City Planning Proposes Important Definitional Changes to Zoning Resolution

The New York City Zoning Resolution consists of almost 1,000 pages of text, plus appendices and maps. Without a doubt, the most important are the 34 pages of definitions set forth in Section 12-10.

In a proposed text amendment referred out for public review on September 27, 2010, the City Planning Commission seeks a comprehensive overhaul of two of the most important definitions: "building" and "development." According to the Department of City Planning, at least one of these terms is found on seven out of every ten pages of the Zoning Resolution. The purpose of the text changes is to clarify their meaning, restore original intent, and increase certainty.

Background

The proposal stems from one of the most mundane of issues — a dispute over a parking space between the owner of a twenty-foot-wide townhouse on the Upper East Side and the City Planning Commission.

Section 13-551 of the Zoning Resolution allows the Commission to approve onsite accessory off-street parking facilities in R8B zoning districts by authorization, a form of discretionary approval based on certain findings. However, Section 25-633 prohibits curb cuts for residential developments on zoning lots having a width of less than 40 feet.

After meeting with City Planning, the owner applied to the Commission for an authorization to park a single car in the basement, accessed by a nine-foot curb cut. After internal review, City Planning terminated the application based on Section 25-633, concluding that the townhouse was a residential development on a less than 40-foot-wide zoning lot. This decision was entirely consistent with the manner in which this section had been applied in the past.

The owner filed an Article 78 proceeding, alleging that Section 25-633 was not applicable because the 100-year old townhouse was not a "development" as defined in Section 12-10. In an October 3, 2010 decision, Justice Paul G. Feinman agreed. *Gruson v. Dep't of City Planning,* Index No. 106396/08 (N.Y. Cty. Sup. Ct.).

"Development"

Section 12-10 defines development as "the construction of a new building or other structure on a zoning lot, the relocation of an existing building on another zoning lot, or the use of a tract of land for a new use."

Since the adoption of the current Zoning Resolution in 1961, the term development has been interpreted to refer to both new and existing buildings, depending on the context. In other words, once a new building is constructed, it continues to be a development.

The statutory definition clearly refers to the construction of new buildings, however. As reasoned by the Petitioner, after a new building is constructed, it is no longer a development. Accordingly, the prohibition against curb cuts for residential developments should not apply.

In response to the *Gruson* decision, the City has proposed to overhaul the Zoning Resolution so that the term development is used only to refer to the construction of a new building. At the same time, the term building will be used to refer to existing buildings.

"Building"

A building is currently defined as "any structure which: (a) is permanently affixed to the land; (b) has one or more floors and a roof; and (c) is bounded by either open area or the lot lines of a zoning lot." Under the Building Code, a structure bounded by fire walls, even if it adjoins another structure on the same zoning lot, may constitute a separate building. Therefore, there can be any number of attached but separate buildings on a single zoning lot under the Building Code. However, attached buildings on a single zoning lot, even if separate in all other respects, fall under the literal definition of a single building under the Zoning Resolution because they are not separated by zoning lot lines or open areas.

This dichotomy has led to problems in applying the regulations of the Zoning Resolution. For example, in a mixed-use building, residential use must be located above the level of commercial use. However, where there are two or more adjacent buildings, the permitted height of residential use is determined by the highest commercial floor in any of the buildings, not just the new mixed-use building. This makes no sense.

Another problem arises in applying the sliver law, which limits the height of developments of less than 45 feet in width. Contrary to the intent of the sliver regulations, a new building of less than 45 feet in width on a zoning lot with adjoining buildings may be permitted to exceed the height limit when the width of the adjoining building(s) is included in the total width.

The proposed text changes would clarify the zoning definition of building to treat a building as it is treated in the Building Code — i.e., as a structure bounded by open areas, lot lines, or fire walls.

Underlying City Planning's proposal is an attempt to increase the predictability of the Zoning Resolution and reduce the number of interpretations required by the Department of Buildings. The proposed text changes appear to be a good start.

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