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Victory in the courts continue for land use in New York City - by Ross Moskowitz and Eva Schneider

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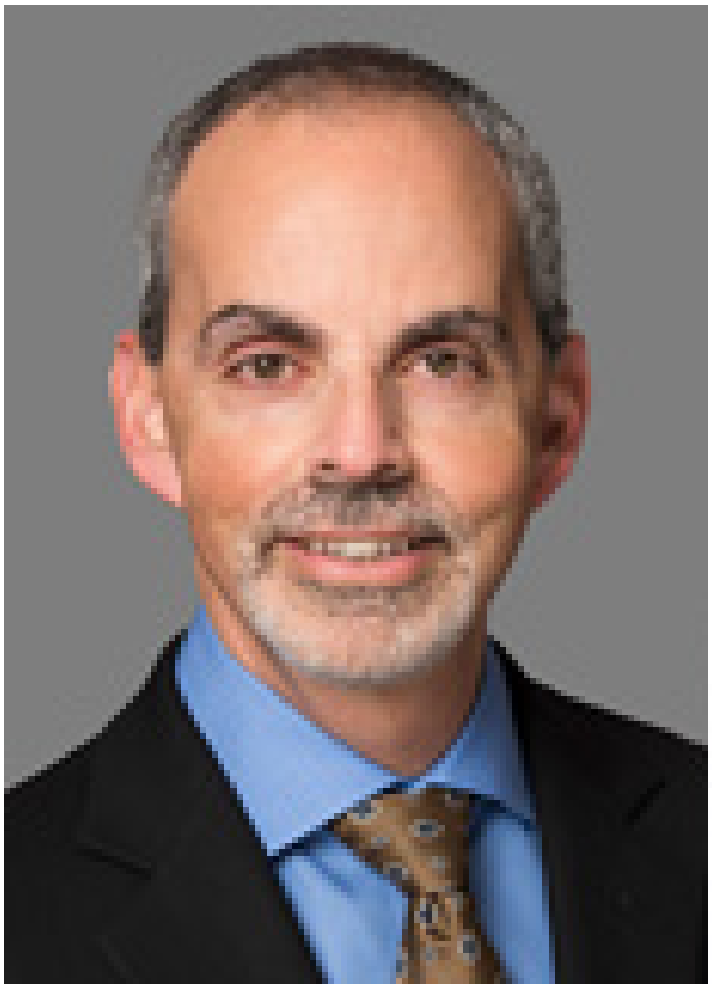

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Last week, the New York Appellate Court unanimously ruled in favor of a proposed development in the Two Bridges neighborhood on the Lower East Side of Manhattan. (In re Council of the City of New York, et al. v. the Department of City Planning of the City of New York, et al, N.Y.S. 3d, 2020 WL 5048132 (the "Two Bridges Case"). JDS Development Group, L+M Development Partners, CIM Group, and Starrett Corp. (collectively, "the Developers"), plan to construct three mixed-use buildings comprising of four towers that will provide for approximately 11,000 s/f of retail and over 2,700 residential units, of which approximately 700 units will be affordable and 200 of which would be set aside for seniors. The proposed development will also provide for new and improved open spaces (including $15 million in park improvements), an ADA-accessible subway station (including $40 million in repairs to the local subway station) and $12.5 million in improvements to the New York City Housing Authority (NYCHA). This decision reversed the lower court's ruling as a matter of law, which, wrongly, sought to subject the proposed development to the Uniform Land Use Review Procedure (ULURP) at the behest of community opposition.

The development site has a unique land use history that is integral to understanding the controversy around this development, as well as the Appellate Court's decision. In 1967 the area was part of an Urban Renewal Plan (which expired on its own terms in 2007). In 1972, the Two Bridges area was designated a Large-Scale Residential Development (LSRD) area as part of an application to construct federally subsidized housing on one of the parcels within the development site, and the City Planning Commission (CPC) issued the first special permits in a series of special permits that allowed "the location of buildings without regard for the height and setback regulations which would otherwise apply." (Two Bridges Case p. 3, citing Zoning Resolution Section 78-312(d)). The remaining special permits were issued in 1995 and 1997. The special permit issued in 1995 included a site plan for the whole LSRD, which showed blank rectangles at the locations the Developers intend to build the four towers as part of the proposed development.

