

NY Real Estate Legislation And Regulation To Watch In 2017

By **Matthew Perlman**

Law360, New York (January 2, 2017, 1:03 PM EST) -- New York's real estate industry will be closely monitoring developments at the federal, state and local levels of government in 2017 for changes to subsidies and other benefits developers see as crucial to getting their projects off the ground.

The real estate industry is waiting to see what the incoming presidential administration's impact will be on a number of federal programs used for the development and preservation of low-income housing and other projects. It is also watching as New York state's 421-A tax credit program begins another year hanging in the balance, while also gauging the progress of local zoning initiatives at the city level.

Here, Law360 looks at some legislation and regulation New York real estate players should be watching in 2017.

Federal Tax Credits

President-elect Donald Trump's pro-business rhetoric has included a promise to lower corporate tax rates, and though the policy is far from actually being implemented, Trump's message is already having an impact on real estate opportunities.

The Low-Income Housing Tax Credit was enacted through the U.S. Tax Reform Act of 1986, and is used by developers for the construction of affordable rental units in New York and throughout the country. It provides federal income tax credits that developers sell to syndicators in exchange for capital, and D. Hara Perkins, a director in Goulston & Storrs PC's real estate group, said it's currently used in almost all projects involving affordable units.

"Even if you're doing other programs, even if there's a local program that you're taking advantage of, even if you're developing on land that you bought for a dollar from a city agency, there's a good chance that one of the subsidies you're using is the federal low-income housing tax credit," Perkins said.

But the expectation of lower corporate tax rates has would-be investors in the projects holding off, since the value of the tax credits themselves would be reduced, Perkins said.

"Already, since the election, you see investors holding off on new activity for a 2017 or 2018 closing, because they're uncertain as to the value of the credit for them in the future," she said.

In places like New York, she said, a reduction in the pricing of the tax credits could result in a funding gap

big enough to make a project no longer feasible, even if a market for them persists after corporate tax burdens are lowered.

Rental Assistance Demonstration

Another uncertain federal initiative is the Rental Assistance Demonstration, or RAD, program, which can be used by public housing authorities to make needed building repairs. In exchange for a debt or equity investment from a private party, the authorities can shift rental units to the Section 8 rental assistance program, under which the private partners receive direct rental subsidies from the federal government and are required to keep the units permanently affordable.

The New York City Housing Authority, which operates 328 public housing developments with more than 400,000 residents, issued a request for proposals under the program in February 2016 for a 1,400-unit development in Queens that it said is in need of \$174 million in repairs. All told, the agency has said it would cost \$17 billion to perform all the needed maintenance on its properties.

“It’s one tool for a housing authority as big as NYCHA to help it focus its portfolio on properties it can best own, operate and manage,” Perkins said. “They privatize a portion, while still restricting the pieces it has privatized as permanently affordable.”

While a privatization program is something that seems like it could appeal to a Republican administration, Perkins said there are rumblings that the future of the program could be in jeopardy.

“We really don’t know what the appetite of this administration will be for supporting affordable housing at the federal level,” she said.

State Tax Incentive

New York state’s 421-A program provides developers with long-term real estate tax abatements in exchange for the inclusion of affordable apartments in certain residential projects. **The program expired** at the end of 2015, and real estate experts have been hoping for a new iteration because it’s seen as an important source of funding.

Nick Kamillatos, a member of Rosenberg & Estis PC, said 421-A’s popularity was evidenced by a surge in building permits issued as developers scrambled to get their projects started before it expired, and by a subsequent dearth of new developments during 2016.

“The bottom line is, that because of the cost of land and the cost of construction, without a substantial exemption from real estate tax assessments resulting from the construction, rental housing, especially affordable rental housing, is just not feasible,” Kamillatos said. “The numbers are irreconcilable.”

Democratic New York Gov. Andrew Cuomo left it up to the Real Estate Board of New York, an industry group, and the Building and Construction Trades Council of Greater New York, a union coalition, to reach an agreement over hourly wage requirements for certain projects covered under the program and other issues, which would be included in legislation reviving the abatements.

The sides finally hammered out a solution in November 2016, but now the legislation itself will have to be drawn up and steered through Albany, which could raise other issues that have not yet been addressed, Kamillatos said.

“Just because there was an agreement done on wage and benefit scales in the outer boroughs, doesn't mean that there's a political will to extend the 421-A program as it was in existence in December 2015,” he said. “There are other elements besides wages.”

Among elements of the program that could be up for debate are the length of the tax exemptions, the extent of the affordability mandates and other conditions imposed as a eligibility requirements under the program.

“Until it actually manifests itself in a bill that's going to be approved by the assembly and senate, and that the governor's happy with, we don't know for a fact what incentives will exist for projects which are commencing now,” Kamillatos said.

