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# Buying And Selling Air Rights In New York City: Part 1

By **Robin Kramer**

Robin Kramer

The transfer of air rights (also referred to as developments rights) to a development site is often utilized by developers to facilitate construction of a taller building on the development site than would have been possible had such rights not been transferred. This article discusses air rights in New York City: what they are, the as of right (i.e., without government approval) acquisition of air rights, and the documents necessary to acquire such rights for development of land.

## Definitions

There is no legal definition of air rights or development rights. Those terms are not defined in the Zoning Resolution of the City of New York (zoning resolution), the New York City Building Code, the New York State Multiple Dwelling Law or any other law that governs the development of land in New York. Instead, "air rights" and "development rights" are simply commonly used terms for the unused buildable capacity of a site. It should be noted that the zoning resolution includes several techniques for acquiring air rights which are beyond the scope of discussion of this article, including by providing affordable housing, by transfer from a theater in the Theater Subdistrict, by transfer from landmark properties, by transfer from lots under the High Line and in accordance with other provisions that are applicable only within a specific geographic area.

The buildable capacity of a development site is dependent on the size of the site, the floor area ratio that is applied to such site by the zoning resolution and the existing built "floor area" to remain. As the size of the site increases, the buildable capacity of such site increases. For all purposes of the zoning resolution, the site which is the basis for the calculations of the amount of floor area that can be developed is the zoning lot (see below for definition).

Certain terms are defined in the zoning resolution, and an understanding of such terms is a prerequisite to an air rights deal. Note that the below definitions are simplified definitions and for the actual definition it is necessary to look at the language of the zoning resolution.

*Zoning lot*. Generally, a zoning lot is (a) a tax lot that has not been joined with another tax lot, or (b) two or more tax lots that have been joined together to form a single zoning lot pursuant to the procedures in the zoning resolution. It should be noted that adjacent tax lots that were in the same ownership in 1961 and at certain other times may be considered a single zoning lot in certain situations.

*Floor area and floor area ratio*. The zoning resolution regulates the floor area in a building. Floor area is defined in the zoning resolution. Generally, it is the total space within a building measured from the exterior faces of exterior walls, subject to a variety of exclusions for cellars, certain mechanical spaces and other areas, and given that space in some balconies and other partially unenclosed spaces may count as floor area. The floor area of a building for zoning resolution purposes is not the same as gross floor area or buildable floor area. For clarification, the term floor area in this article means the floor area as defined in the zoning resolution unless otherwise specified. The floor area ratio (FAR) is the number that relates the size of a zoning lot to the amount of floor area that can be built (lot area multiplied by FAR yields the amount of floor area that can be built).

*Air rights lot*. The air rights lot is the property from which floor area is being acquired.

*Zoning lot merger*. To acquire floor area from the air rights lot, the air rights lot must become part of the same zoning lot as the development site. The zoning resolution establishes two basic conditions for the merger of two or more lots into a single zoning lot (a zoning lot merger): each tax lot to become part of the zoning lot must be contiguous with another lot in the zoning lot for at least 10 linear feet, and all parties in interest must consent to the merger (see discussion below on parties in interest).

## Creation of Single Zoning Lot / Zoning Lot Merger

Where the development site and the air rights parcel are in separate ownership, a single zoning lot can only be created by execution and recordation of a declaration of zoning lot restrictions (referred to in this article as a declaration). All parties in interest identified in the parties in interest certification (as discussed further below) must execute the declaration or waive their rights to execute the declaration by a written instrument recorded prior to or simultaneously with the declaration.

It should be noted that you cannot record a declaration of restrictions and then obtain waivers; the waivers must be obtained and recorded prior to or simultaneously with recordation of the declaration. If your client is acquiring an assembled site (meaning a development site that already includes more than one parcel from which air rights are being acquired) or is acquiring a site that has a recorded declaration and it plans to enlarge the zoning lot, it is prudent to review all prior declarations, parties in interest certifications and waivers to ensure that all required waivers were recorded prior to or simultaneously with the applicable declaration.

## Preliminary Steps — Ordering Title and Surveys (Pre-Closing)

*Land and Floor Area Surveys*

A preliminary assessment as to whether the tax lots or existing zoning lots are contiguous for at least 10 linear feet can be made by examination of the on-line digital tax map, but the tax map can miss gores and a land survey of the existing lots and/or a review of the existing deeds is critical to ensure that the lots have the requisite contiguity and there are no gores or similar issues.

Buying air rights means buying the excess floor area that has not been used in the building (s) on the air rights lot. Therefore, you need to know how much excess floor area exists; it is only the floor area that is relevant, as there is no zoning resolution limit on the amount of gross floor area in a building. A developer will usually have done some type of online search of public records to determine that there are available air rights, but such searches at most only give information about the gross floor area before exclusions and deductions from gross floor area permitted under the zoning resolution. So, there may be more — or less — floor area available.

