NOTES & COMMENTS

PREDICTING THE UNPREDICTABLE: ANALYZING NEW YORK CITY'S HOTEL SPECIAL PERMIT REQUIREMENT

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ABSTRACT

In December of 2021, during the final month of the de Blasio Administration, the New York City Council passed a zoning amendment requiring special permits for all new hotels being constructed in the city. Developers hoping to build a new hotel or expand an existing one by twenty percent or more must now go through a lengthy special permit process, involving review by numerous city boards and elected officials. While proponents of the policy claim that it takes power away from developers and puts it in the hands of the communities most affected by the new construction, detractors warn that the policy will quickly result in a hotel shortage and could potentially cost the city billions in lost tourism revenue. This Note examines the citywide hotels special permit requirement in the context of the current state of the hotel industry, the intricacies of New York City politics, and the larger trends in zoning policy in New York City and across the United States. Ultimately, it concludes that the benefit of increased control over hotel development is far outweighed by the economic costs of an inefficient process born out of political relationships rather than thoughtful city planning.

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I. INTRODUCTION

In December of 2021, the final month of the de Blasio Administration, an alteration to the zoning code signaled a major shift for hotel construction in New York City.[1] Hotels, which were previously *as-of-right* developments in most parts of the city, would now require special permits for every new construction, regardless of its location.[2] Responding to ongoing pressure to better regulate hotel development in light of decades of unchecked growth, the amendment was the culmination of years of piecemeal changes to the zoning code which added special permit requirements for hotel constructions in certain neighborhoods.[3] While its proponents champion the change as a victory for the working class over wealthy developers, critics of the amendment argue that the policy will cost the city billions of

[1] *See* discussion *infra* Part III.
[2] *See infra* notes 44–45, 84–85 and accompanying text.
[3] *See* discussion *infra* Section II.C.

dollars and result in a shortage of available hotel rooms in the near future.[4]

This Note examines the policy and the context surrounding its implementation to determine whether a citywide special permit requirement for hotels is sound land use policy. Ultimately, I argue that the benefits of requiring all new hotels in the city to obtain special permits are greatly outweighed by the costs. Part II explores the history of zoning laws and the hotel industry in New York City, exploring how zoning laws in New York City have evolved from the initial Zoning Resolution of 1916, the growth of the city's hotel industry during the last few decades, and the zoning changes and political climate leading up to the 2021 amendment.[5] Part III examines the 2021 zoning amendment, what the special permit process entails, and the projected effects that implementation will have on the hotel industry.[6] Part IV discusses two other relevant city policies affecting the lodging industry: the treatment of homestay services such as Airbnb, and HONDA, a program which attempted to convert hotels into housing during the COVID-19 pandemic.[7] Finally, Part V analyzes whether a special permit requirement for hotels is good for New York City, placing the policy within the context of broader trends in the field of zoning and land use planning in the United States.[8]

II. NEW YORK CITY HOTEL ZONING

A. New York City Zoning Laws

In 1916, New York City became the first city in the United States to pass a comprehensive zoning resolution.[9] A lack of regulation had led to developers building skyscrapers which entirely filled their lot lines in order to maximize space.[10] These solid-block style skyscrapers and high population densities had noticeable negative public health effects: they made the streets congested, created wind

[4] *See infra* notes 88–93, 125–31 and accompanying text.
[5] *See* discussion *infra* Part II.
[6] *See* discussion *infra* Part III.
[7] *See* discussion *infra* Part IV.
[8] *See* discussion *infra* Part V.
[9] *City Planning History*, N.Y.C. DEP'T OF CITY PLAN., https://www.nyc.gov/site/planning/about/city-planning-history.page [https://perma.cc/8BAZ-8FGZ].
[10] Carol Willis, *A 3-D CBD: How the 1916 Zoning Law Shaped Manhattan's Central Business Districts*, *in* PLANNING AND ZONING NEW YORK CITY: YESTERDAY, TODAY AND TOMORROW 3, 6 (Todd W. Bressi ed., 1993).

tunnels, inhibited sunlight and ventilation, created fire hazards, and contributed to the spread of diseases.[11] The 1916 resolution attempted to address these concerns by regulating the height, bulk, and area of buildings[12] and by separating land by use.[13]

The 1916 resolution did not, however, create an agency to administer its zoning laws.[14] It was not until the 1936 City Charter that the City Planning Commission, with the power to draft and approve amendments to the Zoning Resolution, was established.[15] Today, the Commission consists of thirteen members: seven, including the Chair (who also serves as the Director of City Planning), are appointed by the mayor; each of the five respective Borough Presidents appoints one member; and one is appointed by the New York City Public Advocate.[16]

The 1916 resolution remained in effect until 1961, when New York City revised its Zoning Resolution, creating a template for the city which remains in effect to this day.[17] Societal changes, particularly in the wake of World War II, had left the 1916 resolution outdated.[18] Inspired by developing principles of city planning, the 1961 zoning

[11] *Id.*

[12] *City Planning History*, *supra* note 9; Willis, *supra* note 10, at 13–14. While other cities combatted the problem of overcrowding by setting maximum building heights, New York City created the innovative concept of a zoning envelope—"a diagonal plane projected from the center of the street" which a developer could not build beyond—with twenty-five percent of a lot given no height limit. Willis, *supra* note 10, at 3–5, 9–10. The applicable zoning envelope for a building was calculated using five formulas based on street width and setback requirements, resulting in a variety of potential requirements based on the specifics of any given street. *Id.* at 14–15. This innovative approach to height, bulk, and area regulation enabled New York City developers to continue filling the city skyline with impressive skyscrapers while allowing for sunlight and air to pass through and combatting some of the problems caused by overcrowding. *See id.* at 14. The result was the construction of buildings in a stepped-pyramid shape, as less of the lot was allowed to be used the higher developers built. *Id.* at 4.

[13] *City Planning History*, *supra* note 9; Willis, *supra* note 10, at 13–14. Districts were divided into three categories of use: residence, business, and unrestricted. Willis, *supra* note 10, at 14.

[14] *City Planning History*, *supra* note 9.

[15] *Id.*

[16] *City Planning Commission*, N.Y.C. DEP'T OF CITY PLAN., https://www.nyc.gov/site/planning/about/commission.page [https://perma.cc/K79G-HM4Z]. The Commission originally consisted of seven members appointed by the mayor, but was expanded in 1989 to its current size. *Id.* The twelve regular members of the Commission serve for five-year terms while the Chair serves at the mayor's pleasure. *Id.*

[17] *City Planning History*, *supra* note 9; Roy Strickland, *The 1961 Zoning Revision and the Template of the Ideal City*, *in* PLANNING AND ZONING NEW YORK CITY: YESTERDAY, TODAY AND TOMORROW 48, 48 (Todd W. Bressi ed., 1993). Planning experts were concerned about the complexity created by the 1916 resolution and its amendments, as well as the resolution's inability to adapt to changes in the city. Strickland, *supra*, at 53–54. Additionally, the resolution incentivized developers to completely fill the maximum building envelope and to only develop in "desirable" locations, resulting in uniform buildings being built in high-density areas with underdeveloped parts of the city receiving little attention. *Id.*

[18] Strickland, *supra* note 17, at 48–55.

revision attempted to provide an ideal template for an envisioned "modern" city.[19] Among the ideals that guided the 1961 revision was a continued desire for open space, which the revision attempted to encourage through incentive zoning devices.[20] Incentive zoning encouraged developers to build open spaces such as plazas and arcades in exchange for the city increasing their allowable floor area ratio (FAR).[21]

Built upon the framework of the 1961 revision, New York City today is divided into three basic types of zoning districts: Residence Districts (R), Commercial Districts (C), and Manufacturing Districts (M).[22] These basic zoning districts are then assigned a number based on their density and intensity of use.[23] Residence Districts range from R1 to R10, Commercial Districts from C1 to C8, and Manufacturing Districts from M1 to M3.[24] Lower numbers indicate lower density and intensity of land use, and higher numbers indicate higher density and intensity of land use.[25] For example, R1 Districts contain detached single-family homes while R10 Districts contain residential skyscrapers.[26] In addition to the three basic zoning districts, certain districts are designated as Special Purpose Districts with unique zoning requirements and incentives designed to achieve specific urban planning objectives in areas with unique characteristics.[27]

The Zoning Resolution can be amended through zoning text and zoning map amendments.[28] Zoning text amendments change the actual text of the Zoning Resolution, while zoning map amendments alter the divisions and designations of districts.[29] Both types of amendments require a formal review process involving the City

[19] *Id.* at 55–57.

