

# N.Y. Real Property Law Journal

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# Development Rights Purchases by Zoning Lot Merger in New York City

By Francisco Augspach

## I. Introduction

Zoning lot mergers are one of the two ways to purchase development rights (sometimes called “air rights”) in the City of New York. This article explains what development rights are and how to purchase them by zoning lot merger. While these transactions involve the purchase of rights under the zoning law, they are typically handled by real estate practitioners because: (1) they involve private parties as opposed to the zoning law, where the object is governmental power, and (2) because the ultimate goal is to create interests attaching to land. Despite their twin-nature, zoning lot mergers are not prohibitively difficult, except for the fact that they involve concepts foreign to the real estate practitioner. Transferable Development Rights, i.e., development rights purchases from landmarks or special districts, are beyond the scope of this article.

## II. Elements of New York City Zoning Law

Development rights are rooted in zoning law, not real property law. In order to understand their nature, the real estate practitioner must first familiarize himself or herself with concepts of the zoning law. At the very least, familiarity with the terms will ease communications with the client’s architect and the Department of Buildings.<sup>1</sup>

### A. “FAR,” “FA,” and Other Building Restrictions

The City is divided into residential, commercial, and manufacturing districts. Every district is designated with the letter “R”, “C,” or “M” followed by a number, 1 through 10. Usually, a higher number means a higher district density. For example, a building in an R2 district cannot have more square footage than half

its lot size. If the lot is 40 feet by 100 feet, then it has a total 4,000 sq. ft. and any building on the lot cannot have more than 2,000 sq. ft. In a C5 district a building can have 10 sq. ft. per sq. ft. of the lot size. A lot with 4,000 sq. ft. would allow for a building with 40,000 sq. ft. (a tower). The ratio (e.g., 0.5 to 1 in R2; or 10 to 1 in C5) is called “floor area ratio” (“FAR”) and the resulting square footage, “floor area” (“FA”) or “development rights.”

In addition to FAR, districts have many other restrictions. For example, minimum-lot size, front yard (i.e., setback), rear yard, side yards, and maximum height can be very strict in low-density residential districts. In fact, in the case of R1 and R2 districts, these restrictions typically limit the shape of the building to the extent that the builder cannot benefit fully from its endowment of FA. In low density residential districts, FAR is rather meaningless because the other restrictions determine the size of the building. An endowment of FA does not carry the right to expend it fully. In higher density districts, this point becomes relevant when the lot acquires FA in excess of its original allotment.

Other noteworthy restrictions include minimum garage/parking, lot coverage and sky exposure plane. Lot coverage is the percentage of the surface of the lot that may be covered by the building. For instance, a lot with 4,000 sq. ft. in a C5 district may have a total of 40,000 sq. ft of FA, but at the ground level the building cannot occupy more than 40% of the surface of the lot, or 1,600 sq. ft. The sky exposure plane is a setback (or further setback) that begins at a certain height to prevent buildings from blocking all light and air from the streets. The sky exposure plane varies substantially

depending on whether the building fronts a narrow or a wide street.

The object of this scant exhibition of zoning restrictions is to show that development rights, or FA, are only one form of building restriction in a large regulatory framework. Zoning approvals require compliance with the entire framework, not just with FAR. More importantly, the real estate practitioner must recognize that this is part and parcel of the zoning law, and must avoid thinking of “development rights” as real property rights. While the principles of real property law protect the transfer of real estate, the transfer of development rights is a “privilege” at the pleasure of the city of New York, rather than a “right” incidental to ownership.

### B. Commercial, Residential and Community Facility FA

There are three kinds of FA: commercial, residential, and community facility. These determine how much square footage can be designated to a specific use.<sup>2</sup> For instance, only commercial FA can be used for retail store space and most offices. “Community facility” refers to services (which can be profitable) that are essential to the immediate community, such as health care, houses of worship, libraries, and educational centers.

In C1 and C2 districts, unused commercial FA can be used for residential purposes. Community facility FA can sometimes be used for residential purposes.<sup>3</sup> Otherwise, no amount of one kind of FA can be exchanged for any amount of the other. When drafting contracts, it is important to distinguish the amount and type of FA involved.

### C. A Definition of Floor Area?

Floor area “is the sum of the gross area of the several floors of a

building or buildings, measured from the exterior faces of the exterior walls or from the center lines of walls separating two buildings.”<sup>4</sup> Five pages of items specifically included and excluded follow this definition. While we will not delve into the intricacies here, a word of caution is warranted.

An illegal use or development can result in more use of FA. For example, cellar space does not count toward FA unless the cellar is being used as dwelling space. After accounting for this, one may find that a lot did not have as much disposable FA as one thought. Other instances where FA may be accidentally increased are: (a) by enclosing steps, porches and galleries; (b) by increasing off-street parking (such as by covering yard with cement); and (c) by enlarging loading docks. In short, the legality of the premises involved in the transfer should be checked.

#### D. Other Means of Increasing FA

A zoning lot merger is only one way of increasing the original allotment of FA. The zoning resolution provides for other means, such as the purchase of excess development rights from protected buildings (landmarks or special districts) that they cannot legally use themselves. In addition, dedications of portions of the property to the public use are rewarded with a bonus of FA. Examples include creating a public park or indoor area at the ground level, building an archway or public passage connecting public streets, or even constructing an alternative access to the subway. While the closing attorney is not expected to be a building planner, this information sheds light on dedications filed on record, consequences of their breach and rights to be reserved when merging zoning lots.

### III. Zoning Lot Mergers

#### A. Introduction

Zoning lot mergers are used to transfer development rights; however, they do not really cause trans-

fers at all. The concept is straightforward: two or more owners of adjoining zoning lots enter into an agreement by which (a) the zoning lots are combined (i.e., merged), and (b) they apportion the resulting FA among them. For example, A and B own adjoining zoning lots, and each is allowed to develop 100,000 sq. ft. of FA. They merge the zoning lots, and now own a zoning lot with a maximum of 200,000 sq. ft. of FA. B records covenants and restrictions against her lot prohibiting her from using more than 70,000 sq. ft. of the combined FA. As a result, A now has 130,000 sq. ft. available. There is no actual transfer as would be the case in transfers involving special districts or landmarks (neither of which will be reviewed here). There is a merger of zoning lots, with filed covenants and restrictions against the parcel giving up development rights. That the other parcel can benefit from the balance of the combined zoning lot is only the result of merger and restriction.<sup>5</sup> The rationale in allowing this form of transfer is that the district density remains unaffected. The New York City Zoning Resolution (“ZR”) assigns a certain FAR to the district. The city is neutral as to whether the FA is expended by one building or the one next-door, provided the lots, when seen jointly, remain within the district FAR.

#### B. Applications

In order to be merged, lots must be contiguous by ten linear feet and must be within the same block.<sup>6</sup> Any number of lots can be joined. The requirement of ten feet is satisfied if complied with in sequence, e.g., lot A shares ten feet with B, lot B shares ten feet with C, but A and C do not touch on each other. Occasionally, the immediately adjoining lot, for example, B, has no disposable FA, but will agree on a merger with A and C so that A can purchase FA from C. B would naturally exact a fee and perhaps some other benefit for this service.<sup>7</sup> A lot that joins in a merger to facilitate a transaction between two other lots, without selling any FA

itself, is typically called a “through-lot.” Zoning lot mergers have also been pursued by advertising companies. The maximum legal size of a sign is dictated by the size of the zoning lot. By having lots merge, advertising companies can post larger signs.