If the existing building was constructed prior to 1961 and there has not been any significant alteration, then the amount of floor area is the same as the gross floor area excluding the cellar. An as-built survey of the building, with the dimensions of each floor, will allow for a determination of the floor area.

If the existing building to remain was constructed recently, there may be filed documents (the zoning sheets) at the New York City Department of Buildings (DOB) that show the floor area. Obtaining such documents requires going to the DOB.

However, if the building was constructed or substantially renovated after 1961 and there is no information available at the DOB, you will need a floor area survey to determine the amount of floor area in the existing building and thus the amount of excess floor area that is available for development. Some surveyors will do such a floor area survey, and there are specialized companies that do the floor area calculations but not land surveys. Once a surveyor has prepared an as-built survey of the existing building, an architect may be able to calculate the floor area. The surveyor or architect will need access to the interior of a building to do an accurate floor area study.

In many zoning districts, the maximum permitted FAR will differ for each category of use (residential, commercial (including restaurant, retail and office space), community facility or manufacturing. Therefore, in undertaking the survey of the existing floor area, it may be important to identify the amount of floor area in each use category to determine if there is extra floor area for the use the developer client is proposing.

If the property owner/seller consents, a developer may arrange for the floor area survey before a purchase and sale agreement (PSA) is signed; otherwise, the PSA should provide for the developer to have the right to undertake such a survey between contract and closing.

As discussed further below, some PSAs and zoning lot development agreements (ZLDAs) do not include the specific amount of excess air rights but just provide for the sale of all excess development rights. This is not best practice for either seller or purchaser. If there is no calculation of the amount of floor area in a building, and thus the amount of the excess, disputes between the seller and the purchaser can later arise (even many years later) as to the amount of floor area that existed in the seller's building and the amount that were available for use by the purchaser.

*Title*

The zoning resolution defines "party in interest" to include (i) fee owners; (ii) holders of a recorded interest in the property that is superior to the interest of the owner and by which such holder can obtain possession of the land; (iii) holders of a recorded interest in all or substantially all of the property which would be adversely affected by development or the creation of the single zoning lot; and (iv) holders of an unrecorded interest that would be superior to and adversely affected by its development or the creation of the single zoning lot and which would be disclosed by a physical inspection of the land. The New York Court of Appeals has held that space tenants are not parties in interest. Macmillan Inc. v CF Lex Assocs., 56 N.Y.2d 386.

A title company can prepare a parties in interest certification to identify the parties in interest. The zoning resolution requires that the parties in interest certification be prepared by "a title insurance company licensed to do business in the State of New York;" it does not authorize a parties in interest certification prepared by a title agent or a title abstract company. Although abstract companies commonly undertake such searches and they are accepted by the DOB, the DOB could at some point refuse to accept such certifications if they are not done by a title company. A title report in addition to the parties in interest certification is not required for the enlargement of a zoning lot/zoning lot merger, but it is

advisable to obtain one to ensure that (1) there are no recorded restrictions on the use or development of the air rights parcel, (2) the tax lot that comprises the air rights parcel was not subdivided from a larger lot which may have had such restrictions, and (3) there are no other recorded documents that could interfere with any light and air easement granted pursuant to the ZLDA.

*General Due Diligence*

The creation of a new zoning lot can create zoning issues, including but not limited to the rules related to rear yards, minimum distance between buildings, the applicable set of zoning regulations and restrictions on conversions. These rules can affect both the new building that a developer is planning as well as changes to the seller's building. Therefore, it is important to consider whether a land use lawyer should be engaged to analyze the impact of the new zoning lot.

## Documentation of the Air Rights Purchase and Sale

The following documents are needed for a successful purchase and sale of air rights:

- PSA, which sets forth the agreement of one party to purchase the air rights from another party;
- Declaration, the document that creates the zoning lot that will allow the transfer and use of air rights from the air rights lot;
- Waivers and subordinations from parties in interest (see explanation below) to subordinate their prior interest in the land to the new zoning lot and the zoning lot development agreement (ZLDA) (defined below) and their agreement that the creation of the single zoning lot may proceed; and
- ZLDA, which establishes the rights and obligations of the lot owners on the new single zoning lot.