[20] Norman Marcus, *Zoning From 1961 to 1991: Turning Back the Clock – But With an Up-to-the-Minute Social Agenda*, *in* PLANNING AND ZONING NEW YORK CITY: YESTERDAY, TODAY AND TOMORROW 61, 63–64 (Todd W. Bressi ed., 1993).

[21] *Id.* at 64.

[22] *About Zoning Districts*, N.Y.C. DEP'T OF CITY PLAN., https://www.nyc.gov/site/planning/zoning/districts-tools.page [https://perma.cc/98MW-5VH3].

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Special Purpose Districts*, N.Y.C. DEP'T OF CITY PLAN., https://www.nyc.gov/site/planning/zoning/districts-tools/special-purpose-districts.page [https://perma.cc/R3AJ-GXUT].

[28] *How Zoning Gets Amended*, N.Y.C. DEP'T OF CITY PLAN., https://www.nyc.gov/site/planning/zoning/about-how-zoning-gets-amended.page [https://perma.cc/XZL8-C9W5].

[29] *Id.*

Planning Commission and the City Council, as well as an assessment of the potential amendment's environmental impact.[30]

B. The Hotel Industry in New York City

Before 2007, New York City did not have enough hotel rooms to meet demand, and the city had some of the highest occupancy rates in the country.[31] However, from 2007 to 2020, New York City saw a seventy-three-percent increase in hotel rooms, with over 54,100 new rooms being added.[32] Much of this growth took place outside of Manhattan, as hotels prior to 2007 had been concentrated in the Manhattan core.[33] Growth in the other four boroughs during this period was largely contained in certain neighborhoods, creating well-established hotel districts in Long Island City, Downtown Brooklyn/Gowanus, Flushing, Jamaica, Williamsburg/North Brooklyn, and Sunset Park.[34]

Growth in the hotel market reached its peak in 2019, when over 127,800 rooms were operating.[35] Tourism was the seventh-largest industry in New York City that year and directly supported over 300,000 jobs.[36] Visitors to the city generated almost $47.7 billion in sales, with over seventy percent of these sales coming from the leisure travel market.[37] Visitors spent $13.5 billion on the lodging industry (more than food & beverage at $10.5 billion, retail at $9.3

[30] *Id.*

[31] N.Y.C. DEP'T OF CITY PLAN., NOTICE OF COMPLETION OF THE FINAL ENVIRONMENTAL IMPACT STATEMENT: CITYWIDE HOTELS TEXT AMENDMENT 3 (2021), https://www.nyc.gov/assets/planning/download/pdf/applicants/env-review/citywide-hotel/noc-feis.pdf [https://perma.cc/C8AW-JGCE].

[32] N.Y.C. DEP'T OF CITY PLAN., N.Y.C. HOTEL MARKET ANALYSIS: EXISTING CONDITIONS AND 15-YEAR OUTLOOK 1 (2020), https://www.nyc.gov/assets/planning/download/pdf/planning-level/housing-economy/nyc-hotel-market-analysis.pdf [https://perma.cc/69YX-DX52]. A large portion of this growth took place between 2015 and 2019, with 21,000 new hotel rooms coming online, a forty-percent increase from the previous five-year period. *Id.*

[33] N.Y.C. CITY PLAN. COMM'N, CITYWIDE HOTELS TEXT AMENDMENT: FINAL ENVIRONMENTAL IMPACT STATEMENT ch. 2, at 6 (2021), https://zap.planning.nyc.gov/projects/2020Y0203 [https://perma.cc/AJ7U-UHRY] [hereinafter FINAL ENVIRONMENTAL IMPACT STATEMENT] (expand the "FEIS_21DCP059M" filter under "Public Documents" in order to view links for each chapter of this report). However, Manhattan still dominates the hotel industry in New York City. It contained eighty-one percent of the city's hotels in 2020, and, since 2010, seventy-five percent of new hotel rooms coming online are located in Manhattan. *Id.*

[34] *Id.*

[35] *Id.* ch. 1, at 8.

[36] N.Y.C. HOTEL MARKET ANALYSIS, *supra* note 32, at 63.

[37] *Id.*

billion, local transportation at $8.5 billion, and recreation at $5.6 billion) and lodging alone accounted for almost 55,000 jobs.[38]

All this changed in 2020 with the COVID-19 pandemic, which altered the landscape of the New York City tourism industry in ways that are still felt today. High-density urban centers saw the largest drop in visitors, since travelers were apprehensive about visiting crowded locations.[39] Even as—in the wake of the pandemic—people began to travel again, these city centers were the slowest markets to recover.[40] 2020 estimates predicted that New York State would lose $1.8 billion in tax revenue from the hotel industry alone, and that New York City would lose 197,000 jobs in leisure and hospitality.[41] It was not until 2022, two years after the COVID-19 pandemic began, that the New York City hotel industry experienced a surge, with the industry continuing to normalize into 2023.[42] While the New York City market has typically lowered rates during times of recovery in order to increase occupancy, the post-pandemic recovery has been "rate-driven," with owners aggressively raising rates, regardless of the effect on occupancy.[43]

C. Prior Attempts to Implement Special Permits for Hotels

Since the city's first Zoning Resolution in 1916, hotels have always been permitted on an as-of-right basis.[44] An *as-of-right* development is one which "complies with all applicable zoning regulations and does not require any discretionary action by the City Planning Commission or Board of Standards and Appeals."[45] Requiring special permits for hotels has been a point of discussion in multiple past

[38] *Id.* at 64–65. At the same time, 2019 saw New York City have negative growth in Revenue Per Available Room (RevPAR), a metric which is calculated by dividing a hotel's total revenue from guestrooms by the room count and the number of days in the measured period. *Id.* at 7, 22. This loss in RevPAR can be attributed to an oversupply of rooms, competition from other types of lodging such as Airbnb, high labor costs, and third-party commission fees. *Id.* at 23.

[39] Noelle Mateer, *Market Spotlight: New York City*, HOTEL DIVE (Oct. 26, 2023), https://www.hoteldive.com/news/hot-markets-nyc/697915/ [https://perma.cc/2BX4-J5VH].

[40] *Id.*

[41] N.Y.C. HOTEL MARKET ANALYSIS, *supra* note 32, at 65.

[42] Mateer, *supra* note 39. 2023 saw 61.8 million travelers visiting New York City, a ninety-three-percent return to 2019 visitation levels. *Fact Sheet: New York City Tourism Generates $74 Billion in Economic Impact for State and City Economy in 2023*, N.Y.C. TOURISM + CONVENTIONS (Dec. 18, 2023), https://www.business.nyctourism.com/press-media/press-releases/year-end-tourism-numbers-announcement [https://perma.cc/E4L9-QDZX].

[43] Mateer, *supra* note 39.

[44] Joyce Hanson, *NYC Zoning Rules Slow Rockefeller Center Hotel's Course*, LAW 360 (Aug. 16, 2023, 8:19 PM EDT), https://www.law360.com/articles/1709598 [https://perma.cc/DQ9G-9SN2].

[45] *Glossary of Zoning Terms*, N.Y.C. DEP'T OF CITY PLAN., https://www.nyc.gov/site/planning/zoning/glossary.page [https://perma.cc/7JN7-48T7].

zoning changes.[46] One major rezoning challenge facing the city in the 2010s was East Midtown Manhattan.[47] Although the area is the city's largest business district, generating around ten percent of the city's property tax revenue, the East Midtown office buildings, averaging seventy-five years old, were becoming increasingly outdated.[48] Additionally, public transportation had reached capacity, stifling the area's growth.[49]

Hoping to leave a mark on the city in the final years of his tenure, then-Mayor Michael Bloomberg proposed a massive rezoning of seventy-four city blocks, aiming to work with developers to create modern skyscrapers and revitalize the area.[50] However, in November of 2013, the Bloomberg Administration withdrew its plan to rezone East Midtown Manhattan after the City Council indicated it would fail in a vote.[51] Although there was a consensus that East Midtown needed to be rezoned to allow for more modern commercial spaces, there were disagreements as to the details of the proposal.[52]

Ultimately, the Bloomberg Administration failed to gather a coalition able to pass the major rezoning plan.[53] The Administration had rejected the proposal of the hotel union, the Hotel and Gaming Trades Council (more commonly, Hotel Trades Council or HTC), to include a special permit requirement for new hotel constructions in the project, and some attributed the proposal's defeat to the HTC's then-president, Peter Ward, and his connections and influence within the City Council.[54] Opponents of the proposal argued that, although East Midtown needed to be rezoned, Bloomberg's proposal was too generous to developers and did not reserve enough benefits for the

[46] *See, e.g.*, N.Y.C. HOTEL MARKET ANALYSIS, *supra* note 32, at 1.