#### C. What Is a “Zoning Lot”?

Until now, we have referred to “lots” and “zoning lots” indistinctively. The concept of a “zoning lot” was introduced by the 1961 Zoning Resolution. A “zoning lot” is defined as “a lot of record existing on December 15, 1961” or as a lot that may result from a zoning lot merger.<sup>8</sup> By “lot of record,” the Zoning Resolution means a tax lot on the official tax map of the city of New York. The first portion of the definition sets the starting line, the second portion opens the door for zoning lot mergers. “A ‘zoning lot,’ therefore, may or may not coincide with a lot as shown on the official tax map of the City of New York, or any recorded subdivision plat or deed.”<sup>9</sup> The first task of the practitioner facing a zoning lot merger is determining which are the zoning lots involved. It is common practice to leave this determination to the title companies. However, as will be shown, identifying zoning lots can be a rather complex matter. The relevant information exceeds the type of records title companies are used to working with. Therefore, blind reliance on the title company’s determination is ill-advised.<sup>10</sup>

#### 1. Zoning Lot Mergers Between December 15, 1961 and August 18, 1977

Between December 15, 1961 and August 18, 1977, adjoining zoning lots (and in the same block) would be merged if they were in single ownership at the time of the application for a certificate of occupancy or building permit. Single ownership, however, did not necessarily mean “single fee ownership.” The city had taken the position that a ground lease with a duration of 75 years, or a 50-year lease with an option to increase it to

75 years, qualified as “ownership.” Developers would typically own in fee the parcel planned for development and obtain ground leases on surrounding lots meant to remain vacant or underdeveloped. The lots were only required to adjoin each other. The developer would submit its application with the lease and the permit would be issued for the combined lots in single ownership. The merger would then be noted (if only by metes and bounds covering both lots) in the building file with the resulting permit.

Mergers dating from this period present three problems. The first problem is that there was no requirement that the ground leases be recorded. Therefore, no diligent title search can reveal whether zoning lots have been merged. A developer might have thought he or she was purchasing vacant land in Manhattan (that alone should raise suspicion) and then later discover that there was a preexisting ground lease requiring the property to remain undeveloped for 75 years. A diligent search in the Department of Building records would not necessarily disclose the lease either. The merger would only be noted in the file of the building that benefited from it, not in the file of the transferor lot. This issue was mostly cured by the 1977 amendment, which, among other things, required all such ground leases to be recorded no later than August 1, 1978. We say “mostly cured” because a troublesome fact pattern remains unresolved. If a building was completed and the certificate of occupancy was issued prior to August 18, 1977, the developer would have had little interest in recording the ground lease and the Department of Buildings would have had little leverage to require it (even assuming that files for approved buildings would be revisited to check this).<sup>11</sup> Therefore, a purchaser of underdeveloped land could still find that the property is subject to a private ground lease.<sup>12</sup>

The second problem of mergers from this period is that the merger

did not occur as soon as the lots entered into “single ownership”; an application for a permit or certificate of occupancy also had to be made. The fact that an owner granted a ground lease to the adjoining owner did not result in a merger. Consequently, the zoning law would consider both the fee owner and the lessee as the “owner.” The Department of Buildings could legally entertain an application from either party.<sup>13</sup> The zoning law did not regard them as “co-owners” but each one as “the owner.” Each one of them had the right to expend the available FA to the detriment of the other.<sup>14</sup>

The third issue is that ground leases, though long, expire or terminate prematurely. If the minimum term was 50 years (with an option to renew) and starting in 1961, then these leases could begin expiring in 2011. It appears that the Department of Buildings will allow these owners to continue to benefit from these mergers through the life of the building, rather than through the expiration of the lease.<sup>15</sup> Litigation by ground lessors is expected in this situation.

## 2. Zoning Lot Mergers After August 18, 1977

It was the 1977 amendment that finally disassociated development rights and land ownership. “Single ownership” is no longer required to merge lots. Rather, the current zoning resolution merely requires adjoining owners (or the same owner, should he or she be the same person) to file a statement declaring the lots merged. This statement, called a “Declaration of Zoning Lot Restrictions,” must be filed with the City Register, or with the County Clerk, if filed in Richmond County.<sup>16</sup> Therefore, mergers occurring after August 18, 1977 are easily revealed by a title search. The procedure for merger will be explained below.

## 3. Zoning Lot Mergers Before 1961

It is undisputed that the concept of “zoning lot” was introduced by the Zoning Resolution of 1961. Therefore, there is support for the proposition that there could not have been any zoning lot mergers before 1961. Unfortunately, this is not the case.<sup>17</sup>

Air rights transactions pre-date the 1961 resolution. The Empire State Building (1931) and 666 Fifth Avenue (1957) were built thanks to air rights transactions.<sup>18</sup> The original 1916 resolution imposed height limits, but allowed them to be waived in one instance. After reaching the height limit the building could continue, if thereafter it only occupied 25% of the allowable base area of the building. For example, if a building could have 1,000 sq. ft. at its ground level, the so-called “25% tower” could have up to 250 sq. ft. at each level, without height limit.<sup>19</sup> Soon thereafter, “the Department of Buildings construed a ‘lot’ to include contiguous parcels that were: (i) held in common ownership; or (ii) held in separate ownership, provided that one of the parcels benefited (sic) from the use of the adjoining parcel’s air rights by way of an air rights sale, lease, or other conveyance.”<sup>20</sup> In 1959 this interpretation of “lot” for the purposes of waiving height restrictions was codified into New York City Zoning Resolution (hereinafter ZR) section 9(d).

It can be argued that none of this amounted to a zoning lot merger. These might have been requirements for the issuance of permits and certificates of occupancy. To say that these transactions constituted zoning lot mergers, when the concept was not introduced until 1961, would mean reclassifying them retroactively.

The 1961 Zoning Resolution presented three alternative definitions of “zoning lot.” Two of them we have reviewed in Section 1, *supra*, which are a lot of record in the official tax map in effect on December 15, 1961 and zoning lots resulting from mergers after 1961. We are now concerned

with the third definition of “zoning lot” in the 1961 resolution:

(b) A tract of land, either unsubdivided or consisting of two or more contiguous lots of record, located within a single block, which, on the effective date of this resolution or any subsequent amendment thereto, was in single ownership].<sup>21</sup> (underlining added, italics in the original.)

This subsection (b) appears to have been meant to subsume pre-1961 transactions into zoning lots. The underlined portion clearly refers to something in place at the time of the writing (note the use of the past tense “was”). Moreover, “*single ownership*” are the precise words that the immediately following subsection (c)<sup>22</sup> uses to refer to what we call a zoning lot merger (no statute, not even the current one, uses the word “merger”). The fact that there is no reference to ground leases, or any other form of air rights conveyances, is not surprising. Subsection (c) does not refer to them either. There was probably no need to because “single ownership” had already been interpreted to include them. Our current Zoning Resolution contains a practically identical subsection (b), using the words “single ownership” without italics.

Norman Marcus, former counsel to the New York City Planning Commission, was of the opinion that these pre-1961 transactions effected mergers. In 1984 he wrote:

In 1959, this ruling was codified by an amendment to section 9(d) that both the City Planning Commission and the Board of Estimate approved. The amendment provided that with respect to buildings erected or being erected on or before October 14, 1959, a “lot” could embrace contiguous parcels, provided

that there is an ‘acquisition of the air rights . . . [pertaining to one such parcel] by deed, lease or other written instrument’ for the benefit of the other parcel. The viability of this definition of a “lot” was tested when, in 1956, C.L.R. Realty Co., the owner of a parcel apparently restricted by an air rights lease sued the Commissioner of Housing and Buildings and the owner of a contiguous benefited parcel with a twenty-five percent tower. The plaintiff sought to remove any restriction from his apparently restricted parcel and thereby establish its independence. He sought a declaration that the twenty-five percent tower had no effect on any development rights that accrued to the plaintiff’s parcel. The defendant argued that once the parcels were severed, the tower would more than double its coverage in relation to the reduced size of its owner’s parcel and become markedly non-complying as to bulk. The New York Supreme Court held for the defendants and dismissed the complaint. The decision was affirmed on appeal.<sup>23</sup> (Internal citations omitted.)

