

ONE STEIN DAY

## What Does New York Have Against Real Estate?

New York's campaign against real estate reached new heights on February 13. That's when the judicial branch made its latest contribution to the efforts of the executive and legislative branches to assure that New York City's housing crisis, already 75 years old, lasts another 75 years.

The story began when SJP Properties and Mitsui Fudosan acquired the site of the former Lincoln Square Synagogue at 200 Amsterdam Avenue. The site benefited from arrangements made in 1987 that moved unused development rights (the right to build a certain amount of interior space) from other nearby land to the synagogue site. Much of that vacant land consisted of partial tax lots — sometimes very small — not complete tax lots. But it all complied with city rules on development right transfers, as interpreted from 1978 until February 12.

The developer invested over \$300 million to buy the site, including the development rights transferred in 1987, and build the tallest building in the neighborhood — a big building in a city of big buildings, each eventually surpassed by a bigger building.

After the developer invested much of its capital, some anti-development groups, led



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by the Municipal Arts Society, tried to enjoin the project. They said zoning law didn't allow use of partial tax lots to transfer development rights. The court said the plaintiffs would probably lose and denied their request.

The city's Buildings Department and Board of Standards and Appeals scrutinized the 1987 arrangements and blessed them. The Buildings Department did say the guidance from 1978 constituted a "misinterpretation," but it had effectively become law, so changing it now would be unreasonable. The Buildings Department suggested it might change its interpretation, but that went nowhere.

Soon after the developer topped out, the anti-development groups struck again, this time with success. On February 13, the same court decided the developer, its land use counsel, the Buildings Department, the BSA, the 1987 documents, and 40 years of zoning interpretations were all wrong on partial tax lots. Implicitly, certificates of occupancy for other building that used the same technique were also illegal and would need to be revoked, and the affected buildings vacated.

The court treated the Buildings Department's trial balloon as governing law

and seized on the Department's "misinterpretation" comment. The court decided the City must revoke the developer's building permit and the developer must "remove all floors that exceed bulk permitted under the Zoning Resolution."

The developer will surely appeal. For a year or more, the developer's \$300 million-plus investment will earn no return, wiping out much of the anticipated profit. The anti-development forces would say that's just too bad.

Regardless of the merits, and regardless of how often (rarely) developers use a partial-tax-lot technique, this court decision suddenly changed 40 years of zoning law, potentially costing a developer tens of millions of dollars even after it had obtained a building permit and started a project in reliance on existing law as applied by the agency responsible for its application.

Disasters like this send future developers a terrible message about development in New York City, whether or not it uses partial tax lots to transfer unused development rights. The fact that this sort of thing can happen at all undercuts the stability and predictability that any investment requires, part of what distinguishes the United States from a Third World country.

New York City needs more housing. City

government should do all it can to encourage — not discourage — housing development. If the city wants to change the treatment of partial tax lots or any other zoning rule, that should happen slowly with plenty of notice — not after someone has acquired development rights and built a building in reliance on prior guidance.

In the meantime, the legislature (here, the City Council) should quickly fix whatever zoning language created the opening that the anti-development groups grabbed. That's not too likely to happen, though, given today's anti-real-estate atmosphere. In contrast, when the state's highest court issued a decision in mid-2019 that the state legislature thought hurt tenants, the legislators soon voted to change the law.

A city government that truly wanted to drive down housing costs would go much further and loosen and simplify development constraints city-wide, so developers wouldn't need to jump through the bizarre hoops that have created so much tumult at 200 Amsterdam Avenue.

Good luck with that. More likely, we can count on 75 more years of housing crisis.

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