[47] *See Mayor de Blasio and Council Member Garodnick Announce Adoption of Greater East Midtown Rezoning*, N.Y.C. OFF. OF THE MAYOR (Aug. 9, 2017), https://www.nyc.gov/office-of-the-mayor/news/544-17/mayor-de-blasio-council-member-garodnick-adoption-greater-east-midtown-rezoning [https://perma.cc/5CQJ-2WWG] [hereinafter *Adoption of Greater East Midtown Rezoning*].

[48] *Id.*

[49] *See id.*

[50] Garth Johnson, *More Skyscrapers Proposed in Massive Midtown East Upzoning Plan*, GOTHAMIST (July 12, 2012), https://gothamist.com/news/more-skyscrapers-proposed-in-massive-midtown-east-upzoning-plan [https://perma.cc/T8YG-9W9H].

[51] Jen Chung, *City Council Kills Bloomberg's East Midtown Rezoning Proposal*, GOTHAMIST (Nov. 13, 2013), https://gothamist.com/news/city-council-kills-bloombergs-east-midtown-rezoning-proposal [https://perma.cc/38LD-9HD9].

[52] *Id.*

[53] *See id.*

[54] Charles V. Bagli, *End of Proposal to Raise Skyline on the East Side*, N.Y. TIMES (Nov. 12, 2013), https://www.nytimes.com/2013/11/13/nyregion/support-evaporates-for-bloombergs-plan-to-rezone-east-side.html [https://perma.cc/A4Q9-SSJY].

public.[55] Then-Mayor-Elect de Blasio praised the City Council for "pressing the pause button" on the rezoning, arguing that the city "cannot afford to hand over the right to develop some of the most valuable real estate in the world without ensuring real and fair benefits for the people of New York City."[56]

After the Bloomberg Administration failed to gather support for its East Midtown proposal, the new de Blasio Administration, recognizing the need to rezone the area, attempted to tackle the problem in a multi-stage approach. The de Blasio Administration first proposed a zoning text amendment for the Vanderbilt Corridor.[57] Unlike the Bloomberg Administration's proposal, this rezoning included a special permit requirement for the development, conversion, or enlargement of hotels in the area.[58] The proposal was ultimately adopted by the City Council on May 27, 2015.[59]

The de Blasio Administration then proposed a new plan for the rest of East Midtown, which promised to foster the creation of new, modern office buildings and invest in public transportation and public spaces.[60] The amendment restricted as-of-right hotel use to twenty percent of the floor area of any new development, requiring new developments that wished to use more than twenty percent for non-office uses to acquire a special use permit.[61] With the support of the HTC, the plan was unanimously approved by the City Council in August 2017.[62] Ward thanked the de Blasio Administration for "listening to our input throughout this critical rezoning process," and commended the plan for "ensur[ing] that new developments in the district will be thoughtful and responsible."[63]

This trend of including special permit requirements for new hotels in the rezoning of various neighborhoods continued with the rezonings of East Harlem and Inwood, approved by the City Council

[55] *Id.*

[56] *Id.*

[57] *Vanderbilt Corridor*, N.Y.C. DEP'T OF CITY PLAN. (May 27, 2015), https://www.nyc.gov/site/planning/plans/vanderbilt-corridor/vanderbilt-corridor.page [https://perma.cc/BC5Z-MZZR]. The Vanderbilt Corridor is a five-block strip of buildings next to Grand Central Terminal, between East 47th Street to the north, East 42nd Street to the south, Vanderbilt Avenue to the east, and Madison Avenue to the west. *Id.*

[58] *Id.*; Bagli, *supra* note 54.

[59] *Vanderbilt Corridor*, *supra* note 57.

[60] *Adoption of Greater East Midtown Rezoning*, *supra* note 47.

[61] *East Midtown Rezoning*, N.Y.C. DEP'T OF CITY PLAN. (2013), https://www.nyc.gov/assets/planning/download/pdf/plans/east-midtown/east_midtown.pdf [https://perma.cc/SCY3-335X].

[62] *See Adoption of Greater East Midtown Rezoning*, *supra* note 47.

[63] *Id.*

in November 2017 and August 2018, respectively.[64] The city then implemented hotel special permits on a wider scale in 2018, when the City Council approved the M1 Zoning Text Amendment, requiring hotel developers to obtain a special permit for any new hotel constructions in M1 districts zoned for light manufacturing.[65] With the stated intent of preventing hotels from being built in spaces meant for manufacturing, the amendment was again supported by the HTC.[66] Of the special permit process, then-Mayor Bill de Blasio said that "[i]t will be a very serious process . . . with a lot of rigor and a lot of scrutiny from the community."[67]

D. The Hotel and Gaming Trades Council

The HTC is a union which represents almost 40,000 non-managerial hotel and gaming employees, and has contracts with more than 300 hotels and related businesses.[68] Arguing that an overabundance of rooms and the resulting lower room rates would hurt hotel workers, the union has been outspoken in favor of special permit requirements for new hotel construction.[69] This may seem counterintuitive, as labor organizations tend to be in favor of job growth in their sector.[70] However, the union includes the 2021 amendment in their newsfeed's list of political wins, calling it "a huge step in stopping the overdevelopment of hotels in the city."[71]

Requiring special permits gives the union more leveraging power to ensure that new hotels are unionized.[72] As developments go through the special permit process and there is increased public

[64] *See East Harlem Rezoning Proposal*, N.Y.C. DEP'T OF CITY PLAN. (Nov. 30, 2017), https://www.nyc.gov/site/planning/plans/east-harlem/east-harlem.page [https://perma.cc/4S4B-HP2X]; *Inwood Rezoning*, N.Y.C. COUNCIL, https://council.nyc.gov/land-use/plans/inwood-rezoning/ [https://perma.cc/K4LF-H3A8].

[65] N.Y.C. HOTEL MARKET ANALYSIS, *supra* note 32, at 26.

[66] *See* Natalie Rodriguez, *3 NYC Hotel Zoning Plans Hospitality Attys Should Know*, LAW 360 (Nov. 5, 2015, 2:25 PM EST), https://www.law360.com/articles/721667/3-nyc-zoning-plans-hospitality-attys-should-know [https://perma.cc/VF37-BGEL].

[67] *Id.*

[68] *Who We Are*, N.Y./N.J. HOTEL & GAMING WORKERS UNION, https://hotelworkers.org/about/who-we-are [https://perma.cc/QK7J-LKTD].

[69] *See* Hanson, *supra* note 44.

[70] *See* Dana Rubinstein & J. David Goodman, *A $7 Billion Mistake? New York Seeks to Curb New Hotels*, N.Y. TIMES (Apr. 27, 2021), https://www.nytimes.com/2021/04/27/nyregion/hotels-tourism-new-york-covid.html [https://perma.cc/6QQU-HASC].

[71] *Newsfeed*, N.Y./N.J. HOTEL & GAMING WORKERS UNION, https://hotelworkers.org/article/newsfeed [https://perma.cc/2VTS-H6EX].

[72] *See* Kathryn Brenzel, *City Planning Votes to Restrict Hotel Development: Commission Approval Sends Issue to City Council*, REAL DEAL (Oct. 20, 2021, 11:34 AM), https://therealdeal.com/new-york/2021/10/20/city-planning-votes-to-restrict-hotel-development/ [https://perma.cc/MRC8-RRME].

scrutiny of every new hotel construction, the union hopes to use this leverage to push new constructions to use union labor.[73] Additionally, as new hotel rooms are often less expensive than existing rooms, restricting their proliferation will drive up room prices and help higher-end hotels.[74] Driving up prices helps the union because its members tend to be employed by high-end hotels, as mid-price hotels are difficult to unionize.[75]

The HTC's political presence increased significantly under the leadership of Peter Ward in 2008.[76] Ward and HTC political director Neal Kwatra built a database of their members to allow for quick mobilization during campaigns, the union hosted seminars encouraging members to become more engaged in political activism, and the union's dues were increased in order to fund greater campaign contributions.[77] The HTC had a close relationship with the de Blasio Administration, having endorsed then-Mayor de Blasio's 2020 presidential campaign and having spent $440,000 on ads for his ill-fated run.[78] This close relationship between the union and the mayor's office continued into Eric Adams's tenure.[79] The HTC was the first union to endorse Adams's run for mayor, spent millions on his campaign, and organized thousands of its members to volunteer for the campaign.[80] Adams even hired former HTC political director Katie Moore as his campaign manager.[81] The aggressive approach to

[73] *See id.*

[74] Rubenstein & Goodman, *supra* note 70.

[75] *See id.*

[76] Nicole Hong & Matthew Haag, *A Hotel Was Set to Become Affordable Housing. Then the Union Stepped In*, N.Y. TIMES (June 20, 2023), https://www.nytimes.com/2022/12/07/nyregion/new-york-hotel-workers-union.html [https://perma.cc/RP2L-RTRJ].