Jay A. Neveloff, chair of Kramer Levin Naftalis & Frankel LLP's real estate practice, said the city may need to start looking towards compromises for its requirements under the program, in the interest of getting an important incentive back on the books.

“The need for 421-A is clearly critical for lots of reasons — it helps the construction industry and it helps redevelop areas that really need redevelopment,” Neveloff said. “It's important to act in a socially responsible way, but right now I think the city has to re-evaluate whether its aspirational requirements are commercially realistic.”

Mandatory Inclusionary Housing

Real estate experts will also keep close tabs on the city council heading into 2017, where issues surrounding zoning regulations are percolating.

The Mandatory Inclusionary Housing program — which requires affordable housing units in projects that need zoning changes to allow for increased density — went into effect in 2016, but so far its impact has been fairly minimal. Of the seven neighborhood-wide planning studies proposed by the city that would be subject to the program, only one has been approved so far, and it was in the works long before MIH, said Frank Chaney, of counsel with Rosenberg & Estis PC, and a former planner with the Department of City Planning.

While he expects the neighborhood studies to ultimately be approved, because they are broad-based and are supported by Mayor Bill de Blasio, he noted that specific projects under the program may not have it so easy because of the allowable scale.

“Predictably, when it comes down to cases, individual mandatory inclusionary housing projects coming through the pipeline, the community organizations, and the elected officials, are knocking them down,” Chaney said. “Nobody wants denser housing.”

Chaney said the MIH program was originally designed to work alongside the state's 421-A tax abatements to help balance the need for increased scale with other incentives that make projects financially feasible. A change in one, he said, could result in changes to the other.

“Because the new 421-A program is not going to be your mother's 421-A program, either the new 421-A program will be designed to fit MIH, or MIH will be amended to fit the new 421-A,” he said.

Board of Standards and Appeals

There is also a current proposal in the city council that would make changes to the Board of Standards and Appeals, a body that issues zoning variances and special permits to developers outside of the city's full Uniform Land Use Review Procedure. Critics argue that the BSA grants too many of the variances that are requested, and essentially allows developers to circumvent zoning restrictions with little review or oversight.

The proposed legislative package includes ten bills which step up reporting requirements for the BSA, increase requirements for developers seeking the variances and provides for input from elected officials and community members.

Chaney noted that while the BSA used to be a less time consuming process than a full land-use review, that's not actually the case any more in practice.

"Partly, it's the change in administration and the character of the board," he said. "But also, I think they're probably looking over their shoulder a little bit. They don't want to approve something unless it's air-tight. They don't want to be seen as granting variances willy-nilly."

He said the MIH program actually includes some precedent for adding a layer of oversight to the BSA. The program allows developers to seek waivers of its requirements, likely as a way immunize MIH from a constitutional takings challenge, he said, and that those waivers require approval from the BSA with input from the city's Department of Housing Preservation and Development.

"HPD does not have the ability to overturn or override the BSA determination, but they play a very significant role in determining whether or not the variance or permit should be granted," Chaney said. "Which, historically speaking, is a significant new development."

Midtown East

A specific zoning proposal to watch in 2017 will be the latest iteration of the Midtown East rezoning, which looks to spur the development of new office stock in the area roughly bounded by West 39th and West 57th streets between Third and Fifth avenues. A prior plan under Mayor Michael Bloomberg died in the city council amid opposition, and the outline of a new version was released by the city in August.

Chaney expects the full details of the plan to emerge in early 2017, followed swiftly by a public review. He said it's in the city's interest to get a "fully formed" plan out there quickly, and to move ahead.

"But on the other hand, nobody really knows what they're doing and we'll have a very limited amount of time to review, understand and comment on it," he said.

One issue to keep an eye on, he said, is the transferability of development rights for landmark buildings. In most parts of the city, unused development rights, or air rights, can only be transferred to adjacent properties, or in the case of landmarks, across the street. The Midtown East plan would allow landmark buildings to transfer their rights anywhere in the rezoning area.

A fee for the transfers has been proposed and the size of the fee will be of interest to stakeholders and observers alike.

But in the end, Chaney said, the proposal has a good chance of succeeding this time around.

“This proposal probably has a pretty good chance of getting through, because they've really taken their time with it,” he said. “They're getting a lot of input from a lot of different people, and it's being supported by the people who opposed the first one.”

Kamillatos stressed that none of the current proposals or programs, at the city or state level, can be viewed in a vacuum. They all have to work together to provide developers the right mix of incentives to encourage new projects, while still providing affordability and other public benefits.

“They are ultimately interconnected, and cannot be disconnected,” Kamillatos said.

— Additional reporting by Natalie Rodriguez and Braden Campbell. Editing by Ben Guilfooy.