*Purchase and Sale Agreement*

*Basics*

The PSA for an air rights sale is substantially similar to a PSA for the sale of land, in that it establishes the price, the payment process (including down payment, escrow, interest, etc.), conditions for closing, default rights, notice provisions, representations and warranties, obligations for payment of transfer tax, broker provisions and other general contract provisions. Provisions in a land sale contract that are not part of an air rights PSA include:

- Deed
- Title insurance requirements except as related to air rights and easements
- Provisions relating to existing tenants, leases and existing contracts
- Apportionments
- Anything relating to fixtures or personalty

## Additional Provisions for an Air Rights Purchase and Sale

The following additional or changed provisions are needed in a PSA for an air rights transaction:

*Defined terms*. As the PSA is for the sale of air rights, or floor area, and the associated creation of the merged zoning lot, the PSA needs to include definitions of such terms. Best practice is to use the same definitions as are used in the ZLDA to avoid inconsistencies, even if different lawyers draft the PSA and the ZLDA.

*Survey and calculation of air rights*. If the survey of the available floor area has not been completed by the time the PSA is executed, the purchaser needs the right to enter the seller's land to conduct a floor area survey before closing; this is particularly important if the purchase price is on a square foot basis. Seller's attorney must make sure to include the right to review the survey before it is final, and a requirement that the survey be certified to seller as well as purchaser.

*Title*. The only title insurance that is available in New York state related to the purchase of air rights is a New York City development rights endorsement. No other title insurance is available, and a seller should not agree to anything else. To obtain a development rights endorsement, all parties in interest need to consent to the zoning lot merger and either sign the declaration or waive their rights to sign. Therefore, the purchaser should order a title company to provide a parties in interest certification, which must be delivered to seller's attorney. Seller's attorney should require that the parties in interest certification is delivered promptly after the PSA is signed to ensure that the seller has sufficient time to obtain waivers. The only title-related closing condition in the PSA is that the title company must be able to issue a New York City development rights endorsement, and that all liens and other interests affecting the excess development rights must be removed. If you are representing the purchaser and a light and air easement is being granted, you should obtain affirmative insurance for the easement to ensure that the easement can actually be granted as intended.

Representations and Warranties. In addition to the standard representations and warranties, seller's representations should include that (i) it has not sold, leased or granted an option, right of first refusal or similar right with respect to the air rights; (ii) there are no restrictions on the use of the air rights; and (iii) there is no unrecorded lease or other document that gives a person or entity any rights that would prevent the sale of the air rights. The purchaser will want these representations to be as broad as possible as an additional level of certainty, and the seller will want the representations to be limited to unrecorded agreements, because the parties in interest certification should identify all interests that arise out of recorded documents. If the lot to which the floor area is to be transferred is contiguous to the air rights seller's lot or is part of an already assembled zoning lot that is contiguous to the seller's lot, the purchaser should represent that he or she owns such lot. If the purchaser does not currently own the lot but is under contract to buy the land, seller's attorney should make such acquisition a condition to closing. The purchaser could also acquire an airspace parcel in which to hold the air rights until the lots are contiguous.

*Takings and Casualty*. As the existence of air rights does not depend on existence of a building, and the amount of air rights appurtenant to a lot is unchanged by a casualty, a casualty does not reduce the amount of excess air rights. Therefore, the PSA should state that a casualty does not affect the contractual obligations to buy and sell the air rights. Although a taking is very unlikely to occur, a clause is needed setting forth the rules if a government entity "takes," by eminent domain, any of the land or the air rights. This applies to both the land area as well as the excess floor area: if the area of the seller's lot is reduced, the amount of floor area appurtenant to that lot is concomitantly reduced and there will be less excess floor area. To address a taking and potential reduction in air rights available for sale, the PSA should do one of the following: (i) provide for a minimum number of air rights that must be taken before the PSA is terminated, (ii) provide for a reduction in price if

the number of excess air rights is reduced, or (iii) provide another rule agreed to by the purchaser and seller. The PSA should state that the provisions of the PSA relating to takings and casualty are in lieu of the provisions contained in Section 5 1311 of the New York General Obligations Law.

*Actions between Contract and Closing*. The PSA should provide that between execution of the PSA and closing the purchaser will not (i) use, encumber, grant an option in or transfer the development rights; (ii) subdivide the lot; (iii) apply for or agree to any changes to the zoning; (iv) add any other parties in interest unless such party agrees to execute a waiver and subordination; or (v) take any action that would be prohibited by the ZLDA if it were in effect.

If the purchaser is doing an assemblage and anticipates adding other parcels to the seller's zoning lot prior to the closing, the PSA should allow the purchaser to add other parcels to the zoning lot and make the necessary changes to the declaration, the ZLDA and any other documents, to reflect the expanded lot.

