

HAPPY 2013

"I don't want to get to the end of my life and find that I've lived just the length of it. I want to have lived the width of it as well."

- Diane Ackerman

# LEPATNER REPORT

CONSTRUCTION COST CERTAINTY

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A QUARTERLY FOR OWNERS AND THE REAL ESTATE & CONSTRUCTION INDUSTRY FOR 33 YEARS



## Where Do We Go from Here?

By Barry LePatner

The exhausting multi-year election process has now come to an end. And while the noise from Washington, DC, may indicate that most of the politicians seem to be blind to this fact and carry on as before, the rest of the nation just wants some sense of assurance that common sense and our fiscal best interests are going to be attended to going forward. Not likely.

What those who paid attention to the electoral results have learned is that numbers count. Not just the numbers in the electoral college or the number of voters who supported one party or the other. It is the fact that even the most savvy of politicians are prone to ignore numbers that are staring them in the face and proceed to speak and act exactly to the contrary leaving important issues to fester or go unintended.

Take the unemployment numbers, for example. Yes, there appears to be a steadying of the unemployment figures at or around a bit under 8 percent for the nation as a whole. Yet the construction industry remains a troublesome world apart with about one million fewer employed in the field than when the recession began.

Some bad news still shows problems that could be alleviated if the U.S. Congress were to act definitively: The Associated General Contractors of America recently reported that 28 states and the District of Columbia lost construction jobs between October 2011 and 2012. The number of stalled construction projects in New York City is up 17 percent since

continued on Page 3 ►

## An Overview of the New York City Department of Buildings' Determination Request Process: The Practitioner's Guide

By John B. Egnatios-Beene, Esq.

*This is a brief guide to navigating the New York City Department of Buildings' determination request process. Discussed is a step-by-step description of how to appeal an unfavorable plan examination objection.*

### The Purpose

The scenario is all too familiar to developers in New York City. A design team has worked tirelessly to turn a client's vision into a set of construction documents. The construction loans are in place. A general contractor has been retained. Perhaps a hard-fought Landmarks Preservation Commission approval has been obtained. All that is left before shovels hit the dirt is a DOB permit.

Things begin well enough. The plans are assigned to a seasoned examiner who understands the challenges presented by the project. Thanks to the DOB Development Hub, virtual meetings begin almost immediately, and objections are satisfied almost as soon as they are raised. An approval seems imminent, that is, until the following conversation occurs:

Examiner: "The plans look good, but you're going to need a recon for Objection 8."

Applicant: "But I just got an approval for an almost-identical design in Brooklyn three months ago!"

Examiner: "Well, that may be, but I can't approve it as designed."

Panic does not have to set in at this point. The DOB has a process for obtaining a determination (formerly known as a "reconsideration" or "recon") on a disputed objection. Understanding this process, and understanding the scope of DOB's authority and the nature of its review, are the keys to preventing delays and unnecessary costs during the construction document phase of a project.

### The Submission

As with anything involving DOB, the determination request begins with a form, or, in this case, two forms: Form CCD1 and Form ZRD1. Both forms are available on the DOB website, and failure to use the form will likely result in the request not being considered.

continued on Page 2 ►

### CCD1

The CCD1 form is used to request determinations regarding any of the New York City Construction Codes (i.e., the Building Code, Plumbing Code, Mechanical Code, Fuel Gas Code, Electrical Code, and Energy Code), the 1968 and 1938 Building Codes, the Housing Maintenance Code, and the New York State Multiple Dwelling Law. The form must be properly and fully completed and signed and sealed by a registered design professional or submitted by an attorney. Proper completion of the form means a number of things. First, the request should be



clearly articulated as either an interpretation or a variation, and the corresponding box on the form must be checked. (The differences between an interpretation and a variation are discussed below.) Second, the objection(s) at issue should be quoted verbatim, or a copy of the objection sheet should be provided with the request.

Third, the request should include a short, plain statement explaining why the objection was issued in error. Such explanation should make reference to all relevant provisions of law, any applicable interpretive documents issued by DOB (e.g., bulletins, policy and procedure notices, memoranda, etc.), and any relevant prior approvals by DOB. Fourth, the request should include complete and accurate plans, sections, specifications, etc., showing the building or portion thereof related to the request. Finally, all documentation supporting the material facts of the request that may be subject to dispute should be included as well.

### Interpretation v. Variation

As Form CCD1 Section 5 indicates, requests take one of two forms—either they seek an interpretation of the provision(s) at issue or they seek a variation of the provision at issue. An interpretation is requested where the requirement is ambiguous or subject to more than one reasonable understanding. In essence, the interpretation seeker merely wants confirmation of what the requirement is.

In contrast, a variance seeker knows what the requirement is and knows that his design does not comply, but seeks an approval from DOB nevertheless. Section 28-103.3 of the Administrative Code of the City of New York authorizes DOB to vary the substantive requirements of the code provided that there is a practical difficulty complying with the requirement and an equally safe alternative to compliance. In contrast, DOB's authority to vary the requirements of the MDL is limited to variances issued pursuant to MDL Section 277.16. It should be noted that variances are not typically permitted for new buildings, the rationale being that there can be no practical code-compliance difficulty where a building is being designed from the ground up.

