

# To Our Clients and Friends

# Memorandum

October 19, 2021

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## *Newly Adopted Requirements and Opportunities for Development near Subway and Rail Stations*

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The City of New York has adopted a Department of City Planning (“DCP”) and Metropolitan Transportation Authority (“MTA”) proposal known as “Zoning for Accessibility” (“ZFA”), creating a widely applicable transit easement review process and potential easement requirement for sites near the 532 subway and rail stations in New York City. The goal of ZFA is to support the long-term planning needs of mass transit and specifically to improve station accessibility. ZFA requires a new review process for the affected sites prior to any application for excavation, foundation, and building permits. ZFA also creates a new floor area bonus available to owners who provide transit improvements in high-density areas and seeks to streamline the approval process for City review of this bonus.

### **Where does the easement review process apply?**

ZFA requires owners to obtain a determination from the MTA (or other applicable transit agency) as to whether an easement is required for any developments and enlargements of the lowest story of a building on zoning lots that are:

- Within certain medium and high-density zoning districts (described below);
- Within 50 feet of a mass transit station, including the underground portion of such stations (as diagrammed in maps available on [DCP's website](#)); and
- 5,000 square feet or greater.

The easement review process applies in R5D, R6, R7, R8, R9, and R10 districts; commercial districts mapped in, or with a residential equivalent of, such districts and R5 districts; and all manufacturing districts. The easement review process does not apply in most of the Special Hudson Yards District, to “qualifying sites” in the East Midtown Subdistrict of the Special Midtown District, or in the Special Transit Land Use District.

The easement review process applies based on the configuration of a zoning lot, not the development site within a zoning lot, although an easement is not required on a portion of a zoning lot occupied by an existing building that will remain. Thus, it is critical for owners, and prospective owners, of a development site that is part of a zoning lot merger to review whether any part of the zoning lot is within 50 feet of a mass transit station when evaluating ZFA’s applicability to a property; if so, the easement review provision applies to any new development or any enlargement of the lowest story of a building on the zoning lot, regardless of its distance from the station. In addition, the lot size threshold of 5,000 square feet applies

to the zoning lot, not just the development site; this new process and potential easement requirement should be considered when deciding to expand a zoning lot for a development rights transfer or to purchase a site that is part of a larger zoning lot.

Certain projects that received, or were in the process of receiving, building permits or discretionary land use approvals on or prior to October 7, 2021 (the date of the adoption of ZFA) are exempt from the new easement review process.

### **How would the easement review process affect development?**

Before filing an application for an excavation permit, foundation permit, or a new building or alteration permit for a new development or an enlargement of the lowest story of a building, owners of affected sites must obtain confirmation as to whether the MTA (or other applicable transit agency) will require an easement. If an easement will not be required, the owner may proceed with an application for a building permit. If an easement will be required, the easement must be established and ZFA outlines a process for identifying and approving the dimensions and location of the easement volume.

Easement volumes can be used for a broad range of transit facilities, and ZFA does not include limitations on the size, street frontage, or configuration of an easement volume. Owners and developers have expressed concern about the potential for this process to delay and complicate construction and design development. To mitigate delay concerns, ZFA permits easement maintenance and operation agreements to be negotiated following the issuance of a building permit, but before a certificate of occupancy is obtained.

Properties that are subject to the easement requirement are permitted to utilize more flexible use, bulk, parking, and streetscape regulations, including a floor area exemption for the space within the easement volume and an allowance for a height increase of 10 to 20 feet, all as of right. Discretionary actions are available to obtain more significant zoning modifications as well, including, for example, height increases and other bulk modifications (but not floor area ratio increases).

Prior to the MTA's construction of transit facilities within the easement area, owners may use the easement volume for various uses (including retail in residential districts), but owners and occupants must vacate the easement volume upon 12 months' notice from the MTA.

### **Where is the transit improvement floor area bonus available?**

The floor area bonus is available to zoning lots that are located:

- Within 500 feet of subway and rail stations (or within 1,500 feet in certain central business districts) and
- In the highest-density districts, consisting of R9 or R10 residential districts; commercial districts mapped within, or with an equivalent of such districts; M1 manufacturing districts paired with an R9 or R10 district; and M1-6 manufacturing districts.

The bonus is not available in most of the Special Hudson Yards District, to "qualifying sites" in the East Midtown Subdistrict of the Special Midtown District, in the Court Square Subdistrict of the Special Long Island City Mixed Use District, or for improvements to the 34th Street – Hudson Yards subway station.

**What are the benefits of the transit improvement floor area bonus?**

The transit improvement bonus permits a floor area increase of up to the lesser of 20 percent or 200,000 square feet in exchange for the provision of an on-site or off-site transit improvement that enhances the capacity or accessibility of a mass transit station. These improvements could include, for example, the provision of elevators and escalators; widening, straightening, expanding, or otherwise enhancing the existing pedestrian circulation network; and reconfiguring circulation routes to provide more direct pedestrian connections to stations. (Other station improvements, including resiliency upgrades, also generate floor area bonuses, but must be provided in combination with accessibility or capacity-related improvements.)

Many more owners are eligible to apply for this bonus than the existing subway improvement bonus, creating new opportunities for development and investment in and near the City’s transit infrastructure.

Like the existing subway improvement bonus, the amount of floor area bonus granted would depend on the City Planning Commission’s subjective evaluation of the benefit of the proposed improvements, and would not necessarily be related to the financial cost of such improvements. The floor area bonus is a discretionary action subject to environmental review, community board review, City Planning Commission approval, and close coordination with the MTA. Related discretionary actions permit more flexible use, bulk, parking, and streetscape regulations for sites that receive this bonus.

Applications for floor area bonuses of more than 200,000 square feet (up to a maximum 20 percent floor area increase) require a special permit from the City Planning Commission, which would be subject to environmental review and a full public review process, including City Council approval.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its contents. If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or an attorney listed below:

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