If the closing will not occur for several months, the purchaser may, prior to closing, want to start filing applications with New York City agencies (DOB, Department of City Planning, etc.) for necessary permits or approvals related to development. In such case purchaser will want a provision requiring seller to cooperate and allow purchaser to file such documents. If seller is willing to agree to such cooperation, the PSA should provide that all such cooperation is at the purchaser's costs, including attorneys' and other professionals' fees, and that the purchaser will withdraw any application if closing does not occur.

The purchaser may request that the seller's obligations with respect to the cooperation described above survive the closing. It is better practice to make all rights and obligations that arise after the closing and are related to development controlled by the ZLDA.

## Closing Documents

The PSA should set forth the documents required to close the air rights transaction, and the party responsible for obtaining and delivering such documents at closing. The following closing documents are required for an air rights closing:

- ZLDA (signed and delivered by purchaser and seller)
- Declaration (signed and delivered by purchaser and seller)
- Waivers and subordinations (signed by all parties in interest and delivered by seller and purchaser, as applicable)
- Releases from liens, if applicable (seller responsibility)
- Certificate of nonforeign status (delivered by seller)
- Transfer tax documents (signed by both seller and purchaser)
- Letters restating representations and warranties (from each of purchaser and seller)
- Any other documents required by the title company of seller and/or purchaser

The forms of the declaration, ZLDA and waivers should be negotiated at the same time as the PSA, and copies should be attached to the signed PSA as exhibits.

Seller's attorney should be aware that obtaining a waiver from a lender that is a party in interest is not a certainty, and that there is likely to be a cost — both a fee and lender's attorneys' fees. If representing the seller, you should only agree to use commercially reasonable efforts to obtain the waiver, with a cap on fees and no obligation to litigate. A seller should therefore not agree to a time of the essence closing unless the seller has already obtained the waiver. If the loan is securitized, it may be difficult and very time-consuming or even impossible to get a waiver.

*Declaration*

There is no required form for the declaration; the only requirements are that the declaration declare that the tax lots are to be treated as one zoning lot. The DOB put forth a form of declaration that title companies often prepare whenever a parties in interest certification is ordered, and which is referred to as Exhibit IV. It is not necessary to have the title companies prepare the declaration or to call it Exhibit IV.

If the zoning lot will include more than two tax lots, the zoning lot can be created by a series of declarations, e.g., a declaration between development site and air rights parcel 1 and a separate declaration between development site and air rights parcel 2. The use of a series of tax lots is most commonly done when the tax lots are merged at different times. A single declaration covering all lots is preferable as it clarifies the final zoning lot size and that all parties in interest have either signed the declaration or waived their rights to sign it. If a series of declarations is used, make sure that all waivers for each declaration are signed and recorded prior to the relevant declaration.

If the declaration is in the DOB Exhibit IV form, there is nothing to negotiate between the developer acquiring the air rights and the owner of the air rights parcel selling the air rights because the declaration simply creates the zoning lot.

Although the declaration does not need to include any other provisions, some additional provisions that are desirable for the developer and should not be an issue for the seller of the air rights include (i) a statement that the declaration is subject to the provisions of the ZLDA; (ii) seller's agreement that if the developer enlarges the zoning lot, seller waives its right to sign any new or replacement declaration that does not otherwise harm seller; (iii) and a statement that the zoning lot cannot be subdivided except in accordance with the zoning resolution.

*Waivers*

The form of required waiver should be attached to the PSA as an exhibit. The simplest waiver would be in the form included in the DOB Exhibits as Exhibit V, and simply state that the party waives its right to sign a declaration that the various lots make a single zoning lot. A developer will want the waivers to include (i) a subordination by the party in interest to the ZLDA, (ii) an agreement that the waiver extends to amendments of the declaration to expand the zoning lot and amendments of the ZLDA, and (iii) waiver and subordination to future agreements related to the transfer of development rights or other agreements that the developer may need.

This concludes the first part of this article. Part 2 will follow tomorrow.

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*Robin A. Kramer is a partner with Duval & Stachenfeld LLP in New York.*

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# Buying And Selling Air Rights In New York City: Part 2

By **Robin Kramer**

This is the second part of this article. Read the first part here.

Robin Kramer

## ZLDA: Allocation of Development Rights and Control of Future Activities on Zoning Lot

As noted previously, the declaration creates the zoning lot. However, the declaration has nothing to do with the allocation or use of the development rights / floor area on the zoning lot. If the zoning lot is created but there is no agreement allocating the floor area on the zoning lot, than either party can theoretically go to the New York City Department of Buildings and get a building permit for a building that includes all unbuilt floor area. Note that there is no clear case law that resolves the issue of whether the purchaser of air rights, in the absence of a recorded zoning lot development agreements or other document stating that only the developer/purchaser has a right to the purchased floor area, is entitled to compensation, on an equitable basis or otherwise, where the seller uses the excess floor area, even if the developer paid for such floor area.

