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Land Use and Zoning Newsletter

Sheldon Lobel P.C.

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ZONING CHANGES AND VESTED RIGHTS

By Jordan Most

I. Background

Real estate developers in New York City (the "City") are currently building at a frenzied pace. Existing buildings are being demolished, air rights are being transferred between parcels to allow for increased bulk, and the sizes of construction projects are expanding. Furthermore, sites once deemed undesirable for a variety of reasons are rapidly being developed. In reaction to this intense development activity, many communities, fearful of overdevelopment that could threaten the character of their neighborhoods, have lobbied the Department of City Planning and created the impetus for a number of down-zonings, particularly in the outer boroughs.

The typical down-zoning reduces the permissible density in a given area; it may lead to a decrease in the maximum permissible floor area, the unit density and/or building height for a given site. The implications for a developer of a property located in a down-zoned area can be profound. Property is acquired at a purchase price that contemplates a certain amount of developable square feet or number of units; if down-zoned however, the value of the property is diminished, perhaps dramatically, depending on the degree of the zoning change.

II. Ascertain the Probability of a Rezoning

Before spending funds on redeveloping a property already owned, or acquiring a property with the intent of redeveloping, a developer should conduct zoning due diligence, which among other items, should include:

A. confirming the present zoning of the property;

B. checking with the Department of City Planning, the local Community Board and the local Councilperson to see if there are plans or applications to rezone the affected area; and

C. consulting with an architect or zoning attorney.

III. No Rezoning Planned

After conducting this inquiry and learning of no plan to rezone, a developer may be in a good position to proceed with the contemplated development.

IV. Rezoning Proposed

If, however, a rezoning proposal is progressing through the land use rezoning process, New York City's Uniform Land Use Review Procedure ("ULURP"), a developer must take certain steps to preserve his or her rights, thereby maintaining the right to proceed under the old zoning even after the zoning change goes into effect.

Once it is apparent that a rezoning is imminent in a given area, it becomes critical that the architect, developer and general contractor track the progress of the rezoning through the ULURP hearings. The critical action is the vote of the City Council, since this is deemed to be the date the zoning change is effective. Knowledge of this schedule will enable the developer to keep certain project tasks ahead of the zoning change date. Regardless of the status of construction and the condition of the site on the zoning change date, site conditions should be meticulously documented as of that date by: (i) having a foundation survey

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Ramifications of Recent Real Estate Boom

As land use attorneys, we have witnessed the benefits of low interest rates, increased demand for housing and the general burst in real estate activity during the last few years. Residential development continues at a breakneck pace.

However, we have also monitored the negative impact of rapid development: politically initiated down-zoning, which has caught many owners and developers off guard. Building projects have been hampered as approved building permits are revoked due to down-zoning. Permits are revoked because down zoning reduces building areas such as floor area.

We have represented a number of clients who are confronted with economic disaster when their approved plans are disallowed and their building can no longer be built because their property has been down-zoned. If their building rights have not vested, they must build at reduced levels. There are ways to insure that plans and building permits previously issued by the Department of Buildings can be continued, but the developer must be aware of the steps to be taken.

In this edition of our newsletter, Jordan Most writes about the applicable laws in the accompanying article. Read it and learn what must be done to "vest your rights" when your property is down-zoned. If you are interested, please feel free to schedule an appointment with one of our attorneys to discuss these issues or any other land use, zoning or real property matters.

Sheldon Lobel

Welcome to our new newsletter

With this issue, our newsletter has undergone a complete makeover. Our goal has been an updated look and a more efficient use of space for the stories we'd like to bring you in the future. The new design ties in with our recently-launched web site at www.sheldonlobelpc.com

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completed as of the zoning change date (by either the architect or a surveyor — be sure that the document is dated, signed and sealed); (ii) hiring a photographer to take photographs of the foundation and the site on the zoning change date and make sure the photographs are date stamped (also have the photographer further certify as to the date and time such photographs are taken); and (iii) keeping all original concrete delivery slips which should indicate the volume of concrete delivered and poured on each date.

