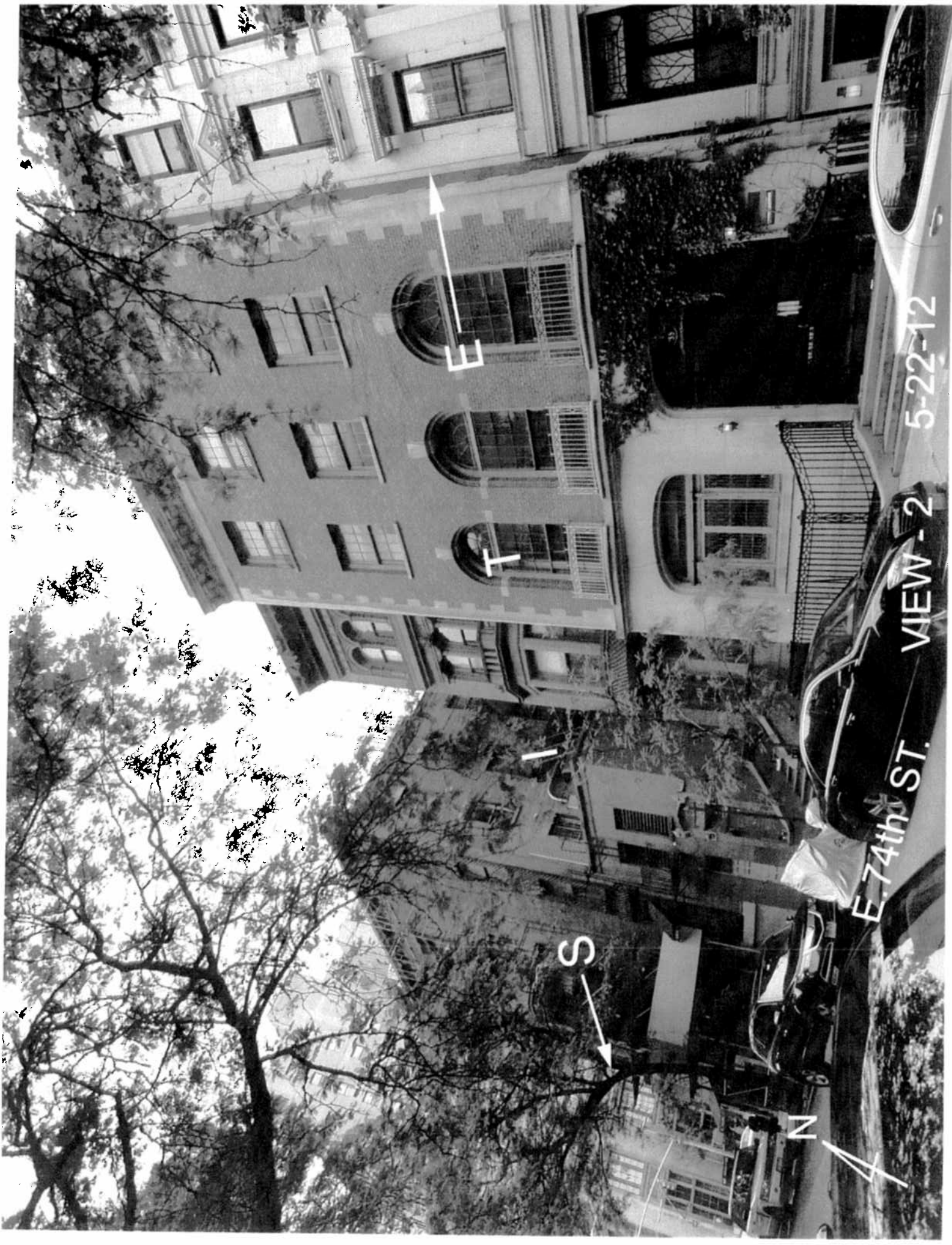
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