The document that allocates the floor area and establishes the rights and obligations of the lot owners and to some degree controls development on the zoning lot is the zoning lot development agreement, also called a zoning lot development and easement agreement (ZLDA, commonly pronounced Zelda.)

*General Outline/Minimum Standards of ZLDA*

The following provisions are generally included in a ZLDA (explanations below):

- Definitions
- Transfer of floor area to the developer
- Grant of light and air easement
- Downzoning and upzoning
- Cooperation obligations
- Expansion of the zoning lot
- Enforcement rights

Other general provisions:

- *Notice*. It is customary to include a statement in the form of a notice to all that the transfer of floor area has reduced the amount of floor area available to the seller/owner's property and increased the amount of floor area available to the buyer/developer's property, including a statement of the amount of such reduction and increase.
- *Separate Tax Lot*. A statement that the property belonging to each party will remain a separate tax lot to be taxed separately, and that if the owner is taxed on the floor area transferred to developer, the developer will take all necessary actions to correct and will pay all related costs. Although taxes are not currently assessed based on unbuilt air rights, this could change in the future.
- *Condominium Rights*. Rights of parties to create condominiums on their tax lots.
- *Boilerplate*. General contract provisions including notice, statement that the agreement runs with the land, interpretation assists, court of jurisdiction, etc.

As with most legal agreements, ZLDAs begin with explanations and rationales, in the form of whereas clauses/recitals. The recitals should state the parties' ownership positions (meaning the address, block and lot that each party owns); their intent to create a single zoning lot, or, if the ZLDA is part of an assemblage that has already been partially assembled, a statement as to the existence of a combined zoning lot and the intent to add the new property to the existing combined zoning lot; and the purpose of the ZLDA, i.e., to transfer floor area and regulate the rights and obligations of the parties to the ZLDA.

In a ZLDA, the purchaser is often called the developer and the seller of air rights, the owner.

*Definitions*

The most important definitions in a ZLDA are the definitions of exactly what floor area is being transferred to/acquired by a developer and what floor area is retained by an owner. The floor area being transferred to the developer falls into two main categories: the excess floor area that is measured by multiplying the lot area of the seller/owner's lot by the maximum as of right floor area ratio and then subtracting the existing floor area, sometimes referred to as excess development rights, subject floor area, or subject floor area development rights; and all other floor area that can accrue to a zoning lot, such as from zoning bonuses or from upzonings.

With respect to the excess floor area measured by multiplication and subtraction, the ZLDA should specify the amount of floor area, based on a specific square footage, that is being transferred.

With respect to all other possible floor area, the definition of the excess floor area should clearly indicate whether it includes the right to use the seller's/owner's land in calculating additional floor area that may be obtained from a bonus, such as for providing a public plaza or inclusionary housing, or in connection with a special permit or other discretionary approval; it is also possible to have a specific provision that states that the purchaser / developer may use the lot area of the seller's/owner's lot in calculating the floor area. These definitions are critical to avoid future issues as to what each party has in the event of future changes to the zoning resolution and/or the zoning lot.

For clarity, there should be a definition of owner floor area, what the seller/owner is retaining, and developer floor area, what the purchaser / developer has. The owner floor area would include the floor area in the existing building, any additional floor area that the purchaser/owner is retaining to enlarge its building, any upzoning rights and/or bonus floor area rights that the purchaser/owner has. The developer floor area would include the floor area on the existing lot owned by the developer, the excess floor area it acquires from the seller/owner (both as of right and bonus), any floor area the purchaser / developer has

acquired or will in the future acquire from other lots in the zoning lot, and upzoning rights.

*Transfer of Floor Area to the Developer*

The ZLDA is the functional equivalent of a deed, in that it is the document/agreement that actually transfers the development rights. A developer should ask for the right to use the purchased development rights on any other land that is included in the zoning lot in the future (see discussion below under expansion of the zoning lot) or to transfer the purchased development rights to any other land as permitted by law. An owner's zoning counsel should consider whether the enlargement of the zoning lot would have any potential issues for the owner's property, such as downzoning or subjecting the property to additional zoning controls, and add limits if necessary.

The following language is common:

> "Owner hereby transfers and conveys the [Excess Development Rights] to Developer in perpetuity for Developer's use and incorporation thereof into a New Developer Building, the Development Site and/or any Additional Parcels brought into the Combined Zoning Lot by Developer, subject to the provisions of this Agreement. Owner acknowledges and agrees that the Owner Parcel shall have no rights at any time to the use or benefit of any Additional Development Rights available to the Combined Zoning Lot. Developer may include the lot area of the Owner Land in any application to any Agency in connection with Developer's acquisition of any Bonus Floor Area and/or any Additional Development Rights for purposes of calculating the maximum amount of Bonus Floor Area and/or the Additional Development Rights Developer is allowed to utilize pursuant to the zoning resolution and the provisions of this Agreement. Subject to the provisions of Section ___ hereof [relating to downzonings], Owner shall retain all rights in and to the Owner Development Rights."