It should be noted that the 1959 amendment to ZR § (9)d, the reference to lots that were in single ownership prior to the 1961 ZR, and the excerpt from Marcus’ article, above, turn on the definition of “lot” or “zoning lot,” not on building requirements. Therefore, the conclusion that these pre-1961 actions merged zoning lots cannot be escaped, even if the terms “zoning lot” and “zoning lot merger” were only coined subsequently.

The consequences of this are troublesome. This reading means that lots were merged or deemed merged retroactively at least as far back as 1931. Since the buildings would have been completed long before 1978, there would have been no interest in recording air rights leases or “other conveyances.” As a result, there is another layer of unrecorded leases that might determine the zoning lot. Moreover, the older the building record, the more cryptic it is.

#### 4. Certificate of Occupancy Searches

Sometimes a certificate of occupancy is approved subject to conditions, such as an easement for emergency egress through an adjoining lot. These conditions can sometimes have implications for the purpose of determining the zoning lot. For instance, the author has seen certificates of occupancy that read, “Note: Entire lot to remain in single ownership.” Needless to say, this very much suggests that a zoning lot merger has occurred. Similarly, the certificate of occupancy could make reference to unrecorded leases, a negative easement for light and air, or a variance. The fact that one of the lots involved is subject to a variance can jeopardize a merger as will be explained below. In sum, review of the certificate of occupancy for the lots to be merged should be on the practitioner’s due diligence list.

#### 5. About Unrecorded Leases and Undisclosed Prior Mergers

If a zoning lot was merged and expended its development rights, the Department of Buildings could deny new applications on that basis. For that reason, practitioners should keep an eye out for any hints of unrecorded leases, such as references in the certificate of occupancy, or even references in other documents in the title records. There is no formula to discover unrecorded leases. The most conservative approach would be to request the building file of every building on the block. A more practical one would be to request the

building files only for those buildings that are too large for their lots. The client's building planner, or any professional familiar with building requirements, could be of great assistance identifying suspect buildings. Signage extending beyond the lot can also hint at a merger, as well as a building dwarfed by its neighbor. Once suspect buildings are identified, building files for them can be requested to investigate what their approvals were based on.

Despite our warning, the reader should know that it appears that the Department of Buildings has quietly decided to ignore over-development that may result from undisclosed zoning lot mergers. Many factors point to this conclusion. First, we know that the city has adopted the policy that development rights "are not recoverable during the life of the improvement."<sup>24</sup> Hence, no action will be taken against completed buildings. Second, the purpose of the recording requirements in the 1977 amendment was not only to protect private parties but to protect the city's interest against overbuilding as well. This suggests that the city is hardly any better positioned to detect prior mergers than private parties.<sup>25</sup> Third, because the City could not detect them, the actual language of the 1977 amendment required a zoning lot description to be filed on every application, regardless of whether a new merger was intended.<sup>26</sup> The plan appears to have been to define and record a zoning lot description every time the Department of Buildings visited a building file. If a merger was not filed before, it would be filed as the Department opened the file for any reason. Mergers on building files would then appear in the title records. However, the Department has chosen not to apply this portion of the ZR.<sup>27</sup> All in all, the Department might have given up searching for undisclosed leases and decided to address the problem with the new rules over decades as buildings are replaced.

This only provides some comfort to the practitioner. Private parties who oppose the development might search for and find the lease, and then report it to the Department. The Department has the duty to enforce the ZR, but not the right to dispense with provisions. Waivers, i.e., variances, can only be given by the Board of Standards and Appeals. Therefore, if the Department receives proof that a lot has been merged and that granting a permit will result in a violation of the ZR, then the Department would be bound to deny the permit.

The problems caused by unrecorded mergers extend beyond the context of development rights purchases. Searching for them should be considered in connection with the purchase of properties in Manhattan. For example, if a building was erected with the benefit of an unrecorded merger and it then burns down, the owner might not be able to rebuild it. If the owner cannot prove to the Department that the lot benefits from a merger, the permit will be denied. Even if it can be proven, there is the risk that the other lot might have been issued permits without knowledge of the merger, thereby expending the FA. The owner might find that its replacement building will be smaller, even though there was no down-zoning.

#### D. Mechanics of the Zoning Lot Merger

The current statute on mergers reads:

A "zoning lot" is either . . . (d) a tract of land, either unsubdivided or consisting of two or more lots of record contiguous for a minimum of ten linear feet, located within a single "block", which at the time of filing for a building permit (or, if no building permit is required, at the time of filing for a certificate of occupancy) is declared to be a tract of land to be treated

as one "zoning lot" for the purpose of this Resolution. Such declaration shall be made in one written Declaration of Restrictions covering all of such tract of land or in separate written Declarations of Restrictions covering such parts of such tract of land and which in the aggregate cover the entire tract of land comprising the "zoning lot". Any Declaration of Restrictions or Declarations of Restrictions which individually or collectively cover a tract of land are referred to herein as "Declarations." Each Declaration shall be executed by each party interest (as defined herein) in the portion of such tract of land covered by such Declaration (excepting any such party as shall have waived its right to execute such Declaration in a written instrument executed by such party in recordable form and recorded at or prior to the recording of the Declaration). Each Declaration and waiver of right to execute a Declaration shall be recorded in the Conveyances Section of the Office of the City Register or, if applicable, the County Clerk's Office of the county in which such tract of land is located, against each lot of record constituting a portion of the land covered by such Declaration.<sup>28</sup>

The requirements regarding contiguity by ten feet, that the lots must be in the same block, and that the Declaration must be filed in the land records are self-explanatory. The form and content of the Declaration poses no difficulty either. On May 18, 1978, the Acting Commissioner of Buildings promulgated forms (often called Exhibits I through V) to be used.<sup>29</sup>

The only difficulty here is determining who the “parties in interest” are. The procedure and form will be addressed briefly.

## 1. Parties in Interest

A “party in interest” in the portion of the tract of land covered by a Declaration shall include only (W) the fee owner or owners thereof, (X) the holder of any enforceable recorded interest in all or part thereof which would be superior to the Declaration and which could result in such holder obtaining possession of any portion of such tract of land, (Y) the holder of any enforceable recorded interest in all or part thereof which would be adversely affected by the Declaration, and (Z) the holder of any unrecorded interest in all or part thereof which would be superior to and adversely affected by the Declaration and which would be disclosed by a physical inspection of the portion of the tract of land covered by the Declaration.<sup>30</sup>

It is undisputed that fee owners are parties in interest under (W). All others need clarification.

### a. Mortgagees, Remaindermen, Life Tenants and Contract Vendees

Mortgagees, remaindermen, life tenants and contract vendees have an interest superior<sup>31</sup> to that of the owner’s, which could develop into possessory rights, and could be adversely affected by the Declaration. Therefore, they may qualify under (X), (Y), and (Z), depending on whether their interest is of record or can be ascertained by inspection.