### ZRD1

The ZRD1 form is used to request determinations regarding the Zoning Resolution of the City of New York. Unlike the code, DOB has no authority to vary the ZR requirements—if an eight-foot side yard is required, DOB cannot approve a side yard measuring seven feet and three-quarters (only the Board of Standards and Appeals may vary the ZR). Still, there is ample room for reasonable disagreement over the text of the ZR, and DOB is charged with determining which interpretation is the correct one. A ZRD1 should include a plain statement supporting the proposed interpretation, all supporting documentation, and any applicable interpretive documents issued by DOB and any relevant prior approvals by DOB.

### The Decision

Regardless of the issue being appealed, the first level of DOB review will be the borough commissioner's office where the permit application has been filed. The borough commissioner will approve the request, deny it, or, in a limited number of cases, refer it directly to DOB Technical Affairs. If the request is denied, the requestor may appeal the denial to Technical Affairs, where the request will eventually be reviewed by the first deputy commissioner. Technical Affairs will often seek additional information regarding the request and sometimes request a meeting. If the first deputy commissioner denies the request, the determination becomes a "final determination," which is ripe for appeal to the Board of Standards and Appeals.

An approved determination request is valuable. It not only resolves the objection issued; it is an official DOB statement of the law, which, if not adhered to, exposes DOB to claims of arbitrariness. A denial is also valuable to the extent that it also creates a precedent from which DOB may not arbitrarily depart. Accordingly, a practitioner should retain all determination requests and DOB decisions for future reference.

## Eight Frequently Asked Questions about Determinations

1. What are some examples of cost savings due to an approved determination request?
2. Do I need an attorney to review and/or submit my request?
3. How long will it take for DOB to process my request?
4. What is a "pre-determination," and how do I obtain one?
5. What is a "conditional approval," and do I want one?
6. How do code consultants abuse the plan examination and determination request process to overbill clients?
7. Should I appeal my denial to Technical Affairs?
8. Should I appeal my final determination to BSA?

**LePatner & Associates has expanded its services to include zoning and code consulting in NYC. Contact us for answers to these questions and many more.**



February. This is so despite the fact that there are 700 sites that have come to a halt since 2008 and have yet to be restarted. Investment in nonresidential construction was down 4.4 percent in the third quarter, according to the first Marcum Commercial Construction Index. “Despite 13 consecutive quarters of economic growth, nonresidential construction has not been among the sectors experiencing meaningful recovery,” noted analyst Anirban Basu.

The contrary nature of the financial facts of our economy continues to send mixed signals, even though the trend remains upward for the near future. Consider that Reuters recently reported, “In the third quarter, business spending tumbled for the first time since the 2007-9 recession ended, weighed down by the looming tax increases and reductions in federal spending, Europe’s long-running debt problems and slowing global demand.”



While weakness in business spending has been restraining growth, the housing market is gaining momentum, which should support the recovery. Single-family home prices rose for an eighth straight month in September, a separate report showed. The Standard & Poor’s/Case-Shiller composite index of 20 metropolitan areas gained 0.4 percent in September on a seasonally adjusted basis.

“The strengthening in home prices is a plus for growth through various channels, including increased consumer spending because of wealth and confidence effects,” said Jim O’Sullivan, chief United States economist at High Frequency Economics in Valhalla, NY.

Then there was Hurricane Sandy. The tragic aftermath of this storm will have long-term dramatic impact on the area’s economy as homeowners and businesses attempt to recover from its effects. I have been interviewed several times since the storm struck, and here are the main points I have made to the media:

1. For decades, politicians and the public alike have essentially ignored the growing perils of our inadequate infrastructure. It took a storm of Sandy’s magnitude striking at the heavily populated northeast coast to dramatically highlight the failings of our electrical grid, our improper mechanisms to protect our shores and airports from inevitable storm surges, and the recognition that investment in these areas will require a national commitment over the next few decades if we are to avoid future tragedies.