*Light and Air Easement*

It is common for the ZLDA to include the grant to the developer of a light and air easement over the owner's building. Although a light and air easement is not necessary to transfer floor area, the ability to have light and air over the owner's building may be a

critical element of the new development because it allows "legal light and air" to certain rooms ("legal light and air" means the light and air required by the Multiple Dwelling Law for bedrooms and certain other rooms). Most commonly there is no charge for such easement. Even if the purchaser / developer does not need the easement for "legal light and air," e.g., if the new building will be more than 30 feet from the seller's/owner's building or if the new building will be an office building, the purchaser / developer may want a light and air easement to provide views.

One issue that arises relating to the light and air easement is the height at which the easement will begin. A developer will want the owner limited to the existing physical configuration of the owner's building, including bulkheads, chimneys and other items on the roof, so that he or she can locate windows. If the owner is not planning on any expansion, and has not retained any floor area to do so, the main issue with such a restriction is the future right to move existing or place new mechanical equipment on the building's roof.

Rather than just grant an easement over "the existing building" or some specified height above the existing building, the owner should require the developer to obtain an elevation survey showing the height of the roof and all elements on the roof, such as bulkheads, chimneys and mechanical equipment, which survey should be attached to the ZLDA. Then the easement should either be over the envelope of the existing building as shown on the survey, or the elevation of the bottom of the easement should be specified. Where the easement is over the existing envelope, an owner must also have the right to relocate existing or install new roof equipment and mechanicals; it is acceptable to agree to a restriction on the height of the roof elements so that the developer can design his or her building.

The DOB requires a specific form of light and air easement for an easement that will be used to provide legal light and air. The ZLDA should include the owner's obligation to sign the DOB form of easement. Alternatively, the DOB form can be attached to the PSA and signed at the closing.

*Downzoning and Upzoning*

If there is a downzoning on the zoning lot (meaning a reduction in the amount of floor area available to the zoning lot) and one or more buildings are demolished (whether by choice or by casualty), the amount of floor area available for the rebuilding will be decreased. The ZLDA should contain a statement as to the effect of a downzoning on each party's development rights and right to rebuild in three different scenarios: (i) only one of the buildings on the zoning lot is demolished; (ii) more than one but not all the buildings on a zoning lot are demolished; and (iii) all of the buildings on a zoning lot are demolished. The chart below sets forth appropriate provisions for each of the three scenarios:

| Condition | Effect |
|---|---|
| Only one building is demolished | All other buildings remain regardless of the impact on the potential rebuilding of the building that was demolished, even if it prevents such rebuilding |
| For multi-building zoning lots, more than one but not all the buildings on the zoning lot are demolished | Buildings that are not demolished remain regardless of the impact on the potential rebuilding of the building that was demolished, even if it prevents such rebuilding. The buildings that were demolished split any floor area that remains available on the zoning lot, in the proportion of the floor area that each building contained or had the right to contain pursuant to the ZLDA prior to the downzoning. |
| All buildings on a zoning lot are demolished | The buildings split any floor area that remains available on the zoning lot, in the proportion of the floor area that each building contained or had the right to contain pursuant to the ZLDA prior to the downzoning. |

The above provisions could differ in other situations, for example if there are multiple new buildings on a zoning lot.

The ZLDA also needs to include a provision regarding the use of additional floor area if there is an upzoning (meaning an increase in the amount of floor area available to the zoning lot). Common allocations of upzoning in the ZLDA are: (i) the developer has the right to all increased floor area from an upzoning; (ii) the developer has just the floor area attributable to the developer's lot; (iii) each party owns its proportionate share of an upzoning, based on the amount of floor area that each property has before the transfer compared to the total floor area available on the zoning lot; or (iv) any other distribution of the upzoning rights the parties agree to.

If the air rights purchase will be part of a large assemblage with many separately owned properties, the developer may want, as an exhibit to every ZLDA, a table that shows both the absolute amount of floor area belonging to each party and the percentage of the floor area available to every lot owner in the zoning lot.

*Limitations on Development*

The ZLDA should include a separate covenant/agreement by each party not to take any action on its tax lot that would create a new non-compliance or increase the degree of a non-compliance by its respective building with the zoning resolution or use any floor area allocated to another parcel on the zoning lot.