A. Statutory Vesting Rights — Department of Buildings

In order to develop the parcel according to the zoning in effect prior to the zoning change date, the developer must fulfill certain criteria. In general, the architect must prepare plans, secure full building permits, and the developer must prepare the site for construction and commence, and in some cases complete, construction. The Zoning Resolution of the City of New York (the "ZR") has very specific criteria for determining whether a developer has vested rights once a down-zoning has gone into effect. ZR Section 11-331, in conjunction with ZR Section 11-31, very clearly state that prior to the effective date of the zoning change, the following elements must be satisfied:

1. a valid building permit is issued prior to the zoning change date that authorizes the entire construction of the project and not merely a part thereof;

2. the permit must be based on complete plans and specifications; and

3. the foundation must be complete.[1]

The Department of Buildings (the "DOB") will make the determination as to whether these criteria have been satisfied. If the DOB is satisfied, rights should vest and the developer should be able to proceed pursuant to previously issued permits.

If the developer's foundations are not complete as of the zoning change date, then the permit technically lapses by operation of law and the right to continue construction terminates. Any work undertaken at this point is at the risk of the developer since the DOB may issue a stop work order at virtually any time after the zoning change date and before the issuance of a final certificate of occupancy.

B. Statutory Vesting Rights — Board of Standards and Appeals

Even if the previously discussed statutory requirements regarding foundations have not been fulfilled according to the DOB, ZR Section 11-331 may still help the developer. In the event foundations for new construction are not complete as of the zoning change date, ZR Section 11-331 provides that the New York City Board of Standards and Appeals (the "BSA") may determine that rights have vested provided:

1. a valid building permit is issued prior to the zoning change date that authorizes the entire construction of the project and not merely a part thereof;

2. the permit must be based on complete plans and specifications;

3. site excavation is complete;

4. substantial progress has been made on foundations (the foundations need not be complete); and

5. the case (a "BZY" case) is commenced at the BSA within thirty (30) days after the zoning change date.

In the case of an alteration permit, the BSA may find that rights have vested under ZR Section 11-332 provided valid permits are in place and substantial construction has been completed and substantial expenditures made as of the zoning change date. Again, as of the zoning change date, the same level of proof of completion is needed for the alteration job as with new construction.

An important complication is that while a developer's permit may have technically lapsed by operation of law, the DOB may not have issued a stop work order and shut down the job site. Where foundations are not complete, any work undertaken after the zoning change date is technically work without a permit. Since the DOB can issue a stop work order at virtually any time after the zoning change date, it is imperative that the developer properly document site conditions on the zoning change date and actually proactively file the BZY case within the thirty (30) day time frame. The BSA prefers that vested rights questions are addressed within the framework of the BZY application, rather than the alternatives discussed below.

C. Common Law Vested Rights — Too Late to File BZY Case

Assuming foundations were not complete as of the zoning change date, the developer has decided to proceed with construction after the permit has technically lapsed and the thirty (30) day period to file a BZY case has also passed, the developer may still pursue certain remedies at the BSA.

The owner may commence an appeals case under the theory of common-law vested rights (an "A" case), or file a variance application (a "BZ" case). The Appellate Division has made clear that the statutory and common-law vesting theories, while similar, are not identical; and most importantly, the statutory text of section 11-331 does not "codify or abolish the common-law doctrine of vested rights."[2] The A-case criteria differ in a number of respects from the BZY case; specifically, the A-case need not be brought within thirty (30) days of the zoning change date, and the permits need not be for the complete building, a valid excavation and foundation permit may suffice.[3] However, substantial construction[4] and substantial expenditures[5] as of the zoning change date must still be proven; therefore, the importance of documenting site conditions on the zoning change date still remains paramount.[6]

D. Variance

Lastly, if the partially completed job has been stopped by the DOB for failure to properly vest rights, foundations were not complete as of the zoning change date, it is too late for a BZY case, and the developer has poor proof of site conditions as of the zoning change date, or permits were mistakenly issued by the DOB after the zoning change date, a variance application may be filed at the BSA. The BSA must

make a determination that the required findings, as set forth in ZR Section 72-21, have been met. Briefly stated, the BSA must find that there are certain unique physical conditions affecting the property and that such conditions give rise to a financial hardship, that the proposed development will not be detrimental to the local community character, that the problem was not self-created and that the variance sought is the minimum necessary to afford relief. These variance findings may be very difficult to satisfy in the vested rights context.

V. Conclusion

It is the developer's responsibility to stay apprised of possible zoning changes — the developer will receive no notice from the City that a rezoning is forthcoming. So, to protect one's property interest, it is of the utmost importance that the property owner thoroughly document site and foundation conditions as of the zoning change date.

If the developer's due diligence reveals that a down-zoning may affect his or her property, the developer should be able to stay ahead of the ULURP process and properly vest rights and continue building under the old zoning.

