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Transferring **Development** Rights In New York City

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NEW YORK CITY led the nation as the first city to implement a development rights transfer, or "TDR" program, in 1968.[1] The concept of transferring development rights gained popularity throughout the 1960s and '70s as a way to preserve historical structures, agricultural land and other ecological resources, promote the creation of public spaces and affordable housing, and control urban density and suburban sprawl.

The city's TDR program was enacted as part of its Zoning Resolution (ZR) and was intended to mitigate possible financial losses suffered by owners whose properties had been designated as landmarks pursuant to Local Law 46 of 1965, otherwise known as the Landmarks Preservation Law.[2]

Today, New York is one of more than 20 states that have enacted legislation specifically authorizing cities, towns and villages to adopt development rights transfer programs.[3] Various ones throughout New York state have joined New York City in implementing TDR programs.

Air and Development Rights

Historically, real property ownership rights encompassed everything under and over the land. A landowner was considered to own "the earth to its center and up to the heavens."[4]


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The advent of air travel, increased development within cities and other modern circumstances resulted in a narrowing of this concept of property ownership. Property owners today are considered to own only so much of the airspace above their property as may reasonably be used or occupied in connection with its use and enjoyment. Thus, "air rights" are the rights of property owners to use and enjoy the airspace over their property, up to a reasonable distance or such distance as is otherwise allowed by law.[5] "Development rights" are the rights to build on, or otherwise develop, real property.

In New York City, "development rights" are governed by the New York City Zoning Resolution, now over 2,800 pages in length. The ZR regulates, among other things, the use of real property and the size of development thereon.

The size of a development is regulated by limitations on building height and bulk, and by lot coverage regulations including yard and setback requirements. An important factor in a building's size is the amount of "floor area ratio," or "FAR," available to the site under zoning regulations. As defined in the ZR, "'[f]loor area ratio' is the total floor area on a zoning lot, divided by the lot area of the zoning lot…".[6]

Many zoning lots within the city are not built to the maximum allowable FAR. In a city with limited area and almost constant demand for new development, it is tempting for developers to utilize this excess FAR either by razing the existing buildings on such lots and building new ones with the maximum FAR, or by adding onto, or building over, above or even under such underutilized sites (sometimes referred to as "soft sites"). One well-known case involving this concept was the ill-fated plan to build an office tower atop Grand Central Terminal in Midtown Manhattan.[7]

Transfer Mechanisms

Soft site development is less feasible where such sites are subject to historical preservation, landmark status or other restrictions. In addition, many owners of soft sites have no desire to re-develop their sites or enlarge their buildings. This creates a market of development rights, where owners of underbuilt "sending site(s)" can transfer rights to developers wishing to build larger buildings than would be permitted as-of-right by the zoning on the "receiving site(s)."

The Zoning Resolution provides three basic mechanisms for the transfer of development rights in New York City: by zoning lot merger,

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by certification or special permit, or through the Inclusionary Housing Program.

A "zoning lot merger" is created when two or more existing zoning lots are joined together. Once the lots are merged, the development rights from all merging lots are combined, and may be used anywhere within the zoning lot (subject to "split-lot" provisions where the merged lot is comprised of lots located within different zoning districts).[8] In order for a zoning lot merger to take place, the lots sought to be joined must:

- be contiguous, located within a single block, and in single ownership as of Dec. 15, 1961, or as of the time of enactment of any applicable amendment to the Zoning Resolution; or
- be contiguous for a minimum of 10 linear feet, located within a single block, and be under single fee ownership as of the time of filing for a building permit or certificate of occupancy, if no permit is required, or
- if the lots are not under single ownership, a restrictive declaration must be entered among all parties in interest that own the lots sought to be joined, declaring that the lots in question are intended to be treated as one lot for purposes of the Zoning Resolution. Such lots must be contiguous for a minimum of 10 linear feet, and the declaration must be filed prior to obtaining a building permit, or certificate of occupancy (if no permit is needed).[9]

Zoning lot mergers are the most common way to transfer development rights. The ability to accomplish a zoning merger "as-of-right," without a special permit or other government approval, renders them more cost-effective and less time-consuming than other TDR methods.