Although the DOB reviews filings for every building separately, as such filings reflect the floor area on the entire zoning lot, and concurrent applications of two buildings on a zoning lot could theoretically cause delays in processing at DOB, a developer may want to restrict an owner's right to file any applications, or at least applications to change use or enlarge owner's building, at the DOB until the developer's new building has a temporary certificate of occupancy (TCO) or certificate of occupancy (CO). Depending on what the owner is doing on its property, it may be reasonable for the owner to agree not to change the use in its building, add floor area, or make certain other filings at DOB, but an owner should ask for a time limit on such restriction apart from the TCO, to prevent the situation where construction is delayed. If the owner agrees to limit his or her right to file applications at

DOB until the developer gets its TCO, the ZLDA should state whether it is the first TCO or the TCO for the entire building.

The DOB may require that the owner amend its CO to reflect that the parcel is now part of a larger zoning lot; if the owner's building has no certificate of occupancy, the DOB may require some notation in the DOB record for such building that there is now a combined zoning lot. The developer will want the owner to agree to take such actions as are needed to make such change in the CO or DOB records, and this is reasonable for the owner as long as all documentation is prepared by the developer for owner's reasonable review, all at the developer's cost.

Both parties must covenant not to create any violations of law that would adversely affect development on the other party's property. The degree of adverse impact is negotiable; it could be those violations that have a material impact or those that have any negative impact except de minimis impacts, or any other degree. One possible definition of such violations is violations of law that would:

(i)prevent, materially delay or hinder or otherwise adversely affect the issuance or maintenance of a temporary or permanent Certificate of Occupancy for any building located on the [zoning lot] or (ii) prevent, materially delay or hinder or otherwise adversely affect the issuance or maintenance of a building permit or any other permits or approvals required by law to build on any parcel that is part of the [zoning lot] or (iii) create a new or increase an existing non-compliance by any building or nonconformance of any use located on the [zoning lot] with the zoning resolution.

*Cooperation Obligations*

As the owner's and the developer's properties will be part of the same zoning lot, the owner and the developer need to cooperate with each other regarding applications to the DOB and other city agencies, including any applications for discretionary approvals. Early ZLDAs generally only obligated the owner to cooperate with the developer, but it is more common now for the ZLDA to mandate cooperation by both parties.

The parties should agree to cooperate, subject to the limitations that (i) applications are consistent with other provisions of the ZLDA, (ii) applications are for construction that does not reduce the owner's rights to its retained floor area, (iii) such cooperation does not create any non-compliance with the zoning resolution or other laws, and (iv) such cooperation is at the other party's expense for out of pocket costs, such as attorneys' and architect's fees. The developer will want the owner to be obligated to sign any applications submitted to New York City related to such development, and should ask for the right to sign as attorney in fact and agent for the owner if the owner refuses to sign. This is not unreasonable for an owner, as long as such power of attorney is limited to specific documents and he or she has sufficient time to review the documents and she gets some kind of reminder as to the fact that if she doesn't sign then the developer can sign. The developer will want the rights of cooperation to include discretionary applications. The owner should be prohibited from opposing any such obligations if it meets the same test as other cooperation. An application to New York City for a discretionary approval may require that the developer sign and record a restrictive declaration, and that all parties in interest to the zoning lot sign, or waive their respective rights to sign, the restrictive declaration. The developer should ask for the owner's cooperation to include the obligation of the owner and its lenders to sign or waive to such restrictive declarations. Owners should be cautious in agreeing to sign or waive their rights to sign restrictive declarations to ensure that it doesn't impose any obligations on her, and any such agreement should be subject to the owner's reasonable approval.

The developer may want the right to review all applications filed by the owner with any city agency for construction. If you are representing the owner, note that any such review right

should be limited to determining consistency with the ZLDA.
If the owner is also doing construction, the cooperation rights will need to be reciprocal.

*Expansion of Zoning Lot*

If you are representing the developer, make sure to obtain the right to expand the zoning lot to add other parcels of land and/or buy development rights from other land to increase the size of a building. Such a provision should be included even if there aren't any current plans to expand the zoning lot. The provision should state that all parties in interest to the zoning lot consent to such expansion and waive their right to sign any documents related to such expansion, which waiver and consent applies regardless of whether the applicable party in interest signs such documents, but should include an obligation by the parties in interest to execute any additional documents confirming their waiver. In addition, the provision should include a detailed list of all possible documents that the developer may need to execute in order to undertake such expansion. This should include the obligation of the owner to cooperate with the developer and sign or obtain the signatures of other parties in interest if needed. All such cooperation would be at the developer's cost and expense, including reasonable attorneys' fees.

