

New York Law Journal

Real Estate Trends

WWW.NYLJ.COM

VOLUME 266—NO. 101

An ALM Publication

WEDNESDAY, NOVEMBER 24, 2021

ZONING AND LAND USE PLANNING

Housing To Take Center Stage In Wave of ‘Repurposings’

By
Anthony S.
Guardino



Retail malls, large shopping centers, office towers and industrial parks are at a crossroads. The shutdowns, lockdowns and other restrictions stemming from the COVID-19 pandemic as well as the corresponding changes in the behavior of millions of individuals—on top of the years-long growth of the Internet and online shopping and the declining interest in brick and mortar stores—have affected the underlying economics of these structures. Indeed, many have simply closed down and been permanently abandoned while others remain vacant or severely underutilized.

Real estate developers, lenders, lawyers, accountants and consultants, aided by far-sighted government officials, all are involved in an effort to ameliorate the problem. Buildings are being rehabilitated, selectively redeveloped and even completely redeveloped across the country. *See, e.g.,*

ANTHONY S. GUARDINO is a partner with Farrell Fritz, resident in the firm's Hauppauge, Long Island office. He practices in the areas of land use, zoning and environmental law. He can be reached at aguardino@farrellfritz.com.

awardPlanning Inc., “Rehabbing Long Island’s Empty Storefronts” (Oct. 4, 2021), available at https://www.scribd.com/document/530719990/Rehabbing-LI-s-Empty-Storefronts#from_embed (citing examples from West Springfield, Virginia, and Joplin, Missouri, to Jackson, Mississippi, and Wheat Ridge, Colorado).

Of course, one need look no further than New York to see examples of extensive redevelopments, such as the recent conversion of a former shopping mall in upstate Irondequoit in an effort to revitalize the whole community. *See* “Town of Irondequoit Looks Forward to Several Major Economic & Community Development Projects in 2021” (Dec. 30, 2020), available at <https://www.irondequoit.org/2020/12/30/town-of-irondequoit-looks-forward-to-several-major-economic-community-development-projects-in-2021/>.

The concept of adaptive reuse of commercial and industrial buildings for residential use is not new. For example, a 1981 amendment to the New York City Zoning Resolution entitled “Residential Conversion of Existing Non-Residential Buildings in Certain Community Districts in the

Boroughs of Manhattan, Brooklyn and Queens” was adopted to facilitate the residential conversion of obsolete non-residential buildings.

At the state level, the New York State Multiple Dwelling Law was amended to include a section entitled “General Residential Occupancy of Loft, Commercial or Manufacturing Buildings” to allow adaptive residential reuse of older industrial loft and office buildings.

What is relatively new, however, is the concept of redeveloping non-residential buildings for the purpose of creating affordable housing. Consider the local law enacted recently by the Town of Brookhaven, on Long Island. *See* Local Law No. 15 of 2020, available at <https://ecode360.com/BR0012/laws/LF1284703.pdf>.

The Brookhaven Law

The town board of Brookhaven adopted Local Law No. 15 of 2020 for the purpose of enacting a “commercial redevelopment district” (CRD). The CRD is a new “floating zone” with planning and zoning flexibility intended to stimulate the revitalization of specific commercial shopping center, bowling alley and health club properties. The

town board recognized that more rigid conventional zoning regulations did not allow owners of these properties to redevelop them in a way that is both economically beneficial and socially desirable; hence, it adopted Local Law No. 15.

The town board envisioned that the CRD would guide redevelopment patterns that are “civic-oriented, pedestrian-friendly, economically vibrant, environmentally sustainable, and that evoke a unique sense of place.” Toward that end, Local Law No. 15:

- Provides for “flexibility” in site and architectural design;
- Encourages redevelopment that blends a combination of residential, commercial, cultural or institutional uses;
- Offers the opportunity for a “balanced array of housing” designed to meet the needs of the town and the region; and
- Fosters redevelopment characterized by “compact, pedestrian-oriented developments” that provide a variety of uses and diverse housing types and that are anchored by a central public space and civic activity.

The town board also said that it intended to encourage redevelopment that is “walkable, affordable, accessible, [and] distinctive,” where public and private spaces have equal importance and a “balanced community” serves a wide range of home and business owners.

The CRD only applies to existing abandoned, vacant or underutilized properties with certain characteristics, such as commercial shopping center properties over five acres in size.

With the goal of creating affordable housing, Local Law No. 15 also provides that no more than 30 percent of the residential units in a redevelopment shall exceed 1,200 square feet; that a minimum of 30 percent of the residential units shall be less than or equal to 800 square feet; that no more than 10 percent of the residential units shall be less than or equal to 450 square feet; and that no residential unit shall be less than 400 square feet.

The concept of adaptive reuse of commercial and industrial buildings for residential use is not new. What is relatively new, however, is the concept of redeveloping non-residential buildings for the purpose of creating affordable housing.