Since, with a restrictive declaration, the zoning lots to be merged need not be in common ownership, many TDR deals involve agreements between developers and owners of nearby lots with excess FAR. Often, the proposed sending and receiving sites are within the same block but are not adjoining. In these cases, the developer may approach intervening landowners that connect the sending and receiving lots to create an assemblage, merging all of the lots into one zoning lot. Developers may not use subsurface lots, such as underground rail yards, to create such assemblages.[10]

Recent examples of permissible assemblages include the development of the Ariel West condominium tower on Manhattan's Upper West Side, which added about four stories to its height via a zoning lot merger involving four nearby townhouses, and the luxury apartment tower at 515 Park Ave., which more than doubled its FAR through zoning lot mergers with nearby properties including two five-story brownstones and the 59th Street headquarters of Lighthouse Inc.[11]

'Development rights' are the rights to build on, or otherwise develop, real property; the New York City Zoning Resolution provides three basic mechanisms for their transfer.

Development rights may be transferred to non-contiguous receiving sites where the sending property has been designated a landmark, or where the sites are located within a special zoning subdistrict. These types of TDRs do not involve zoning lot mergers.

The city has created several special zoning subdistricts to promote the preservation of historic buildings, open space or unique cultural resources.[12] Within these subdistricts, a qualified sending lot may transfer development rights to another qualified site located within that subdistrict, without the need for the lots to be adjoining.

Examples include the Grand Central Subdistrict (sending sites must be a designated landmark), the South Street Seaport Subdistrict and Special Sheepshead Bay District (sending sites must be of a specified size or type), and the Theater District (sending sites must be designated as a "Listed Theater").[13] Transfers from "special subdistrict" sites require the issuance of either a "certification" by the City Planning Commission (CPC) or a special permit.

Where the sending site is a designated landmark not located within a special subdistrict, a transfer of development rights is allowed only with a special permit from the CPC. The receiving site may be adjacent, directly across the street or, if the landmark is on a corner lot, diagonally across an intersection from the landmarked building.

Applications for special permits to allow a TDR from a landmarked site (or from a permitted site within certain special subdistricts) are subject to the Uniform Land Use Review Procedure (ULURP), which includes review by the relevant community board(s), the applicable Borough president(s), the CPC, and, in many instances, the New York City Council.[14] As a result, obtaining a special permit can be very costly and time-consuming.

One Additional Method

Another method for achieving a transfer of development rights is through the Inclusionary Housing Program (Program), implemented by the Department of City Planning and administered by the Department of Housing Preservation and Development (HPD). Created in 1987, the Program was initially confined to Manhattan's highest density districts: R10 residential districts or R10-equivalent commercial districts.

The Program was expanded in 2005 to include several areas recently re-zoned or in the process of being re-zoned, and to include medium- and high-density districts. The Program is now available in several areas in Manhattan, Brooklyn and Queens, including Fort Greene, Williamsburg, Greenpoint, Park Slope, Bedford Stuyvesant, Woodside, Maspeth, Jamaica, Harlem, West Chelsea, the Hudson Yards site and the Upper West Side.[15]

The Program combines a zoning FAR bonus with various housing subsidy programs to create an incentive for developers to build or

preserve housing units for low- and moderate-income families.

In order to take advantage of the full bonus, developers must devote at least 20 percent of the total residential floor area to units which must be affordable to households at or below 80 percent of Area Medium Income. In most areas where the Program is available, the amount of bonus floor area is determined by the amount of lower-income housing provided; for each square foot of housing the developer is eligible for 1.25 square feet of bonus FAR.[16]

The FAR bonus generated by building or preserving affordable housing units under the Program can be transferred to other developments off-site. The receiving site must be located within the same community district, or within an adjacent community district within a half-mile of the sending site, i.e., the site receiving the FAR bonus.[17] In order to transfer the FAR bonus (sometimes referred to as "inclusionary air rights"), HPD must issue either a Certificate of Eligibility, or a letter certifying that the sending site developer has entered into a regulatory agreement with HPD and that the "inclusionary air rights" may be allocated to the receiving site.

Future Trends

While TDR deals may slow for a period, given current market trends and construction financing issues, millions of square feet of development rights in New York City remain unused. Many of these unused development rights come from sites owned by governmental or quasi-governmental entities. These entities are not subject to city zoning laws, leading to fears that these entities will sell off their development rights and yet still be able to enlarge or redevelop their properties.[18]

In addition, governmental entities are not subject to the city's ULURP review process, so community groups and neighboring land owners have no formal opportunity to weigh in on these transfers. Recent examples of such transfers include the sale by the U.S. Postal Service of TDRs from Cooper Station in the East Village and the Times Square Station on West 42nd Street.[19] The threat of possible sales by the New York City Housing Authority of some 30 million square feet of TDRs has led to a call for some kind of public oversight of these sales.[20]