If you are representing the owner, make sure that the developer's right to expand the zoning lot is limited to actions that do not violate the ZLDA or the zoning resolution and do not reduce owner's rights under the ZLDA. In particular, the owner should not be obligated to obtain any additional waiver from a lender, but could agree to reasonable efforts to obtain same. The owner should ask for a provision that any future ZLDA executed by the developer in connection with the expansion of the zoning lot will include agreements by the owner(s) of the land(s) that are the parties to such future ZLDA(s) that he will not use any of the owner's development rights and not do anything that would create a violation of the zoning resolution that would negatively affect the owner. The developer will then want reciprocal language, as follows: "Owner agrees that any owner of any [land] which is included in the [zoning lot] shall be deemed to be a third party beneficiary of the development limitations set forth in the ZLDA [or a specific section of the ZLDA] with respect to the Owner's property and shall be entitled to enforce such limitations against Owner." The developer will want to ensure that its obligations with respect to future ZLDAs are limited to "commercially reasonable" obligations to obtain such language in the future ZLDA.

*Enforcement / Violations*

Parties to a ZLDA should have the right, after notice and an opportunity to cure, to enforce the ZLDA as well as those violations that adversely affect the development of or maintenance of a CO for the other property. Enforcement should be by an action for specific performance or other court action.

In addition, either party may want to include a right of self-help, meaning the right to enter onto the other land to cure any violations, and then sue for the costs incurred in such cure. Although this self-help right would be mutual, developers, who are undertaking major construction, are more likely to be concerned about having to go to court to enforce the ZLDA, which could be time-consuming and delay their development project. It is very unlikely that either party would actually engage in such self-help, because of the potential for damages to the party performing the self-help. If self-help is permitted, a limit would be indemnification for any damages caused thereby. Damages may also be permitted; both parties will want to make sure that the party in violation is only liable for damages up to the value of the property.

*Easements for Access, Construction Protections and Preconstruction Surveys*

Developer will want various easements from the owner in the ZLDA to facilitate

construction, including the following:

- An access easement to conduct a pre-construction survey. A pre-construction survey is useful for both the developer and the owner – to know the existing condition of the owner's building so that the developer can take necessary precautions if there are issues and repair any construction-caused damages, and, for the developer, to prevent claims of damages that may not have been due to the construction.
- Easement to install construction protections on the owner's building, construction fence, protective coverings, and similar items.
- Easement to allow for installation of shoring or other foundation supports.
- Right to relocate flues and chimneys on the owner's lot if they would cause a violation of the building code when the developer's building is built.
- License for actions that would facilitate construction by the developer, such as a right to swing a crane over the owner's property.

The ZLDA should make clear which of these are temporary and should be licenses and which, if any, should be permanent.

If you are representing the owner, make sure that any such licenses and easements protect your client and do not cause an unsafe condition. Reasonable limits are that the access is limited to activities required by law or good construction practice; that only listed actions are permitted; and that the access is only for a limited time, e.g., until developer's TCO. The licenses and easements should only be exercisable if the work complies with law, if the developer and its contractors carry sufficient insurance (and the minimum and types of insurance can be specified), and provided that the developer indemnifies the owner for damage related to construction and for all claims related to such construction. Desirable language would be that such rights:

> shall be exercised (i) in a prompt, safe and efficient manner and so as not to unreasonably interfere with the use, occupancy or structural integrity of the Owner Parcel or the buildings and improvements thereon (consistent, however, with good construction practice); (ii) taking such precautions as may be necessary or appropriate to prevent damage to the Owner Parcel or injury to persons; and (iii) so that on completion of any work, the area of any such work is restored to its former condition (insofar as possible) with all debris removed; and (iv) in compliance with law and with all necessary government approvals and permits if any are required.

The owner may want the right to review plans for any work proposed to be done pursuant to such easements/licenses, especially if there is any shoring or underpinning or other physical changes to the owner's property. Additional language may also be appropriate if the owner's building is a landmark or if there are particular concerns.

*Subdivision*

The ZLDA should state that the owner cannot subdivide the new zoning lot; the developer should be permitted to subdivide the zoning lot if no noncompliances with law are created or increased for the owner. There should be a provision allowing each party to subdivide its tax lot, such as to create a condominium on its lot.

## Final Thoughts

The above discussion pertains to common ZLDA issues and does not include all provisions that can or should be included in a ZLDA, which will depend on the particular development plans. In particular, there are several situations where other provisions will be required, including if one of the parties to the transaction is a condominium, if the developer wants a cantilever, if the developer is a ground lessee and if the developer will not own a contiguous parcel by the closing and wants to acquire an airspace parcel until the developer's land is contiguous.

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*Robin A. Kramer is a partner with Duval & Stachenfeld LLP in New York.*