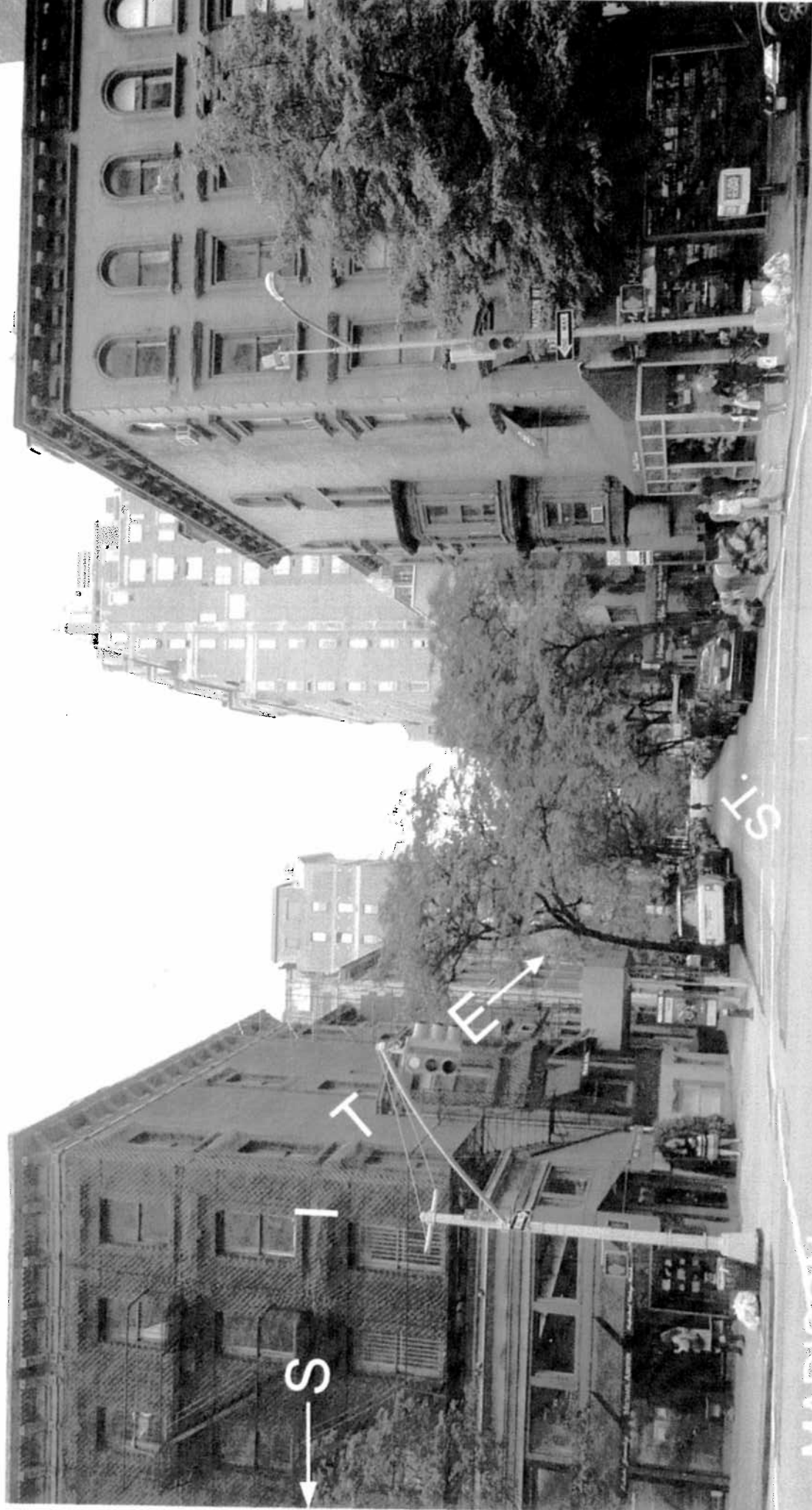
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E. 74th ST. VIEW - 2