[1] If the project involves the new construction of more than two buildings on a single zoning lot or contiguous zoning lots, the foundations for at least one building must be complete. For jobs involving alteration permits, the work simply must be complete, however, the Board of Standards and Appeals does have discretionary power to allow an incomplete alteration job to proceed.

[2] *Estate of Kadin v. Bennett,* 163 A.D.2d 308 (2d Dep't 1990), *leave to appeal denied,* 77 N.Y.2d 801 (1991).

[3] *See Glenel Realty Corp. v. Worthington,* 4 A.D.2d 702 (2d Dep't 1957), *appeal dismissed,* 3 N.Y.2d 708 (1957).

[4] *See Glenel Realty, supra; Ageloff v. Young,* 282 A.D. 707 (2d Dep't 1953); *Hasco Electric Corp. v. Dassler,* 144 N.Y.S.2d 857 (Sup. Ct. Westchester County 1955), *aff'd,* 1 A.D.2d 889 (2d Dep't 1956), *leave to appeal denied,* 1 N.Y.2d 642 (1956); *Miller v. Dassler,* 155 N.Y.S.2d 975 (Sup. Ct. Westchester County 1956). *But see Smith v. M. Spiegel & Sons Inc.,* 31 A.D.2d 819, (2d Dep't 1969), *aff'd,* 24 N.Y.2d 920.

[5] *See Town of Orangetown v. Magee,* 156 Misc.2d 881 (Sup. Ct. Rockland County 1992), *aff'd,* 218 A.D.2d 733 (2d Dep't 1995), *aff'd,* 88 N.Y.2d 41 (1996); *Lefrak Forest Hills Corp. v. Galvin,* 40 A.D.2d 211, 218 (2d Dep't 1972), *aff'd,* 32 N.Y.2d 796 (1973); *Ageloff, supra.*

[6] *See Ellington Construction Corp. v. Zoning Bd of Appeals of Vil. of New Hempstead,* 77 N.Y.2d 114 (1990).

TRANSIENT PARKING PURSUANT TO THE MULTIPLE DWELLING LAW

By Jordan Most

There are many instances in Manhattan in which the Board of Standards and Appeals (the "BSA") granted variances to allow accessory parking spaces to be used for transient parking. Such grants were made subject to the condition that building tenants could reclaim the parking spaces allocated to transient users upon notice to the garage operator. During the late 1950's and early 1960's the BSA granted these variances, typically for a term of ten (10) or twenty (20) years, under Section 60(3) of the Multiple Dwelling Law (the "MDL"). The BSA no longer makes such grants pursuant to the MDL, but they regularly renew them.

When these cases were originally granted, the BSA typically allowed "surplus spaces to be used for transient parking," although in some instances the actual number of spaces eligible for transient parking was specified in the BSA's resolution. Several recent term renewal cases at the BSA addressed the possibility of reducing the overall number of parking spaces in garages. The basis for this possible reduction was that the original plans and certificates of occupancy sometimes did not completely comport with contemporary code requirements for determining the maximum number of parking spaces.

In the context of these surplus transient parking garage cases we have adamantly opposed any reduction in the overall number of parking spaces in garages. We believe any such parking space reduction is beyond the scope of the BSA's jurisdiction, and moreover, has potential damaging economic impacts for the cooperative or condominium buildings in which such garages are typically located, as well as possible traffic and environmental implications.

At a recent BSA hearing for an extension of term case, we convinced the BSA to renew an original grant without tampering with the total number of parking spaces in the garage — a matter that was never before the BSA (remember, the original grant is usually for the garage operator to use "surplus" spaces for transient parking). We, of course, will continue to fight any improper reduction in the number of parking spaces in these so-called MDL public parking garages.

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We welcome the following new associates to our firm:

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Ms. Fernandes works in the areas of zoning, land use and general real estate law. She handles a variety of land use matters before the City Planning Commission, the Board of Standards and Appeals, and other regulatory agencies. In addition, she handles a variety of real estate transactional matters.

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Mr. Answini practices land use law, primarily preparing and filing variances and special permit applications at the NYC Board of Standards and Appeals. He also focuses on obtaining real estate tax exemptions and abatements under the NYC Housing Preservation and Development programs of 421(a), 421(b) and J-51 and the NYC Dept. of Finance ICIP program. Prior to joining the firm Mr. Answini was an associate at Seward & Kissel LLP and Morgan, Lewis & Bockius LLP where his practice focused on securities law.

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