[77] *Id.*

[78] Rubenstein & Goodman, *supra* note 70. De Blasio was eventually ordered to pay $475,000 in fines for misusing public funds for his presidential campaign. Jake Offenhartz, *Ex-NYC Mayor Bill de Blasio Ordered to Pay $475,000 for Misusing Public Funds on Failed White House Bid*, PBS NEWS (June 16, 2023, 7:44 PM EST), https://www.pbs.org/newshour/politics/ex-nyc-mayor-bill-de-blasio-ordered-to-pay-475000-for-misusing-public-funds-on-failed-white-house-bid [https://perma.cc/9F2W-KP4M].

[79] *See* Gloria Pazmino, *'I Never Forget My First': Adams Vows to Back Hotel Trades Council After Early Endorsement*, SPECTRUM NEWS NY1 (July 15, 2021, 9:28 PM ET), https://ny1.com/nyc/all-boroughs/politics/2021/07/16/eric-adams-hotel-trades-council-rally-vows-to-deliver-on-union-priorities [https://perma.cc/7C5A-SNG9].

[80] *Id.*

[81] *See* Sally Goldenberg, *Adams Taps Political Operative at Influential Hotel Workers Union to Run Mayoral Campaign*, POLITICO (Nov. 22, 2020, 8:03 PM EST), https://www.politico.com/states/new-york/albany/story/2020/11/22/adams-taps-political-operative-at-influential-hotel-workers-union-to-run-mayoral-campaign-1337688 [https://perma.cc/9HQ2-PX4J].

organizing has paid off for HTC members, as labor experts rank the HTC's contract as one of the strongest in the country.[82]

III. THE 2021 HOTEL SPECIAL PERMIT REQUIREMENT

A. 2021 Citywide Hotels Text Amendment

Adopted by the City Council on December 9, 2021, the Citywide Hotels Text Amendment amended the Zoning Resolution to require special permits for all new hotels being built in the city.[83] The change applies to new and enlarged hotels and motels, tourist cabins, and boatels in C1, C2, C4, C5, C6, C8, Mixed-Use (MX), and paired M1/R districts.[84] Any new construction of a hotel or expansion of an already-existing hotel by twenty percent or more will now require the developer to go through the extensive special permit application process.[85] Hotels that were planned prior to the amendment's approval are exempt, as are hotels designed for housing homeless individuals.[86]

Proponents of the amendment have primarily given two arguments in its favor. First, by making hotel construction requirements uniform throughout the city, the amendment makes development more predictable.[87] With special permits already required for hotels in a variety of special districts,[88] making the requirement apply citywide would add a level of predictability to the process, since developers will know they need a special permit regardless of where they build.[89] Second, proponents argue that additional review of developments will prevent conflicting uses with the surrounding neighborhoods.[90] Continued proliferation of new hotels could result in economic activity becoming increasingly focused on tourism-based

[82] Hong & Haag, *supra* note 76. Union housekeepers make an average of $37 per hour with competitive benefits. *Id.*

[83] *Citywide Hotels Text Amendment*, N.Y.C. DEP'T OF CITY PLAN. (Dec. 9, 2021), https://www.nyc.gov/site/planning/plans/citywide-hotel/citywide-hotel-overview.page [https://perma.cc/4LS7-RMYB].

[84] FINAL ENVIRONMENTAL IMPACT STATEMENT, *supra* note 33, ch. 1, at 2, 5.

[85] *See* Kathryn Brenzel, *Hotel Development Blocker Now One Step From de Blasio's Desk*, REAL DEAL (Nov. 23, 2021, 12:15 PM), https://therealdeal.com/new-york/2021/11/23/hotel-development-blocker-now-one-step-from-de-blasios-desk/ [https://perma.cc/V5KS-ULQM].

[86] *Id.*

[87] FINAL ENVIRONMENTAL IMPACT STATEMENT, *supra* note 33, ch. 1, at 2.

[88] *Id.* ch. 2, at 4–5. Special permits were already required for hotels built in Clinton, Hudson Square, Tribeca, Garment Center, Midtown, 125th Street, East Harlem, Jerome Avenue, and Inwood. *Id.*

[89] *See id.* ch. 1, at 2.

[90] *Id.*

services, limiting the diversity of uses in affected neighborhoods.[91] In smaller commercial areas, such as neighborhood-based commercial areas, regional commercial areas, and mixed-use commercial districts, this increase in tourism-based services has the potential to change the character of these neighborhoods by creating additional unwanted noise and traffic, particularly late at night, as these services tend to operate for longer hours than businesses aimed at serving locals.[92]

B. Special Permit Application Process

Projects that require a special permit must be reviewed by the Department of City Planning and the City Planning Commission.[93] The Department of City Planning's website details a five-step process that a special permit applicant must go through in order for their application to be approved: (1) Understanding What's Allowed on Your Property; (2) Begin the Pre-certification Process; (3) Preparation of Land Use and Environmental Applications; (4) Filing of Application & Paying Fees; and (5) Uniform Land Use Review Procedure (ULURP).[94]

Prospective developers can use the city's zoning and land use map (ZoLa) to determine which zoning district their property occupies and what type of land use is permitted.[95] To begin the pre-certification process, applicants must schedule an informational interest meeting with their respective borough office.[96] Applicants may then submit a

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[91] *Id.* ch. 4, at 5.

[92] *Id.* ch. 4, at 4–5.

[93] *Application Process Overview*, N.Y.C. DEP'T OF CITY PLAN., https://www.nyc.gov/site/planning/applicants/applicant-portal/application-process.page [https://perma.cc/4CYG-JM4W].

[94] *Id.*

[95] *See ZoLa: New York City's Zoning and Land Use Map*, N.Y.C. DEP'T OF CITY PLAN., https://zola.planning.nyc.gov/ [https://perma.cc/2X7L-V2AB]. The Department of City Planning also provides a variety of resources to help landowners understand the zoning requirements applicable to their property. *See Zoning FAQ*, N.Y.C. DEP'T OF CITY PLAN., https://www.nyc.gov/site/planning/zoning/zoning-faq.page [https://perma.cc/CTU9-5N4W]; N.Y.C. DEP'T OF CITY PLAN., ZONING HANDBOOK (2018), https://www.nyc.gov/assets/planning/download/pdf/about/publications/zoning-handbook/zoning-handbook.pdf [https://perma.cc/G3AN-XE2U].

[96] *Step 2: Begin the Application Process*, N.Y.C. DEP'T OF CITY PLAN., https://www.nyc.gov/site/planning/applicants/applicant-portal/step2-begin-process.page [https://perma.cc/JL3H-4AZR]. In advance of this informational meeting, applicants are required to provide the relevant official zoning sectional maps, official tax maps, a colored aerial photo (which can be provided for free through ZoLa), land use maps, and color site and area photographs. *Id.*; *Informational Interest Meeting Checklist*, N.Y.C. DEP'T OF CITY PLAN., https://www.nyc.gov/assets/planning/download/pdf/applicants/applicant-portal/interest_checklist.pdf [https://perma.cc/A7NA-5K3H].

Pre-Application Statement (PAS) at which time the Department of City Planning (DCP) will issue a project ID number and applicants will be assigned a lead planner from the relevant borough or division office.[97] Following submission of the PAS, the applicant will schedule an interdivisional meeting with their lead planner, where they will present their proposed project to their assigned DCP team.[98] Depending on the potential environmental impacts of the project, applicants may be required to submit a Reasonable Worst-Case Development Scenario form or meet with the Environmental Assessment and Review Division.[99]

After the pre-certification process is complete, applicants must then submit Draft and Filed Land Use Applications, and, if necessary, Environmental Review Forms.[100] The application itself consists of the Land Use Application and Doing Business with the City forms alongside attachments describing the proposed land use action and developments that will be part of the project.[101] An application is complete upon submission of these forms and attachments with payment of applicable fees, signatures of the applicants, proof that the project has undergone any applicable environmental reviews, and a determination by the City Planning Commission that the application contains all the necessary information.[102] Upon filing, the Land Use Application will be sent to the affected borough president, community board, and the City

[97] *Step 2: Begin the Application Process*, *supra* note 96; *see also* PRE-APPLICATION STATEMENT FORM, N.Y.C. DEP'T OF CITY PLAN., https://www.nyc.gov/assets/planning/download/pdf/applicants/applicant-portal/pre-application-statement-form.pdf [https://perma.cc/ZHA6-6EGB]. The form asks for basic information regarding the project location and a description of the project. PRE-APPLICATION STATEMENT FORM, *supra*. The form is intended to help DCP advise the applicant about their project and is not intended to assess the merits of the proposal. *Step 2: Begin the Application Process*, *supra* note 96.