AVE.

VIEW - 3 5-22-12

MADISON

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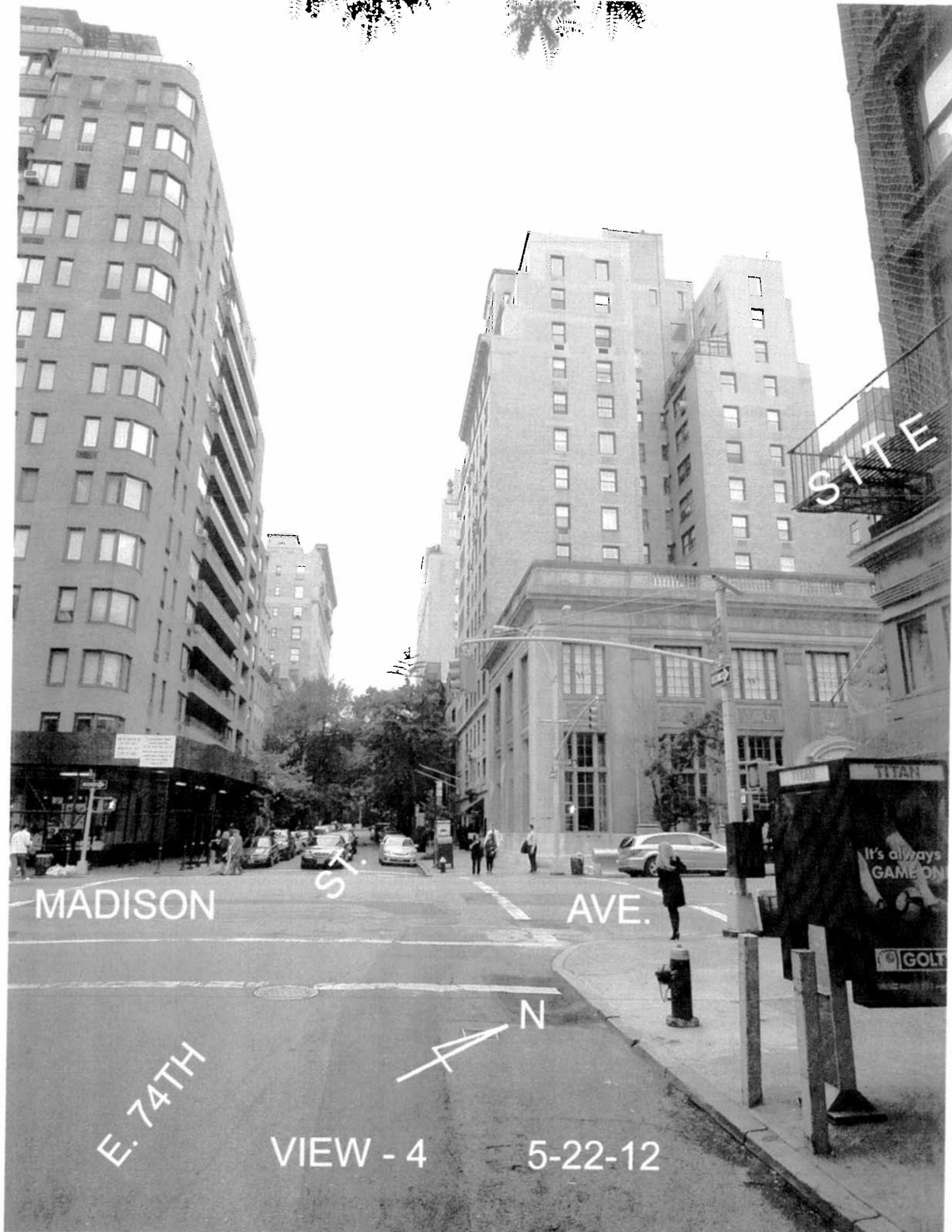
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MADISON

