CITY OF ALBANY

NEW YORK

NOTIFICIATION OF LOCAL ACTION

RECOMMENDATION OF THE PLANNING BOARD

CASE NUMBER:	ZTA #0013
REQUEST:	Amendment to USDO Text - §375-5(E)(24)
DESCRIPTION:	Amendment to the Unified Sustainable Development Ordinance (USDO) to repeal §375-5(E)(14)(iii) and amend §375-5(E)(1)(c) and §375-5(E)(17) to remove the ability of the Planning Board to grant waivers, require the Chief Building Official to enforce all relevant City, County, State, and Federal requirements, and remove the ability of the Chief Planning Official or Chief Building Official from waiving or altering conditions placed by all relevant City, County, State, and Federal entities.
PROJECT APPLICANT:	Councilmember Thomas Hoey, 15th Ward, 24 Eagle Street, Room 202, Albany, NY 12207
DATE OF RECOMMENDATION:	April 21, 2020
RECOMMENDATION:	UNFAVORABLE

FACTS:

1. Application documents and supplemental filings of the applicant as of the date of this decision, as evidenced in the digital record for ZTA #0013
2. All plans, renderings, analyses and reports received as of the date of this decision, as evidenced in the digital record for ZTA #0013
3. All written correspondence received as of the date of this decision, as evidenced in the digital record for ZTA #0013
4. Content and testimony of the April 21, 2020 hearing of the City of Albany Planning Board, as well as the corresponding workshop session.

ANALYSIS:

Section 1. ***Subdivision iii (Waivers) of subsection (b) (Procedure) of section 375-5(E)(14) (Major Development Plan Review) of Chapter 375 of the Code of the City of Albany (Unified Sustainable Development Ordinance) is hereby repealed.***

WAIVERS (iii)

A. An applicant may request, in writing, a waiver or modification of any of the development plan review development standards.

B. The Planning Board reserves the right to waive or otherwise modify such standards upon a finding that such action is necessary to eliminate practical difficulties associated with strict interpretation of these provisions and that the result will not violate the spirit and intent of

these provisions. Such request shall set forth the specific relief sought and the reasons the same are necessary.

1. Justification for eliminating the provision is insufficient

The sponsor's justification for repealing this waiver provision is that it would reduce the USDO's ambiguity because "the USDO permits waivers to be granted without clearly outlining what specific situations rise to the level of a 'practical difficulty' and the vague nature of this language can lead to misunderstandings and a lack of transparency." The repeal of USDO 375-5(E)(14)(b)(iii) is unlikely to reduce ambiguities in the development approval process. This is because the "practical difficulties" standard is well established in New York law, and in practice is essentially the same as the test applied for area variances. Moreover, repealing the waiver provision will simply shift requests for development waivers to be made as applications for variance relief, and the standards for both use and area variances present the same "ambiguity" challenges for applicants that this amendment seeks to reduce.

2. Legislative Intent of Waiver Provisions

The original legislative intent of waiver provisions, as articulated by the NYS legislature in General City Law § 27-a and § 27-b and the supporting legislative history, was to provide authority for planning boards to grant waivers from site plan and special permit requirements. This was intended to reduce the number of land use review boards a project needed to appear before in furtherance of a streamlined public process for the review of development applications. The result is a consolidation of venues or a to allow a "one-stop" process for projects requiring multiple approvals.

Case law approving planning board waivers provides a suggestion as to their typical uses, including: design requirements for wireless telecommunications facilities;[1] maximum lot coverage and fencing requirements;[2] architectural guidelines;[3] off-street parking requirements;[4] signage design criteria;[5] and stormwater requirements.[6]

3. Waiver Provision in Prior Zoning Code

The current USDO language was carried over verbatim from the City's prior zoning ordinance. In that ordinance, there were many fewer development standards, as the USDO codified many standards that were previously issued as guidelines or unwritten rules. Accordingly, the waiver provision did not previously have the same utility or necessity as it does under the USDO with the additional development standards that have been added.