2. We have been ignoring the warnings of several decades. Starting as long ago as 1988, when a NASA scientist warned the U.S. Senate of the grave implications of global warming, on through a 2010 Pentagon report that highlighted changes in global temperatures that will lead to increased frequency of floods, droughts, and other dramatic weather conditions, politicians have dealt with these issues only in political terms. The science of these issues is clear and should not be ignored any longer.
3. The facts of Hurricane Sandy evince a clear implication for the future if steps are not taken to anticipate the next weather event. Up and down the East Coast, from Maine to Florida, there are over a dozen urban areas that are in low-lying areas—including Providence, RI, Tampa, FL, and the NY Metropolitan area, among others—that will be impacted by future storm surges, leaving millions unprotected and without homes, electricity, and dealing with the expected aftermaths of these ravages.
4. The scale of what is needed is massive, but so is the cost of repeated repairs and rebuilding of our shores, homes, and businesses and the economic impact to the commercial vitality of affected areas. NYS will show an economic hit of over \$42 billion; New Jersey over \$20 billion. One year from now, many of those whose homes and businesses were destroyed along the areas of the surge will still be struggling to rebuild—provided they have the necessary insurance coverages, since FEMA pays only \$31,000 max for any home that is destroyed. It is highly questionable if future insurance for these areas can be secured upon rebuilding, or, if available, at a cost that is not prohibitive.
5. All of this will have to be assessed not on a local or state basis, but on a regional basis. Planning to install barriers for future storm surges will have to be coordinated with national perspective in mind. We are going to need, more than ever, a national infrastructure czar, one who is highly respected nationally and above politics to drive home the needed commitments that must not be caught up in the customary Washington, DC, gridlock. This was done by President Dwight D. Eisenhower who appointed Gen. Lucius Clay to oversee the administration of the construction of the Federal Interstate Highway System beginning in the late 1950s.
6. Ignoring these imperatives will be a dangerous choice for our nation. The cities of Rotterdam, Venice, and London have already invested billions to protect their low-lying shores. At the same time, we must coordinate repairs to our ailing bridges and roads, which are a national tragedy waiting to happen. We must address our nearly 8,000 structurally deficient/fracture-critical bridges that are in a state of inevitable collapse unless funding is found for their repair. See [www.SaveOurBridges.com](http://www.SaveOurBridges.com).



I was recently—and pleasantly surprisingly—asked by Arianna Huffington herself, in an email, to write a piece on the state of our nation’s infrastructure along with recommendations for how the country can address these problems. You can read the piece, which appeared recently, at [http://www.huffingtonpost.com/barry-b-lepatner/infrastructure-investment\\_b\\_2138986.html](http://www.huffingtonpost.com/barry-b-lepatner/infrastructure-investment_b_2138986.html).

Finally, I was asked by PE magazine (the magazine for professional engineers across the nation) to write a proposed letter to President Obama giving advice for the next four years and addressing key issues. My response, which is set out along with recommendations from other prominent people in the field, can be found at [http://www.nspe.org/PEmagazine/12/pe\\_1112\\_Advice.html](http://www.nspe.org/PEmagazine/12/pe_1112_Advice.html). My comments included the following:

The problem we’re facing post-election is whether there’s going to be any agreement to see the long-term solutions of our infrastructure before tragedy strikes. We can’t think short-term. It’s about saving our nation in terms of national security [and] the global marketplace we compete in, and the importance of moving commerce and the supply chain across the nation.

We have 8,000 bridges in our nation that could fall at a moment’s notice because they’re structurally deficient and fracture-critical. Those two elements really represent a danger to the public who goes across those bridges.

Put the money in. Remember that anytime we invested in our nation’s infrastructure, whether it was the Erie Canal, Transcontinental Railroad, Hoover Dam, levies, or the interstate highway system, our economy has grown, our jobs have increased, and we’ve created demand that cannot come from anywhere else. And it’s easy to create all that by investments in our infrastructure.

There’s 17 percent unemployment today in the construction industry. We can put one million construction workers back to work for two full years merely by addressing the top 2,000 [deficient] bridges. That effort would restore growth in many areas, cut unemployment tremendously, and return a great deal of money into the community.

[Also] develop a new federal cabinet position, Secretary of Infrastructure. Appoint someone of huge reputation and respect who understands infrastructure problems and helps make a congressional policy with support from the president and administration.

My best wishes to each of you for a wonderful 2013 and keeping optimistic about the days, weeks, and years to come.

\* The LePatner C<sup>3</sup> team served as construction counsel and project manager for the design and construction of Tiffany’s new retail store in SoHo. LePatner helped select and guide the project team from the outset of design through punchlist, while successfully navigating many challenges to open the store on budget and in time for NYC’s Fashion Week in early September.

\* LePatner C<sup>3</sup> was recently selected by the nonprofit New York Junior Tennis League to project manage its new **Cary Leeds Center for Tennis & Learning**, which will be built this year in Crotona Park in the South Bronx. We are excited to be an integral part of this important project that benefits kids and their communities.

\* LePatner recently secured the dismissal of contribution and indemnification claims brought against our client stemming from an on-site construction accident. The judge agreed with LePatner’s position that the claim was baseless under contract and common law and that the Labor Law barred the plaintiff’s action against our client.

\* LePatner welcomes attorney John Egnatios-Beene to the firm as an Associate. John spent several years as in-house counsel at the NYC Department of Buildings. We’re happy to have his expertise at LePatner to strengthen our knowledge base on code, zoning, and permitting issues. See John’s article in this issue of the LePatner Report.

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**LEPATNER & ASSOCIATES LLP**  
 575 LEXINGTON AVENUE - 12<sup>TH</sup> FLOOR  
 NEW YORK, NEW YORK 10022  
 (212) 935-4400  
 INFO@LEPATNER.COM  
 WWW.LEPATNER.COM  
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