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### CONSTRUCTION LAW

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Welby, Brady & Greenblatt, LLP periodically publishes its Legal Alert Bulletin to notify its clients and others in the construction industry about court decisions and changes in the law in the Tri-State area that may affect their businesses or the way they do business. We urge you to regularly visit our website, [www.wbglp.com](http://www.wbglp.com), to keep abreast of what is happening in the courts and law that may affect your business.

#### **Municipality's Reasonable Doubt About Lawful Purpose of Proposed Building Dooms Project**

Municipal authorities are not required to allow a property owner to develop its property where there is reasonable doubt that the building would be used for a lawful (zoning permitted) purpose. So holds the New York Court of Appeals in a recent decision that would be developers need to heed.

In the reported case, a developer, who acquired property in Manhattan formerly occupied by a school building, sought a building permit to construct a 19 story dormitory on the property. Use of the property for a dormitory building was allowed by both the deed and the zoning laws. So what was the problem? Well, the Department of Buildings, became skeptical, apparently because the developers plans were configured more like an apartment building than a dormitory. It asked the developer to provide proof that the new building would be used as a dormitory, by showing an "institutional nexus" with an educational institution. If built as an ordinary apartment building, which was less favored under the zoning law, the structure would be limited to 10 stories, not 19.

Undaunted, the developer submitted documentation showing that it was committed to lease the new building for 10 at least years to University Housing Corp. (UHC). Further investigation (by the Department of Buildings) found that UHC was a newly created entity filed by the developer's attorneys. Still undaunted, the developer promised the Department of Buildings that UHC's board of directors would consist solely of people appointed by "participating education institutions" who, the developer never identified.

The Department of Buildings refused to issue a building permit. The developer took the matter to the he Board of Standards & Appeals, who upheld the building permit denial. The developer then went to court to challenge the administrative determinations. The lower court sustained the Building Department's refusal to issue a

building permit however, on the developer's appeal, the appellate court reversed, with two judges dissenting. The majority in the appellate court held that a building permit could not be denied on the basis of a possible future illegal use of the property. The majority said that the Building Department's refusal to issue a building permit was an impermissible administrative anticipatory punishment, and that if the new building was not used as a dormitory, the City could either revoke the certificate of occupancy or start a lawsuit against the developer to enforce the deed restrictions (on the use of the property). The Building Department appealed.

The Court of Appeals (New York's highest court) reversed. It said that if the developer had showed the Department of Buildings that its proposed building would be used initially as a dormitory, the mere possibility that it might later be converted into an illegal apartment building would not justify withholding a building permit. But here, the Department of Building expressed doubt that the building would ever be used as a dormitory and it asked the developer for proof that it had a connection with an educational institution – which the developer failed to provide. To seek such assurances, the Court of Appeals said, is prudent, because allowing the developer to build a 19 story building, that from the outset would not be used in a legally-permitted way, would create needless problems and the City would then have to choose whether to waive the zoning restrictions and require the building to remain vacant or be torn down. The Department of Buildings, the Court of Appeals said, did not act arbitrary or capriciously by avoiding that dilemma.

The lesson for developers from this case is that if you plan on developing a property for a "legal" (zoning/use) purpose, be prepared to prove that the proposed structure(s) will be used, at least initially, in conformance with that "legal" purpose. If you can do that, the municipality cannot withhold a building permit based on a mere possibility that the property may later be converted to an "illegal" use.

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