4. Alternatives to seeking waivers

The alternative to seeking a waiver would be to apply for an Area Variance. If the waiver provision were to be removed in its entirety, the number of variance applications would likely increase. Area Variances are typically applied to standards that can be measured quantitatively, whereas many of the development standards are qualitative in nature. The variance process is therefore not particularly suited to qualitative measures.

The City has also worked diligently to reduce the total number of variances applications, both through the adoption of the USDO and administratively, reducing the number of Area Variances appeals from an average of 112 per year prior to the adoption of the USDO to just 14 and 18 appeals in 2018 and 2019, respectively. Removal of the waiver provision could reverse this trend, with the potential for administrative consequences.

Repealing USDO 375-5(E)(14)(b)(iii) will consequently complicate the development review process, making it more burdensome for applicants, staff, and members of the City's land use boards. This is because repealing the waiver provision will force applicants to submit their proposal to the Planning Board, seek referral to the Zoning

1 Matter of Edwards v Zoning Bd. of Appeals of Town of Amherst, 163 A.D.3d 1511 (4th Dept. 2018)
2 Matter of Lockport Smart Growth, Inc. v. Town of Lockport, 63 A.D.3d 1549 (4th Dept. 2009)
3 Carr v Village of Lake George Vil. Bd., 64 Misc. 3d 542 (Warren County 2019)
4 Matter of Tabernacle of Victory Pentecostal Church v. Weiss, 101 A.D.3d 738 (2d Dept. 2012)
5 Matter of Point Five Dev. Grant & James LLC v City of Syracuse Planning Commn., 27 Misc. 3d 1225(A) (Onondaga 2010)
6 Matter of Coalition to Save Cedar Hill v Planning Bd. of Inc. Vil. of Port Jefferson, 68 A.D.3d 764 (2d Dept. 2009)

Board for variance relief, and then return to the Planning Board to complete their permit review, rather than simply requesting a waiver during a streamlined Planning Board review.

5. Improve but do not eliminate the waiver provision

If the goal of Ordinance No. 15.81.19 (as amended 01/29/2020) is to reduce ambiguities in what is and what is not required of applicants, the Common Council may wish to consider alternative amendments that are likely to be more effective. These alternatives include: (1) providing specific parameters for the waiver of different requirements included in the USDO's development plan review regulations; and/or (2) providing more specific criteria for the "practical difficulties" standard, such as the test used for area variances pursuant to General City Law § 81-b(4).

(1) The waiver provision in Section 375-5(E)(14) could stand to be improved, but should not be eliminated in its entirety. The grant of authority for the Planning Board to waive "any of the development plan review development standards" could be construed as overly broad if interpreted to refer to all of Section 375-4 (Development Standards). There are some standards, such as building heights and other standard dimensional requirements that should probably be deemed ineligible for waivers.

(2) The criteria that the Planning Board must assess when granting a waiver could also be strengthened. Section 375-5(E)(14)(b)(2) currently states that a waiver may be granted "upon a finding that such action is necessary to eliminate practical difficulties associated with the strict interpretation of these provisions and that the result will not violate the spirit and intent of these provisions." More formal criteria could be applied and established in the evaluation of waiver requests, similar to those applied to Area Variances, Administrative Adjustments or other forms of relief authorized under the USDO. The criteria for area variances in General City Law § 81-b(4), for instance, could be adapted as follows:

(a) The [Planning Board] shall have the power... to grant area [waivers] as defined herein.

(b) In making its determination, the [Planning Board] shall take into consideration the benefit to the applicant if the [waiver] is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination the board shall also consider:

(i) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the [waiver];

(ii) whether the benefit sought by the applicant can be achieved by some method feasible for the applicant to pursue, other than [a waiver];

(iii) whether the requested [waiver] is substantial;

(iv) whether the proposed [waiver] will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and

(v) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the [Planning Board], but shall not necessarily preclude the granting of the [waiver].

(c) The [Planning Board], in the granting of [waivers], shall grant the minimum [waiver] that it shall deem necessary and adequate and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community.