[98] *Step 2: Begin the Application Process*, *supra* note 96. Complex projects may require multiple interdivisional meetings. *Id.*

[99] *See id.*; *see also* REASONABLE WORST-CASE SCENARIO FORM, N.Y.C. DEP'T OF CITY PLAN., https://www.nyc.gov/assets/planning/download/pdf/applicants/applicant-portal/rwcds-paper-form.pdf?r=1 [https://perma.cc/VSH5-GY2M].

[100] *Step 3: Preparation of Land Use and Environmental Applications*, N.Y.C. DEP'T OF CITY PLAN., https://www.nyc.gov/site/planning/applicants/applicant-portal/step3-preparation-applications.page [https://perma.cc/9FXZ-39G2] (stating that DCP will only review draft land use applications once per project, after which the applicant will be instructed to file the application).

[101] *Id.*

[102] *Step 4: Filing of Application & Fee Requirements*, N.Y.C. DEP'T OF CITY PLAN., https://www.nyc.gov/site/planning/applicants/applicant-portal/step4-filing-application.page [https://perma.cc/RR4L-296W].

Council.[103] If the project involves more than one community district, the application will also be sent to the appropriate borough board.[104] It is not until certification of the application by the DCP that the project can begin ULURP, the public review process required by the New York City Charter.[105]

ULURP is an extensive process requiring the involvement of the DCP, City Planning Commission, community boards, the relevant borough president, borough boards, the City Council, and the mayor.[106] The certified application is first reviewed by the community board, which is required to hold a public hearing within sixty days of receiving an application certified by the DCP.[107] The community board will then submit a written recommendation to the City Planning Commission, the applicant, the borough president, and, if applicable, the borough board.[108] Following the community board review, the borough president has thirty days to submit a recommendation to the City Planning Commission.[109] At this time, applications that involve more than one community district will also be reviewed by the borough board.[110]

The application then moves on to the City Planning Commission for review, which has sixty days after the close of the borough president's review period to make a decision.[111] The City Planning Commission must hold a public hearing and, with a vote of seven or more commissioners, may decide to approve, approve with modifications, or deny an application.[112] The City Council may elect to review zoning special permit applications approved by the City Planning Commission, but is not required to do so.[113] The City Council has fifty days after the City Planning Commission files its report to make a decision.[114] Any modifications that the City Council wants to make to a proposal must be done by referring the proposal

[103] *Step 5: Uniform Land Use Review Procedure (ULURP)*, N.Y.C. DEP'T OF CITY PLAN., https://www.nyc.gov/site/planning/applicants/applicant-portal/step5-ulurp-process.page [https://perma.cc/7EHK-PKM6].

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.* If the Borough President has recommended against an application, nine votes are required for the project to be approved. *Id.* Disapproval by the City Planning Commission typically terminates ULURP and is the end of an application. *Id.*

[113] *Id.*

[114] *See id.*

back to the City Planning Commission, which will decide whether the modification is significant enough to require additional review.[115] A decision by the City Council to approve or disapprove a land use application is final; however, the mayor has an opportunity to veto the decision, which can be overridden by a two-thirds vote of the Council.[116]

C. Projected Policy Outcomes: The Future of New York City Hotels

In August of 2023, nearly two years after the amendment was initially adopted, the City Planning Commission reported that it had only had pre-certification contact with a handful of potential applicants.[117] Not a single one of these potential applicants has received certification by the DCP to begin ULURP, nor have any potential applicants reached a stage where there is a specific timeline for when they will be certified.[118] One developer in the pre-certification process is Aspen Hospitality, which plans to open The Little Nell Hotel, a ten-story, 130-room hotel in Rockefeller Center.[119] Aspen Hospitality has filed a PAS, but has not had their application certified or been able to begin ULURP.[120]

At a time when New York City's tourism industry is trying to recover from the pandemic, it seems counterintuitive to further restrict the industry rather than encourage growth. The de Blasio Administration announced a $30 million advertising campaign to bring tourism back to the city in April of 2021, all while advocating for special permit requirements for hotels.[121] Proponents of special permits have used the drop in tourism due to the pandemic as evidence that there is an overabundance of hotel rooms in the city.[122] In a 2021 news conference, de Blasio pointed out that "[t]here's no lack of hotel rooms in New York City right now," and attempted to reassure skeptics that the market would still meet the demand for hotel rooms even with a special permit process in place: "When hotels are full up again and tourism is booming again, I think the market will adjust, and you'll see new hotel development."[123]

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115 *Id.*
116 *Id.*
117 Hanson, *supra* note 44.
118 *See id.*
119 *Id.*
120 *See id.*
121 Rubinstein & Goodman, *supra* note 70.
122 *See id.*
123 *Id.*

However, experts are already predicting that development under the new zoning policy will not be able to keep up with demand.[124] The City Planning Commission's Environmental Impact Statement estimates that 47,070 fewer hotel rooms will have been built by 2035 as a result of the policy, a twenty-seven percent decrease in supply.[125] This will cost the local economy $5.3 billion in 2035 alone.[126] Fewer hotels will result in 18,970 fewer direct workers by 2035, a loss of $1.3 billion in these workers' wages.[127] With city tourism officials predicting a return to pre-pandemic visitor numbers, the city is projected to have a shortage of thousands of rooms, "even in a best-case-scenario" outcome.[128] A lack of hotel room supply to meet demand will result in prospective visitors staying in an Airbnb or other homestay services, staying with friends, staying elsewhere nearby and commuting to the city by day, or simply not coming to the city at all.[129]

IV. OTHER RELEVANT POLICIES AFFECTING THE LODGING INDUSTRY

A. Airbnb in New York City

The situation is made more complicated by the city's ongoing efforts to crack down on homestay services such as Airbnb.[130] When Airbnb and other similar short-term rental platforms were first being created, existing laws in New York City precluded short-term rentals under thirty days unless the host was present.[131] This led to a situation in which many Airbnb listings were operating illegally, with city officials estimating that more than half of Airbnb's New York City revenue in 2022 was from illegal activity.[132] Struggling to enforce these laws, the city began enforcing new regulations on September 5, 2023, requiring all eligible short-term rentals to

[124] *Id.*

[125] FINAL ENVIRONMENTAL IMPACT STATEMENT, *supra* note 33, ch. 3, at 3–4 (projecting a decrease from 174,730 rooms built by 2035 without special permits to 127,660 rooms built by 2035 with special permits).

[126] *Id.* ch. 3, at 3 (projecting that the local economy would fall from $19.8 billion without special permits to $14.5 billion with special permits). All monetary projections in the Final Environmental Impact Statement are based on 2019 dollars. *Id.*

[127] *Id.* (projecting a drop from 70,420 workers generating $4.7 billion in direct wages without special permits to 51,450 workers generating $3.5 billion in direct wages with special permits).

[128] Rubinstein & Goodman, *supra* note 70.

[129] *Id.*

[130] *See* Mihir Zaveri, *New York City's Crackdown on Airbnb Is Starting. Here's What to Expect*, N.Y. TIMES (Sept. 5, 2023), https://www.nytimes.com/2023/09/05/nyregion/airbnb-regulations-nyc-housing.html [https://perma.cc/W728-UZRC].

[131] *See id.*

[132] *Id.*

register with the city in order to continue hosting.[133] Additionally, platforms like Airbnb must make sure that a host is properly registered before collecting fees for short-term rentals in the city.[134] Hosts who violate the regulations can be fined up to $5,000, and platforms facilitating transactions for illegal hosts can be fined up to $1,500.[135]

The push to crack down on Airbnb rentals is also supported by the HTC, which sees the platform as a direct competitor to the hotel industry.[136] Opponents of short-term rentals argue that they negatively affect residents.[137] The use of apartments as short-term rentals for tourists instead of housing for residents worsens the city's housing crisis and contributes to rising rent prices.[138] Additionally, residents complain that short-term rentals create excessive noise, negatively affect building cleanliness, and attract crime to the area.[139]

Although there are strong arguments that temporary rentals like Airbnb have negative effects on residents and require regulation, the city's policy of cracking down on homestay services while limiting the new construction of hotels calls into question how the lodging industry in New York City will evolve in the wake of the COVID-19 pandemic.[140] The prevalence of Airbnb speaks to the high demand for these types of homestay services, and if the city is going to restrict their availability, it should offer would-be tourists alternatives. But New York City has done the opposite. Rather than encouraging tourists to use hotels instead of homestays, the city has restricted both with seemingly little plan for how the lodging industry will look when it returns to pre-pandemic levels.[141] The industry has been able to function using the infrastructure already in place before the pandemic, since the pandemic created a massive supply of unused rooms.[142] But the surplus of hotel rooms created by a global pandemic is inherently temporary. Policies governing developments ought to be designed with the long-term trajectory of the industry in mind, since

[133] *New York, NY*, AIRBNB HELP CTR., https://www.airbnb.com/help/article/868 [https://perma.cc/P3UZ-GRC6].
[134] *See* Zaveri, *supra* note 130.
[135] *Id.*
[136] *See id.*
[137] *Id.*
[138] *See id.*
[139] *Id.*
[140] *See id.*; Rubinstein & Goodman, *supra* note 70.
[141] *See* Rubenstein & Goodman, *supra* note 70.
[142] *See id.*

developments themselves are long-term projects.[143] By the time a new hotel is constructed after having gone through the special permit process, the demand for hotel rooms will likely have already returned to pre-pandemic levels.