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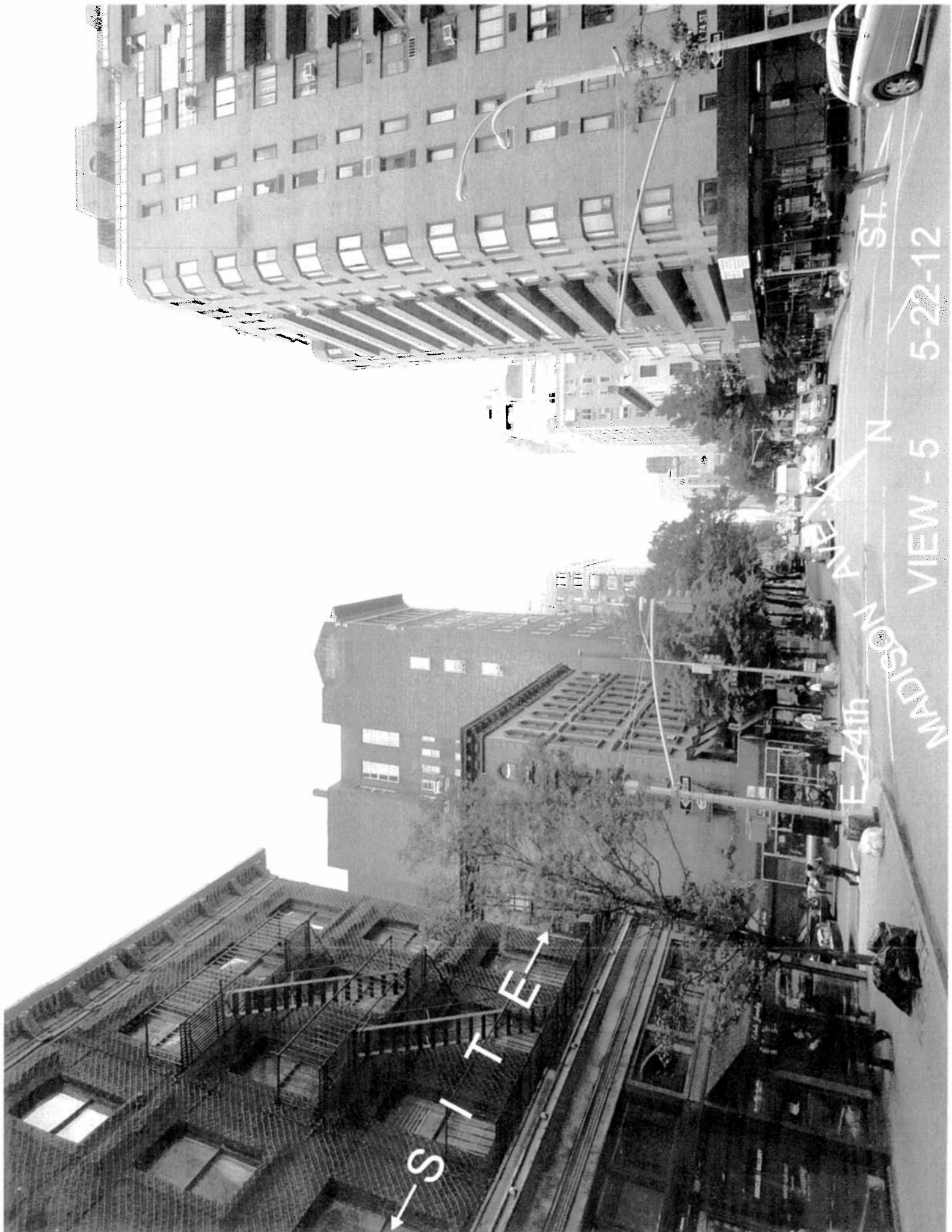
VIEW - 4