Section 2. Subsection (c) (Review Criteria) of section 375-5(E)(1) (Building Permit) of Chapter 375 (Unified Sustainable Development Ordinance) is amended to read as follows:

(c) Review Criteria

An application for a Building Permit shall be approved only if the Chief Building Official determines that it is consistent with the adopted Building Code, Uniform Fire Code, any provisions of the USDO, and the Albany City Code. No permit shall be issued unless all relevant prior approvals or conditions required and imposed by City, County, State or Federal agencies or departments prior to

building are met. No waiver or alteration of such condition may be made by the Chief Planning Official and Chief Building Official.

1. Justification for the amendment is insufficient

Ordinance No. 15.81.19 (as amended 01/29/2020) would amend USDO 375-5(E)(1)(c) and 375-5(E)(17)(c) to add a new review criteria for building permits and demolition permits requiring that before any permit is issued, "all relevant prior approvals or conditions required and imposed by City, County, State or Federal agencies or departments [must be] are met." The justification for these provisions is to strengthen the USDO's protection of the public health, safety, and general welfare by ensuring that specific conditions imposed by local, state, or federal agencies are met before construction or demolition can go forward. While the purpose of these prior approval requirements is undoubtedly motivated by valid building and land use concerns, it would appear to be perhaps too far reaching to be practical or effective.

Building construction implicates numerous complex regulatory schemes, and based on simple construction alone, a given project may require approvals from any number of different local, state, and federal agencies. Additional approvals under this amendment will be triggered depending on the nature of the project or its funding source: hospitals, for instance, require prior approval from the New York State Department of Health and daycares require approval from the New York Office of Children and Family Services; affordable housing could require approvals from New York Department of Homes and Community Renewal or the United States Department of Housing and Urban Development, and commercial and industrial projects might implicate approvals by the city or county Industrial Development Agency or Empire State Development; and construction projects on property affected by environmental concerns might require approval from the New York State Department of Environmental Protection, the federal Environmental Protection Agency, the Army Corps of Engineers, and the Federal Emergency Management Project.

Many of the prior approvals that could fall within this amendment involve complex, scattered, voluminous, and ever-changing regulatory schemes that apply in various ways at different phases of the construction process, depending on a wide range of factors including, among others, the building's location, its intended use, and the manner of construction. To expect the City's building inspectors to understand all of these complex regulatory controls is impractical and likely unworkable, and could result in potential litigation.

2. The proposed text is misplaced and potentially redundant

Section 375-5 of the USDO (Administration and Enforcement) describes the procedures for review of all applications for land use and development set forth within the USDO. Among the subsections within 375-5 are (D) (General Procedures) and (E) (Specific Procedures). The proposed new text would be more appropriately placed within subsection (D) (General Procedures). For example, text relating to conditions of approval should be located in Section 375-5(D)(11) (Conditions of Approval).

Additionally, the proposed text is largely redundant and unnecessary. To the extent that new content exists, it could be accommodated within the already existing sections of the USDO that pertain to the same or similar subject matter:

Section 375-3(A)(4) states:

All uses required by the State of New York, the federal government, or by another public or quasi-public regulatory agency to have an approval, license, or permit to operate are required to have that approval, license, or permit in effect at the time that an application is submitted for a permit or approval, and at all times when the use is operating; failure to do so is a violation of this USDO.

Section 375-4(J)(1)(a) states:

All structures, uses, and activities in all zone districts shall be used or occupied to avoid creating any dangerous, injurious, noxious or otherwise objectionable conditions that would create adverse impacts on the residents, employees, or visitors on the property itself or on neighboring properties. Uses and activities that operate in violation of applicable state or federal statutes or this USDO are presumed to be a violation of this Section 375-4(J) and shall be subject to the penalties of Section 375-5(G) (Enforcement and Penalties).

