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Practice Update

Activists Call for Regulations on "Last Mile Warehouses" With Proposed Amendment

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On September 30, 2022, a group of environmental justice advocates, New York City Council member, Alexa Aviles, and New York State Assembly member, Marcela Mitaynes, filed an application with the New York City Department of City Planning for a text amendment to the New York City Zoning Resolution, which, if enacted by the City Planning Commission and approved by the City Council, would require a special permit for the development of what are defined as "last mile warehouses" (LMWs). Although the application was filed last September, it has not yet been certified as completed, and therefore is not the subject of public review. If passed, the proposed amendment would place significant new regulatory hurdles on freight and logistics companies in the form of environmental impact and traffic studies as well as significantly delaying the permitting process.

Definition of LMW

Section 12-10 of the Zoning Resolution (ZR) would add the definition of an LMW. It would cover a warehouse that is at least 50,000 square feet and the primary purpose of which is to temporarily store, sort, and redistribute goods to fulfill e-commerce orders, which goods are received and then transferred to delivery vehicles for distribution. It would exclude facilities where goods are manufactured or assembled on site and facilities

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whose primary purpose is the storage of food products for wholesale distribution.

Applicability in Commercial Districts

ZR Section 32-25, which lists as-of-right Use Group 16 uses in C8 zoning districts, would specifically exclude LMWs. ZR Section 32-32, which identifies uses permitted by Special Permit by the City Planning Commission, would list permits for LMWs in C8 zoning districts.

Applicability in Manufacturing Districts

ZR Section 42-12 would specifically exclude LMWs from as-of-right uses.

ZR Section 42-32 would specify that special permits issued by the City Planning Commission include LMWs in M1, M2, and M3 zoning districts.

Conditions, Findings, and Additional Requirements

The amendment would add new ZR Section 74-49(a) [JL1] [RGL2] and would contain the following conditions and findings:

Conditions

1. LMWs shall be a minimum of 1,000 feet from schools, parks, nursing homes, or public housing buildings.
2. LMWs shall be a minimum of 1,000 feet from another LMW.
3. LMWs located in a Significant Maritime Industrial Area shall be required to have 80% of deliveries to and from them made by marine transport, unless this is shown to be “infeasible.”

Findings

1. Will not result in “undue” vehicular congestion, pedestrian safety risks, or adverse impacts to road

conditions;

2. Will not increase air pollution in any Disadvantaged Community, any M1, [DF3] M2, M3, or C8 district, or adjacent residential area; and
3. Shall comply with waterfront district zoning requirements if located in a flood plain.

Additional Requirements

1. Mandatory referral to the New York City Department of Transportation for a report and recommendation and if the report is received with 45 days of referral, the City Planning Commission shall give "due consideration" to the report and its recommendations.
2. Mandatory referral to the Department of Environmental Protection for a report and recommendations regarding air pollution and public health, with the same "due consideration" requirement as above.
3. Operators shall be required to submit annual reports including data regarding the aged and number of trucks servicing the facility, the trucks' owners, and the routes used.
4. The Commission may condition approval on the use of alternative transportation (electric vehicles, bikes, rail), the installation of solar panels, electric vehicle charging equipment, battery storage, the provision of air filtration systems at any school, park, nursing home, or public housing building within a mile of the facility, and time of use, hours of operations, or truck idling restrictions.

Questions Presented by the Proposal

It is apparent that the purpose of the proposal is to require an analysis of the environmental impacts of LMWs, which are now permissible as-of-right in C8, M1, M2, and M3 zoning districts. Because they are permitted on an as-of-right basis, they can be developed without any input from the City, other than a determination by the Department of Buildings

whether plans submitted as part of an application for a building permit comply with Zoning Resolution and the Building Code. That determination does not include any analysis of the impacts of a proposed development on traffic, air pollution, and other environmental impact categories. By requiring that an applicant obtain a special permit, the City Planning Commission would be required to conduct an analysis of a variety of environmental impacts under the State Environmental Quality Review Act, 8 ECL Sections 8-0101, et seq. and its implementing regulations, 6 NYCRR Part 617 (collectively SEQRA) and City Environmental Quality Review (CEQR), New York City's regulations under SEQRA.

However, the proposed text puts a "belt and suspenders" on the environmental analysis requirement under SEQRA and CEQR. Both the "findings" and the "additional requirements" provisions of the proposed text add additional layers of analysis to SEQRA and CEQR which, one may argue, are more stringent than SEQRA and CEQR and more limiting of the Planning Commission's discretion than usually exists.

For example, proposed Section 74-49a (b) requires specific findings relating to both traffic and air quality. The language regarding traffic matters includes the need to find that there will not be any "undue" or "adverse" impacts. The language regarding air pollution requires a finding that there will not be an "increase" in air pollution in affected areas.

The "additional requirements" provisions of proposed 74-49a (c) require the referral of applications to the Department of Transportation (DOT) and the Department of Environmental Protection (DEP) for reports and recommendations regarding traffic and air pollution matters, respectively, and that the City Planning Commission give "due consideration" to those reports and recommendations.

The requirements described above go beyond the requirements of SEQRA. Under SEQRA, a lead agency such as the City Planning Commission can be required to prepare an environmental impact statement, which discloses significant adverse environmental impacts and proposes potential mitigation of those impacts. SEQRA does not, however, require a lead agency to reject applications for projects where it finds that there are significant adverse environmental impacts that cannot be practicably mitigated. All the lead agency need find is that identified impacts would be mitigated to the greatest extent practicable. The importance of this is that if, in the discretion of a lead agency, the benefits of a project outweigh the adverse impacts, it may approve the project.

The concern is that a court could determine that the language of the proposed text *requires* the denial of an application for a special permit for an LMW if there are either traffic or air quality impacts irrespective of the impracticality of mitigating them or the other benefits of a proposal, such as jobs, tax revenues and prospective cleanup of *in situ* environmental contamination, which often accompanies industrial redevelopment.

Moreover, the "additional requirements" regarding reports and recommendations from DOT and/or DEP can also be read to strip the Planning Commission of discretion in fashioning mitigation. This is also contrary to SEQRA practice, where a lead agency often solicits input from so-called "sister agencies" but is subject only to a rule of reason or arbitrary and capricious standard of review if it rejects or limits adherence to recommendations from the sister agencies.

Beyond the SEQRA/CEQR concerns discussed above, the adoption of a zoning text amendment requiring a special permit to cite an LMW anywhere in the City would mean that any such facility would need to undergo the City's lengthy discretionary Uniform Land Use Public Review process. This would add

significant cost, delay, and uncertainty to any planned development of such facilities.

The application is in its initial stages and most likely will not be reviewed and decided by the Department of City Planning and the City Council for at least six or more months. Because industrial development is a vibrant element of the New York City real estate market, Akerman is following this closely and will pay close attention to its progress.