B. HONDA

The New York State Legislature tried to take advantage of the temporary surplus of hotel rooms by passing the Housing Our Neighbors With Dignity Act[144] (HONDA) in June 2021, which allotted funds to help nonprofits purchase hotels and convert them into affordable housing for homeless and low-income individuals.[145] HONDA had the backing of the HTC, as well as housing and tenants' rights advocates, homeless advocates, and affordable housing developers.[146] The program, taking inspiration from a similar effort in California which successfully created over 12,500 homes,[147] appeared to offer a creative solution to housing during the pandemic by utilizing the very hotels that the pandemic had emptied.

Implementing this creative solution, however, proved to be more difficult than simply passing legislation, and the program immediately faced several roadblocks. The original version of HONDA failed to make necessary regulatory changes which would allow hotel conversions to be feasible for developers.[148] Hotels located outside of zones allowing for permanent residential housing would have to undergo a long and costly rezoning process before conversion.[149] Even hotels that were already located within

[143] A 2018 study considering over 6,000 new building projects found that hotels, with an average development cycle of three years and eleven months, take twenty-three percent longer to complete than other buildings. Kevin Sun, *Hotels Take Longer to Build Than Other Property Types – Soon It May Take Longer*, REAL DEAL (July 31, 2018, 9:30 AM), https://therealdeal.com/new-york/2018/07/31/hotels-take-longer-to-build-than-other-property-type-soon-it-may-take-even-longer/ [https://perma.cc/XR2N-EAGH].

[144] S.B. 5257-C, 2021–2022 Leg., 244th Sess. (N.Y. 2021).

[145] Sam Mellins, *Zoning Laws Are Blocking the Conversion of Hotels into Affordable Housing*, N.Y. FOCUS (Apr. 19, 2022), https://nysfocus.com/2022/04/19/honda-hotel-conversions-affordable-housing-kavanagh-cymbrowitz [https://perma.cc/9K9N-ULTN]. The original bill allotted $100 million for conversions and the state legislature approved another $100 million for hotel conversions in the 2022 state budget. *Id.*

[146] Bridget Read, *Did New York Miss Its Moment to Turn Hotels into Housing?*, CURBED (Dec. 22, 2022), https://www.curbed.com/2022/12/honda-hotels-to-housing-plan-flop.html [https://perma.cc/2B6S-FAM7].

[147] *See* Janaki Chadha, *Success Eludes New York's Plan to Convert Hotels into Affordable Housing*, POLITICO (Sept. 19, 2022, 4:30 AM EDT), https://www.politico.com/news/2022/09/19/new-york-hotels-into-affordable-housing-00056720 [https://perma.cc/6VPN-U3QV].

[148] *See* Read, *supra* note 146.

[149] *See* Mellins, *supra* note 145.

residential zones would still have to go through extensive renovations in order to meet housing codes.[150] It would take the New York Legislature a full year to realize the legislation as originally passed was broken, and language was subsequently added to the law in June of 2022 to ease these restrictions and the costs they placed on developers.[151]

Although the HTC supported HONDA at the time of its passing, it has been much less supportive of the actual process of hotel conversion.[152] The HTC's support for HONDA was conditional on it having the power to veto conversions of union hotels.[153] In response to Governor Hochul signing the 2022 bill easing restrictions on hotel conversions, HTC President Rich Maroko called HONDA "a smart, thoughtful program that can protect quality hotels that are key to the recovery of our tourism industry while converting failing hotel properties—that pay poverty wages and are a blight on our neighborhoods—into a much needed housing stock."[154]

A nonprofit developer, Breaking Ground, began talks with the owners of the Paramount Hotel in the fall of 2020 to purchase the hotel at a discount and convert it into affordable housing.[155] The successor clause in the union contract with the Paramount Hotel, however, required Breaking Ground to either keep the hotel's workforce of around 170 workers or buy out their contract.[156] Ultimately, HTC and Breaking Ground were unable to come to an agreement, the deal fell through, and the Paramount ended up reopening as a hotel in September 2022.[157] HTC again blocked a hotel conversion in early 2022, when Housing Works attempted to convert a vacant Best Western Hotel in Chinatown into affordable housing.[158] Although city officials were originally in favor of the idea, they withdrew their support after the HTC argued it violated the union

150 *Id.*

151 *See* S.B. 4937-B, 2021–2022 Leg., 244th Sess. (N.Y. 2022) (making any hotel conversion within 400 feet of a residential zone eligible for conversion and allowing conversions to bypass residential building codes as long as the development is in compliance with hotel building codes).

152 *See* Read, *supra* note 146.

153 Hong & Haag, *supra* note 76.

154 Press Release, N.Y. Governor's Press Off., Governor Hochul Signs Landmark Law Unlocking Underutilized Hotel Space for Affordable Housing (June 7, 2022), https://www.governor.ny.gov/news/governor-hochul-signs-landmark-law-unlocking-underutilized-hotel-space-affordable-housing [https://perma.cc/9ZRH-UA3D].

155 Hong & Haag, *supra* note 76.

156 Read, *supra* note 146.

157 Hong & Haag, *supra* note 76.

158 *Id.*

contract.[159] It was not until December 18, 2023, that New York City would be able to close on a deal to convert a hotel into affordable housing, with Slate Property Group and RiseBoro Community Partnership purchasing the JFK Airport Hilton for $64 million.[160] The conversion was initially expected to take twenty-one months and result in the creation of 318 apartments by September of 2025, well after tourism levels should have returned to pre-pandemic levels.[161]

Because of HONDA's slow rollout, potential developers now face a much less friendly landscape for purchasing hotels.[162] With hotel occupancy and rates increasing and the tourism industry rebounding from the pandemic, owners are less likely to want to sell, and, when they do, there will be more competition from private buyers.[163] The failure of HONDA to provide housing during the COVID pandemic is illustrative of the inadequacies of rigid, non-adaptive land use policies. The reasons for the failure are multifaceted. The Legislature failed to draft an original version of the bill that was feasible, given the city's zoning laws and housing codes.[164] The need for creating a political coalition to back the bill resulted in the legislature giving HTC a veto power that it utilized on multiple occasions.[165] While the legislation was conceived as an emergency intervention to address housing shortages caused by the pandemic, the slow rollout has made the program largely irrelevant before a single successful conversion.[166] Although there is still a need for affordable housing in the city, there is little logic in converting hotels for this purpose now that the pandemic has ended, hotel rooms are back in use, and the city, through the special permit requirements, has halted new hotel construction and now faces a potential hotel room shortage.[167]

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[159] *Id.*

[160] Press Release, N.Y.C. Dep't of Hous. Pres. & Dev., Hotel to Housing: City Closes Deal Converting JFK Hilton into Permanent Affordable Housing in First-of-Its-Kind Project from Slate and Riseboro (Dec. 18, 2023), https://www.nyc.gov/site/hpd/news/021-43/hotel-housing-city-closes-deal-converting-jfk-hilton-permanently-affordable-housing-in [https://perma.cc/NX9K-QM8N].

[161] *Id.*

[162] *See* Read, *supra* note 146.

[163] *See id.*

[164] *Id.*

[165] *See* David Brand, *After a Year of Missed Opportunity, New York Revises Sputtering Hotel-to-Housing Plan*, CITY LIMITS (June 10, 2022), citylimits.org/2022/06/10/after-a-year-of-missed-opportunity-new-york-revises-sputtering-hotel-to-housing-plan/ [https://perma.cc/P3XD-8LEX].

[166] *See* Read, *supra* note 146.

[167] *See* Brenzel, *Hotel Development Blocker Now One Step From de Blasio's Desk*, *supra* note 85; Rubinstein & Goodman, *supra* note 70.

V. EVALUATING THE HOTEL SPECIAL PERMIT REQUIREMENT

A. The Creation of Zoning Laws in the United States

Evaluating the hotel special permit requirement as a policy requires an understanding of the larger trends in the evolution of zoning and land use practices in the United States. Zoning policies can have far-reaching consequences for the legal, political, social, and cultural landscape of a given municipality, and it is therefore not enough to simply ask what New York's zoning policy for hotels should be. The far-reaching effects of zoning practices require a larger perspective of the theoretical shifts in land-use planning, and how our ever-changing legal theories and cultural values have led to the current trends in land use policy.