### b. Lienholders

Unlike mortgagees, miscellaneous lienholders cannot qualify under (X) because their interest is not

superior to the owner’s, or, rather, because they simply do not possess a real property interest.<sup>32</sup>

Nevertheless, judgment creditors can qualify under (Y). The test here is merely that their interest (a) be recorded and (b) that it be adversely affected by the Declaration. If the merger reduces the value of the property, which can be presumed, if the lot gave something up for consideration, then the lienholder would be adversely affected by the Declaration. The lesser the value of the debtor’s real property, the lower the chance that the creditor might collect in full. Hence, the creditor of a judgment recorded against the transferor lot qualifies as a “party in interest” under (Y). Lienholders in general qualify under (Y) if their lien attached to the transferor lot.

The reader may properly ask whether the lienholders of a through-lot can be considered “adversely affected.” There is no law to answer this, so the practitioner is encouraged to take the conservative approach and address the liens. With that said, it is the writer’s opinion that they should not be considered “adversely affected.” The value of the through-lot is unaffected by the merger (the new building may have an impact, but that’s a different question). The opportunity to act and benefit as a through-lot is pure chance, unique to the moment. If it lapses because the lienholder refuses to consent, there is no guarantee that a valuable interest has been preserved because the opportunity may not repeat itself. The same advice and rationale to the contrary applies to the case of mergers for signage purposes, where no lot gives up any development rights.<sup>33</sup>

### c. Tenants

In *MacMillan, Inc. v. CF LEX Associates*, the landlord of the office building at 866 Third Avenue was sued by its tenant for merging the zoning lot without declaring the tenant as a party in interest, thereby failing to procure the tenant’s approval.<sup>34</sup> The tenant contended that it used 100%

of the usable area of the building and 95% of the total area of the building, and claimed that it fit under both (X) and (Y).<sup>35</sup> The Court of Appeals noted that the drafters of the resolution chose the words “tract of land” as opposed to “land and improvements” and concluded “that the phrase ‘tract of land’ refers only to the underlying surface land and does not embrace buildings on that land.”<sup>36</sup> The Court reasoned that it would be impractical to require space tenants to sign off on mergers and that it would undermine the purpose of the zoning resolution, which is “to promote the most desirable use of land and direction of building development . . . .”<sup>37</sup> Under *MacMillan*, no tenant is a party in interest except for a ground lessee because it has an interest in the tract of land and not just in the use of the building.<sup>38</sup>

The *MacMillan* holding has met with considerable resistance by practitioners. Consider “[a] space tenant with a right to make improvements that may increase the amount of floor area being used, in conflict with the total available, retained FAR.”<sup>39</sup> While a plain reading of the statute could support that this tenant is a party in interest, after *MacMillan* this can no longer be the case. The fact that the landlord may have frustrated the tenant’s right to develop would be a breach of the lease but not a defect in the merger.

Other difficult cases are conceivable. An advertising company that has a lease for a sign on the building, which will be eclipsed by the development next door, might consider itself “adversely affected,” as may general parties who will suffer congestion or interference in light and air because of the new development. It was the view of the Appellate Division, the lower court in *MacMillan*, that “tract of land” was more than “plot of land,” and that the notion of “parties in interest” was an invitation for afflicted parties to opine on the development.<sup>40</sup> The Appellate Division did not elaborate on what

interests would merit protection, but decided that the 95% space tenant did.<sup>41</sup> As we know, however, this interpretation was rejected by the Court of Appeals.<sup>42</sup> The ruling of the Court of Appeals is best understood when contrasted with the lower decision it was asked to review.

#### d. Easement Holders

The question of easement holders has been largely resolved by *Mac-Millan*. It is well-settled law in New York that an easement is merely a right to use but not a right to the land itself.<sup>43</sup> Therefore, if easement holders do not have rights to the “tract of land” itself, then they cannot be considered “parties in interest.”

#### 2. Certificate of Ownership

Once the parties in interest have been identified, they must either join in the merger or waive their rights. There is no difference between joining and waiving, except that the actual fee owners are expected to join. Mortgage lenders, however, are usually asked to waive and subordinate their interest. This formula is not redundant. The waiver is necessary pursuant to the zoning law, and the subordination is necessary pursuant to the real property law. The former is a merger requirement (i.e., necessary under the zoning law), and the latter protects it from destruction by foreclosure (i.e., necessary under real property law). After all the parties are accounted for, a title company is to issue a certificate of ownership, also called a “certification pursuant to zoning lot” or an “Exhibit II,” which identifies the parties in interest and which represents that all parties have either joined or waived of record. This certificate is then recorded in the land records and a certified copy of it is filed with the Department of Buildings.<sup>44</sup>

#### 3. Declaration of Zoning Lot Restrictions

The document that evidences the consent to the merger is called the Declaration of Zoning Lot Restrictions (Exhibit IV). It is usually

delivered at closing, and every party in interest must either waive or join. Waivers must be in the form of Exhibit V. It should be noted that the Exhibit IV does not cause the merger itself. It is only a request by the parties that the lots be treated as one zoning lot. The merger itself occurs subsequently, upon the filing of an application for a permit or certificate of occupancy.<sup>45</sup>

#### E. The Zoning Lot Development Agreement

The merging of zoning lots is a matter of zoning law; the allocation of the combined FA among the owners is a matter of private law.<sup>46</sup> So far, we have explained how the zoning lots are merged. Now, we will discuss the contract that the parties enter into to apportion development rights between them. This agreement is called the Zoning Lot Development Agreement (“ZLDA,” pronounced “zelda”). The ZR makes no reference to this and it does not control agreements among the owners.

##### 1. A Negative Easement

The purpose of the ZLDA is to create development restrictions on the transferor lots, and any through-lots, so that more FA is available to the purchaser’s lot. In the language of real property law, a covenant running with the land restricting its development is a negative easement, even if the words “negative easement” are not used. The labeling is important to understand the set of rules that will govern it. For example, a negative easement cannot be created except by written conveyance or reservation.<sup>47</sup> Since an easement is an interest in real property, it is recordable.<sup>48</sup> Easements are also interpreted restrictively.<sup>49</sup> Most importantly, negative easements are subject to the two-year release statute in New York Real Property Actions and Proceedings Law.<sup>50</sup>

The restriction itself need only declare how much of the combined FA will be made available to each lot and prohibit development that may

jeopardize the allocation. There is no need for an elevation survey, as would be the practice when a developer wishes to identify air space to remain vacant for light and air. A transferor lot does not need to covenant not to build above a certain height. The height of buildings is irrelevant. What matters is the amount and kind of FA used. A building can increase its FA use without increasing its height, e.g., by illegal occupancy, by building a garage underground, or by creating a mezzanine level in what was an opulent entrance level. The courts will enforce private agreements restricting development merely by preventing further use of FA and will look into the ZR for a determination.<sup>51</sup>

##### 2. Parties

Since the purpose of the ZLDA is to create a negative easement, it would seem that the ZLDA would only require the same parties as would be necessary to create a valid easement. However, we must not forget that in order to determine who was a party in interest by reason of being “adversely affected,” we made representations regarding which lots would lose and which lots would earn development rights. These representations do not appear in the merger documents, i.e., in the Exhibits IV and V. The resulting apportionment only appears in the ZLDA. Therefore, it is the suggested practice to have all the “parties in interest” join or waive their right to join in the ZLDA, even if these parties are not required to create the negative easement.

##### 3. Other Matters Covered in the ZLDA

At a minimum, the ZLDA should contain representations and warranties regarding the availability of FA and prior mergers, provide for the contingencies of down-zoning or up-zoning, compel the parties to agree to subsequent mergers with new lots, and provide who will benefit from the additional FA. In addition, the owners of the transferor and of



the through-lots should covenant to support the new building in all public hearings, or at least not to contest it.

