



NEW YORK  
CITY BAR

**COMMITTEE ON LAND USE  
PLANNING AND ZONING**

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Hon. Bill de Blasio  
Office of the Mayor  
City Hall  
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Dear Mayor de Blasio:

Congratulations on your election as Mayor. I am writing on behalf of the New York City Bar Association's Land Use Planning and Zoning Committee (the "Committee") to convey some policy recommendations for your consideration. The land use and zoning policy recommendations set forth in this letter supplement those made in the City Bar's *Policy Recommendations for New York City's Next Mayor* (the "Report").<sup>1</sup>

In formulating the below recommendations, this Committee researched, examined and vetted a variety of current land use issues and through such process, identified community benefit agreements (CBAs) and multiple dwelling law (MDL) waivers as two of the major land use issues that your administration are likely to encounter in the near future.

We hope you will consider the following issues, which are the focus of our present efforts, and that this letter proves useful for you and your administration.

**COMMUNITY BENEFITS AGREEMENTS: SUGGESTIONS FOR IMPROVEMENT**

**Background**

For approximately 25 years, land use applications in New York City have progressed through the current iteration of the Uniform Land Use Review Procedure (ULURP). More recently the phenomenon of CBAs has emerged, wherein a developer and a coalition of groups claiming to represent the affected communities formally agree that, in exchange for certain agreed-upon benefits flowing to these groups, they will not oppose or otherwise hinder the project. These agreements typically supplement the statutorily mandated, formal, regimented ULURP with a more free-form negotiation.

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<sup>1</sup> See <http://www.nycbar.org/images/stories/pdfs/mayoralreport04302013.pdf>.

Negotiations regarding CBAs generally occur outside the formal city and state review and approval process for land use projects (*i.e.*, ULURP, SEQRA, zoning). They may therefore not involve City officials or agencies at all. To the extent the City is involved in negotiating or arranging for a CBA, however, we make the following recommendations. Moreover, we recognize that many land use experts have serious concerns about CBAs and whether they have any legitimate role in the land use review process that is designed to address all legally relevant concerns, environmental impacts and property rights. We do not try to resolve these concerns here.

In the Committee's earlier report on this subject in March of 2010<sup>2</sup>, we wrote that many of the members of this committee would prefer to avoid CBAs for reasons set forth in Part IV of the 2010 report although it was recognized that they likely would remain part of the process. It was noted that if an effort was made to ban them, developers would likely strike agreements with community groups with even less transparency and accountability.

### **Impacts/Concerns**

The parties involved in the land use process each have their own motivations for incorporating CBAs.

*Communities:* Participation in the negotiation of CBAs may provide communities with a more meaningful role in the development process for both ULURP and non-ULURP projects. That participation also provides the opportunity to address issues that are beyond the purview of the land use process that impact the community, and may allow some in the community more input and control in the distribution of the agreed-upon benefits.

The Committee appreciates the perceived shortcomings of ULURP that have led to the proliferation of CBAs – primarily the committee believes that government was not being responsive and developers looking for more predictability in the ULURP process. On the other hand, the committee has several concerns regarding these agreements, which include:

- CBAs can run counter to sound planning practices by addressing issues that have no substantial nexus to the development project
- CBAs can benefit groups that are not directly affected by the development, to the possible detriment of those more directly affected
- Groups negotiating the CBA may not in fact represent the majority of the community
- Groups negotiating the CBA may not have the expertise to drive an appropriate bargain

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<sup>2</sup> *The Role of Community Benefit Agreements in New York City's Land Use Process*, The Association of the Bar of the City of New York's Land Use Planning and Zoning Committee, March 8, 2010, <http://www.nycbar.org/pdf/report/uploads/20071844-TheRoleofCommunityBenefitAgreementsinNYCLandUseProcess.pdf>.

- CBAs may result in very local solutions to problems requiring a citywide approach
- CBAs may be difficult to enforce in case of a breach

### **Recommendations**

In light of the likelihood that CBAs will continue to be pursued in some land use negotiations, the Land Use Planning and Zoning Committee makes the following suggestions for improvement:

- A requirement for full disclosure, prior to the final hearing and vote in the ULURP process, of all of the benefits extracted with particular emphasis on those groups that benefit financially from the agreement in order to discourage conflicts of interest.
- More forcefully discouraging such conflicts of interest by preventing those groups negotiating the CBA from benefitting financially from the resulting agreement.
- CBAs should address only legitimate nonprofit and charitable purposes carried out through corporations that are qualified as such.
- Elected officials should not benefit from CBAs although they may have a legitimate oversight role regarding the realization of the terms of the agreement.