In 2016, the Developers filed three applications that sought to modify the existing site plan and zoning calculations to facilitate the construction of the four towers. Importantly, "the Developer's proposed changes to the site plan and zoning calculations do not require a waiver, variation or

modification of any applicable Zoning Resolution provision that would require a special permit (ZR Section 78-312), and their applications do not seek a new special permit or modification of any existing special permit." (Two Bridges Case p. 4). Therefore, the CPC chair determined that these proposed modifications are minor modifications, and as minor modifications, the applications were not required to undergo ULURP. The applications were approved by the CPC in December of 2018 and subsequently, the petitioners brought suit challenging the CPC's approval of these applications, seeking injunctive relief, and a declaratory judgment that the application be subject to ULURP.

On August 1st, 2019, the lower court granted the petition, vacating the CPC's approval and requiring the applications to undergo ULURP. Upon review, the Appellate Court reversed this decision, stating "[t]he Court did not cite to any statute, regulation or case law to support its conclusion." (Two Bridges Case p. 5). The Appellate Court went on to state "we are mindful of petitioners' concerns that their constituents have had limited input on the proposed development's potential effects on their neighborhood…However, existing law simply does not support the result petitioners seek." (Id.). The Appellate Court suggested that the petitioners could have taken legislative steps to amend the Zoning Resolution to prohibit buildings of this scale and height, or amend ULURP to add these categories of review by legislation and/or referendum. Further, the Appellate Court suggested that petitioners could have taken steps before the Urban Renewal Plan expired to renew the plan. However, "[h]aving failed to do so, petitioners cannot seek a remedy in the courts." (Id.)

Despite this recent victory, two other lawsuits brought by local community groups remain to be decided. That said, these lawsuits argue that the modifications per the three applications require the CPC to issue an authorization, which, importantly, does not require ULURP.

This decision is the second major land use decision to be reversed by the New York Appellate Court in recent months. In July 2020, the Appellate Court reversed the lower court's ruling which had upheld community groups' challenge to the approval of a city-sponsored rezoning of the Inwood Neighborhood in Manhattan on city and state environmental procedural review grounds known as CEQR and SEQRA, respectively. In re Northern Manhattan Is Not for Sale, et al., v. City of New York, Index No. 161578/18 (App. Div. 1st Dep't 2020). The Inwood Rezoning plan calls for the construction of a new mixed-use building with a new library facility to replace the existing Inwood Public Library, updated and expanded residential zoning with affordable housing, new waterfront parks, and improvements to existing parks and streets and new performing arts center. There as well, the Appellate Court stated "to the extent petitioners take umbrage with the limited scope of the SEQRA/CEQR review process, this argument can only be raised to the legislative body that periodically revises the criteria contained in the CEQR Technical Manual. In the meantime this court is constrained by the limited standard of review under the statute." (Id.)

These Appellate Court decisions, taken together, raise several important questions. First, will these decisions provide stability to the real estate and development industry, particularly in this time of uncertainty as a result of COVID-19? Will these decisions encourage developers to continue to build and invest in New York City? Second, what impact will these decisions have on the future production of affordable housing through the Mandatory Inclusionary Housing Program? Will this Mayoral Administration and future administrations feel emboldened to create more affordable

housing via neighborhood rezonings across the city? How will these decisions impact and shape the 2021 Mayoral election, and more specifically, the priorities and platforms of the Mayoral candidates as well as their development and affordable housing production strategies? Finally, will those who oppose any development (whether affordable housing or otherwise) find new strategies to stop development projects? Will we see a resurgence of calls to revise the New York City Charter, or perhaps, following the Court's suggestion, a proliferation of legislation put forth by city councilmembers?

During these unprecedented times, perhaps these land use and development tensions could be resolved in other ways. As COVID-19 amplifies the current land use and real estate challenges, all parties may see this as an opportunity to reflect on common goals and priorities. We should capitalize on new technology available (like Zoom for community board meetings, or modeling and VR technologies that simulate development projects), to spur on the creation of new housing and dynamic development projects, while simultaneously balancing local community needs with those of the city. We should support the real estate and development industries that supply the city with revenue, financial stability, and new market-rate and affordable housing, which in turn supports the city's citizens, who make this city and all of its varied neighborhoods special and dynamic and unique.

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