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Zoning in the Fourth Dimension

I. Introduction

The twin themes of sustained growth and complementary land use controls have hallmarked the metamorphosis of New York City. Historically, technical advancements in building techniques in the late 19th century, along with the City's centralized location, assured the city of tremendous continuous real estate development. Aided by steel beam construction, the elevator and electricity, New York in a 30 year interval evolved from a horizontal city to a vertical metropolis.¹ Seeking to evolve with and regulate the City's transformance is the law of land use controls.²

Traditionally, the City's planning bodies have sought to draft regulations to enhance urban growth while protecting the rights of individual inhabitants.³ The City's present Planning Commission, in particular, has developed certain planning methods to expedite the regulation of urban development.⁴ Some of the more expeditious measures have caused

1. See Alan, *Development Rights Transfer in New York City*, 82 Yale L.J. 338, 341-44 (1972).

2. This evolution has been illustrated in E. Basset, *Zoning* (1940) and S. Toll, *Zoned America* (1969).

3. See generally New York City, *Zoning Handbook*, DCP 81-10 (5th ed. 1981). See also Alan, *supra* note 1, at 338, and New York, N.Y., *Zoning Res.* §§ 31-00(g) and (k). These sources state a dual legislative purpose which is to promote development, while at the same time ameliorating the adverse effects of intensive development.

4. See Alan, *supra* note 1, at 347-348; New York, N.Y., *Zoning Res.* § 12-10 (1981) (which allows development capacity to be transferred to a contiguous lot); *Id.* at § 74-79 (1981) (which allows development capacity to be transferred beyond a contiguous lot for buildings that have been landmarked). See also *Id.* at § 74-95 (1984) (allowing for 20% additional floor area for complying with the Housing Quality Development Program), and *Id.* at §§ 81-50 to 53 (which allows for additional floor area upon contribution of a public amenity). See generally N. Marcus & M. Groves, *The New Zoning: Legal Administrative and Economic Concepts and Technology* (1970); Marcus & Elliot, *Euclid to Ramapo: New Directions in Land Development*, 1 Hofstra L. Rev. 56 (1973). These sources discuss the implementation of these new devices and the creation of a single zoning authority.

great controversy in the courts.⁵ One of the more controversial planning methods is the "zoning lot merger" or "transferable air right" which is a form of transferable development rights.⁶

The zoning lot merger law has raised environmental issues regarding its adverse affect on the City's ability to control the density levels of the urban population. Moreover, the law has created a controversy with respect to such legal issues as the equitable allocation of these transferable development rights, and the nature of the interest that is being transferred. This study will analyze the zoning lot merger law by examining its history, environmental impact, recent court decisions and possible legal precedents in order to illustrate its deficiencies and elucidate on a more coherent legal and equitable interpretation.

II. History of the Zoning Lot Merger And Urban Density Planning

The 1916 Zoning Resolution established the City's first comprehensive zoning plan.⁷ The purpose of this plan was to ameliorate the effects of huge shadows cast by the first skyscrapers upon the surrounding urban community.⁸ Building

5. Litigation involving transfers of air rights or zoning lot mergers is discussed *infra*. Bonus zoning issues have also been a source of legal contention. See *Trinity Place Co. v. Finance Adm'r of N.Y.*, 38 N.Y.2d 144, 341 N.E.2d 536, 379 N.Y.S.2d 16 (1975); *Trump-Equitable Fifth Ave. Co. v. Gliedman*, 87 A.D.2d 12, 450 N.Y.S.2d 321 (1982); and *Asian Am. for Equality v. Koch*, No. 22491/83, slip op. (N.Y. Sup. Ct. Aug. 6, 1984).

6. Transferring development rights is defined in New York, N.Y. Zoning Res. § 74-79 (1981) and zoning lot is defined in § 12-10; see *infra* note 21 and accompanying text, and *infra* note 53 and accompanying text where the court attempts to distinguish a transfer of development rights from a transfer of air rights; and see generally Marcus, *Air Rights Transfer in New York City*, 36 Law & Contemp. Probs. 372, 374 (1971) where the General Counsel of the City Planning Commission explains the zoning lot merger as a transfer of air rights. But see Alan, *supra* note 1, at 338 n.4, and *infra* note 161 and accompanying text.

7. Alan, *supra* note 1, at 338-40, and Zoning Handbook, *supra* note 3.

8. The development of modern day area zoning in New York is attributable to the construction of the Equitable Life Building in 1916 whose structure cast a shadow of seven acres over lower Manhattan effectively shutting off sunlight from surrounding buildings. New York courts have rejected the common law right to light that existed in England. Zoning may be seen as statute replacing the common law doctrine with bulk, height and setback limitations. Coinciding with the development of area

development, under this comprehensive plan,⁹ was regulated through height and set back limitations¹⁰ which limited the size of buildings.¹¹ City planners soon came to realize that height and set back limitations, while altering building forms, still permitted the crowding together of structures and encouraged separate building design.¹² Furthermore, these limitations failed to directly regulate the density of the working force, and this failure subsequently led to strains on municipal services.¹³

A. Urban Density Controls

Ultimately, city planners discovered that direct regulation of density could be best achieved through a floor area ratio (FAR).¹⁴ The FAR concept was first employed in the 1940s,

zoning was the concept of use zoning, which arose out of fears by affluent Fifth Avenue inhabitants of the spread of the garment industry. See Alan, *supra* note 1, at 340-44. See, e.g., S. Toll, *supra* note 2, at 158-59.

9. N.Y.C. Charter & Admin. Code § 197(a) (Supp. 1977) defines comprehensive plan:

The city planning commission shall be responsible for the conduct of planning relating to the orderly growth and improvement and future development of the city, including adequate and appropriate resources for the housing, business, industry, transportation, distribution, recreation, comfort, convenience, health and welfare of its population. . . .

10. New York, N.Y. Zoning Res. § 12-10 (1981) defines "height factor" as, "equal to the total floor area of the building divided by its lot coverage." Setback is defined by New York, N.Y. Zoning Res. § 81-261 (1982) as, "[a] line drawn parallel to a street line and showing for a given building height the minimum depth to which a building's front wall is required to be set back from the street line by the applicable depth to height chart." These factors are said to regulate the bulk of a building.

11. See Alan, *supra* note 1, at 342-43. The 30 years following the enactment of the zoning resolution witnessed rapid real estate development in the midtown area. For reference to this growth, see generally *id.* at 432, and Toll, *supra* note 2. See also Rifkin, *TDR's are a Growth Industry in the Regulation of Land Use*, 136 N.Y.L.J. at 34, col.3 (Nov. 18, 1981).

12. See Alan, *supra* note 1, at 344.

13. Height and bulk limitations may be overcome by compacting ceiling space. *Id.* at 346; see also Comment, *Building Size, Shape and Placement Regulations: Bulk Control Zoning Reexamined*, 60 Yale L.J. 506, 514-15 (1951).

14. This ratio represents the total allowable floor area of a building divided by its lot area. For example, a 10,000 sq. ft. lot with a FAR set at 12 would have a 120,000 sq. ft. maximum floor area, and consequently a lot zoned for a FAR index of 15 would have a 150,000 sq. ft. maximum floor area space. See *Zoning Handbook*, *supra* note 3, at 9 (5th ed. 1981). By directly limiting the available working floor area,

but for reasons traced to conflicting political interests, it was not fully incorporated as a land use control device until the 1961 zoning resolution amendment.¹⁵ The FAR controls, contemplated by city planners, were seen by developers as a limitation on the growth of their industry.¹⁶ Developers argued that setting the FAR too low would make it impossible to erect the type of building being demanded by their corporate sponsors.¹⁷ Furthermore, the developers explained that FAR limitations on small size lots would make a building less efficient because relatively more space would be consumed by elevator shafts and other service structures.¹⁸ The competing factions eventually compromised.