Section 375-5(C)(1)(c)(ii) states:

The Chief Building Official shall have those powers authorized by the Building Code, and the review, recommendation, decision-making authority and responsibilities shown in Table 375-5-1 (Summary of Development Review Procedures). In addition, the Chief Building Official shall have the following powers and duties under this USDO:

A. To make, adopt and enforce such reasonable rules and regulations, not inconsistent with local, state, federal law or ordinances of the Common Council;
B. To enter into and examine buildings, structures, lots and enclosures of every description to see that all laws of the state, ordinances of the City, and rules and regulations of the Department are enforced.
C. To issue permits for proposed projects that are found to comply with all applicable ordinances and codes, and to inspect approved projects during construction and upon completion to ensure compliance with this USDO and other applicable ordinance and codes.

Section 375-5(D)(12)(c)(i) states:

B. If one development permit or approval is a prerequisite to another permit or approval (e.g., variance approval prior to a development plan approval), development may not take place until all required permits and approvals are obtained. Approval of one application does not necessarily guarantee approval of any subsequent application.

Section 375-5(G)(4)(b) states:

It shall be a violation of this Code to undertake any activity contrary to the provisions of this USDO, including but not limited to any of the following:

(i) Develop land or a structure without first obtaining all appropriate development permits and approvals, and complying with their terms and conditions.
(ii) Occupy or use land or a structure without first obtaining all appropriate development permits and approvals, and complying with their terms and conditions.

3. The terminology "all relevant prior approval and conditions" is ambiguous

While the stated purpose of the ordinance is to limit ambiguity, this specific passage creates more ambiguity for the permit reviewer. Pursuant to the proposed amendment, the permit reviewer must determine the relevancy of "*prior approvals or conditions required and imposed by City, County, State or Federal agencies or departments*" prior to processing a Building Permit.

4. There has been no practical study of the implementation of these provisions

The Department of Building and Regulatory Compliance reviewed approximately 3381 Building Permit applications in calendar year 2019. The notion that building inspectors would review and assess compliance with each and every decision issued or subject to issuance by all City, County, State or Federal agencies or departments prior to the issuance of a Building Permit may be an unreasonable and unwarranted expectation.

5. The text does not acknowledge the sequential nature of permitting

City, County, State and Federal permitting is sequential in nature, with some permits – for reasons, practical, scientific, or otherwise - falling sequentially after that of the issuance of a Building Permit. For example, the Albany County Department of Health cannot inspect a restaurant for food safety before the restaurant is physically built-out and constructed, which requires a Building Permit. In that case, it is unclear whether a Building Permit could ever be issued.

The Court of Appeals addressed a similar requirement in *Bayswater Health Related Facility v. Karagheuzoff*, 37 N.Y.2d 408 (1975), and was extremely doubtful that mandating state certification as a prerequisite to the issuance of building permits was either practicable or legal. The property owners in Bayswater were in the process of constructing a domiciliary care facility when the New York City Commissioner of Buildings suspended their permits under a "stop-gap" resolution that halted all permits for adult care facilities regulated under the state's hospital code. The property owners received formal approval from the Department of Health on the same day

that their building permit was suspended, but as the court emphasized, the city was fully aware that state certifications had not been secured at the time that their building permits were initially granted. The city's proposed zoning changes to deal with health related facilities included the issue of Department of Health certifications, which the court found to be inconsistent with established practices and perplexing enough that it devoted a substantial discussion to the matter, stating that:

> *the practicalities hardly leave us free from doubt whether it would be correct to construe the State certification phrase as a condition precedent altogether. This is especially so since zoning ordinances, being in derogation of common-law rights, are to be read narrowly and their ambiguities resolved in favor of property owners. The State certification was for the use rather than the construction of the facility. Permission for the latter would not necessarily mandate the former. Normally a building permit precedes the start of an alteration; the issuance of a local certificate of occupancy, attesting to its satisfactory completion, would ordinarily come after the work was done. Only then would the health care facility be in condition to meet the requirements for State certification. Also, a builder who applied for an alteration permit did not necessarily have to be the operator of the contemplated domiciliary facility. So it was possible, in fact made sense, for a builder to withhold closing his contemplated purchase of the property and the leasing thereof to a contemplated operator until a permit had issued. That is not hypothetical; it is what Lee actually did without any State problem. The proposed operator, not the owner, would then be the one to file an application with the appropriate agency for the State certification. Under these circumstances, it is not surprising that in actual practice the expected order of things had been to obtain a building permit first and State certification thereafter.*

