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Court Ruling Prompts Changes to NYC Development Rights Calculations

For its buildings to reach new heights, New York City's skyline has long depended on the acquisition and transfer of additional development rights. However, a recent challenge to the zoning and tax lot assemblage for 200 Amsterdam Avenue on Manhattan's Upper West Side has led the NYC Department of Buildings (DOB) to reconsider a 40-year-old interpretation of the Zoning Resolution related to this process.

An Article 78 proceeding commenced by two community organizations challenged the decision of the Board of Standards and Appeals (BSA) to uphold the DOB's issuance of a construction permit for this high-rise residential

condominium.

In the decision made public on February 27, 2020, New York Supreme Court Justice W. Franc Perry ruled against the Owner and New York City, nullifying and vacating BSA's affirmation of DOB's issue of this Permit, ordering DOB to revoke the Permit and the Owner to remove the excessive bulk, which could be 20 or more floors of this already topped out 52-story building.

At the heart of the matter was whether the Owner had abused zoning rules to justify the project's size with an improperly formed, "gerrymandered" zoning lot cobbled together out of multiple existing partial tax lots. Justice Perry, relying on DOB's analysis and a 2018 draft DOB Bulletin, found that the partial tax lots could not be included as part of the zoning lot and eligible to transfer the development rights to 200 Amsterdam Ave.

While this extraordinary ruling surely gives pause to other developers and raises concerns about the application of retroactive provisions and reliance on the City's approval process, it is unlikely that it will be relied on to compel retroactive trim of other buildings constructed or under construction based on approved plans that included partial tax lots.

The court heavily relied on the definition of "zoning lot" in DOB's 2018 draft Bulletin to conclude that partial tax lots are ineligible for zoning lot merger and thus the Permit was issued based on erroneous interpretation which should be invalidated. However, right after the decision was made public, on March 2, 2020, DOB issued a final Bulletin that supersedes its prior interpretation and clarifies "a zoning lot may not consist of parts of tax lots unless a permit has been issued in reliance on such zoning lot prior to the date of issuance of this bulletin."

Significantly, this new DOB clarification blocks retroactive revocation of permits that have been issued before, even though a zoning lot consists of partial tax lots. This Bulletin will likely prevent judges from

applying the same reasoning in this case to others.

Furthermore, the facts of this case are unique. For example, as noted by Justice Perry, the challenge to the permit was commenced even before the installation of building footings and the Owner entered into a stipulation setting forth that the Owner could not rely on the progress of the project or its significant expenditures to argue the rights of continuing or completing the project, including premised on retroactivity, vesting rights, estoppel, mootness, laches or other equitable defenses.

Moreover, equitable defenses are always considered by judges on case-by-case basis since there is no one-size-fits-all solution to the fact-intensive equity balancing inquiries. The failure of equitable defenses in this case does not guarantee the same outcome in another case.

Since DOB has officially clarified that “a zoning lot may not consist of parts of tax lots,” it is likely that, in the future, a developer cannot merge partial tax lots into one zoning lot to acquire development rights.

DOB has not revoked its approval and construction continues as New York City and the Owner appeal the latest decision in this long running dispute. No matter the result, developers shall perceive the growing risk that DOB permits could be overturned by the court and they could be exposed to extremely harsh results. In the case of 200 Amsterdam Avenue, assuming the Perry ruling finally stands, it probably renders the Owner in default of its loan because the required loan-to-value ratio cannot be maintained due to the loss of the building’s most valuable top floors.

This may turn out to be nothing more than a cautionary tale about one ill-fated project. But, in the future, construction contracts may need to include a specific clause to address the extraordinary situation that the court overturns a government’s decision and significantly changes their position in the transaction.