The compromise employed two innovative planning devices.¹⁹ The first device known as a "bonus device," permitted the developer to increase his floor space by twenty percent if he in return incorporated into the development a public amenity. The second device, and the one which would prove more costly, was the "contiguous lot assemblage siphoning principle" or "zoning lot merger" for short.²⁰ The zoning lot merger was created by liberalizing the definition of the zoning

the FAR was able to directly affect the size of the work force. Thus, by doubling the FAR index on a given lot, theoretically you would be doubling the size of the work force. See also Alan, *supra* note 1, at 345-46, and New York, N.Y. Zoning Res. § 12-10 which defines floor area as "the sum of the gross areas of the several floors of a building or buildings measured from the exterior faces of exterior walls or from the center lines of walls separating two buildings. . . ." This concept includes the basement, elevator shafts, penthouses, attic spaces, terraces, covered plazas, accessory buildings and certain accessory parking spaces.

15. See Alan, *supra* note 1, at 346.

16. *Id.*

17. *Id.*

18. City planners arrived at a FAR level of 15 for the commercial districts. They believed this level would serve the needs for office capacity through 1975. Notwithstanding the planners' findings, a powerful coalition of city developers and realtors objected strongly to any reduction in the FAR regulations below an index of 18. *Id.*

19. *Id.* at 347-48.

20. *Id.* at 348 n. 57. But see *Matter of Brause*, 140 N.Y.L.J. 108 at 13, col. 5 (N.Y. Sup. Ct. Dec. 5, 1958). This case notes that zoning capacity mergers had been a common practice between developers and city planning even before the 1961 zoning resolution amendments. In this case, however, the court finally rejected the principle because there was no specific statutory authority authorizing such mergers. In this light the political compromise may be seen as a readoption of a previous common practice.

lot, from which a FAR value was computed.²¹

The new definition allowed a developer who wished to build on his lot to borrow additional unused FAR (or transfer the air rights as some courts like to refer to it) from an adjacent developed lot by merging their respective lots into "single ownership."²² To illustrate the effect of the zoning lot definition one should imagine two adjacent lots, each zoned at a FAR level of 15. The owner of lot 1, developer A, wishes to develop his empty lot with more floor area than he is allowed under the Zoning Resolution. B, the owner of lot 2, already has a building on lot 2, but his building has only consumed 12 of his available FAR of 15. Consequently, by declaring the lots to be under single ownership, B may transfer to A an additional FAR capacity of 3. (This result may be achieved by subtracting the 15 FAR he is presently zoned for from the 12 FAR he has used.) A, owner of lot 1, may now build his building to a FAR level up to 18 or 1/5 greater than he was previously allowed.²³

Futhermore, ownership of a zoning lot and its FAR ca-

21. Under New York, N.Y. Zoning Res. § 12-10 (1971)(amended 1981), *reprinted in* Newport Assoc. v. Solow, 30 N.Y.2d 263, 265, 283 N.E.2d 600, 602, 332 N.Y.S.2d 617, 219 (1972), a zoning lot was defined as:

(a) a lot of record existing on the effective date of this resolution or any applicable subsequent amendment thereto, or (b) a tract of land, either undivided 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 applicable amendment thereto, was in single ownership, or (c) a tract of land, located within a single block, which at the time of the filing for a building permit (or, if no building permit is required, at the time of the filing for a certificate of occupancy), is designated by its owner or developer as a tract all of which is to be used, developed, or built upon as a unit under single ownership.

The zoning lot definition was further clarified by the statute:

1. Zoning lot may or may not coincide with a lot on a tax map or recorded subdivision plate.
2. A zoning lot may be subdivided into two or more zoning lots and all building thereon shall comply with the applicable provision of the zoning resolution.
3. A zoning lot must consist of parcels that are contiguous for at least 10 linear feet.

Id.

22. See *infra* note 64 and accompanying text.

23. Provided he still complied with overall height and setback limitations. See *supra* note 10.

capacity under the "contiguous lot assemblage siphoning principle" did not refer to fee ownership, but rather was defined, "to include a lease of not less than 50 years duration, with an option to renew such lease so as to provide a total lease of not less than 75 years duration."²⁴ Through the use of the zoning lot a developer could merge his lot into single ownership by lease, fee ownership, tenancy, or partnership²⁵ and acquire the excess development capacity of the transferor lot by "siphoning" the FAR to the contiguous parcel.²⁶

B. *Implementation of the Contiguous Lot Assemblage Siphoning Principle and its Impact on the Urban Environment*

The zoning lot merger is a method of increasing your floor area ratio without having to obtain a variance,²⁷ or special exception permit²⁸ from the City Planning Commission or Zoning Board of Appeals. In fact, all that is necessary is a building permit from the Department of Buildings.²⁹ In a sense, the developer's added capacity acquired through the zoning lot

24. See *supra* note 21.

25. 873 Third Ave. Corp. v. Kenvic Assoc., 190 N.Y.L.J. 3 at 6 col. 4 (N.Y. Sup. Ct. July 6, 1983).

26. The resolution failed to address the problem of default by a lessee and possible remedies in case of default, nor did it contemplate the effect of the reversion on the lessee's compliance with the zoning resolution. Possibly it was felt that the reversion would have no value, but this theory would not comport with economic reality.

On this matter the General Counsel for the New York City Planning Commission stated "[I]n accepting a long term lease as lot control comparable to fee ownership the city looked at the useful life of the new structure as measured by the standard mortgage terms."

Marcus & Groves *supra* note 4, at 373.

27. "A variance is an authorization for the construction or maintenance . . . of a use of land, which is prohibited by a zoning ordinance. It is a right granted by a board of zoning appeals. . . ." R. Anderson, *New York Zoning Law and Practice*, § 23.02, at 159 (3d ed. 1984).

28. "A special use permit differs from a variance in that the former contemplates a use expressly permitted by a particular zoning ordinance while the latter is authority to use property in a manner which is otherwise prohibited." *Id.* at 267.

29. The Department of Buildings requires that a N.Y. title insurance company first join all interested parties. Rifkin, *Utilizing TDR in New York City*, Title News, at 17 (August 1981).

merger is "as of right."³⁰

It should be noted that in order for a developer to have incentive to employ the merger system he must be restrained from seeking other alternatives such as a special exception permit or a zoning variance. In order to direct a developer to the zoning lot merger alternative, the comprehensive plan restricts available FAR as close to a constitutional limit as possible.³¹ Relief from bulk, height and FAR regulations which would be available from the Zoning Board of Appeals under a Standard Zoning Enabling Act (SZEa)³² is limited by a requirement that the Zoning Board's decisions must be approved by the City Planning Commission in certain instances and voted on by the Board of Estimate in others.³³ Further-

30. "As of right" building is the term used to describe a development which complies with the zoning requirement of its district and for which the Department of Buildings may issue a building permit without having to refer to the Planning Commission or the Board of Standards and Appeals. See Zoning Handbook, *supra* note 3.

31. R. Anderson, *New York Zoning Law and Practice*, §§ 8,16 (2nd ed. 1973). Also a lot merger can add directly to tax revenue for the City, whereas a variance or an exception does not. The lot mergers are characterized as taxable exchanges of real property or an interest in real property. Taxable exchanges are:

[A]ny document, instrument or writing other than a will, regardless of where made, executed or delivered, whereby real property or interest therein is created, vested, granted, bargained, sold, transferred, assigned or otherwise conveyed, including any such document, instrument or writing whereby any leasehold interest in real property is granted, assigned or surrendered.

N.Y.C. Admin. Code, ch. 46, tit. II, § 46-1.0 (1984) and regulation article 3(b) which states, "[t]he term includes transfers of excess zoning rights in connection with zoning lot mergers and transfers of development rights from landmark designated parcels to nearby parcels." N.Y. Tax Rep. (CCH) P356-903 (June 1985). See e.g., Rifkin, *supra* note 29, at 19; Kuntz & Opar, *Development Rights Transfer: Whose Sky is it Anyway*, 192 N.Y.L.J. 33, at col. 3 (1981).

32. The original New York City zoning ordinance was the inspiration for the Standard Zoning Enabling Act (SZEa) which was a state uniform zoning act, passed by most states during the city planning movement in the 1920's. In its original form the SZEa envisioned a zoning ordinance and map drafted by professional planners and a planning board, which regulated the present and future development of the community. Ellickson & Tarlock, *Land Use Controls* 39-41 (1981).

