

'Legitimate Theater'

Incentives Promote Broadway District Preservation

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The first sales of development rights from New York City's Broadway theaters have recently closed, as developers in the hot Midtown West market take advantage of the mechanisms contained in the New York City zoning resolution to increase the floor area of their development parcels by tens of thousands of square feet. Adopted in 1998 to provide incentives for the preservation of the Broadway theaters, the special theater subdistrict provisions of the zoning resolution remained unused for nearly 10 years—a full real estate market cycle—before the market strengthened sufficiently to make the incentives attractive to both developers and theater owners. With well over one million square feet of development rights still available for transfer from the Broadway theaters to Midtown West development sites, the public policy goals behind the theater subdistrict zoning provisions are finally being accomplished.

Those policy goals establish an economic quid pro quo to protect the Broadway theater district, a vital part of New York's cultural and tourism economy. In return for the right on the part of a Broadway theater owner to sell its unused zoning floor area development rights within a broad district, the owner must covenant to upgrade and maintain its theater in physically and operationally sound condition, and to use its theater in perpetuity as a "legitimate theater." To further support the continued vitality of the Broadway theater district, a theater subdistrict fund, administered by a not-for-profit theater subdistrict council, is being created to promote theater and theater-related uses, into which is to



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◆ DEVELOPMENT RIGHTS ◆

be deposited a one-time contribution from each development rights sale (currently an amount of \$14.91 per square foot). Theater owners utilizing these provisions can transfer their unused development rights within a 35-square-block theater subdistrict bounded generally by 40th Street to the south, Sixth Avenue to the east, 57th Street to the north, and Eighth Avenue to the west.

The Broadway theater development rights transfer provisions constitute one of only a very few instances under the zoning resolution in which unused development rights from land parcels are permitted to "float" across a broad district. (Other examples include the Grand Central, HighLine/West Chelsea, and Hudson Yards/Eastern Railyards zoning districts.) Because of the relatively unique nature of the theater development rights transfers, Section 81-74 of the zoning resolution sets out a specific process to be followed in the transfers.

Any developer/owner of property within the theater subdistrict may apply to the New York planning commission under Section 81-744(a) for "certification" to increase the basic maximum floor area applicable to its development parcel by up to 20 percent through the purchase of theater development

rights. A developer/owner may also apply for "authorization" under Section 81-744(b) to purchase additional theater development rights to increase its developable floor area by an additional 20 percent, for a cumulative total increase of 44 percent. The purchase of the theater development rights is done directly by contract between the developer and the theater owner, but the right to use the development rights on the development site is granted by the planning commission through the "certification" and "authorization" processes. A theater must be listed in Section 81-742 of the zoning resolution to be eligible for the transfer. All Broadway theaters, other than those contained in the 42nd Street Project area, are included in the list.

Certification

The "certification" process is largely ministerial in nature, intended to create a straightforward and non-discretionary mechanism for the transfer of theater development rights. An application for certification must be submitted to the planning commission, containing the following elements: (i) site plans and zoning calculations, showing that the granting site (the theater) has sufficient unused development rights to grant, and that the receiving site (the development parcel) is utilizing no more than 20 percent additional floor area, (ii) a written commitment from a theater operator (which may be the owner) for not less than five years of operations, (iii) a report from a licensed engineer or architect certifying that the theater is physically and operationally sound so as to permit its use as a "legitimate theater," or a plan and program to put the theater in a state of physical and operational soundness; which report must, if the theater is also a city-designated landmark, address the significant architectural features of the theater and a plan and program to preserve such architectural features in good physical repair and sound proper condition, (iv) a

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financial commitment by the theater owner to ensure timely completion of any work required to be completed under the plan and program, (v) a legal commitment for continuing inspection and maintenance of the theater to ensure its continued availability for theater use, and (vi) a legal commitment for the continued use of the theater as a "legitimate theater" for the life of the related development. The application is submitted to the planning commission, with review by the city Landmarks Preservation Commission of the architectural report on any landmarked theater. The application is also referred to the affected community board, the local City Council member, and the Manhattan borough president for a 60-day review before the certification can be granted by the planning commission. The certification is granted if the application meets the requirements specified in the zoning resolution.

Authorization

The process for an "authorization" is more discretionary, since the additional 20 percent zoning floor area increase to the receiving site adds substantial additional density to a development. Thus, in addition to all of the items reviewed for the certification, the planning commission is required to find that the proposed development "relates harmoniously" to all structures and open space in its vicinity in terms of scale, location and access to light and air in the area, and serves to "enhance or reinforce the general purposes of the Theater Subdistrict." Thus, while a certification can be granted without review of the proposed new development, an application for an authorization requires that the planning commission make findings about the harmonious nature of the new development to its surroundings. The commission may also consider whether the second required finding, that of enhancing the general purposes of the theater subdistrict, is met by virtue of the preservation and operating covenants imposed on the theater by the transaction, or requires an additional benefit to the district.

Critical Definition

The completion of the first transactions under the theater subdistrict provisions of the zoning resolution has now established useful precedents for future transactions. Several critical matters, left undefined in the zoning resolution, have been defined in practice. Interestingly, the most significant discussions have been generated not by the scope of the new real estate developments which have been enlarged through the use

of theater development rights (always a hot topic in New York), but rather by the scope of the protections offered to the Broadway theaters by the zoning provisions.

A critical initial matter concerned the definition of "legitimate theater." Since the theater owner must covenant to operate the theater as a "legitimate theater" for the life of the new development (effectively, a perpetual covenant), the theater owners were concerned that the definition of "legitimate theater" have the flexibility to adapt to new forms of theatrical entertainment and to reflect how the nature of Broadway theater itself had changed over the years. At the same time, the planning commission was concerned that the definition not be left overly broad to permit the use of the Broadway theaters for non-theatrical types of entertainment. A definition, which has

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now been incorporated into the restrictive declarations imposed on the theaters utilizing the development rights transfer provisions, was crafted to define "Legitimate Theater" as "the live presentation, available to the general public, of stage productions by professional performing artists, including but not limited to plays, musicals, and other forms of expression that may incorporate dance, music and/or other elements," but excluding exhibition of films, video or similar electronic media, or radio or television studio performances except as incorporated in a live stage production. To allow for future adaptation, the definition contains a savings clause providing that "prevailing modes of live

theatrical productions" as may evolve and change over the life of the related development will continue to qualify as "Legitimate Theater."

A second critical matter, which has not yet been fully resolved, involves the creation of the theater subdistrict council and the uses to be made of the theater subdistrict fund. This is of intense interest to the theatrical community as well as to the neighborhood community in which the theater district is located. Numerous constructive suggestions have been made for the use of the theater subdistrict fund, the size of which will continue to be augmented with additional sales of development rights. Suggested uses include support for theatrical programs in the public schools, support of new plays and playwrights, support for small-scale not-for-profit theaters, and enforcement of the restrictive covenants on the Broadway theaters. The theater subdistrict council is in the process of being incorporated as a not-for-profit corporation, and will then make decisions about the use of the funds.

With the initial transactions serving to iron out ambiguities in the statute and establish precedents for future transactions, subsequent transfers of theater development rights within the theater subdistrict can be expected to proceed smoothly. These provisions of the zoning resolution constitute an effective and efficient way for developers in the Midtown West neighborhood to obtain substantial additional zoning floor area to enlarge their buildings, while serving the laudable social and economic purposes of preserving New York's Great White Way.