5-22-12

SITE

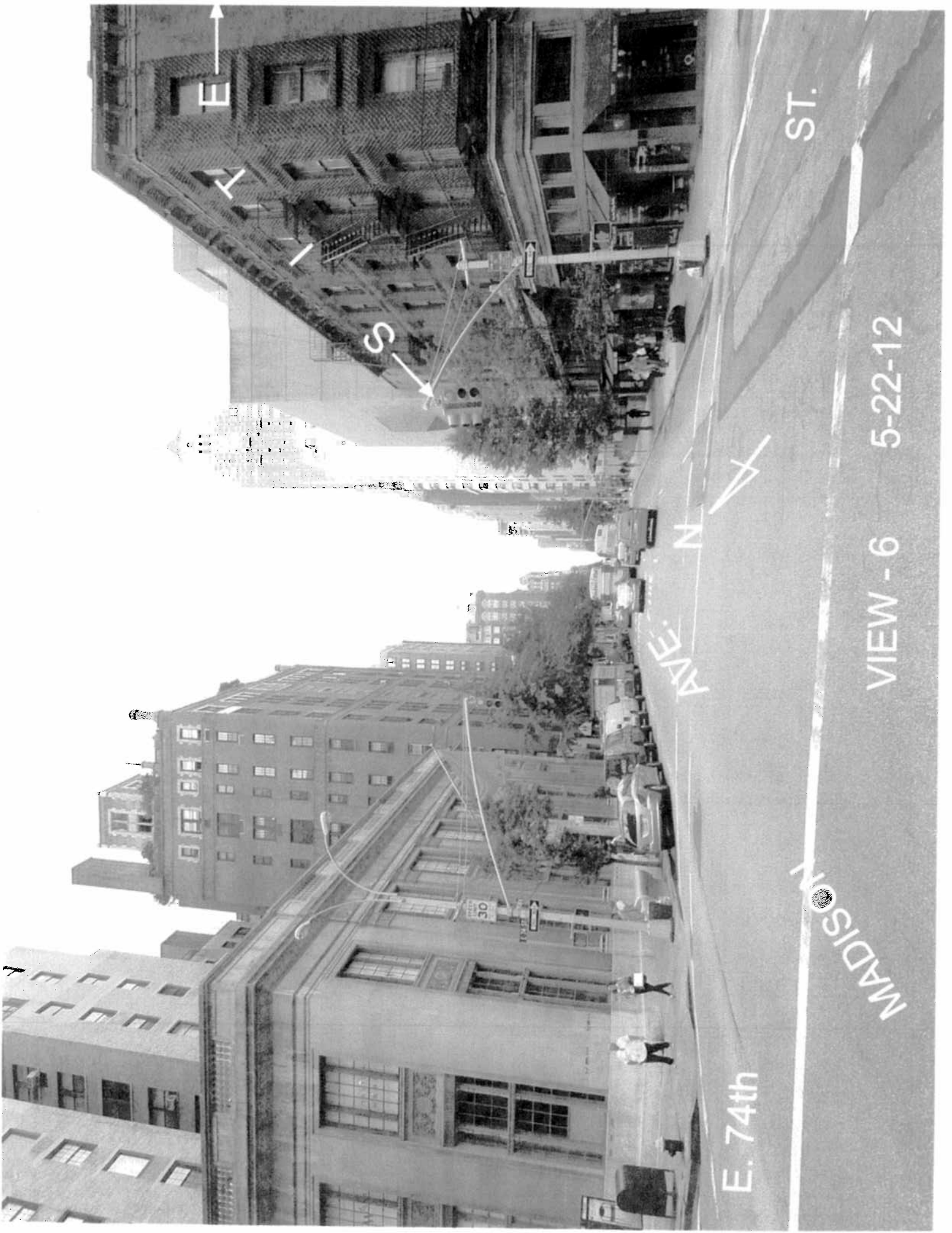
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MADISON AVE N
E 74th ST.
VIEW - 5 5-22-12



VIEW - 6 5-22-12



E. 75th

N

AVE.

ST.

SITE

VIEW - 7

5-22-12