Individual relief in the form of a variance or special permit from the strictures of the zoning ordinance could be made by an administrative review board, the Zoning Board of Appeals, with appellate jurisdiction. The SZEa envisioned a zoning dichotomy where professional planners drafted legislation, and the Board of Appeals provided relief for certain individual cases where literal enforcement of the provision of the ordinance would result in unnecessary hardship. *Id.* at 217.

33. Urban planners, frustrated by decisions of the Zoning Board of Appeals, have

more, the Zoning Board's jurisdiction is restrained by strict standards limiting the definition of hardship,³⁴ needed for a use variance which may alter floor area.³⁵

Zoning lot mergers have been criticized for undermining regulations controlling density and congestion.³⁶ Although the new floor area permitted by the transfer is deemed to have been previously allocated to a district, this theory ignores the fact that the FAR transferred was previously unused.³⁷ Unused FAR did not add to the district's overall needs for light and air, open space, transportation and utilities.³⁸ Transform-

eroded the jurisdiction of the Zoning Board of Appeals to provide relief. *Id.* at 220-21. The New York City zoning resolution limits the jurisdiction to grant special permits to specific categories. See New York, N.Y., Zoning Res. § 74-01 (1983). The City Planning Commission has the authority to appeal to State Supreme Court if it finds that a variance or permit issued by the Zoning Board of Appeals would have an adverse impact on the community. See N.Y.C. Admin. Code tit. 6, § 668(e)(1).

Furthermore, concurrent jurisdiction to offer special permits is given to the City Planning Commission upon approval by the Board of Estimate. New York, N.Y., Zoning Res. § 74-01 (1983). See also Anderson, *supra* note 27, at §§ 13.16, 17.33 and 18.07-08.

34. Use variances require an applicant to overcome the strict standard of proof of unnecessary hardship. See *Otto v. Steinhilber*, 282 N.Y. 71, 24 N.E.2d 851 (1939) where the court ruled the landowner must prove; (1) the land cannot yield a reasonable return under its present use, (2) that there are unique circumstances which are a result of the zoning resolution, and (3) that the use will not alter the essential character of the locality. New York, N.Y., Zoning Res. § 72-21 (1981).

Some court decisions have held that use variances are necessary in order to increase floor area. *Ennis v. Crowley*, 12 A.D.2d 999, 211 N.Y.S.2d 500 (1961); *but see*, *Pondfield Road Co. v. Bronxville*, 1 N.Y.2d 841, 135 N.E.2d 725, 153 N.Y.S.2d 221 (1956).

35. Proponents of these new zoning devices plan to eliminate the conventional zoning dichotomy into a single zoning administrative agency and force developers to bargain with these agencies in order to gain relief. See Marcus & Groves, *supra* note 4; Marcus & Elliot, *supra* note 4.

One effect of this centralized planning could be a stifling of development in areas in which a centralized agency is not concentrating. See generally Hinds, *New Housing Lags in Outer Boroughs*, N.Y. Times, April 14, 1985, § 8 (real estate), at 1, which notes that present zoning has stifled development in the outer boroughs. See also the proposed state charter amendments which proposed a single Zoning Board within the City Planning Department in *Preliminary Recommendations of The State Charter Revisions for New York City* at 120 (1975) (unpublished pamphlet).

36. Alan, *supra* note 1, at 339.

37. *Id.*

38. *Id.* See also Oser, *A Dissenting Voice on Transferring Air Rights*, N.Y. Times, June 16, 1985, § 8 (real estate), at 7, col. 1; Wedemeyer, *Trading Up and Upon a Development Site*, N.Y. Times, Nov. 24, 1985, § 8 at 18, col. 1 (which dis-

ing previously unusable floor area into unregulated occupied floor space can have detrimental effects on the surrounding locality. One planner in an empirical study stated that, "subway traffic at express stops increased roughly in proportion to the increase in rentable floor space."³⁹ By encouraging the intensification of actual as opposed to theoretical urban density development, the zoning lot merger has circumvented the purpose of density controls.⁴⁰

A much more practical way to promote development while regulating its detrimental effects upon the population density in the surrounding community would be through bonus zoning. With this approach variances or special exceptions could be granted on a condition that the developer create an open public plaza or improve the traffic flow to existing local subway stations. Furthermore, with the bonus zoning method the threshold issue would not rest upon the theory of unused FAR, but would instead be determined by the actual needs for open space and light and air in a given block.⁴¹

III. Equitable Allocations of Transferable Air Rights

The zoning lot merger is in essence an interest created by a statute that confers a valuable economic and legal benefit to the holder of the interest. The interest, which is relatively new to jurisprudence, can also result in a financial windfall for its holder.⁴² In order to avoid the possibility of conferring such a

cusses how a developer can "pyramid" the available floor area by merging zoning lots with the surrounding zoning lots).

39. Alan, *supra* note 1, at 345.

40. *Id.* at 339.

41. For some examples of bonus zoning regulations see *supra* note 4.

42. The buying and selling of transferred air rights is a multi-million dollar business in New York City. See, Wedemeyer *supra* note 38; Scardino, *Trading Air to Build Towers*, N.Y. Times, February 21, 1986, § D, at 1, col. 2, where the author notes that developers can make money out of thin air. Such an economic benefit conferred on certain developers to the detriment of the surrounding community would not be included in the state enabling act which delegates the power to zone to the city. See N.Y. Const. art 9, § 2 (McKinney 1969). This act requires that the zoning power be used to promote the general welfare of the entire community rather than a select class. Cf. Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713; *cert. denied*, 423 U.S. 808 (1975), Mt. Laurel II, Southern Burlington County NAACP v. Township of Mt. Laurel, 92 N.J. 158, 456 A.2d 390 (1983).

windfall to one person the drafters of the statute have sought to allocate the interest in an equitable fashion.⁴³ However, the apparent ambiguity in the drafting of the legislation, and the judiciary's uncertainty as to the nature of the interest that is transferred has resulted in certain legal controversies.

A. *Early Court Decisions Interpreting the Allocation of Transferable Air Rights*

Although the New York courts have disagreed in their legal interpretations of § 12-10 and in the equitable allocation of transferable air rights, the courts have generally approved of the zoning lot merger principle. In one early case, *Hotel Taft Assoc. v. Sommers*,⁴⁴ a court ruled that the zoning laws would be violated if a building was erected in the air space already dedicated to another building in a zoning lot merger.⁴⁵ The defendant, Sommers, raised the issues of whether all the excess air rights were transferred by his predecessor in interest, Rockefeller Center, Inc., and whether he, the present

This New Jersey interpretation of the state enabling act was adopted by one court in New York in *Asian Am. for Equality v. Koch*, No. 22491/83, slip op. (N.Y. Sup. Ct. August 6, 1984). These decisions deal with affirmative zoning for moderate and low income housing.

43. The statute allows parties other than the fee owner to determine whether or not the air rights may be transferred. These parties are referred to as parties in interest. See the legislative history to § 12-10 in New York, N.Y. Bd. of Estimate J. calendar no. 283 (July 13, 1977).

44. *Hotel Taft v. Sommers*, 34 Misc. 2d 367, 226 N.Y.S.2d 155 (Sup. Ct. 1962). This case is not the earliest decision on transferred air rights. See *Matter of Brause*, 140 N.Y.L.J. 108 at 13, col. 5 (N.Y. Sup. Ct. Dec. 5, 1958).