Discussions of the history of zoning laws in the United States typically begin with the landmark 1926 U.S. Supreme Court case *Village of Euclid v. Ambler Realty Co.*, which established the constitutionality of dividing communities into districts or "zones" with different restrictions on land use.[168] Euclid had adopted a zoning plan in which the area of the village was divided into "six classes of use districts, . . . three classes of height districts, . . . and four classes of area districts . . . ."[169] The uses in the classes were cumulative, meaning areas zoned for higher levels of use included uses permitted in lower-level classes.[170] The case became the namesake of Euclidean zoning, a model of zoning in which land is divided into different zones based on the type of use—commercial, residential, or industrial—and the intensity of the use, typically in accordance with a comprehensive plan detailing the municipality's land use policy and goals.[171] The division of uses is designed to protect against the negative effects associated with different types of land use, called negative externalities.[172] Industrial uses in particular often create harmful pollutants, undesirable noises, and odors that have negative effects on residents' health and quality of life.[173]

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[168] *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
[169] *Id.* at 380.
[170] *See id.* at 381.
[171] *See* Nicolas M. Kublicki, *Innovative Solutions to Euclidian Sprawl*, 31 ENV'T L. REP. 11001, 11002 (2001); 12 RICHARD R. POWELL, POWELL ON REAL PROP. § 79C.03[1][b][ii] (Michael Allen Wolf ed., 2024).
[172] *See* Kublicki, *supra* note 171, at 11002.
[173] *Id.*

The ability of municipalities to enact zoning regulations is derived from the sovereign's police power.[174] Inherent in the state, police power denotes the ability to pass laws protecting or upholding the public health, safety, morals, and the general welfare of its citizens.[175] Thus, as a given municipality has no inherent authority to regulate land use through zoning on its own, the power to enact zoning regulations must be expressly granted to municipalities by the state as a delegation of the state's police power.[176]

Every state has delegated this power to local governments through general enabling legislation or constitutional provisions.[177] The U.S. Department of Commerce distributed the Standard Zoning Enabling Act (SZEA) in 1924, a model act which most state enabling legislation is based on.[178] The New York State Constitution provides that "every local government shall have power to adopt and amend local laws . . . relating to . . . [t]he acquisition, care, management and use of its highways, roads, streets, avenues and property."[179]

While courts have uniformly upheld the constitutionality of such enabling laws or state constitutional provisions and the concordant exercise of zoning powers by municipalities,[180] this power is not absolute.[181] The police powers from which a municipality's zoning authority flows are themselves limited by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution.[182] However, zoning ordinances are presumed to be constitutional, and the challenger of an ordinance has the burden of proving that it is unconstitutional.[183]

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[174] POWELL, *supra* note 171, § 79C.03[1][a].
[175] *Id.*
[176] *Id.*
[177] *Id.*; *see, e.g.*, N.Y. GEN. CITY LAW § 81 (McKinney 2024).
[178] POWELL, *supra* note 171, § 79C.03[1][b][ii].
[179] N.Y. CONST. art. IX, § 2.
[180] POWELL, *supra* note 171, § 79C.03[1][b][i].
[181] *Id.* § 79C.03[1][e].
[182] *See id.*; U.S. CONST. amend. XIV, § 1. In New York State, for a zoning ordinance to be a valid exercise of the state's police power, it must pass a two-part test: "(1) it must have been enacted in furtherance of a legitimate governmental purpose, and (2) there must be a 'reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end.'" McMinn v. Town of Oyster Bay, 488 N.E.2d 1240, 1242 (N.Y. 1985) (quoting Fred F. French Inv. Co. v. City of New York, 350 N.E.2d 381, 386 (N.Y. 1976); citing Salamar Builders Corp. v. Tuttle, 275 N.E.2d 933, 934–37 (N.Y. 1971); N. Westchester Pro. Park Assocs. v. Town of Bedford, 458 N.E.2d 809, 813 (N.Y. 1983)).
[183] *See* POWELL, *supra* note 171, § 79C.03[1][e].

B. The Developing Complexity of Zoning: From a Planning *to a* Dealing *Model*

Euclidean zoning attempts to create comprehensive city plans by placing different types of uses in different areas.[184] With an understanding that the comingling of industrial, commercial, and residential uses has detrimental effects on a populace, Euclidean zoning tries to minimize these effects by separating uses based on which use best suits which area.[185] In short, the goal of Euclidean zoning is "for everything to have its own place."[186] The very concept of a comprehensive land use plan envisions a world where "zoning c[an] predict and codify some perfect urban form": an ideal layout of land use zones creating a harmonious balance between industry, commerce, and a city's residents.[187]

The 1961 zoning revision established a plan for New York City in this Euclidean model by trying to create a "template of the ideal city," where every type of land use would have its place.[188] But this style of planning had unintended consequences. Separating land uses resulted in the reduced walkability of neighborhoods and increased commute times for workers, since an individual's workplace could not be located near their residence.[189] While separating land by use was once a central tenet of any good planning policy, theories such as New Urbanism, which gained popularity in the latter half of the twentieth century, began to question whether this assumption was correct, arguing instead for the desirability of mixed-use neighborhoods with residences closer to commercial areas.[190] The plazas and arcades, which the city had incentivized developers to build in order to create more open space, became less popular, as crime rates increased and the underused plazas and arcades became a source of danger for

184 Christopher Serkin, *A Case for Zoning*, 96 NOTRE DAME L. REV. 749, 755–56, 759 (2020).
185 *See id.* at 759.
186 *Id.*
187 *Id.* at 760.
188 *See* Strickland, *supra* note 17, at 56.
189 *See id.*; Serkin, *supra* note 184, at 762–63, 775. Because it does not allow for combining land uses, Euclidean zoning prevents cities from growing vertically, resulting in Euclidean sprawl. Kublicki, *supra* note 172, at 11002. Euclidean sprawl results in increased commuting costs and inefficient uses of land. *See id.*
190 Serkin, *supra* note 184, at 762–63; *see also* Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1, 32–36 (2004). New Urbanists argue that living close to commercial establishments "enhance[s] a neighborhood by giving residents a place to go on foot and ensuring that people will be outside, mingling amongst each other." Garnett, *supra*, at 32. This comingling of uses is particularly important in urban environments where "communities . . . are so dependent on a healthy street life." *Id.* at 33.

residents rather than being a benefit.[191] The model of an ideal city—which planners had built in the image of land use concepts developed during the first half of the twentieth century[192]—had become outdated almost as soon as it was implemented.

The result is that, since the 1960s, zoning in New York City (and in other cities around the country) has become increasingly complex. The inability of one-size-fits-all zoning districts to properly address the needs of different neighborhoods resulted in the proliferation of a variety of site-specific changes to the zoning code—variances, special districts, special permits, and other piecemeal changes—which create unique zoning rules for a particular plot or neighborhood.[193] In New York City, over forty special districts were created in the 1970s and 1980s.[194] At the same time as piecemeal zoning changes were becoming more popular, the emerging cultural values of preserving historic buildings and protecting the environment added further layers of complexity to zoning codes.[195]

The flaws of New York City's 1961 Zoning Resolution reveal the cracks in the foundation of the Euclidean model. Euclidean zoning creates overly rigid zoning schemes which fail to adapt to the rapidly evolving environment of a city.[196] Planners cannot anticipate the changes in the market, technological innovations, and shifting cultural values that will shape the needs of a city decades after zoning maps are created.[197] The inevitable result of this failure of Euclidean zoning is increasingly regular adjustments to the zoning code to try to keep up with rapid societal changes.[198]

Today's planners have largely abandoned the utopia-chasing ideals of early Euclidean zoning and moved away from its prescribed *planning* model toward a more dynamic *dealing* model.[199] Under a dealing model of planning, zoning designations do not represent the

[191] Marcus, *supra* note 20, at 64, 86–87. These incentive zoning policies were a bad deal for the city from their inception. The twenty-percent increase in floor area the developer received was much more valuable than the price of constructing a plaza or arcade, and developments often did little to maintain these spaces. *Id.* at 86–87.

[192] Strickland, *supra* note 17, at 56.

[193] *See* Marcus, *supra* note 20, at 77–78; Serkin, *supra* note 184, at 761–62.

[194] Marcus, *supra* note 20, at 77.

[195] *See* Serkin, *supra* note 184, at 763–64, 790–91. In 2010, New York City's historic preservation laws covered 25,000 buildings and 100 districts. *Id.* at 791.