#### 4. Recording

The ZLDA should be recorded, if only because it creates an interest in real property. It is important that all subsequent owners be on notice of the allocation. Otherwise, a *bona fide* purchaser would only be on notice of the merger itself (because of the zoning lot restrictions of record) and of whatever its seller represents to be the allocation.

#### F. "As-of-Right" Development

Most applications for permits and certificates of occupancy are done "as-of-right." This means that the application complies with all zoning regulations and that no discretionary approval is required. The fact that an application calls for FA acquired pursuant to a zoning lot merger does not prohibit its "as-of-right" status; however, there is an exception.

A lot that benefits from a variance cannot be merged without the approval of the Board of Standards and Appeals.<sup>52</sup> Variances are granted as a measure of relief to properties particularly prejudiced by the applicable zoning regulations. In *Bella Vista Apartment Co. v. Bennet*, the owner had obtained a variance to build a movie theater in a residential district, but that would use less FA than its allocation.<sup>53</sup> Years later, a developer merged the lot with a neighboring lot to benefit from the unused FA and applied for a building permit "as-of-right."<sup>54</sup> The application was denied and the litigation that resulted reached the Court of Appeals.<sup>55</sup> The Court, ruling for the city, reasoned that allowing the movie theater to profit from its excess FA by a sale to the developer would "undermine the basis for the use variance grant"; to wit, that the owner could not make a reasonable return under the applicable zoning regulation.<sup>56</sup> Therefore, the lot could not be merged without a decision by the Board of Standards and Appeals on whether it still merited the variance.<sup>57</sup>

#### G. Transfer Taxes

The sale of development rights is subject to the State Real Estate Transfer Tax and to the City Real Property Transfer Tax. There is no uniform convention as to which party is responsible for them. However, since the transfer taxes are the seller's liability under the statute, a silent contract would make the seller liable for them.

#### H. Title Insurance

##### 1. The New York City "Development Rights" Endorsement

Title insurance is available to insure the purchase of FA through zoning lot mergers. At first sight, one would think that title insurance presents hardly any difficulty. There is an endorsement, the "New York City 'Development Rights' Endorsement," available for the Owner's Policy and the Loan Policy, which insures (a) that the "parties in interest" have joined in the merger, (b) the validity of the ZLDA, and (c) that the ZLDA is effective to transfer development rights. The endorsement does not insure either the amount of FA transferred or any matters of zoning law relating to use and occupancy. The cost of the endorsement is only \$25.

##### 2. The Problem of Separate Land and Development Rights Transactions

The drafters of the endorsement clearly envisioned a developer purchasing a tract of land simultaneously with the purchase of development rights. A regular title policy would be issued in the total amount of the purchases and the endorsement would be attached to it. The endorsement fits this transaction squarely.

But what if the developer already purchased and insured his or her tract of land? What if the purchase of development rights occurred subsequently to the land deal? Simply issuing the endorsement later to be made part of the policy is no suitable solution. To begin with, if the developer paid \$10 million for the land

and is now paying \$2 million for the development rights, he or she would want to be insured in the amount of \$12 million. Relying on her original \$10 million policy would leave him or her under-insured by \$2 million. In addition, it is uncertain whether the endorsement would be effective since it would suffer from a fundamental flaw: Insurance policies protect through the Date of Policy, but on the Date of Policy there was no zoning lot merger. Was there an insurable interest on the Date of Policy?

A new policy, as in the drafter's plan, insuring the land with the endorsement would be unacceptable. The developer will object to having to re-insure his or her land for the full amount. And if the developer were to request a new policy only in the amount of the FA purchase price, he or she would encounter two problems. First, the *Title Insurance Rate Manual* forbids title insurers from issuing an Owner's Policy in an amount lower than the greater of the contract price or the value of the interest.<sup>58</sup> Since the purchase price of the FA is by definition less than the value of the FA plus the value of the land, the insurer will refuse to issue the policy. Second, the policy would cover the entire project, so that payments on losses against the developer's main lot will reduce the coverage available for the development rights.<sup>59</sup>

##### 3. A Possible Solution

Title insurers have created a policy to insure only the purchase of FA by zoning lot merger. It consists of the regular 2006 ALTA Owner's Policy with variations in the legal description and of schedules A and B. Schedule A specifies that it only covers the insured's interest under the attached New York City "Development Rights" Endorsement and that the source of title is the ZLDA, which is also excepted in schedule B. The legal description includes all lots involved in the merger, but separates the insured's "fee parcel" and the "development rights parcels," with

the latter being listed “for information only.”

The problem with this policy is that the standard terms of the ALTA are at odds with the intended coverage. For example, the policy insures against lack of access to the “land.”<sup>60</sup> If by “land” is meant the “fee parcel,” we are once again in a situation where the policy inadvertently covers a broader interest. More importantly, it is not clear what the result is of citing the ZLDA as the source of title in schedule A and excepting it altogether in schedule B.<sup>61</sup> On a similar note, the standard policy insures against lack of marketability of title.<sup>62</sup> This coverage, designed with principles of real property law in mind, wreaks havoc in terms of zoning law. It implies that the insured is free to transfer its interest under the ZLDA. Needless to say, this cannot be. Any further transfer will require a new merger and, concomitantly, the approval of the original transferor,<sup>63</sup> and perhaps even a municipal approval. In addition, a zoning lot merger involves clearing liens against all lots involved, including the purchaser’s own. When this is taken into account, we may find that the amount of coverage left for protection against liens on the transferor’s lot is actually lower than the purchase price (i.e., the face amount of insurance).<sup>64</sup> Lastly, there is a question as to whether the policy is valid at all, since it is issued at closing, but the actual merger (as shown above) occurs subsequently, on the filing for a permit. Is there an insurable interest at the date of closing?

To summarize, the terms of the development rights policy are awkward and possibly conflict with the intention of the parties. It has not yet been subject to interpretation by the courts, so its application remains uncertain. The closing attorney can take comfort in the knowledge that insurance policies are typically interpreted in the light most favorable to the insured. At any rate, it’s the only policy available.

#### 4. A Proposed Solution

A different policy for development rights transfers is conceivable. The problem with the current one is that by insuring a zoning lot merger it mixes zoning and real property laws. A practical solution would be to create a title policy that only insures a property law interest, i.e., without the New York City Development Rights Endorsement. As explained above, the purchase of development rights through a zoning lot merger involves (a) the merger under the zoning law, and (b) the building restriction on the transferor-lot under the real property law. The proposed policy would cover only (b), and would, in effect, insure a negative easement on the transferor lot. The fact that it would not cover against (a) would be a concern, but one that could be easily corrected. The ZLDA would need a provision declaring it void (or at least, the negative easement void) in the event the merger is declared void *ab initio*. The title policy would only need to insure affirmatively against avoidance by reason of defect in the zoning lot merger.<sup>65</sup> Then, any challenge to the merger would effectively be a challenge to the negative easement as well. The policy would be delivered at closing without any issues as to whether there was an insurable interest at closing. Moreover, this approach would also avoid an uncomfortable question we have not addressed, namely, whether title insurance companies possess the power to insure matters of zoning law at all.<sup>66</sup> Some provisions, such as the coverage on access to land, would have to be amended in schedule B. Other provisions, such as marketability, could be left untouched.<sup>67</sup>

#### IV. Conclusion

The only difficulty in zoning lot mergers is identifying the zoning lots to be merged. This task is typically relegated to the title companies to determine from title records. However, because the difficulty lies precisely in the fact that mergers may have occurred without notice in the title records, title companies are ill-fitted for

this task. A review of the title records ranks high in the due diligence list, but it is not conclusive.