A concurring judge wrote separately to emphasize this point:

> *In my view, the city zoning requirement of certification by the appropriate governmental agency... was not a condition precedent to the issuance of the building permit. The zoning resolution does not prescribe any such condition precedent, and in a practical sense so to hold might be to foster an Alphonse and Gaston routine – with city building permit issuance dependent on State agency certification and State agency certification dependent on issuance of a city building permit.... Precisely speaking the city building permit refers to* construction *of facilities while State agency certification and zoning restriction refer to* use *of facilities. It could be argued, both from a practical point of view and as a matter of logic, that satisfaction of construction requirements should antedate conformity to use restrictions. The applicant for permission to construct is not necessarily the applicant for authorization to use; construction will necessarily precede use in point of time; and scrutiny of a use application necessarily involves a much broader scope of inquiry.... There is no evidence in this record that the former system in which in practice neither requirement was accorded mandatory precedence over the other caused operational difficulties. It may even be said that it would be injudicious for a court, in an area of overlapping cognizance of two governmental units, to assign a categorical priority status to the mandates of one unit over those of the other, particularly in a proceeding to which the other is not a party and in which, therefore, it has had no opportunity to advance administrative or other considerations in favor of no priority at all or of a priority in its favor.*

6. ***The amendment may exceed the authority delegated to City agencies***

Only the agency authorized to issue the applicable permit is legally authorized to place conditions thereon. Section 375-5(B) (Procedure Summary Chart) sets forth the types of development applications authorized by the USDO and what role City review authorities play in their review.

Numerous cases have addressed various situations in which local building and zoning officials have acted beyond the scope of their authority in imposing permit conditions on matters outside their jurisdiction,[7] and various certification requirements are preempted as a matter of law such that their enforcement by City building inspectors would certainly be impermissible.[8] As one court explained: "the Board's authority is limited to a consideration of the layout, design and related aspects of the proposed development and it is not authorized to

7 See, e.g., Hubshman v. Henne, 42 A.D.2d 732 (2d Dept. 1973); Triphammer Dev. Co. v. Bd. of Trs., 154 Misc. 2d 369 (Tompkins 1992) ; Catalfamo v. Zirk, 22 A.D.2d 802 (2d Dept. 1964); Joseph-Hunter v Town of Cairo, 2009 N.Y. Misc. LEXIS 4706 (Greene 2009)

8 See, e.g., Louhal Props. v. Strada, 191 Misc. 2d 746 (Nassau 2002), *affirmed* Louhal Props. v. Strada, 307 A.D.2d 1029 (2d Dept. 2003) (regulation of alcoholic beverage sales); In re County of Monroe's Compliance with Certain Zoning & Permit Requirements etc. 131 A.D.2d 74 (4th Dept. 1987) (county airport use); Waybro Corp. v. Board of Estimate, 67 N.Y.2d 349 (Urban Development Corporation redevelopment).

assume the powers of other town agencies or departments."[9] And as stated in another case: "each local agency involved in the zoning and planning process may not exceed the bounds of the power specifically delegated to it."[10]

7. The amendment is likely to result in unlawful conditions being placed on permits

Conditions imposed on permit approvals must be reasonable, and it is likely that unreasonable conditions could result under the extremely broad prior approval requirement in Ordinance No. 15.81.19 (*as amended* 01/29/2020). The courts have found that conditions must apply to the building or zoning impacts of the permit at issue to be reasonable, for instance, while requirements dealing with the operational details of proposed businesses and their likely clientele – topics that are frequently a subject to state or federal oversight – are not appropriate matters to be regulated through the building permit process.[11]