45. The history of this case proves interesting. The plaintiff sought to enjoin the defendant from building on a lot from which he had already transferred air rights. The defendant's predecessor in interest, Rockefeller Center, Inc., owners of the Roxy Theater, agreed to give plaintiff, the Hotel Taft, (a contiguous lot) an easement for light and air. The easement restricted defendant from building directly across from the southern portion of plaintiff's lot where an atrium was located. Thirty years later, Rockefeller Center, Inc. entered into an agreement, the "Tower Privilege Agreement" with Rock-Time, Inc. whose lot, the Time Life lot, was east of and contiguous to the Roxy Theater. In this agreement Rockefeller Center, Inc. consented to the inclusion of the Roxy property's unused air rights in computing the zoning lot area of the Time-Life lot. The Time-Life lot before the agreement had a 169 foot height capacity. Following the agreement, they could build to a height of 644 feet. (The court here does not use FAR values.) *Hotel Taft*, 34 Misc. 2d at 373, 226 N.Y.S.2d at 160.

owner of the lot was bound by the transfer of air rights represented by a previously executed agreement. The court held that § 9G of the New York City Zoning Resolution (a predecessor to § 12-10) would be violated if a building was erected in the space dedicated to enable a contiguous lot to build. The court also held that the plaintiff, although not a party to the agreement, could avail itself of this agreement even though it did not relate directly to plaintiff's property and the plaintiff was not a legal beneficiary.⁴⁶

The implications of this decision are clear. First, a non-party to an air right transfer could bring an action to enjoin the violation of a transfer agreement, and the court assumed that it was "dedicating air space" without ever defining what "dedicating" or what "air rights" are. Secondly, the court acknowledged that it would uphold a "dedication" of air space across separate but contiguous fees and subsequently bind each party to the transfer.⁴⁷ Finally, the court acknowledged indirectly that the transferor lot was burdened to a potentially perpetual limitation on its development capacity under the present Zoning Resolution.⁴⁸

1. *The Courts Approve the Leasing and Transference of City Owned Air Rights*

Private parties have not been the only ones to take advantage of the financial windfall created by the zoning lot merger. During the 1960's the State of New York promulgated legislation that allowed municipalities to lease the air rights over publically owned property.⁴⁹ This legislation delegates, "authority to local governments to acquire and develop air

46. *Id.* at 374-75, 226 N.Y.S.2d at 161.

47. *Id.*

48. The court assumed what the parties were dedicating air space to another lot without ever defining the nature of the interest being dedicated. *Id.* at 374, 226 N.Y.S.2d at 161. The effect of such a dedication on the market value of the building for appraisal and tax assessment purposes has yet to be decided by a court although the opportunity has subsequently arisen. See *Rice v. Ritz Assoc.*, 58 N.Y.2d 923, 447 N.E.2d 58, 460 N.Y.S.2d 510 (1983); *Trump-Equitable Fifth Ave. Co. v. Gliedman*, 87 A.D.2d 12, 450 N.Y.S.2d 321 (App. Div. 1982).

49. N.Y. Gen. Mun. Law § 502(7)(McKinney 1982).

rights and easements as part of urban renewal projects.”⁵⁰ Consequently, the City of New York initiated legislation to lease the air rights over city owned property.⁵¹ In 1966, New York City began a program of leasing the air rights over public schools to contiguous lots under commercial development, with the revenue flowing from these leases going to the Educational Construction Fund.⁵²

A New York court has approved the transfer of city owned air rights.⁵³ In its decision the court has left the fate of municipally owned property to the discretion of the municipal officials, limited only by the requirement that the transfer be rationally related to the public interest.⁵⁴ In *Fur-lex Realty Inc. v. Lindsay*, the City entered into an agreement whereby the “air rights” above a section of the Appellate Division Courthouse were leased to a contiguous lot owner, 41 Madison Avenue Corp.⁵⁵ To effectuate this deal the City merged the lot on which the courthouse stood with the developer’s lot in order to form a single zoning lot.⁵⁶

The court held that the lease rental of \$46,000.00 per year over the term of the lease and the \$173,000.00 estimated tax revenue per year were conclusive evidence that the agreement was in the public interest.⁵⁷ Furthermore, the court held that the transfer of “air space” did not violate the city’s comprehensive zoning ordinance and, therefore, did not constitute

50. Warren’s Weed, *New York Law of Real Property, Air Rights*, § 1.03 at 119 (Supp. 1983).

51. New York, N.Y., Admin. Code ch. 15, tit. A, § 384-1.0 (1976).

52. N.Y. Educ. Law § 403-a (McKinney Supp. 1984).

53. See *Fur-Lex Realty Inc. v. Lindsay*, 81 Misc. 2d 904, 367 N.Y.S.2d 388 (N.Y. Sup. Ct. 1975).

54. A decision by a zoning authority to provide relief must be rationally related to a comprehensive plan. *Euclid v. Amber Realty*, 272 U.S. 365 (1926).

55. *Fur-Lex Realty, Inc.*, 81 Misc. 2d at 905, 367 N.Y.S.2d at 390. The lot owner was located at the southeastern corner of Madison Avenue and 26th Street. The lease allowed the developer to acquire 100,000 sq. ft. of additional floor area, which enabled him to build an additional ten floors. *Id.* at 905-06, 367 N.Y.S.2d at 390.

56. This merger was accomplished through a 75 year lease from the City to the developer and a subsequent sub-lease by the developer back to the City. *Id.* at 907, 367 N.Y.S.2d at 391.

57. *Id.* at 910, 367 N.Y.S.2d at 392.

impermissible "spot zoning."⁵⁸

Although the practice of leasing city air rights to adjoining lots has passed judicial inquiry thus far, there are other questions concerning the sensibility of these leasing practices. The short run benefits of the increased revenue these leases provide should be balanced against the long term effect of binding city property to an agreement against development.⁵⁹ Neither the Planning Commission nor the courts have addressed several glaring issues, such as what occurs when the present use of the transferor lot is no longer of use to the city.⁶⁰

Furthermore, there are issues concerning the rights of a lessor of a zoning lot against a defaulting lessee, as well as a concern for the lessor's reversionary right at the expiration of the lease term.⁶¹ If the air rights do revert back at some point, the transferee lot may be thrown into a violation of the city's zoning ordinance.⁶² The lessee and lessor may have previously

58. *Id.* at 907, 367 N.Y.S.2d at 391. Spot zoning is defined as, "the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners. . . ." Anderson, *supra* note 27, § 5.04 at 164.

59. City officials, buoyed by the additional revenues these leases provide the City coffers, may have acted spuriously. Some courts have held that the City will be bound by their restrictive "Zoning Declarations." A Zoning Declaration is an agreement executed by the developer and the City and is recorded. See Zoning Handbook, *supra* note 3. The covenants are said to bind the developer to the terms of the declaration. See Flushing Property Owners Ass'n. v. Planning Comm'n of N.Y., 43 A.D.2d 515, 349 N.Y.S.2d 318 (App. Div. 1973); but see Collard v. Incorporated Village of Flower Hill, 52 N.Y.2d 594, 421 N.E.2d 818, 439 N.Y.S.2d 326 (1981) where this court held that city property would not be bound by zoning restrictions.

60. Such demographic factors as the increasing age of our population portend a dwindling need for educational facilities. If the city has entered into a zoning lot agreement it may leave itself with unmarketable property. See Anderson, *supra* note 31, § 9.02 at 425. The author notes that a village is not subject to zoning restrictions in performance of its governmental as distinguished from its corporate or proprietary activities.

61. See Marcus, *From the Legislatures*, 6 Real Est. L.J. 336, 337 (1978). Here the author concedes that interpretive problems led to the amendment of the zoning lot definition. In order to solve the problem of having a possible nonconforming use situation upon reversion, § 12-10 provides that a zoning lot may not be subdivided into a nonconforming use. This solution, however, would not solve the conflicting claims to the value of the reversionary interests.