A conservative approach to the risk of undisclosed mergers is to inspect the building files of every building on the block. A more practical approach is to identify suspect buildings, i.e., buildings that appear to be too large for their lots and were built prior to 1978, and inspect those building files. The client’s building planner could be of great assistance identifying suspect buildings.

Once the lots to be merged have been identified, determining the “parties in interest” is straightforward thanks to the Court of Appeals’ strict interpretation of “tract of land” in *MacMillan*. Generally, the “parties in interest” are the fee owners, life tenants, remaindermen, contract vendees, ground lessees and mortgagees of all the lots and the lienholders of the transferor and through-lots.

Finally, there is title insurance available which protects against prior, unrecorded mergers. However, the validity and extent of these title policies, drafted in real property law terms, as to zoning law interests remains to be tested. And just as in every construction project, indemnity of the purchase price is an imperfect remedy to a developer who would have also expended time and resources drafting plans and obtaining permits, not to mention the loss of profit and the attorneys’ fees.

#### Endnotes

1. See generally, NEW YORK CITY DEP’T OF CITY PLANNING, ZONING HANDBOOK (2006) (the author recommends this for an excellent introduction to the zoning law of the city of New York).
2. See generally, NEW YORK, N.Y., ZONING RESOLUTION art. VII, available at <http://www.nyc.gov/html/dcp/html/zone/zonetext.shtml> (last modified March 24, 2009) (describing 18 use groups, of which, the first two are residential, the following three are community facility use, the last three are industrial, and the rest are commercial).
3. It should be kept in mind that if a part of a building is used for residential

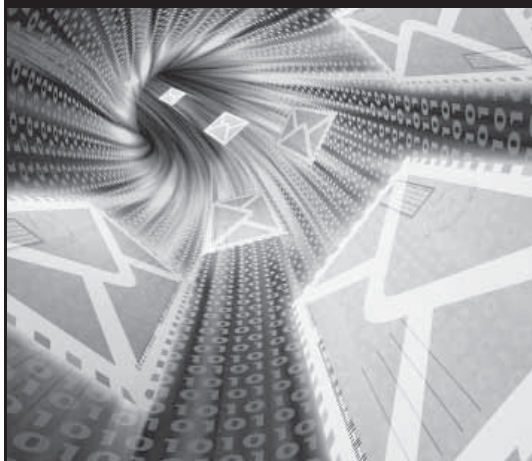
- purposes the amount of FA dedicated to community facility can be severely limited.
4. New York, N.Y. Zoning Resolution, art I, ch. 2, § 12-10, available at <http://www.nyc.gov/html/dcp/html/zone/zonetext.shtml> (last modified March 24, 2009).
  5. *Id.* (“zoning lot,” subparagraphs (d) and (f)). (Subparagraphs (c) and (e) introduce the procedure for zoning lot mergers when all lots to be merged are owned by the same party. While the procedure is substantially similar to the case of different parties, its discussion exceeds the subject matter of this article, as it is not a purchase.)
  6. *Id.* (“zoning lot,” subparagraph (d)).
  7. See WILLIAM NEUMAN, *Selling the Air Above*, NEW YORK TIMES, March 5, 2006, at Real Estate Section, available at <http://www.nytimes.com/2006/03/05/realestate/05air.html>.
  8. § 12-10 (zoning lot, paraphrased for ease of exposition).
  9. *Id.*
  10. A common mistake in this area is to order searches solely on the transferor-lot. At a minimum, searches on the transferee-lot will be required as well.
  11. *In re* Amendment of the Zoning Resolution pursuant to section 200 of New York City Charter relating to Chapter 2, § 12-10 (Definition) concerning modifications to the definition of zoning lot, N 760226 ZRY, Cal. No. 27 (July 13, 1997) (on file with author) (“[A]s City policy, unused development rights which are transferred from one parcel to another parcel within the same zoning lot are not recoverable during the life of the development [ . . . ].”) (The city does not revoke certificates of occupancy for finished buildings because of terminated, rescinded or invalid leases.)
  12. This is an instance where principles of real property law must be distinguished from principles of zoning law. A *bona fide* purchaser for value without notice after a diligent search may take free of the undisclosed lease. However, the validity of the lease between the parties would be irrelevant to the City, which would take the position that the lots have been merged and the combined FA already expended.
  13. Once again, whether an application by the lessor breached the terms of the lease is a matter of private law between lessor and lessee, and of no interest to the Department of Buildings.
  14. See *Newport Associates v. Solow*, 30 N.Y.2d 263, 332 N.Y.S.2d 617, 283 N.E.2d 600 (1972); see also *873 Third Ave. Corp. v. Kenvic Associates*, 109 A.D.2d 489, 492 N.Y.S.2d 727 (1st Dep’t 1985) (“[T]he Court of Appeals held that so long as no one had exercised the air rights, each was free to exercise them and to build to the maximum allowed by law.” *Kenvic* at 492, 492 N.Y.S.2d at 730.).
  15. See *supra* footnote 10.
  16. NEW YORK, N.Y. ZONING RESOLUTION, art I, ch. 2, § 12-10, available at <http://www.nyc.gov/html/dcp/html/zone/zonetext.shtml> (last modified March 24, 2009) (“zoning lot,” subparagraphs (c), (d), and last paragraph). The statute requires that a zoning lot certificate be filed even when there is no merger and the tract of land is the same as the corresponding tax lot from December 15, 1961. However, the Department of Buildings has chosen not to apply this provision. See Memorandum of New York City Department of Buildings, *Zoning Lot Certification Pursuant to Section 12-10 of the Zoning Resolution*, from Acting Commissioner Irving E. Minkin, P.E., to the Borough Presidents (May 18, 1978) (on file with author).
  17. We have left this discussion for last because there is skepticism among practitioners regarding these mergers. Regular standards of review today do not include searching for pre-1961 mergers.
  18. Marcus, Norman, *Air Rights in New York City: TDR, Zoning Lot Merger and the Well-Considered Plan*, 50 BROOK. L. REV. 867, 873 (1984).
  19. NEW YORK, N.Y., ZONING RESOLUTION art. I, ch. 1 § (9)(d) (1916) (current version at NEW YORK, N.Y., ZONING RESOLUTION art. I, ch. 2, § 12-10, available at <http://www.nyc.gov/html/dcp/html/zone/zonetext.shtml> (last modified March 24, 2009)).
  20. Marcus, *supra* note 18, at 871–72.
  21. NEW YORK, N.Y., ZONING RESOLUTION art. I, ch. 2, § 12-10(b) (1961) (current version at NEW YORK, N.Y., ZONING RESOLUTION art. I, ch. 2, § 12-10, available at <http://www.nyc.gov/html/dcp/html/zone/zonetext.shtml> (last modified March 24, 2009)).
  22. *Id.* at § 12-10(c) (“A tract of land, located within a single block, which at the time of filing for a building permit [or, if no building permit is required, at the time of filing for a certificate of occupancy], is designated by its owner or developer as a tract of land all of which is to be used, developed, or built upon as a unit under *single ownership*.”) (italics in original).
  23. Marcus, *supra* note 18, at 872. (citing *C.L.R. Realty v. S.F.S. Realty*, No. 41234-1956 (Sup. Ct., N.Y. Co., Sept. 14, 1956) (unpublished decision), *aff’d*, 2 A.D.2d 972, 158 N.Y.S.2d 753 (1st Dep’t 1956) (mem.), and *appeal denied*, 3 A.D.2d 701, 160 N.Y.S.2d 618 (1st Dep’t 1957)).
  24. *In re* Amendment of the Zoning Resolution pursuant to section 200 of New York City Charter relating to Chapter 2, § 12-10 (Definition) concerning modifications to the definition of zoning lot, N 760226 ZRY, Cal. No. 27 (July 13, 1997) (on file with author).
  25. *Id.* (“[T]he recording of the declaration will eliminate the current problem of not being able to determine from the public record whether the building has been built in part on the basis of development rights applicable to land on which the building is not physically located. The amendment thus proposed protects the City’s interest in avoiding overbuilding, and provides private parties with a certainty based on which they can protect their own interests.)
- The author made an informal inquiry to the Department of Buildings. The inquiry was: If a lot merged and conveyed development rights before the recording requirements were in place, and years later the owner applied for a building permit only for that lot, when and how would the prior merger come up? The informal answer was that it would not. The application would be made “as of right” and everything filed against the applicant lot would be read. But if there is no hint in that file that the building next door expended the floor area already, it might not be detected.
26. NEW YORK, N.Y. ZONING RESOLUTION, art I, ch. 2, § 12-10, available at <http://www.nyc.gov/html/dcp/html/zone/zonetext.shtml> (last modified March 24, 2009) (“zoning lot,” last paragraph).
  27. See Memorandum of New York City Department of Buildings, *Zoning Lot Certification Pursuant to Section 12-10 of the Zoning Resolution*, from Acting Commissioner Irving E. Minkin, P.E., to the Borough Presidents (May 18, 1978) (on file with author). In that 1978 memorandum, the application of this section was limited to issuance of permits and certificates of occupancy and only where the lots in single ownership were held by different parties in interest. Nowadays, it appears that it is dead script altogether.
  28. § 12-10 (Subsection (c) introduces a similar mechanism for merging lots owned by the same party. We will concern ourselves here with arm’s length mergers only).
  29. See Memorandum of New York City Department of Buildings, *Zoning Lot Certification Pursuant to Section 12-10 of the Zoning Resolution*, from Acting Commissioner Irving E. Minkin, P.E. to the Borough Presidents (May 18, 1978) (on file with author) (The forms are available at every title company and are easy to complete. Therefore, we will not go over them here.).
  30. § 12-10 (“zoning lot” subparagraph (f)(4)) (There is a different but similar definition for “party in interest” when merging lots in single fee ownership, pursuant to subparagraph (c)).