8. The amendment must be approved by the New York State Fire Prevention and Building Code Council

New York State Executive Law §379 prohibits a locality from "imposing higher or more restrictive standards for construction within the jurisdiction of such local government than are applicable generally to such local government in the uniform code." A law refusing a building permit to an otherwise qualified applicant until all local, state, and federal approvals have been received would likely be considered to be such a higher or more restrictive standard. As a result, the City would be required to refer this ordinance for approval from the New York State Fire Prevention and Building Code Council before putting the proposed prior approval amendments into effect. This approval process would take several months, as the Code Council only meets four times a year. The Code Council approves more stringent regulations only if it finds that they are "reasonably necessary because of special conditions prevailing within the local government and that such standards conform with accepted engineering and fire prevention practices and the purposes of this article," and it is unclear how they would view the proposed prior approval requirements. Even if approved, the Code Council's approval could be time-limited or otherwise modified to the extent that the Code Council finds the proposed regulation to not be reasonably necessary.

9. The terminology "No permit shall be issued unless all relevant prior approvals or conditions required and imposed…prior to building are met" should be clarified.

The issuance of a Building Permit and the physical act of building are not coterminous. The identified text should probably refer to the issuance of a Building Permit rather than the act of building.

Section 3. Subsection (c) (Review Criteria) of section 375-5(E)(17) (Demolition Permit) of Chapter 375 (Unified Sustainable Development Ordinance) is amended to read as follows:

(xiv) Whether any prior approval or condition has been imposed by a City, County, State or Federal agency or department which requires such approval or condition be met prior to any permit being issued in relation to the demolition of any proposed building or structure.

1. Section 375-5(E)(17) is improperly cited in the proposed legislation

The legislation refers to 375-5(E)(17) (Demolition Permit) when the proper title is 375-5(E)(17) (Demolition Review).

2. The proposed text is misplaced

The procedures pertaining to the issuance of a Demolition Permit are located in Chapter 133 of the City Code and were not incorporated into the USDO. The procedure cited is Demolition Review, a separate procedure legislated by the Common Council in 2009 that must occur prior to the issuance of a permit to demolish a

9 Hill v. Planning Bd. of Amherst, 140 A.D.2d 967 (4th Dept. 1988)
10 Moriarty v. Planning Bd. of Sloatsburg, 119 A.D.2d 188 (2d Dept. 1986)
11 See, e.g., St. Onge v. Donovan, 71 N.Y.2d 507 (1988); Summit School v. Neugent, 82 A.D.2d 463 (2d Dept. 1981); Massa v. City of Kingston, 235 A.D.2d 947 (3d Dept. 1997). *Compare* Matter of 339 W. 29th St. LLC v City of New York, 125 A.D.3d 557 (1st Dept. 2015).

building. Amended text pertaining to the issuance of building permits would be more properly located in Chapter 133.

Furthermore, the proposed text is to be enumerated in Section 375-5(E)(17)(c) (Review Criteria) for Demolition Review. Said section lists the review criteria that the Planning Board should consider in making its determination to approve or deny an application for a Demolition Review. The review criteria in this case are selective and not prohibitive.

3. ***The legal concerns related to prior approvals for building permits are also applicable to prior approvals for demolition reviews*** (see above)

FINDINGS:

Based upon review of the complete record for ZTA #0013, the Board recommends that the Common Council not adopt the proposed USDO Text Amendment as proposed based on a finding that the proposed amendment does not align with the following review standards for Text Amendments in §375-5(E)(24) of the USDO:

A. Is consistent with the Comprehensive Plan;

B. The proposed amendment will not conflict with any other provisions of this USDO and the Code of the City of Albany;

C. The proposed amendment is required by changed conditions;

D. The proposed amendment addresses a demonstrated community need;

E. Will improve compatibility among uses and would ensure efficient development within the City;

VOTE:

For Unfavorable Recommendation:	4	DeSalvo:	Y	Hull:	Y
Against Unfavorable Recommendation:	1	Ellis:	Y	Kuchera:	N
Abstain:	0	Gailliard:	Y		

I, Albert R. DeSalvo representing the Planning Board of the City of Albany, hereby certify that the foregoing is a true copy of a recommendation of the Planning Board made at a meeting thereof duly called and held on the day of April 21, 2020.

Signature: Albert R DeSalvo