[196] Shelby D. Green, *Development Agreements: Bargained-For Zoning That Is Neither Illegal Contract Nor Conditional Zoning*, 33 CAP. U. L. REV. 383, 389 (2004).

[197] *See id.*

[198] *See id.*

[199] Serkin, *supra* note 184, at 760; *see also* John Mixon & Kathleen McGlynn, *A New Zoning and Planning Metaphor: Chaos and Complexity Theory*, 42 HOUS. L. REV. 1221, 1255–60 (2006); Green, *supra* note 196, at 389.

ideal use of that area of land, but rather, an "opening offer" between the government and developers seeking government approval.[200] Instead of focusing on designing a comprehensive plan for the city, modern land use is more concerned with individual legislative and planning decisions based on the moment-by-moment needs of a municipality.[201] Regulatory barriers in development can be seen as a kind of wealth transfer.[202] Developments that produce noises, smells, pollution, aesthetic changes, and an increased burden on local infrastructure implicitly impose costs on the pre-existing neighborhoods in which they are being developed.[203] When a city engages with developers, the city uses land use laws as a way of getting concessions, often to shift the costs of development from the community and onto the developer.[204]

There are many benefits to a dealing model. A dealing model of zoning allows laws to be tailored to the unique needs of a particular parcel of land and surrounding neighborhoods.[205] Instead of encouraging every developer to simply build the most efficient structure possible within a given zone, the dealing process between developers and city officials allows for organic outcomes that create more diverse, unique structures.[206] There is logic in not treating all land in the same way, since each parcel will have its own unique needs and circumstances surrounding development.[207] In short, bargaining allows for compromises that balance a developer's property rights with the needs of the larger community based on the specific character of that plot and the surrounding neighborhoods.[208]

However, the inevitable result of a dealing model is that zoning compliance is costly, time consuming, and unpredictable.[209] Approvals for developments are increasingly dependent on the case-by-case decision making of local authorities.[210] This obfuscates the costs of development for would-be developers, which makes assessing

[200] Serkin, *supra* note 184, at 760.
[201] *See* Mixon & McGlynn, *supra* note 199, at 1262.
[202] Serkin, *supra* note 184, at 782.
[203] *Id.* at 763.
[204] *See id.* at 760–61. However, a zoning regulation making development more difficult does not necessarily mean that the developer will be the one to bear these costs, as developers may push these costs onto consumers. *Id.* at 763.
[205] Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957, 960 (1987).
[206] *See id.*
[207] *Id.*
[208] *Id.*
[209] Serkin, *supra* note 184, at 762.
[210] *See id.* at 765.

these costs ahead of time almost impossible.[211] It also greatly favors developers with experience building in that area due to their connections to local authorities and prior knowledge of the process.[212] In turn, outside developers are deterred from entering into markets they are unfamiliar with, since they will likely have to spend more to navigate a given city's zoning scheme.[213]

The ad hoc nature of zoning today leaves it vulnerable to the whims of the administrative process guiding it.[214] The more that a locality is given discretion to bargain with a developer, the easier it is for the process to be hijacked by political preferences and backroom dealings.[215] Euclidean zoning's rigid comprehensive maps may have been unable to keep up with society's rapid pace of change, but the strict standards they put in place for what is and is not permissible in each zone helped to prevent influence by special interests by keeping land use policy focused on the city's long-term planning goals as detailed in their comprehensive map.[216]

C. Analyzing the Special Permit Requirement Through a Dealing Model

Viewed through the lens of a dealing model, the special permit requirement for new hotel construction is an attempt by New York City to push the costs of hotel development onto the developers. By forcing developers to go through the extensive special permit process, the city hopes to gain concessions from these developers: the use of union labor, ensuring that the developments are environmentally friendly, and making sure that new hotels do not interfere too greatly with the surrounding neighborhoods.

Zoning "represents a tradeoff between stability and dynamism," with stability favoring current landowners and dynamism favoring outsiders—in this case, developers.[217] The problem with the policy is that the tradeoff is not worth the benefits. The city will use up the time and money of countless developers, city officials, lawyers, and consultants as they attempt to navigate the Byzantine special permit process, and in exchange, it will gain more control over a type of land

[211] *Id.*
[212] *Id.*
[213] *See id.*
[214] *See* Wegner, *supra* note 205, at 960–61.
[215] *See id.*
[216] *See id.*
[217] Serkin, *supra* note 184, at 784.

use with relatively minor negative externalities.[218] This control over hotel development comes at the cost of halting the hotel development pipeline and potentially losing the city billions of dollars in income.[219] It is a continuation of recent zoning trends: increasingly complex laws that make enforcement unreasonably cumbersome and that burden development while providing questionable benefits to the communities these laws purportedly intend to protect.

Proponents of city-wide hotel special permits tout the predictability of hotel development as a positive, since the policy creates uniformity across districts.[220] There is an irony in celebrating the predictability of a policy that ensures that every developer will have to go through an inherently unpredictable and discretionary process. The city government has guaranteed that the approval process and costs of every new hotel development will be shrouded in mystery, rather than only some new developments.

Hotels, like any other type of development, have negative externalities. Hotels are a unique type of land use in that they are both commercial and residential in character.[221] They therefore have the potential to conflict with both commercial and residential uses.[222] Districts with heavy commercial activity may not have the appropriate amenities and services for hotel guests, and business activity and traffic may create hazards.[223] Alternatively, commercial districts that are more residential in character may be altered by the transient nature of hotels, with guests coming and going, increasing noise levels, traffic, and congestion.[224]

The mere existence of negative externalities, however, does not necessitate a restrictive and burdensome solution. Many of the cited potential conflicting use problems are already often resolved by market forces. Hotels are incentivized to build in areas which suit the needs of their guests, since a desirable location will generate more business.[225] The rapid hotel growth from 2007 to 2019 is evidence that developers will concentrate growth in areas that are desirable

[218] *See supra* notes 83–88 and accompanying text; *infra* notes 221–24 and accompanying text.
[219] *See supra* notes 120–25 and accompanying text.
[220] *See supra* notes 87–89 and accompanying text.
[221] FINAL ENVIRONMENTAL IMPACT STATEMENT, *supra* note 33, ch. 1 at 1.
[222] *See id.*
[223] *Id.*
[224] *Id.* ch. 1, at 1, ch. 4, at 5.
[225] *See What Are the Aspects to Consider in Hotel Development?*, INT'L HOTEL CONSULTANT SERVS., https://www.ihcshotelconsulting.com/blog/aspects-to-consider-for-hotel-development/ [https://perma.cc/V7XX-55NC]; *see also Factors to Consider for Selecting the Best Hotel Location*, CAL. LODGING INV. CONF., https://cliconference.com/factors-to-consider-for-selecting-the-best-hotel-location/ [https://perma.cc/3NN3-CTQY].

locations for hotels.[226] The fact that a location may lack amenities or create an unsafe environment for guests should be a consideration of any developer hoping to build in that area. If a commercial district is such an inappropriate location for a hotel that it creates hazards for guests, the developer is incentivized to build elsewhere. While these market forces are not a complete solution to the problems posed by hotel development, the negative externalities identified do not justify the costs that come with special permits, given the dramatic effects the policy is projected to have on the tourism industry.[227]

VI. CONCLUSION

In the face of a potential $5.3 billion loss in revenue per year,[228] New York City has gone forward with implementing a citywide special permit requirement for all new hotel constructions.[229] Because of the long-term nature of development cycles, it is impossible to know the wide-ranging effects the amendment will have on the lodging industry this early after its adoption.[230] But the fact that not a single developer has made it past the initial planning phase is not a good sign as to whether the industry will experience healthy growth and be able to meet the demand for places to stay in the coming years.[231] The development process may normalize over time as developers gain experience going through the special permit process and the costs of developing become easier to predict. Still, even by the best estimates, New York City will be facing a hotel room shortage in the next decade.[232] Combined with further restrictions on homestay services such as Airbnb,[233] this policy has the potential to cost the city billions in revenue and increase the prices of hotel rooms across the city.[234] Unless work is done to mitigate the negative economic effects of the special permit requirement, it is possible that staying in New York City—one of the most important cultural centers in the world—will soon become a luxury only available to the wealthy.

[226] *See supra* notes 31–34 and accompanying text.
[227] *See supra* notes 124–29 and accompanying text.
[228] *See supra* note 126 and accompanying text.
[229] *Citywide Hotels Text Amendment*, *supra* note 83.
[230] *See supra* note 143 and accompanying text.
[231] *See supra* notes 117–20 and accompanying text.
[232] *See supra* notes 125–29 and accompanying text.
[233] *See supra* notes 130–39 and accompanying text.
[234] *See supra* notes 74, 125–29 and accompanying text.