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In Zoning Due Diligence, Creative Interpretation Is Key

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It is a given that zoning should be a part of every developer's due diligence. The question is, though, how much zoning analysis is enough and who should provide it.

Here in New York City, large development companies whose high-profile projects fill the front pages of the New York Times will typically take an all-hands-on-deck approach and will hire a small army of architects, attorneys and consultants to do their zoning due diligence: one or more architects to do zoning calculations and prepare massing studies to illustrate the outer envelope of a potential building under various optional development scenarios; a code consultant/expeditor to advise as to potential building code and permitting issues; and a zoning attorney to prepare a zoning analysis memo that describes in detail virtually every aspect of the applicable zoning regulations — use, floor area, height and setbacks, open space and parking — as well as to advise as to whether adjacent properties have any air rights to sell and whether there are any special approvals available to, quite literally, push the envelope.

Smaller development firms on the other hand will often rely on an architect or a code consultant only and forego the services of a zoning attorney, partly out of cost-sensitivity (let's face it, attorneys don't come cheap) and partly out of the not uncommon misconception that because architects, code consultants and zoning attorneys all work from the same source material — the New York City Zoning Resolution — what they do with it and the results they come away with are also the same.

This brings to mind the story of the three blind men and the elephant. Each one gets hold of a different part of the elephant — a leg, a tusk, the trunk — and, extrapolating from that part, each describes a totally different animal than the others. The moral of the story being: working from the same source material, people can come to very different results depending on how they approach it.

With all due respect to my architect and code consultant colleagues, who perform useful and valuable services, the way we each approach the Zoning Resolution is very different. That difference, simply put, is that architects and code consultants read the Zoning Resolution, while zoning attorneys interpret it. When President Bill Clinton famously (or infamously) said, "It depends on what the meaning of 'is' is," he was greeted with hoots of derision. But truth be told, it is a perfect illustration of my point: attorneys

aren't satisfied knowing what words say, we want to know what they mean. Here's an example:

There is a section of the NYC Zoning Resolution commonly known as the "sliver law," which provides that in certain zoning districts, a building on a narrow street (i.e., a street less than 75 feet wide) with a front street wall less than 45 feet wide is restricted to a height equal to the width of the street. However, there is an exception:

Where such street walls [that are less than 45 feet wide] abut an existing building with street walls that exceed [the width of the street], such new street walls may reach the height of the lowest of such abutting building walls ... provided such new street walls are fully contiguous at every level with such abutting street walls.

What does this paragraph mean? I was recently brought into a matter where the client was looking to purchase a 25-foot-wide property on a narrow, 60-foot-wide street. On one side was a building 71 feet in height. On the other side, there was an 8-foot-wide side yard between the side lot line and the building on the adjacent lot.

Both the client's architect and code consultant had advised the client that in order to take advantage of this exception, the property had to have an abutting building on both sides, and because he only had an abutting building on one side, any new building on the property would be limited to the width of the street (60 feet). They based their reading on the section's use of the word "lowest" and of the plural "walls," which they read as meaning there must be two abutting buildings, one on each side with one being the lowest.

I interpreted the same text very differently. To me, the key, controlling phrase is at the very beginning of the paragraph: "Where such street walls abut an existing building ..." That is, the use of the singular "building" clearly indicates the possibility of there being only one abutting building, notwithstanding later use of the word "lowest." If the exception was meant to apply only where there are abutting buildings on both sides, the text would have been written: "Where such street walls are abutted on both sides by existing buildings ..." Thus, the word "lowest" only becomes operative if there are two abutting buildings, one on each side, both taller than the width of the street.

The use of the plural "walls" is explained by the fact that four paragraphs further down, the width of the "street wall" (singular) is defined as being "the sum of the maximum widths of all street walls of a building." In other words the "street wall" may be comprised of a number of component street walls. Thus, the use of the plural "street walls" doesn't necessarily imply the plural "buildings."

As it turns out, to be certain and to break the tie, we took the question to the Department of Buildings' chief zoning specialist, who confirmed that only one abutting building on one side is required to qualify for the exception. Thus, the client's building could reach a height of 71 feet rather than 60 feet — a difference of another floor and an approximately 17 percent increase in floor area.

The point I'm trying to make is not that attorneys are by nature or training smarter than architects or code consultants. To go back to the analogy of the blind men and the elephant: what one takes away from the Zoning Resolution will differ depending on how one approaches it. Zoning attorneys approach it not as a set of instructions or as a checklist, but as if it were the Dead Sea Scrolls requiring analysis, interpretation, translation and explanation. We want to know what the meaning of "is" is.

With fewer obvious or easy development sites in prime areas of NYC, developers must increasingly look

at sites that they might once have passed over. On such sites, a thorough zoning due diligence is essential to identifying and addressing potentially difficult zoning issues, including, in addition to the sliver law discussed here, other special rules that apply to irregular lots (such as for narrow lots, through lots and lots with multiple rear yard lines), “split lots” (where the lot is divided by two or more zoning districts), special zoning districts (where the normal rules are superseded), and since late last year following Hurricane Sandy, flood hazard areas (where use and development is restricted below the applicable flood elevation).

Such sites often require not only an expertly knowledgeable reading but also a creative interpretation of the Zoning Resolution. Developers of all sizes and experience would be well-advised to take a team approach to their zoning due diligence and avail themselves of the particular expertise offered not only by architects and code consultants but also — and, especially — by zoning attorneys.

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