62. This violation is known as a nonconforming use which is defined as a use

agreed that the residual value of the air rights have been fully exhausted (amortized), but such an agreement would not reflect the lot's true economic and development potential. One can also foresee a number of marketing problems for the owner of a transferee lot. Few potential tenants would be willing to sign long term leases with this potential cloud on the building's title.⁶³

2. *The Courts Approve the Transference of Air Rights by a Building Lessee Despite the Owner's Objection*

The provision of the zoning resolution defining ownership as a lease for a period of 75 years or more leaves three possible scenarios: (1) an owner lessor transfers the air rights to his building despite a long term building lessee's objections; (2) the lessee (or owner) acquires air rights to build an additional structure to the one he presently leases (or owns); and (3) the lessee of a lot transfers air rights to a contiguous lot which he already owns despite his landlord's objection. The third scenario was considered by New York State's highest court in *Newport Assoc. v. Solow*.⁶⁴

In this case, the court ruled that the zoning resolution did not define air rights in terms of real property ownership, but rather as a form of ownership defined by and derived from the resolution itself.⁶⁵ The plaintiff, the owner of a fee parcel improved with a building on 4 West 58th Street, brought an action to compel a determination of a claim to real property (the air rights). Defendant was a long term lessee of plaintiff's building and in addition owned two contiguous lots which he

which does not comply with use restrictions applicable to the area in which it is situated. See Anderson, *supra* note 27, § 6.02 at 199; New York, N.Y., Zoning Res. § 52-01 (1982). The zoning resolution provides several methods for dealing with a nonconforming use ranging from prohibiting certain structural rehabilitation to uncompensated condemnation of the structure following a statutory amortization period. See New York, N.Y., Zoning Res. § 52-10 (1982).

63. See *infra* note 174 and accompanying text. Also title insurance companies would not give a special zoning endorsement under this circumstance.

64. *Newport Assoc. v. Solow*, 30 N.Y.2d 263, 283 N.E.2d 600, 332 N.Y.S.2d 617 (1972).

65. *Id.* at 268, 283 N.E.2d at 604, 332 N.Y.S.2d at 621.

sought to develop. At issue was whether the developer, a long term lessee, could merge lots which he owned in fee with his lessor's lot, despite the lessor's objection, and transfer the air rights represented by the lessor's unused excess FAR.⁶⁶

In addressing this issue the court looked first at the lease signed by lessor and lessee. Despite the fact that the lease was executed before the zoning lot resolution became effective and that § 4.02 of the lease limited structural changes or alterations to the building, the court held that the lessee may merge his lot with the adjacent lot that he owned despite his lessor's objection.⁶⁷ The court reasoned that § 12-10 of the zoning resolution allowed such a merger,⁶⁸ because § 12-10 defined ownership of the superadjacent air rights as a lease of a building for 75 years or more.⁶⁹ The court noted that in as much as there was no provision in the lease which precluded the lessees from exercising this transfer, it could not be found that the lessor was wronged.⁷⁰ Furthermore, commenting on the lost residuary value of the lessor's asset the court stated:

[T]his overlooks the fact, in view of defendant's ownership of the adjoining building, his lease from plaintiff and the Zoning Resolution itself, plaintiff possesses no such right of sale. There is nothing in the ordinance which treats its reversionary interest as ownership for the purpose of Floor Area Ratios or air space rights. . . whatever rights that plaintiff may otherwise have had were not lost by any act of the defendant, but rather as a result of the operation of the ordinance.⁷¹

The *Newport Assoc.* decision disconcerted the real estate community.⁷² The court's holding that the owner of the reversionary interest in the leasehold estate was not the owner for the purpose of FAR or air rights appeared to many to be a

66. *Id.* at 265, 283 N.E.2d at 603, 332 N.Y.S.2d at 620.

67. *Id.* at 268, 283 N.E.2d at 604, 332 N.Y.S.2d at 621.

68. *Id.* at 267, 283 N.E.2d at 604, 332 N.Y.S.2d at 621.

69. *Id.*

70. *Id.*

71. *Id.* at 268, 283 N.E.2d at 604, 332 N.Y.S.2d at 621.

72. Rifkin, *supra* note 11, at 34.

taking of a valuable asset from the present owner.⁷³ Some contemporary critics of the decision believe that the court of appeals confused the concept of air rights and transferable development rights.⁷⁴

B. *New York City Amends § 12-10*

The controversy caused by the *Newport Assoc.* decision ultimately led to an amendment of § 12-10.⁷⁵ Under this amended section, effective August 18, 1977, a New York State title insurance company is required to certify that "each party in interest" has been joined in an agreement with respect to a merger of a zoning lot or has waived their rights in a declaration of merger.⁷⁶ Party in interest in the "tract of land" referred to in the declaration consists of the following:

(iv) 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

73. *Penn Central Transp. Co. v. New York*, 438 U.S. 103 (1978). These cases stand for the proposition that barring an outright physical taking of the property by the City, the court will not find a taking, rather the affected party must claim a due process (over burdensome regulation) violation; *Fred F. French Investing Co. v. New York*, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976), *appeal dismissed*, 429 U.S. 900 (1976).

74. Rifkin, *supra* note 29, at 16 n.5.

75. *Id.* at 17. These amendments were also made for the purpose of encouraging the parties to record their lot merger document in order to provide notice to a subsequent purchaser. See Marcus, *supra* note 61, at 339.

76. New York, N.Y., Zoning Res. § 12-10 (1981). Zoning lots merged prior to August 18, 1978 are protected by a grandfather clause which allows the old law to apply. This clause has caused much controversy on the issue of whether or not a lease of a zoning lot needs to be recorded in order for the clause to apply. Marcus, *supra* note 61, at 338. See *873 Third Ave. Corp. v. Kenvic Assoc.*, 109 A.D.2d 489, 494 N.Y.S.2d 727 (App. Div. 1985).

be superior to and adversely affected by the Declaration and which would be disclosed by a physical inspection of the land covered by the Declaration.⁷⁷

This section, like its predecessor, allows a lot to be merged while the "tract of land" remains in separate fee ownership.⁷⁸ Consequently, courts have interpreted this section to allow mergers through a long term lease, a sale, tenancies in common, partnership, trust and joint tenants with rights of survivorship.⁷⁹ The new law demanded only that all "parties in interest" (all parties with recordable interest who would be adversely affected) be joined in a merger declaration in order to gain the necessary approval permit from the Department of Buildings.⁸⁰ Furthermore, by requiring that all parties in interest be joined, a plain reading of the definition of parties in interest appears to allocate ownership of transferred air rights to more than just the fee owner.⁸¹

1. *Interpretations of "Parties in Interest"*

Practitioners of zoning lot mergers believed that the amendments to § 12-10 established conclusively who the "interested parties" that had an interest in the transferred air rights were.⁸² Ground lessees⁸³ or long-term lessee of an entire

77. New York, N.Y., Zoning Res. § 12-10 subd. (d), para. (iv) (1981) (emphasis added).

78. *Id.* Subdivision (d) allows multiple fees to merge while subdivision (c) refers to single fee ownership. See Frankel, *Three-Dimensional Real Property Law: The Truth about "Air Rights,"* 12 Real Est. L. J. 330 (1984).

79. 873 Third Ave. Corp. v. Kenvic Assoc., 190 N.Y.L.J. 3 at 6, col. 4 (N.Y. Sup. Ct. July 6, 1983). This case was decided on the issue of the grandfather clause. But this court notes a variety of methods to create a zoning lot merger including a long term lease. It should be noted that the zoning lot merger may only merge the zoning capacity of a parcel and does not always merge the fee titles.

80. Rifkin, *supra* note 29, at 17.

81. *Id.* at 18.

82. *Id.*

83. The ground lease is explained by one source as, "primarily an urban financing and investment vehicle that enables a lessor to convey land or air rights to a lessee who undertakes to develop the property through new construction or substantial improvements." Axelrod, *infra* note 107, at 981.

A lessee can lease a building and the lease may or may not cover the underlying fee. This type of lease is similar to a common space lease but without the ground

building were thought to be parties in interest.⁸⁴ In fact, the Department of Buildings required these parties to be joined.⁸⁵ Similarly, the mortgagee of a fee property and a mortgagee on a lease were thought to be "parties in interest."⁸⁶

Following the amendments to § 12-10 two developers, Campeau Corp. and CFC Associates, sought to merge their respectively owned lots located along a block at Third Avenue between 52nd Street and 53rd Street at Lexington Avenue with a contiguous lot owned by Cadillac Fairview, Inc.⁸⁷ In *MacMillan v. Cadillac Fairview Corp.*, the long term lessee of a building occupying Cadillac's lot brought an action to enjoin Cadillac from transferring the air rights over the lessee's building to a contiguous lot owned by CFC Associates.⁸⁸ The lots, although merged into a single zoning lot, were in separate fee ownership. The lessee, MacMillan Co., claimed they were a party in interest to the transfer and had not been joined in the September 30, 1981 declaration of zoning lot merger submitted to the Department of Buildings.⁸⁹ The main issue in this action was whether the term "party in interest" used in the zoning resolution applied to a long-term lessee of an entire building.