### **WAIVER OF THE MULTIPLE DWELLING LAW: THE COMMITTEE SUPPORTS PASSAGE OF S.3584**

#### **Background**

For several years prior to 2008, the NYC Department of Buildings (DOB) granted waivers of the MDL where strict enforcement gave rise to practical difficulty or unnecessary hardship, so long as public health safety and welfare were preserved. Such waivers—an example of which would be for DOB to permit a stair with a deficient width to be sprinklered instead of requiring that it be widened to comply with the requirements of the MDL - were seen as a logical parallel to DOB's authority to waive Building Code requirements on the same findings. In 2008 the NYC Board of Standards and Appeals, in resolving an appeal, concluded that DOB lacked the authority to grant MDL waivers, and that the BSA itself was the agency authorized to grant such waivers by the law.<sup>3</sup> Since then, property owners have had incur costs to file applications with the BSA pursuant to Section 310 of the MDL (which speaks to variances) to obtain waivers that were formerly available at DOB through a basic ministerial process. New York State Legislation S.3584, introduced by Senator Golden on February 7, 2013, was passed by the Senate on March 5, 2013, but was subsequently returned to the Senate and referred to the Assembly Housing, Construction and Community Development Committee.<sup>4</sup> The legislation would authorize the DOB Commissioner to vary or modify “any provision or requirement of the

<sup>3</sup> See BSA Cal. Nos. 81-08-A and 82-08-A (holding that DOB has no authority to approved alternative safety measures, except as set forth in MDL § 277.16).

<sup>4</sup> S.3584, 236<sup>th</sup> Session (N.Y. 2013), available at <http://open.nysenate.gov/legislation/bill/S3584-2013>.

MDL” where strict compliance results in practical difficulty or unnecessary hardship as long as the spirit and intent of the law are maintained and public safety is preserved.

### **Impacts/Concerns**

The legislation could encourage investment, discourage deferred maintenance, and improve the quality of lower-income housing by allowing older buildings to be renovated with greater flexibility. This, in turn, will help address the perpetual housing shortage in the city. The legislation could also allow property owners to utilize their unused development rights. For example, because many existing multiple dwellings cannot be enlarged as-of-right, in spite of having unused development potential, the MDL conflicts with the City's own Zoning Resolution. The legislation will also allow local officials - rather than Albany - to have final say over how to build in the City. And finally, DOB may be better qualified to make determinations regarding the substantive issues of the MDL (fire protection, public safety and welfare) and so the legislation aligns legal authorization with professional qualification.

However, because this legislation could shorten the timeframe for obtaining building permits (especially in the case of older existing buildings), it could have the effect of hastening gentrification. By virtue of its substance, the legislation could also be seen as benefitting property owners at the expense of community residents.

The Committee does not believe that criticism is valid. First, DOB can already waive the MDL for certain buildings that were not originally constructed as residences and BSA can waive it in all others (assuming certain findings can be made), so the primary function of the legislation is to reduce bureaucracy. Second, by decreasing the costs associated with renovating older buildings, the legislation would create an incentive to preserve and improve older buildings, providing residents with an opportunity to remain in place (the opposite of gentrification) and for older buildings to be brought to current safety standards. Third, by reducing the total cost of developing buildings, the law would allow owners to achieve a reasonable return on their investments at a lesser scale (*i.e.* fixing the old building makes more sense than tearing it down to build a new one). Fourth, the waivers that DOB will be able to grant (currently available from BSA), tend to include upgrades to buildings that were not widely available at the time the MDL was drafted, such as sprinkler systems, hard-wire smoke detectors, and fire retardant building materials. Adding such elements to older buildings, and repairing older building in general, is an overall benefit to community residents.

### **Recommendation**

The Committee believes that the benefit of the legislation outweighs the possible concerns. For the reasons that are described above, the Committee encourages your administration to urge the adoption of the legislation to amend the NYS Multiple Dwelling Law to grant DOB broad waiver authority.

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We would be happy to discuss any of these issues in further detail with the appropriate member of the administration. Thank you for your time and consideration.

Sincerely,

  
Ross F. Moskowitz

Cc: Vicki Been, Commissioner, Department of Housing Preservation & Development  
Marco A. Carrión, Commissioner, Community Affairs Unit  
Thomas Farriello, Acting Commissioner, Department of Buildings  
Alicia Glen, Deputy Mayor for Housing & Economic Development, Office of the Mayor  
Kyle Kimball, President, New York City Economic Development Corporation  
Sherif Soliman, Director, Mayor's Office of State Legislative Affairs  
Meenakshi Srinivasan, Chair, Board of Standards & Appeals  
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