

Zoning Map Amendments During Construction

Since 2002, the City Planning Commission has approved 89 rezonings covering over 7,000 blocks. Many of these involve “downzonings” which reduced the permitted FAR or imposed greater restrictions on use or bulk.

As a general proposition, the completion of foundations on the effective date of the rezoning (i.e., upon City Council approval under the Uniform Land Use Review Procedure) will “vest” the right to complete a new building under the prior zoning. However, where foundations have been commenced but not completed on the effective date, a development with approval from the New York City Board of Standards and Appeals may be entitled to be completed under the prior zoning in accordance with either the Zoning Resolution or as a matter of “common law vesting.”

Vesting Under the Zoning Resolution. Where foundations have been commenced but not completed on the effective date of a rezoning, the building permit is automatically revoked and a stop work order should be issued by the Department of Buildings. At this point, the developer has 30 days to seek a six-month extension of time to complete foundations from the BSA under Section 11-331 of the Zoning Resolution.

In order to obtain an extension from the BSA, an applicant must establish the following facts as of the effective date of the new zoning: a building permit has been lawfully issued based upon an approved application showing complete plans and authorizing the entire construction and not a part thereof; the building permit has been issued to a person with a possessory interest in the zoning lot; excavation was complete; and substantial progress was made on foundations.

Each of these facts must be supported by substantial evidence, including affidavits and documentary evidence. The “substantial progress” test is of particular interest, because this term is not defined. The BSA measures “substantial progress” based on the amount of work completed, the amount of time required to complete, and the amount of money expended, all as a percentage of the total required to complete the foundation. An application to the BSA for an extension of time to complete foundations is referred to the affected Community Board, which typically holds a public hearing and adopts a recommendation. The application is then subject to a public hearing at the BSA.

Common Law Vesting. The New York courts recognize a constitutional right to complete a project where enforcement of a zoning change would cause serious financial loss to the owner. See *People v. Miller*, 304 N.Y. 105 (1952).

Under this line of cases, a developer may seek the right to proceed under the prior zoning even where the findings required by ZR 11-331 cannot be made. The findings here are whether “work of a substantial character” has been completed on the effective date and “serious loss” will occur from enforcement of the Zoning Resolution.

As with extension cases under the Zoning Resolution, common law vesting claims should be made to the BSA within 30 days after the effective date of the new zoning and must be supported by substantial evidence. A common law vesting claim may be made as part of an application for an extension under ZR 11-331 or as a stand-alone application.

In theory, applications under ZR 11-331 are more ministerial in nature, as they are based upon specific findings set forth in the Zoning Resolution (notwithstanding the lack of a definition for “substantial progress”). Common law vesting claims, on the other hand, have no statutory basis and involve a greater degree of discretion by the BSA. As a matter of administrative practice, the BSA generally prefers to decide claims under ZR 11-331. Where the facts do not clearly support such claim, however, an applicant has the right to assert a common law vesting claim, either in the alternative or as a stand-alone application.

— Howard Goldman

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only the indictment as evidence for the suspensions.

OATH ALJ Tynia Richard dismissed the charges, ruling that an indictment was not grounds for license suspension under the construction code and could not be considered evidence to prove the allega-

tions. Even if considered evidence, the indictment could not provide the standard of proof required at OATH for license suspensions. Finally, Richard found that Buildings was authorized to suspend licenses and self-certification privileges prior to a hearing for no more than five days

provided there was a finding of imminent jeopardy. Buildings was not authorized, however, to suspend the professional filing privileges without a hearing.

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DOB v. Testwell Lab., OATH Index Nos. 1374/09, 1375/09 (Dec. 2, 2008).

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