The appellate division held that a long term lessee of an entire building was a party in interest to the lot merger.⁹⁰ The court after examining the legislative history of the amended zoning resolution determined that the function of the amendment to the zoning lot definition in § 12-10 was to, "facilitate air rights transfers in a manner which would not derogate

lease provisions. A space lessee of a building ("building lessee") has little control over the use of the grounds surrounding the building.

84. Rifkin, *supra* note 29, at 18-19.

85. *Id.* at 17.

86. *Id.* at 18. Rifkin believes that parties in interest may be defined as parties with recordable interests under N.Y. Real Prop. Law § § 290(2) and 294(7) (McKinney 1981).

87. *MacMillan v. Cadillac Fairview Corp.*, 86 A.D.2d 15, 16-17, 448 N.Y.S.2d 668, 670 (1982), *rev'd*, *MacMillan v. C.F. Lex Assoc.*, 56 N.Y.2d 386, 437 N.E.2d 1134, 1138, 452 N.Y.S.2d 377, 380 (1983).

88. *Id.*

89. *Id.*

90. *Id.* at 20-21, 448 N.Y.S.2d at 669.

from the rights of parties with certain defined substantial interests in the real property affected. The purpose was to involve and bind all such parties to the arrangement. . .” and:

Plaintiff's lease and its amendments were recorded prior to the declaration in issue as required in article 1 (ch 2, § 12-10, “zoning lot”, subd [d], par [iv], cl [X]) of the resolution. It is equally clear that on the face of the complaint sufficient is alleged to indicate that plaintiff is “adversely affected by the Declaration” as required in clause (Y) of paragraph (iv).⁹¹

In addition to this determination the court attempted to define the phrase, tract of land. The court concluded that although a tract of land was not defined in the zoning resolution, it appeared to mean something more than merely the plot of land on which a structure stands. “Tract of land” should be deemed to include the space above the land including buildings, the court explained.⁹²

The appellate division was quickly reversed by the New York Court of Appeals in *MacMillan v. C.F. Lex Assoc.*⁹³ In this decision the court of appeals focused its attention on the zoning resolution's use of the phrase tract of land. The court ruled that, ‘tract of land’ referred to the surface land only and does not include buildings erected thereon.⁹⁴ Accordingly, even a very substantial tenant is not a party in interest to a

91. *Id.* at 19, 448 N.Y.S.2d at 669. In its analysis, the court examined the legislative purpose of the zoning resolution governing “commercial districts.” This section states that the purpose is to protect commercial development in central, major or secondary commercial centers against congestion as far as possible by limiting the bulk of buildings in the resolution in relation to the land around them. Consequently, the court reasoned that a long term lessee of practically the entire building is surely as affected by such a transfer as the ground lessee (courts have assumed that ground lessees are parties in interest). Furthermore, the court determined that the resolution's purpose was to regulate the development processes' interference on light and air, and the ensuing congestion on community services. Therefore, the court found that a long term lessee held an enforceable recorded interest in all or part of the “tract of land” to which the resolution applied. *Id.* at 18-19, 448 N.Y.S.2d at 669. See New York, N.Y., Zoning Res. § 31-00(G) (1981).

92. *Cadillac Fairview*, 86 A.D.2d at 19-20, 448 N.Y.S.2d at 669-70.

93. *C.F. Lex Assoc.*, 56 N.Y.2d at 386, 437 N.E.2d at 1138, 452 N.Y.S.2d at 381.

94. *Id.* at 391, 437 N.E.2d at 1140, 452 N.Y.S.2d at 383.

Declaration of Zoning Lot Merger under the zoning resolution.⁹⁵ Additionally, the court of appeals attempted to formulate its own definition of air rights. The court believed that air rights were associated with the ownership of land rather than with the ownership of the structures erected on the land.⁹⁶ Air rights, the court stated, are incidental to the ownership of the surface property. Thus, the court quoted "cujus est solum. . . ."⁹⁷

Recently, the appellate division in *Kenvic v. 873 Third Ave. Assoc.*,⁹⁸ ruled that a fee owner could transfer air rights to an adjacent lot despite his ground lessee's objection. The court gave two alternative reasons as a basis for its decision that a ground lessee was not a party in interest because it was

95. The court based its conclusion on the plain meaning of the phrase "tract of land." The word "tract," they noted, usually refers to "a region or stretch (as of land) that is indefinitely described or without precise boundaries or a precisely defined or defineable area of land (Webster's Third New International)." *Id.* Furthermore, the court noted the word "land" means, "The solid part of the surface of the earth in contrast to the water of the oceans and seas." *Id.* at 392, 437 N.E.2d at 1140, 452 N.Y.S.2d at 383. Subsequently, the court stated, neither alone nor in combination do these words in their lexicographic sense connote buildings or improvements . . . and it would be a strained interpretation to include buildings and structures." *Id.*

Also, the courts differed in their interpretation of the legislative purpose behind the zoning resolution. The court of appeals cited a completely different general purpose clause than the lower court by quoting § 31-00 subd. (k) which stated the purpose of the resolution was to, "promote the most desirable use of land and direction of building development in accord with a well considered plan, to promote stability of commercial development, to strengthen the economic base of the City." *Id.*

96. *Id.*

97. "[T]o whomsoever the soil belongs, he owns also to the sky and to the depths. . . ." *Id.*

The court rejected plaintiff's argument that air rights owe their origin to New York Zoning Resolution. The court, instead, interpreted the zoning resolution as a "sophisticated procedure to facilitate the functional transfer of air rights. In doing so it treats property rights long antedating the enactment of the resolution." *Id.* at 393 n.3, 437 N.E.2d at 1140 n.3, 452 N.Y.S.2d at 383 n.3. This definition is not an accepted definition of air rights for it fails to identify which property rights the court is referring to.

Evidently, the court's analysis was diametrically opposed to the appellate division. Whereas the appellate division recognized a difference in the degree of a right to possess air right between a long term lessee of an entire building and an ordinary space tenant, the court of appeals refused to differentiate between these two different tenancies.

98. *Kenvic Assoc.*, 109 A.D.2d at 489, 494 N.Y.S.2d at 727.

disputed as to whether or not the lessee qualified for treatment under a grandfathering provision in the old § 12-10.⁹⁹ The court for its first reason denied the lessee ownership of air rights under the old § 12-10 because his lease did not run for the required 75 years or more duration.¹⁰⁰ For its second alternative reason the court interpreted the *C.F. Lex Assoc.* decision to hold that a ground lessee was not a party in interest under the new amended § 12-10, and the court held accordingly.¹⁰¹

The *Kenvic* analysis is incorrect. The *C.F. Lex Assoc.* decision did not factually deal with a ground lease. Rather, the MacMillan Company in that case was merely a space tenant of the building from the second floor up.¹⁰² Furthermore, the appellate division failed to recognize that the court of appeals stated, in *C.F. Lex Assoc.*, that a party in interest must be someone who had an interest in the tract of land itself.¹⁰³ Since the ground lessee in *Kenvic* had the right to possession of the land and the right to add additional improvements and floor area for the duration of his lease, it would be correct to say that he had such an adversely affected interest in the land itself and, therefore, fulfilled the court of appeal's requirement for a party in interest.