In addition, Local Law No. 15 provides that civic space (which may be provided both indoors and outdoors) and recreational areas, including squares, private plazas, greens and public parks, must be intermixed throughout the development for the community’s social activity, recreation and visual enjoyment.

Moreover, a developer must provide a minimum of two square feet of civic space per residential unit and the outdoor recreational area must at least be equal to the number of units multiplied by 200 square feet.

Interestingly, the Brookhaven law also requires secure interior bicycle storage space for the residential units—along with non-residential bicycle lockers for employees and bicycle racks for visitors. Where appropriate, a developer should provide pedestrian

and/or bicycle paths connecting the site with abutting areas to promote pedestrian and bicycle circulation and safety. Bike paths also are required along any main roadway that connects the development to a street or community or as may be directed by the town board or the town’s planning board.

Other local governments have taken similar action. For example, the Long Island Town of Smithtown recently adopted a zoning amendment that allows for the conversion of industrial buildings in the Hauppauge Industrial Park to residential mixed-use buildings. *See* <https://ecode360.com/15103487>.

There also has been legislative action at other levels of government.

New York State

In March, S5257C, the “Housing Our Neighbors with Dignity” Act, became law in New York. *See* <https://www.nysenate.gov/legislation/bills/2021/s5257>. The law amends the New York State Private Housing Finance Law to authorize the state, through the Housing Trust Fund Corporation, to finance the purchase, acquisition, holding or conversion of distressed hotels and commercial office properties for use as affordable permanent housing to be made available to low-income households and people experiencing homelessness. Under the new law, these properties are to be owned, operated and managed by nonprofit organizations through the use of government agency funding to acquire the properties.

The law provides that the acquired properties “shall be converted into permanently affordable housing” modeled as financially and operationally

deemed necessary by the state or appropriate nonprofit organization for the purposes of creating supportive or permanently affordable housing units.

Under the law, the housing “shall remain” affordable housing, defined as permanent housing that is affordable to low and moderate-income households such that the new housing achieves income averaging at or below 50 percent of the area median income, with residents’ eligibility capped at a maximum of 80 percent of the area median income at the start of their lease.

The law provides that at least 50 percent of the converted properties must be set aside for those experiencing homelessness. It also states that each unit must contain, at a minimum, a living/sleeping space, private bathroom with bath or shower, and either a full kitchen or a kitchenette with at least a 24-inch refrigerator, sink, cooktop, microwave oven and outlets for countertop appliances.

The legislative history makes it clear that the Legislature passed S5257C to address a statewide “ongoing financial and public health crisis related to housing.” It cited statistics indicating that the number of homeless single adults in New York City was 132 percent higher than it was 10 years ago, reaching a record 20,000 people in shelters as of October 2020.

The legislative history also noted that, even prior to the COVID-19 pandemic, as many as 580,000 New Yorkers were either rent burdened, overcrowded or living in long-term shelters.

At the same time, according to the legislative history, the COVID-19

pandemic hit New York’s hotel industry hard, and it suggested that as many as 25,000 rooms, or 20 percent of New York’s total, might not reopen.

The Legislature indicated that S5257C “puts New York on a pathway to social housing with permanent affordability.” It also pointed out that New York would not be alone in implementing this kind of solution, noting that California also has taken steps to establish a policy, known as the “HomeKey” program, to convert distressed hotels to permanent housing using federal funds.

One need look no further than New York to see examples of extensive redevelopments, such as the recent conversion of a former shopping mall in upstate Irondequoit in an effort to revitalize the whole community.

In Congress

Legislation also has been introduced in Congress in an effort to help revitalize unused office buildings. This summer, U.S. Senators Debbie Stabenow (MI) and Gary Peters (MI) and U.S. Representatives Jimmy Gomez (CA-34), Dan Kildee (MI-05) and John B. Larson (CT-01) introduced the “Revitalizing Downtowns Act.” See <https://www.congress.gov/bill/117th-congress/senate-bill/2511>.

If enacted, the bill would expand the investment tax credit to create a Qualified Office Conversion Tax Credit. The amount of the new credit would be 20 percent of the qualified conversion expenditures with respect to a “qualified converted building.” The bill

defines qualified converted building as any building if:

- Prior to conversion, the building was nonresidential real property that was leased, or available for lease, to office tenants;
- The building has been substantially converted from an office use to a residential, retail or other commercial use;
- The building was initially placed in service at least 25 years prior to the beginning of the conversion; and
- Straight line depreciation is allowable with respect to the building.

Conclusion

As various interested parties gain more experience in this form of redeveloping vacant or underutilized properties, one can expect that more local and state government officials, and perhaps representatives in Washington, D.C., will enact legislation to simplify the steps needed for such redevelopment to occur. This can turn out to be a win-win for both developers and the communities in which their properties are located.