31. The meaning of “superior interest” can easily be misunderstood. Despite the fact that this appears in the Zoning Resolution, we must bear in mind that the drafting of this particular section “was undertaken in consultation with the Committee on Real Property Law of the Association of the Bar of the City of New York.” *In re* Amendment of the Zoning Resolution pursuant to section 200 of New York City Charter relating to Chapter 2, § 12-10 (Definition) concerning modifications to the definition of zoning lot, N 760226 ZRY, Cal. No. 27 (July 13, 1997) (on file with author). Therefore, because this section relates to interests in a “tract of land,” it is proper to give this term its specific meaning in the real property law.
- In real property law, a “superior interest” is merely one that the holder of the inferior one cannot destroy. It does not mean that the superior interest can divest or dispossess the inferior one. For example, a right of way is a superior interest to the landowner’s because the landowner cannot rid himself or herself of it. See BLACK’S LAW DICTIONARY 1478 (8th ed. 2004). Examples of this use in cases abound. See *Canfield v. Ford*, 28 Barb. 336 (Sup. Ct., N.Y. Co. 1858) (“This class of cases is nearly allied to, . . . a still superior interest in real property, called an easement . . .”); see also *Arbor Nat’l Mortgage v. Goldsmith*, 154 Misc. 2d 853, 586 N.Y.S.2d 702 (Sup. Ct., Nassau Co. 1992) (“[T]he plaintiff, [foreclosing mortgagee], contends that [debtor’s wife who is not in title], by virtue of her claim of an interest in the real property superior to that of plaintiff mortgagee, is attempting to resurrect the right of dower . . .”). Whether a superior interest is one that may mature into title (such as a remainder or a mortgage) is a separate question. Only real property rights can be superior to real property rights.
32. Filing liens with the county clerk does not result in real property rights. See *2386 Creston Ave. Realty v. M-P-M Mgmt.*, 58 A.D.3d 158, 867, N.Y.S.2d 416, 2008 N.Y. Slip Op. 09002 (1st Dep’t 2008). Their nature is different from that of mortgages. Foreclosing on a mortgage restores title to the state it was in when the mortgage was first made, destroying all subsequent liens, covenants, restrictions and conveyances, which jeopardizes the Declaration. Levying on a judgment against real property does not have this effect. The buyer receives the same estate the debtor possessed at the time of the transfer, not the time of filing.
33. On zoning lot expansions, i.e., on subsequent mergers, it is the standard practice today to ignore new liens against through-lots. The only possible support for this is that the lienholder is not deemed to be “adversely affected” by the new merger and therefore cannot be a party in interest. This, however, does not explain why new mortgages are ignored. The Zoning Resolution does not distinguish between original and subsequent mergers. They are both subject to the same rules.
34. 56 N.Y.2d 386, 452 N.Y.S.2d 377, 437 N.E.2d 1134 (1982).
35. *Id.* at 389, 452 N.Y.S.2d at 378, 437 N.E.2d at 1135.
36. *Id.* at 391, 452 N.Y.S.2d at 380, 437 N.E.2d at 1137.
37. *Id.* at 392, 452 N.Y.S.2d at 380, 437 N.E.2d at 1137.
38. Ground leases are different from space leases in that they convey the owner’s estate for a term of years. As opposed to space leases, they convey the land as well, and therefore fit within the *MacMillan* standard of having an interest in the “tract of land.” In fact, and to illustrate their nature as a conveyance of title, they can be created by deed. The only change that a standard deed would require is the substitution of the word “forever” for a definite term in the *habendum* clause (e.g., “to have and to hold [for X number of years]”).
39. Michael J. Berey, *Development Rights Transfers in New York City*, in CITY BAR CENTER FOR CONTINUING LEGAL EDUCATION, HOW DID THAT BUILDING GET SO TALL? 8 (New York City Bar, 2008).
40. *MacMillan, Inc. v. Cadillac Fairview Corp.*, 86 A.D.2d 15, 19-20, 448 N.Y.S.2d 668, 671 (1st Dep’t 1982), *rev’d sub nom. MacMillan, Inc. v. CF Lex Associates*, 56 N.Y.2d 386, 452 N.Y.S.2d 377, 437 N.E.2d 1134 (1982).
41. *Id.* at 19, 448 N.Y.S.2d at 671.
42. *MacMillan, Inc. v. CF Lex Associates*, 56 N.Y.2d 386, 452 N.Y.S.2d 377, 437 N.E.2d 1134 (1982).
43. See *Lewis v. Young*, 92 N.Y.2d 443, 682 N.Y.S.2d 657, 705 N.E.2d 649 (1998); see also *Grafton v. Moir*, 130 N.Y. 465, 29 N.E. 974 (1891); *Dowd v. Ahr*, 78 N.Y.2d 469, 577 N.Y.S.2d 198, 583 N.E. 911 (1991); *Bakeman v. Talbot*, 31 N.Y. 366 (1865); *Onthank v. Lake Shore & Mich. S. R.R.*, 71 N.Y. 194 (1877).
44. NEW YORK, N.Y. ZONING RESOLUTION, art. I, ch. 2, § 12-10, available at <http://www.nyc.gov/html/dcp/html/zone/zonetext.shtml> (last modified March 24, 2009) (“zoning lot,” subparagraph (f)1 and the last paragraph). Title companies typically issue a draft certificate first which purchaser and seller of development rights use to determine which parties they have to reach out to for joining or waiving. The fact that the statute should expressly call for certification by a title insurance company is odd. Why can’t attorneys issue the certificate, as a legal opinion on ownership? It is not a matter of solvency, because no title insurance is issued and title companies usually limit their liability to \$1,000 on the Exhibit II. It can hardly be a matter of expertise either. Reviewing documents of record and issuing opinions regarding real property rights (or zoning rights) is legal work under any definition. The only reason why title companies are allowed to issue regular certificates of title, i.e., title reports, in the first place is because of an exception in the Judiciary Law. N.Y. JUD. LAW § 495(5) (McKinney 2005). Why should the Zoning Resolution prohibit attorneys from issuing the certificate of ownership?
45. § 12-10 (“zoning lot,” subparagraph (d), “a tract of land . . . consisting of two or more lots of record, which at the time of filing for a building permit . . . is declared to be a tract of land to be treated as one “zoning lot” . . .) (italics added).
46. See generally *402 West 38th St. Corp. v. 485-497 Ninth Avenue*, 16 Misc. 3d 1131(A), 847 N.Y.S.2d 901, 2007 WL 2429695, 2007 N.Y. Slip Op. 51654(U) (Sup. Ct., N.Y. Co. 2007) (providing an example of the supreme court distinguishing between zoning duties under the ZR and private rights under the ZLDA).
47. See *Eng v. Shimon*, 12 Misc. 3d 1174(A), 820 N.Y.S.2d 842, 2006 WL 1789085, 2006 N.Y. Slip Op. 51221(U) (Sup. Ct., Queens Co. 2006); see also *Chatsworth Realty 344 v. Hudson Waterfront Co.*, 309 A.D.2d 567, 765 N.Y.S.2d 39, 2003 N.Y. Slip Op. 17392 (1st Dep’t 2003); see also *Lafayette Auvergne Corp. v. 10243 Management Corp.*, 35 N.Y.2d 834, 362 N.Y.S.2d 863, 321 N.E.2d 784 (1974).
48. N.Y. REAL PROP. LAW §§ 290-91 (McKinney 2006).
49. See *Brody v. St. Onge*, 167 A.D.2d 671, 563 N.Y.S.2d 251, (3rd Dep’t 1990); see also *Crane Neck Assoc., Inc. v. NYC/LI County Serv. Group*, 92 A.D.2d 119, 460 N.Y.S.2d 69 (2nd Dep’t 1983); *Sweet v. Hollearn*, 142 Misc. 408, 254 N.Y.S. 625 (Sup. Ct., Fulton Co. 1932).
50. N.Y. Real Prop. ACTS § 2001(2)(a) (McKinney 2009). See *Pak v. 5 Harrison Associates, Ltd.*, 43 A.D.3d 807, 841 N.Y.S.2d 779 (1st Dep’t 2007); see also *Ram Island Homeowners Ass’n v. Hathaway Realty*, 305 A.D.3d 390, 758 N.Y.S.2d 522 (2nd Dep’t 2003); *Rahabi v. Morrison*, 81 A.D.2d 434, 440 N.Y.S.2d 941 (1981). (The consequences of this statute can be troubling. If the seller violated the ZLDA by using more FA than agreed, the purchaser would only have two years to enforce the ZLDA. The purchaser is well-advised to procure its own permits promptly and to keep an eye on the seller’s activities until permits covering all the FA are issued. One must bear in mind that the Department of Buildings will not look at the allocation of FA, i.e., the ZLDA; it will only look at the merger documents.)

