Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

NY City Council's Proposed Land Use Bill May Be Illegal

By **Frank Chaney**
October 4, 2017, 11:05 AM EDT


Frank Chaney

Last month, the New York City Council introduced legislation that would exempt Uniform Land Use Review Procedure (ULURP) applications by the mayor, the five borough presidents and the city council from the preapplication requirements of the Rules of the City of New York (RCNY). The bill, if approved, would give elected officials a powerful new weapon against development projects they and their constituents don't like. The target of the bill, known as Intro 1685, is four proposed residential towers next to the East River just north of the Brooklyn and Manhattan Bridges.

Described by some as "super talls" or "pencil buildings," the towers range from 700 to more than 1,000 feet in height and combined will have nearly 3,000 apartments, a quarter of which would be affordable. A coalition of local community groups opposed to the projects joined with their local city council member to lobby the city planning commission to require the projects go through ULURP, which would give them leverage to force reductions in the size of the projects. That effort was thwarted, however, when the chair of the city planning commission determined that because the towers did not require any new zoning approvals, there was no basis on which to require ULURP. In response, the local city council member wrote and submitted Intro 1685.

There are just two things wrong with Intro 1685, however: (1) it is unlikely to work as its proponents think it will, and (2) because it is inconsistent with multiple provisions of the city charter, it is arguably if not in fact illegal.

To understand why Intro 1685 won't likely work, we must first look at ULURP — what it is and how it works.

ULURP is established by Section 197-c of the New York City Charter: "Applications … for changes, approvals, contracts, consents, permits or authorization thereof, respecting the use, development or improvement of real property subject to city regulation" must be reviewed pursuant to ULURP. Section 197-c authorizes the Department of City Planning to certify that a ULURP application is complete, and establishes a mandatory seven month public review following certification: two months by the community planning board, one month by the borough president, two months by the city planning commission and two months by the city council and the mayor.

As a practical matter, however, getting through ULURP took (and continues to take) much longer than seven months — typically, 18 to 24 months. That's because, while there's a time "clock" for the public review process after certification, there is no such clock for the Department of City Planning's precertification review. Until a number of years ago, the precertification process had no set structure or rules. Draft after draft of an application would be submitted, marked up, revised and resubmitted. The process would repeat itself once the application was formally submitted. The entire precertification process, both before and after formal submission of the application, typically took a year at minimum, often longer.

To address the problem, using its rule-making authority under the city charter (more about that later when we get to why Intro 1685 is or may be illegal), the Department of City Planning established a new pre-application process that it expected would shorten and bring more certainty to the precertification process.

Intro 1685 would allow the mayor, the five borough presidents and the city council to bypass this process so that when a new development is proposed, elected officials could immediately submit a ULURP application for a text change or rezoning to restrict or even prohibit the development.

However, Intro 1685 is unlikely to give elected officials the "Do not pass go, do not collect $200" head start its proponents appear to hope it will. That's because it doesn't eliminate the Department of City Planning's precertification review, it merely shifts it from before to after the ULURP application has been submitted. And there's still no clock on the precertification review. Also, as of right now projects only require plans to be reviewed and approved by the Department of Buildings for compliance with zoning and code requirements, a process that is typically completed in half the time (or less) as a ULURP application. Finally, under federal and state law, a ULURP application is subject to city environmental quality review (CEQR), a process that cannot be shortcut, regardless of who is the applicant. Anti-development activists have often attempted and sometimes succeeded in getting the courts to stop development projects where the environmental review ignored or insufficiently examined one or more potential environmental impacts. Developers would almost certainly turn the tables.

There is a larger problem with Intro 1685, though, which boils down to the question: Is it legal? The answer, some believe, is no.

City Charter Section 197-c, in addition to establishing ULURP, gives the Department of City Planning sole authority for establishing rules its implementation. The city council has no charter authority for establishing or amending the department's rules for ULURP. In fact, Section 28 of the charter expressly limits the city council's role with respect to Section 197-c in two ways. First, it provides that "[t]he Council shall adopt local laws which it deems appropriate, *which are not inconsistent with provisions of this Charter*" [emphasis added]. It then provides: "The power of the Council to act with respect to matters set forth in section [197-c] shall be limited by the provisions of section [197-d]."

Section 197-d provides that the council's power with respect to Section 197-c (i.e., ULURP) is limited to reviewing and acting upon ULURP applications approved and reported to it by the city planning commission. Section 197-d does not give the city council the Section 197-c power to establish or amend the ULURP rules, a power clearly and unequivocally reserved by Section 197-c to the Department of City Planning and the department only. Accordingly, for this reason alone, Intro 1685 is "inconsistent with the provisions of [the] Charter" and therefore illegal.

Secondly, in establishing and amending their respective rules, all city agencies must follow the rule-

making procedure set forth in Chapter 45 of the city charter, known as the City Administrative Procedure Act (CAPA). That process requires that agencies publish any proposed rule or rule change in the city record with copies transmitted to, among others, "the speaker of the council… [and] each council member." Not less than 30 days later, the agency must hold a public hearing, following which, the agency must draft a final version of the rule. The final rule must be posted on the agency's web site, published in the city record and, as with the draft rule, copies must be transmitted to the city council.

There is no provision in CAPA that explicitly allows or even implicitly suggests that the city council may establish or amend agency rules. For example, where an agency proposes a rule, CAPA provides that copies must be given to the city council, but there is no similar provision that a rule proposed by the council must be given to the agency affected by such rule. Even if one could make the case that the charter allows the council to establish agency rules by local law, the legislative process is clearly not an equivalent substitute for CAPA, which also requires that a proposed rule be reviewed by the law department and the mayor's office of operations to ensure, among other things, that the rule as is understandable, practicable and appropriate, narrowly drawn for and consistent with its purpose, not in conflict with any other provisions of law, and that it minimizes compliance costs. The bottom line is that because Intro 1685 makes a new rule without following the charter mandated rule-making procedure, it is, for this reason, too, "inconsistent with the provisions of [the] Charter" and therefore illegal.

Unfortunately, Intro 1685 is just one in a string of local laws recently proposed and in some cases enacted by the city council that make an end run around existing land use rules and procedures. For example, in June, the council extended for an additional two years a local law prohibiting the conversion of hotels to apartment buildings. New York City's land use regulations are contained in the zoning resolution, any change to which requires public review under ULURP and CEQR. By regulating land use through a local law rather than by amendment of the zoning resolution, the council side-stepped ULURP and CEQR, thereby cutting the community boards, borough presidents and city planning commission out of the process. The law is currently under appeal in the courts.

These laws are no doubt intended to address what are fair questions about recent development trends in New York City. Should 1,000 foot tall buildings be as of right in neighborhoods where most buildings are well under 200 feet? Is it a good thing that all or even most of the "air rights" on a city block can be transferred to and utilized on just one property? However, taken together, these laws represent what some view as a troubling trend. By circumventing existing land use rules and procedures and exempting themselves from rules everyone else must follow, the city council risks undermining the very protections it purports to be strengthening.

Frank E. Chaney is of counsel with Rosenberg & Estic PC's transactional law department in New York.