

State Environmental Law

Expert Analysis

Working Through New York City's E-Designation Program

On occasion, this column focuses on an environmental program or issue that impacts particular regions or municipalities, rather than on statewide issues. This month's column focuses on the City of New York's "e-designation" program, which many environmental practitioners deal with at one time or another.

The city's e-designation program involves designations placed on the city's zoning map by the Department of City Planning (DCP) and the City Council as a part of a zoning action. A designation indicates the potential presence of hazardous materials contamination, window and wall noise attenuation issues, or air quality impacts but oftentimes is not based on actual sampling data or other specific site-related investigative information.

As a practical matter, an e-designation impedes the transferability of the affected property, and it can be rather challenging to

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have an e-designation removed. Recently, the city amended the e-designation removal portion of the e-designation program, which may very well make the process of removing an e-designation operate more smoothly.

This column discusses the general outlines of the e-designation program and the amendment that could help smooth the sale and redevelopment of city sites subject to the program.

The E-Designation Program

The e-designation program is set forth at <http://www.nyc.gov/html/oer/html/e-designation/e-designation.shtml> and is sometimes formally referred to as the "E-Designation Environmental Review Program for Hazardous Materials, Air Quality, and Window/Wall Noise Attenuation." It is a mandatory environmental remediation program administered by

the New York City Office of Environmental Remediation (OER) to ensure that environmental requirements established during a land rezoning process are fully addressed in a new development.

E-designations are assigned to properties identified by the city agency (the so-called Lead Agency) in charge during the city's environmental quality review (CEQR) of a proposed zoning amendment or zoning action in order to apply

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environmental requirements related to potential hazardous materials, air quality, or noise impacts resulting from the proposed action. The e-designation rule, available at http://www.nyc.gov/html/oer/downloads/pdf/E-Designation_Rule.pdf, sets forth procedures that property owners,

developers, and others must follow to satisfy e-designations relating to hazardous materials (or air quality or noise) and obtain city building permits for their projects. As might be expected, the rule defines hazardous materials quite broadly, as:

“any material, substance, chemical, element, compound, mixture, solution, product, solid, gas, liquid, waste, byproduct, pollutant, or contaminant which when released into the environment may present a substantial danger to the public health or welfare or the environment, including, but not limited to those classified or regulated as ‘hazardous’ or ‘toxic’ pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C.A. §9601 (1995) et seq., the Resource Conservation and Recovery Act (RCRA) 42 U.S.C.A. §6901 (1995) et seq., the Clean Water Act (CWA), 33 U.S.C.A. §1251 (1986) et seq., the Clean Air Act (CAA) 42 U.S.C.A. §7401 (1995) et seq., Toxic Substances Control Act (TSCA), 15 U.S.C.A. §2601 (1998) et seq., Transportation of Hazardous Materials Act, 49 U.S.C.A. §5101 (1997) et seq., the Hazardous Substances Emergency Response Regulations, 15 RCNY Chap. 11, and/or the List of Hazardous Substances, 6 NYCRR Part 597.”

A Lead Agency also may accept the recording of a “Restrictive Declaration” (RD) to ensure that

environmental requirements established during a land use determination or similar process are fully addressed in a new or existing development. An RD binds a property owner to investigate or remediate a property after the zoning or variance action is certified. RDs are formal notices incorporated into a property deed and can provide environmental requirements for existing or a future development.

E-designations and RDs have equivalent environmental requirements. A city website, <http://www.nyc.gov/html/oer/html/e-designation/ceqr-documents.shtml>, contains links to the hazardous materials, air quality, and noise requirements of each e-designation. They have been sorted by borough into tables that contain the CEQR number, the certification date of the rezoning action, the name of the rezoning action, and the Uniform Land Use Review Procedure (ULURP) number. The CEQR and ULURP numbers represent environmental studies conducted by Lead Agencies to support rezoning actions throughout the city.