A court has similarly rejected the contention that a mortgagee is a party in interest. In *Schleifer v. M.W. Realty Assoc.* the plaintiff, the holder of a first mortgage on the lot of 797 Third Avenue and 201-207 East 49th Street, brought an action for waste when the fee owner of a two story restaurant, the defendant, attempted a zoning lot merger with a contiguous lot.¹⁰⁴ The court reasoned that an action for impairment of security of the mortgage, or waste, may be brought when a mortgagor impairs the value of the mortgagee's security

99. *Id.*

100. *Id.*

101. *Id.* at 495-99, 494 N.Y.S.2d at 729-30. (Asch, J., dissenting in part).

102. *C.F. Lex Assoc.*, 56 N.Y.2d at 389, 437 N.E.2d at 1136, 452 N.Y.S.2d at 379.

103. *Id.*

104. *Schleifer v. M.W. Realty Assoc.*, 186 N.Y.L.J. 27, at 6 col. 1 (N.Y. Sup. Ct. August 7, 1981).

lien.¹⁰⁵ The court noted that an action for waste is for physical damage to the premises and the transfer of air rights does not constitute physical damage, but rather a "transfer of real property" subject to the mortgagee's first lien.¹⁰⁶ The court explained that there had been no impairment of the plaintiff's security since his mortgage remains a prior first lien on the mortgagee's premises and the transferred floor area.¹⁰⁷

In this decision the court was relying on a precarious assumption. The assumption was that the transfer of air rights was in fact a transfer of real property.¹⁰⁸ New York real property law does not define transferred air rights as real property.¹⁰⁹ Moreover, real property is transacted from one party to another by "conveying" the property by a deed or a will, not by "transferring" parcels from one location to the next.¹¹⁰

105. *Id.*

106. *Id.* The court here does not explain how real property in the form of air rights is transferred.

107. *Id.* at col. 2. The court relied on the fact that there was no specific clause in the mortgage calling for acceleration of the outstanding principle or enforcement of the lien interest on the property. It is quite probable that a due on sale clause would cover air rights. *See infra* notes 140-51 and accompanying text. Furthermore, since most due on sale clauses did not become popular until the inflationary 1970's, they would most likely not cover the concept of air rights. *See* Axelrod, Land Transfer and Finance 121 (2d ed. Supp. 1984). *See also* Wellenkamp v. Bank of America, 21 Cal. 3d 943, 582 P.2d 970, 148 Cal. Rptr. 379 (1978) upholding due on sale provisions as not being a restraint on alienation.

Additionally, although the court granted the mortgagee a first security lien on the transferred FAR, it did not discuss a remedy for the mortgagee in case of default. For example, one glaring issue that the court failed to address was whether the transferee lot, the second mortgagee of the air rights, would have the right to partially redeem the FAR affixed to the building, or whether he would have to redeem by purchasing both lots. *See* Springer Corp. v. Kirkeby-Natus, 80 N.M. 206, 453 P.2d 376 (1969).

108. If it was not a transfer of real property, the mortgagee's only alternative was to bring an action for waste, which he did. *See* Warren's Weed, N.Y. Law Real Prop., Waste § 1.01 (4th ed. 1983).

109. *See infra* notes 181-85 and accompanying text.

110. A conveyance is an *intervivos transfer of title* to or interest in real property from a living person or from a legal entity to another. *In re Loes' Will*, 55 N.Y.S.2d 723, 726 (1945). Conveyance is defined by N.Y. statute as, "including every instrument, in writing, except a will, by which any estate or interest in real property is created, transferred, assigned or surrendered." N.Y. Real Prop. Law § 240(2) (McKinney 1964).

A transfer of air rights from one parcel to another depicts a transfer of the prop-

In fact, there is no commonly held legal definition of what an air right or a transferred air right represents.¹¹¹

2. *Parties in Interest: An Alternative Interpretation.*

The lack of a commonly accepted definition of transferred air rights as well as its recent evolution in the real estate community relative to the length of certain leases,¹¹² has caused and will probably continue to cause a certain degree of inequity in the judiciary's allocation of these transferred rights. The court of appeals in *Newport Assoc.* and the appellate division in *Cadillac Fairview* concluded that the statutory authority denied the fee owner exclusive¹¹³ rights to the transferred air rights. These courts avoided the strained interpretations which could conceivably have used the lease itself to allocate air rights.¹¹⁴ Instead, these courts chose to rely on a new definition of ownership, a form of beneficial ownership,¹¹⁵

erty as opposed to the transfer of an instrument representing the conveyance of a real property. Real property is defined as, "[l]and, and generally whatever is erected or growing upon or affixed to land. . . . In respect to property, *real* and *personal* correspond very nearly with *immovables* and *movables* of the civil law." Black's Law Dictionary 1383 (14th ed. 1964) (emphasis in original).

Furthermore, New York statute defines real property as, "coextensive in meaning with lands, tenements and hereditaments." N.Y. Real Prop. Law § 210 (McKinney 1968).

111. The court in *C.F. Lex Assoc.* defines transferred air rights as long associated with property rights, but the court refers to no authority. See *supra* note 95-97 and accompanying text.

112. Axelrod, *supra* note 107, at 981. The author notes that the common length for ground leases is usually 21 years or more.

113. Exclusivity is defined as the right to exclude others who might want to take part of the property. Hirsch, *Law and Economic Analysis*, at 19 (1979).

114. This may be attributable to the fact that most ground leases and long term building leases ran for a period of 30 years or more. The zoning resolution governing air rights was first employed in the early 1960's leaving many leases without provisions governing air rights. In light of this problem, the drafters of the original zoning lot merger may have purposefully defined ownership of air rights as a lease totalling 75 years or more. See *supra* note 21 and accompanying text; Marcus, *supra* note 6, at 372-74; but see Frankel, *supra* note 78, at 330-35 where the author believes the term of the lease should control. Possibly the definition of floor area may be inserted into the lease. Also, if a term in a lease could conceivably constitute a waiver, it would have to be put into a form acceptable to the zoning resolution. The landlord may have to compel his tenant in some way to sign such a waiver.

115. In order to conform to the contemporary realities of urban development,

conferred upon parties with adversely affected recordable interests defined in the zoning resolution as parties in interest.¹¹⁶ Thus, an enforceably recorded interest under these courts' analysis must refer to the parties with some ownership interest in the air rights such as a building lessee (a space tenant of the majority of the building), a ground lessee,¹¹⁷ or a building lessee with the option or the possibility of adding additional floor space,¹¹⁸ and the value of whose ownership right

land-use law should redefine exactly what is meant by ownership of real property. Modern urban engineering capabilities combined with certain tax advantages diminish the importance of fee ownership of property. Equity as well as the authority delegated to the city to zone for the general welfare demands the protection of parties with other than fee interests. *See supra* note 42 and accompanying text. For example, one person may own a building but only lease the land or the supports upon which it rests. Conversely, one person may develop a property and later sell it for tax purposes, while taking back a lease for 75 years or more.

The original zoning lot merger defined ownership for the purposes of air rights as a lease for 75 years or more. *See supra* note 24 and accompanying text. *See also* Mark, *Leasehold Mortgages - Some Practical Considerations*, 14 Bus. Law. 609 (1959), where the author notes that in Baltimore, Maryland and other jurisdictions a ground lease is considered the equivalent of a fee estate. *Id.* at 609.

Land is not a depreciable asset. Therefore, developers often lease the land and build improvements, buildings, which are depreciable. The developer deducts his land rents as well as depreciating his buildings, thus effectively increasing his cash flow. *See* Axelrod, *supra* note 107, at 991, and see I.R.C. § 178 (1984) which governs the depreciation or amortization of lessee owned improvements on leased land.

For purposes of financing and tax advantages such as ACRS (accelerated cost recovery depreciation formulae) many corporations have developed properties, exhausted the accelerated tax benefits, and then sold the building taking back long term leases in exchange. *See* Axelrod, *supra* note 107 (Supp. 1984) at 991; Frank Lyon Company v. United States, 435 U.S. 561 (1978); Cary, *Corporate Financing Through the Sale and Lease-Back of Property: Business, Tax and Policy Considerations*, 62 Harv. L. Rev. 1 (1948).

116. *See supra* note 77.

