After the downturn: Will your zoning approvals survive?

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Many projects that were planned and approved in a different economic climate are now on hold at various stages of demolition, excavation or construction. If a development project involves discretionary governmental approvals, these approvals may have a limited shelf life, and may lapse after a period of time. Additionally, as-of-right projects (those that did not require discretionary approvals) may have been planned based on zoning provisions that could change before the project is ready to proceed.

It is thus crucial to be aware of the applicable lapse provisions (for a discretionary approval) and potential zoning changes (for all projects), as well as what steps can be taken for keeping approvals intact until conditions allow for construction to proceed.

This article will discuss time limits on some discretionary land use approvals, as well as general vesting requirements under the New York City Zoning Resolution.

Lapse of Approvals by the City Planning Commission

The City Planning Commission (CPC) grants "authorizations" or "special permits" approving certain aspects of development projects. Some examples of discretionary approvals include large parking garages in central areas of Manhattan; bulk waivers for air rights transfers from designated landmarks; or "big box" retail developments in certain zoning districts.

In order to retain the rights granted under a CPC authorization or special permit, it is generally necessary to complete "substantial construction" within four years following the effective date of the approval. If not, the original authorization or special permit expires, along with the rights to build pursuant to those approvals. Renewals are only possible if an application for a renewal is made prior to the date the original approval lapses. Renewals may be granted for up to two additional three-year periods, where CPC finds that the facts surrounding the approval have not substantially changed.

Lapse of Approvals by the Board of Standards and Appeals

The Board of Standards and Appeals (BSA) also grants certain authorizations or special permits identified in the Zoning Resolution, as well as "variances" from applicable zoning regulations. For example, special permits are required for health clubs or large public parking garages outside of central Manhattan. A variance allows modification of use or bulk controls where the applicant demonstrates that the applicable regulations would present a unique hardship.

Unless the approval specifies otherwise, "substantial construction" for a BSA-approved project generally must be complete within four years of the approval date; otherwise a special permit, authorization, or variance from the BSA lapses. The BSA regulations, unlike those for CPC, provide for reinstatements of expired approvals. Since the procedures and costs, however, become greater once an application expires, owners and lenders will want to be aware of the BSA deadlines as well.

Common Questions in Connection with Discretionary Approvals

What is "substantial construction"? The Department of Buildings has held this to mean "substantial enclosing and glazing" in the case of a new building. In the case of an alteration, this has been held to mean sufficient completion to justify issuance of a temporary certificate of occupancy. Application of these criteria to a specific project depends on the facts and circumstances of that project.

When does the clock start ticking? The start date for the applicable period is generally the date the approval is issued. There are exceptions, however, that may be applicable to your project in the case of government-sponsored projects, or actions that were the subject of judicial review following approval.

Can I change the building plans? The discretionary land use approvals discussed in this article usually apply to a specific set of plans that were filed as part of the application. If those plans change by virtue of market circumstances or otherwise, re-application to the issuing agency may be required. The review process could range from a staff level acknowledgement of substantial compliance with the original plans, to a modification of the existing approval, or the necessity to begin an entirely new application process.

Zoning Changes

Since the current Zoning Resolution was enacted in 1961, its regulations have been continually amended to reflect new administration priorities, changing practices in urban planning, and a variety of other considerations.

Recent changes have included "downzoning" (decreasing the allowable bulk) in certain neighborhoods, requirements for bicycle parking and planting strips in certain parking areas, and new design requirements for waterfront public access areas and public plazas. The zoning changes apply to buildings which have not "vested" under the prior regulations.

The statutory criteria for vesting (sometimes called grandfathering) under prior zoning controls are different than the "substantial construction" necessary to vest CPC or BSA approvals. A project is grandfathered under the previous zoning controls, if, prior to the effective date of the zoning change:

(1) a building permit authorizing the entire construction has been issued; and (2) all work on foundations has been completed. If a building has not vested by the effective date of the new zoning, any building permit automatically lapses and the right to continue construction terminates. (If substantial progress on foundations has been made, it may be possible to renew the building permit through application to the BSA.)

In addition to these first criteria, building construction must be completed and a temporary certificate of occupancy issued within two years of the zoning change; otherwise, building permits will lapse and the right to continue construction terminates.

The BSA may grant extensions under either the zoning regulations or under common law rights where substantial construction has been completed and substantial expenditures have been made within the two years.

With respect to both foundation completion and substantial construction, it is crucial to maintain detailed records of construction progress.

The City is not required to provide affected owners with direct notice of downzonings or other proposed zoning changes.

Some recent text amendments have included special rules for vesting under those amendments. An owner should remain aware of potential zoning changes and consider whether the situation warrants a request to include special vesting rules in the new text.

Conclusion

If a project is on hold, owners and lenders will want to check the details of any discretionary land use approvals, remain aware of expiration dates, and apply timely for renewals.

For as-of-right projects, you will want to monitor zoning changes to minimize surprises when it is time to move forward. ■

Architects & brokers: Partners for the future

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While the current economic environment has significantly reduced the pace of new development, the confidence in the market will eventually be restored, financing will become more readily available and demand for development of commercial, residential, office and mixed-use projects will return.

Although the economic climate may improve, however, the building climate will remain complex. Development plans are affected by physical constraints and by zoning regulations for factors such as setbacks, height limitations, and parking requirements.

Without a clear picture of how physical constraints and zoning requirements affect development plans, a broker is unable to show the property owner the potential differences in valuation based on the yield for various development scenarios.

By partnering with a multi-disciplinary architecture, urban design and planning firm such as DMR Architects during the interview process, however, a broker can provide the property owner with turnkey design solutions for various types of development, including retail, residential, commercial office, mixed-use, transit-oriented, traditional neighborhood, urban infill and brownfield development, thus giving the brokerage team a competitive advantage that separates them from their rivals.

In addition to helping determine the value of the property for development purposes, such services also can be used during the presentation to ownership to provide a visual understanding of how the value of the property was determined and how the property can be developed.

It is becoming more common for brokers to seek help in the valuation process of property. A multi-disciplinary firm such as DMR Architects can help determine the most likely redevelopment scenarios for a given property, which in turn can determine the property's potential yield.

After conducting a site analysis, the architect can prepare a development summary for each plausible scenario with total square footage, parking and parking rations based on zoning requirements.

An architect's participation as a subconsultant in the presentation to ownership can also provide a broker with a competitive advantage in their bid to obtain an exclusive sales contract on any property.

In particular, a multi-disciplinary architecture firm can provide the following services to help a potential client understand the development and/or redevelopment potential of a property quickly and effectively.

Site/Feasibility Analysis: Outlines existing property constraints including parking requirements, topography, easements, riparian buffers, setbacks, height limitations, contamination and access.

Yield Study: Provides an accurate redevelopment yield for a given property with quantities of square footage, parking and units based on existing zoning regulations.

Conceptual Site Plan: Incorporates site layout, uses, parking configuration and development yield, providing potential buyers with enough information to run a cost pro forma analysis to assess their level of interest.

Precedent Case Studies: Provide the owner with examples of similar projects around the country, with quantitative information that can be used to determine the redevelopment potential of a property.

Conceptual Architecture/Design Development: Provides the owner with a more complete understanding of the cost by generating more detailed architectural elevations and plans.

The chances are, the next wave of building will take a different form than in the past. One element of that new direction will be an increased emphasis on redevelopment.

Although partnering with an architectural firm in the valuation and interview process to ascertain the most likely redevelopment strategy is valuable in any case, it will become increasingly necessary in the future in order to accurately establish a property's true worth. ■