A party seeking to access the requirements of a specific e-designation must know which e-designation is associated with the property’s block. The CEQR or ULURP number is a hyperlink that opens a document that generally contains all the requirements for hazardous materials, air quality, and noise e-designations.

The E-Designation Process

As described in §24-04 of the e-designation rule, a Lead Agency may prepare or may cause to be prepared a preliminary screening assessment consisting of visual or historical documentation of any of a broad range of past or current uses at a development site, or another other tax lot that might have affected or be affecting a development site. The uses include incinerators, underground or above ground storage tanks, active solid waste landfills, permitted hazardous waste management facilities, inactive hazardous waste facilities, suspected hazardous waste sites, hazardous substance spill locations, areas known to contain fill material, petroleum spill locations, and the like.

For a tax lot or tax lots not under the ownership or control of the party seeking a zoning amendment or other zoning action, the Lead Agency, relying on the visual or historical documentation, may determine that an e-designation should be placed on the tax lot or tax lots in connection with the approval of the zoning amendment or zoning action.

For a site under the control or ownership of the applicant that warrants a hazardous materials assessment, the Lead Agency must conduct, or cause to be conducted, a Phase I Environmental Site Assessment.

Under the e-designation rule, before a property owner or developer may receive a city building permit for any development with respect to a property subject to an e-designation or an

RD, the applicant must either complete a Phase II Environmental Site Assessment (Phase II ESA) to determine the level and extent of contamination at the site or demonstrate to the OER that a Phase II ESA is not required.

The e-designation rule has extensive provisions relating to Phase II ESAs, describing what an applicant must prepare and submit to the OER, explaining procedures for all sampling techniques and methods, and setting forth in great detail what must be included in a Phase II ESA and associated appendices.

After the OER reviews a Phase II ESA report, it may decide that a "Remedial Action Plan" is needed to satisfy an e-designation. Where a Remedial Action Plan is required, it must address the contamination identified in the Phase II ESA Report to the satisfaction of the OER, including, but not limited to, elevated levels of contaminants pursuant to applicable NYSDEC standards, criteria, and guidance; contaminant source areas; the exposure pathways for contamination; environmental exposure to contamination; public exposure to contamination; proposed cleanup criteria; and health and safety of construction

workers and the general public during remedial action.

Removal of E-Designations

As noted above, the New York City Department of Environmental Protection (DEP) and the OER recently amended the e-designation rule to streamline the way e-designations can be removed.

As a result of the recent amendment to the e-designation rule, the process for removing an e-designation appears to be less cumbersome than before, which is good news for property owners, sellers, and developers.

The amendment did two things. First, it authorized the OER to approve a final cleanup at certain sites with an e-designation without site management where those sites achieved a level of remediation that did not rely on institutional or engineering controls. According to the DEP and OER, site management is not required in instances where the activities that a site owner otherwise would monitor under a site management plan already are prohibited by the city. Therefore, under the amended rule, in certain instances, hazardous materials e-designations can be removed from properties that achieve a cleanup without reliance on institutional or engineering controls.

Second, the amended rule allows for e-designations related to noise

or air quality to be removed from a tax lot upon notice from the OER that the environmental requirements for noise or air quality have been completed. The amendment clarifies that where a development project with an e-designation for noise or air quality has been built out to its full development potential according to zoning, and installation reports demonstrate that the noise or air quality requirements have been fully completed, the e-designations for noise and air quality can be removed from a tax lot.

Once the DCP has received a final notice of satisfaction, the e-designation rule provides that it must remove the affected tax lot or tax lots from the e-designation list. It then is required to notify the DOB and OER of the removal. The sale or development of the property may proceed as proposed.

Conclusion

Until recently, it often seemed easier to have an e-designation placed on a particular property than to have it removed. As a result of the recent amendment to the e-designation rule, the process for removing an e-designation appears to be less cumbersome than before, which is good news for property owners, sellers, and developers.