Public opposition to zoning lot assemblages has already led to imposition of height limits and creation of contextual districts, sometimes called "downzoning," in certain areas. This tends to decrease the demand for TDRs as the possible size of receiving sites are restricted. On the other hand, the recent addition of special zoning subdistricts, such as in the West Chelsea High Line area, has created alternative TDR markets.[21]

The role of TDRs in public-private partnerships will likely continue to expand. Over the past several years the New York City Department of Education has become increasingly involved in a long dormant program involving the sale or lease of development rights over the city's existing public school buildings to developers, in exchange for new schools to be built at the developer's expense.[22] Meanwhile, the recent expansion of the Inclusionary Housing Program reflects a trend toward greater utilization of TDRs as an incentive to build affordable housing; this trend will likely continue as New York City's need for affordable housing continues to grow.

Finally, recent favorable tax treatment may also increase the popularity of TDRs. On Feb. 1, 2008, the IRS issued Private Letter Ruling Number 200805012, which concluded that development rights are "like kind" to fee interests in a property and may be included in an exchange under §1031 of the Internal Revenue Code. Given these and other trends, it is likely that TDRs will continue to be a valuable asset in the quest to preserve the city's past and shape its future.

1. See ZR §74-79 et seq. These provisions were expanded in 1969 and have been amended several times, most recently in 2007.

2. NYC Ad. Code §§25-301 et seq. TDRs have been held to be a mitigating factor in so-called "regulatory taking" or "inverse condemnation" cases. See e.g., *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Peck Slip Assoc. LLC v. City Council of the City of New York*, 789 N.Y.S.2d 806 (Sup. Ct. N.Y. Co., 2004), aff'd, 26 A.D.3d 209 (1st Dept., 2006); cf. *Fred F. French Investing Co. v. New York*, 39 N.Y.2d 587 (1976).

3. See Gen. City Law §20-f; Town Law §261-a; Village Law §7-701.

4. See *United States v. Causby*, 328 U.S. 256 (1946).

5. Id. See also *Wing Ming Properties, Ltd. v. Mott Operating Corp.*, 79 N.Y.2d 1021 (1992); *3775 Genesee Street Inc. v. State*, 415 N.Y.S.2d 575 (Ct. Claims, 1979).

6. ZR §12-10.

7. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

8. See ZR §77-01. Zoning districts govern the permitted use of a property and have distinct bulk, height, setback and other regulations. The three main types of zoning districts are residential, commercial, and manufacturing.

9. ZR §12-10. These provision incorporate the definition of "party in interest," which was amended in 1977 to eliminate lessees as possible parties in interest, a provision which proved to be problematic. See e.g., *Newport Assoc. Inc. v. Solow*, 30 N.Y.2d 263 (1972).

10. See e.g., *383 Madison Assocs. v. City of New York*, 193 A.D.2d 518 (1st Dept., 1993); see also David Dunlap, "Real Estate: Plan to Ease the Transfer of Air Rights," N.Y. Times, Nov. 15, 1989.

11. See e.g., William Nueman, "Selling the Air Above," N.Y. Times, March 5, 2006; David Dunlap, "Using Thin Air to Let Buildings Grow Taller," N.Y. Times, May 17, 1998.

12. The constitutionality of these special zoning subdistricts has so far been upheld. See e.g., *Fisher v. Giuliani*, 280 A.D.2d 13 (1st Dept., 2001).

13. See ZR §§ 81-63, 81-744, 91-64 and 94-01.

14. See ZR §74-79 et seq.

15. See ZR §23-922.

16. See ZR §23-90 et seq.; see also New York City Zoning Reference, Residential Districts: Inclusionary Housing, NYC Department of City Planning, 2008.

17. See ZR §23-951 et seq.

18. See e.g., *St. Ann's Comm. v. Hudson 12th Dev. LLC*, No. 111100/06, 206 N.Y. Misc. LEXIS 2632 (Sup. Ct. N.Y. Co., Sept. 20, 2006).

19. See John Freeman Gill, "Uncle Sam Sells Air Rights, and Preservationists Cringe," N.Y. Times, Aug. 7, 2005.

20. See e.g., Peter Kiefer, "City Housing Authority May Sell Off its Air Rights," The New York Sun, Aug. 4, 2008.

21. See ZR §98-01 et seq.

22. See John Tozzi, "Private Developers Help Squeeze in More Desks for City Schools," The Real Deal, Jan. 2, 2008; C.J. Hughs, "Air Rights, Swapped for Schools," N.Y. Times, Dec. 16, 2007.