51. *Wing Ming Properties Ltd. v. Mott Operating Corp.*, 79 N.Y.2d 1021, 584 N.Y.S.2d 427, 594 N.E.2d 921 (1992).
52. See *Bella Vista Apartment Co. v. Bennet*, 89 N.Y.2d 465, 655 N.Y.S.2d 742, 678 N.E.2d 198 (1997), see also *Fisher v. N.Y.C. Bd. of Standards & Appeals*, 21 Misc. 3d 1134(A), 873 N.Y.S.2d 511, 2008 WL 4966546, 2008 N.Y. Slip Op. 52345(U) (Sup. Ct., N.Y. Co. 2007).
53. *Bella Vista*, N.Y.2d at 467, 655 N.Y.S.2d at 742, 678 N.E.2d at 98 (1997).
54. *Id.* at 467, 655 N.Y.S.2d at 743, 678 N.E.2d at 199.
55. *Id.* at 467, 655 N.Y.S.2d at 742-43, 678 N.E.2d at 198-99.
56. *Id.* at 470, 655 N.Y.S.2d at 745, 678 N.E.2d at 201.
57. *Id.* at 471, 655 N.Y.S.2d at 745, 678 N.E.2d at 201.
58. See TITLE INS. RATE SERV. ASS'N INC., TITLE INSURANCE RATE MANUAL: NEW YORK STATE § 5, at 8 (2d rev 2008), available at <http://www.tirsa.org/12-01-08IndexedTIRSARateManual.pdf>. (The few enumerated exceptions therein do not apply here.)
59. See AMERICAN LAND TITLE ASS'N ("ALTA"), *Owner's Policy* (June 17, 2006) <http://www.alta.org/forms/#2> ("Conditions," subparagraph 10).
60. *Id.* ("Covered Risks," subparagraph 4).
61. This case is not the same as citing a deed as source of title in schedule A and excepting a portion of it (e.g., the covenants and restrictions) in schedule B. The exception in question covers the entire document. It would be difficult to improve on it because the ZLDA is in essence a building restriction on the transferor lot. Therefore, excepting the covenants and restrictions in the ZLDA would also be inappropriate.
62. ALTA, *supra* note 59 ("Covered Risks," subparagraph 3).
63. ZLDAs typically include a power of attorney provision which allows the purchaser to cause further mergers and execute the same for the seller, if the seller refuses to join. However, no prudent attorney uses a power of attorney such as this one without court approval. See *402 West 38th St. Corp. v. 485-497 Ninth Avenue*, 16 Misc. 3d 1131(A), 847 N.Y.S.2d 901, 2007 WL 2429695, 2007 N.Y. Slip Op. 51654(U) (Sup. Ct., N.Y. Co. 2007). Does this mean that the title company intends to cover the costs of enforcing the power of attorney?
64. This point is exacerbated in light of 2006 ALTA Owner's Policy, Condition #11 (Liability Noncumulative). Suppose the same title insurer issued three policies in the same project: an Owner's Policy on the land, an Owner's Policy on the development rights purchase, and a Loan Policy on the entire project. Any payout on the Loan Policy will reduce coverage on both Owners' Policies. Every dollar paid out on the Loan Policy would reduce coverage on each Owner's Policy by one dollar.
65. That the existence or life of an easement should be measured by the application of a different law is no new concept. The reader need only recall the ubiquitous easements for emergency egress which lapse if the building is demolished or if they cease to be required by the NYC Fire Code. Similarly, covenants and restrictions in towns and villages that delayed in passing a zoning ordinance were occasionally set to lapse upon adoption of a zoning ordinance by the local municipality.
66. See N.Y. INS. LAW § 6403(b) (McKinney 2009). The NYC Development Rights Endorsement insures that the ZLDA "is effective to transfer to the insured the floor area development rights. . . ."
67. We will not expand here on the difference between predicating "marketability" of an "easement," i.e., a real property interest, and predicating "marketability" of "FA" or "development rights," i.e., a zoning law term. We will only say that the former is a recognized and established real property law concept, while the latter is a new concept for the zoning law, which meaning is to be determined by the courts.

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