117. *Cadillac Fairview*, 86 A.D.2d at 18, 448 N.Y.S.2d at 670. This decision was reversed on the issue of a building lessee being a party in interest in *C.F. Lex Assoc.*, 56 N.Y.2d at 393, 437 N.E.2d at 1138, 452 N.Y.S.2d at 381. However, the court's reversal may be seen as a reinstatement of the New York State Supreme Court's decision that a ground lessee was a party in interest. Furthermore, under the court of appeals decision the ground lessee would have an interest in the tract of land. *Id.* But *see Kenvic Assoc.*, 109 A.D.2d at 492, 494 N.Y.S.2d at 726, which recently held that a ground lessee with a long term lease and the right to build additional improvements was not a party in interest for the purposes of air rights.

118. New York, N.Y., Zoning Res. § 12-10 (1981). Frankel believes adversely affected parties are those parties whose lease terms are adversely affected by a zoning lot merger. Frankel believes the term adversely affected interest of § 12-10 subd. (d),

would be undermined by the effects of a transfer.¹¹⁹

For example, no court could rule that a lessee of Grand Central Station would not be adversely affected by an air rights conveyance project built over his roof.¹²⁰ Such a project would have an adverse impact on the lessee's right to ingress and egress,¹²¹ his light-air access rights,¹²² and his right to quiet enjoyment of the premises.¹²³ Moreover, according to these courts' plain reading of § 12-10, it is not essential that a building lessee or a ground lessee be used as a means of support. If a lessor "transfers," without his tenant's consent, the air rights to a contiguous parcel, the lessor is interfering with his tenant's light-air access rights and ingress and egress rights.¹²⁴ These factors will ultimately decrease the value of

par. (iv), cl. (Y) modifies enforceable recorded interest such as a building lessee or a ground lessee and not just any holder of a recorded interest. Frankel, *supra* note 78. But see *supra* note 117. Also, it would be difficult to imagine which implicit or explicit term in a lease would cover transferred air rights since there is no accepted legal definition.

119. *Cadillac Fairview*, 86 A.D.2d 15-17, 448 N.Y.S.2d at 670. Prospective lien holders such as mortgagees and option holders are covered under § 12-10 subd.(d), par. (iv), cl. (X); building lessees are covered under cl. (Y). The law of equitable servitudes and negative reciprocal servitudes is covered by cl. (Z).

120. For problems with air rights projects where the owner seeks to add additional floors see Hinds, *Upper East Side Institutions Fear Downzoning*, N.Y. Times, June 6, 1985, § 8 (real estate), at 1. Also, for examples of entire buildings being carved out of air space, see Morris, *infra* note 142, at 268. In one example, the U.N. Plaza, the bottom supporting structure was built and was later surmounted by two towers over a time period reflecting market values in the area. Warren, *supra* note 50.

121. These words express the right of the tenant to enter upon and return from the lands in question. Blacks Law Dictionary 921 (4th ed. 1968).

122. See *infra* note 124.

123. Quiet enjoyment refers to a covenant usually inserted in a lease or conveyance on the part of the grantor promising that the tenant or grantee shall enjoy the possession of the premises in peace without disturbance. Black's Law Dictionary 1416 (4th ed. 1968).

124. Light and air easements are the so-called negative easements which have generally been avoided by the courts in this country unless specifically agreed to by the parties. See Warren's Weed, New York L. Real Prop., Easement § 1.01 (4th ed. 1983); see also *Irving Trust v. Amahma Realty*, 285 N.Y. 416, 35 N.E.2d 21 (1941); *Stanley Harte v. Empire State Building*, 30 Misc. 2d 665, 219 N.Y.S.2d 566 (Sup. Ct. 1961). This latter case noted the complications of enforcing negative easement.

These cases illustrate that a covenant against a landlord's interference with his lessee's light and air will not be implied unless the parties so intended.

the leasehold.¹²⁵ The tenant's leasehold is as adversely affected by an air rights transfer as it would be if his landlord conveyed the air rights for a twenty story building to be erected on top of the leasehold.¹²⁶ For this reason, the earlier courts interpreted that the statute did not distinguish between a ground lessee who had the right to the tract of land and the air space above it and a lessee of an entire building whose leasehold would be adversely affected.¹²⁷

In *Cadillac Fairview* the appellate division recognized the long term building lessee's qualified ownership of air rights when it stated:

A long-term lessee of practically an entire building is surely as affected by such a transfer as a *ground lessee*. The interference with light and air and the ensuing congestion and effect on community services and other consequences plainly impact on each in a similar manner. (Emphasis supplied.)¹²⁸

Evidently, this obligation not to adversely affect interested parties without first obtaining their consent is what the zoning resolution attempted to establish.¹²⁹ An adversely affected party becomes important in a vertical subdivision be-

125. The market value here would be determined by the value of a hypothetical sublease, if the lessee has such rights.

126. The law of equity has a few examples of restricting intensive development which may effect owners or lessees such as privity of estate, negative reciprocal servitudes, and equitable servitudes. Cf. *Snow v. Van Dam*, 291 Mass. 477, 197 N.E. 224 (1935); *Sanborn v. McLean*, 233 Mich. 227, 206 N.W. 496 (1925) (where equitable servitudes were created by implication); *Bristol v. Woodward*, 251 N.Y. 275, 288 (1929); *Tulk v. Moxhay*, 2 Phillips 774, 41 Eng. Rep. 1143 (1848); New York, N.Y., Zoning Res. § 12-10 subd. (d), par. (iv), cl. (z) (1981). The aforementioned discuss how equitable servitudes may be created by implication and benefit third parties.

See generally Note, *Restrictive Covenants in Shopping Center Leases*, 34 N.Y.U.L. Rev. 940, 943 (1959) where the author discusses how negative servitudes have been developed by courts of equity to benefit a lessee from competition by his landlord on lessor's other property, where the burden of an affirmative restrictive covenant does not touch and concern the other property so restricted by the covenant. These are referred to as anti-competition clauses.

127. *Cadillac Fairview*, 86 A.D.2d at 15-17, 448 N.Y.S.2d at 669-70.

128. *Id.*

129. *Id.*

cause a zoning lot merger gives a developer an "as of right" right to develop additional FAR and to consequently affect other owners. The consent requirement of § 12-10 would allow affected parties; ground lessee, building lessee,¹³⁰ fee owners, and mortgagees to join in an agreement that would regulate development in a manner which would have the least adverse affect on other owners in the vertical subdivision.¹³¹ Such an agreement could also provide for ameliorating the development's affect on the surrounding community and consequently promote the general welfare as opposed to the welfare of a select body of developers.¹³²

The statute in this interpretation would create a proper balance between the rights of the fee owners and the other adversely affected parties by giving this latter group a certain amount of bargaining power. This bargaining power may not be sufficient to terminate development, but at least should be enough for the interested parties to have some input in the overall development plan.¹³³ In this manner, the zoning resolution can be seen as a way of allowing private parties to create their own vertically scaled subdivision plan within the zoning lot, as well as a way for them to allocate an equitable distribution of transferable air rights.¹³⁴

130. A building lessee refers to a space tenant of the entire building without a ground lease.

131. *Cadillac Fairview*, 86 A.D.2d at 15, 448 N.Y.S.2d at 669; see also *supra* note 42 and accompanying text. Covenant and servitudes as architectural land-use controls are similar to anti-competition clauses and have been upheld by courts in other states. See *Caullet v. Stilwell*, 67 N.J. Super. 111, 170 A.2d 52 (1961); M. Urban, *Urban Evaluation of the Applicable Zoning Principles to the Law of Private Land-use Restrictions*, 21 UCLA L. Rev. 1655 (1974).

132. See *supra* note 42 and accompanying text. See also *infra* note 134 and accompanying text.

133. For example one authority notes that the court of appeals found that the design of the building adjacent to the MacMillan building was constructed in a way that minimized the structure's effect on the light and air and overall view of the MacMillan building. Frankel, *supra* note 78, at 343. So any challenge to the transfer under this interpretation may have had the same result.

134. Subdivision is defined as, "any tract of land which is hereafter divided into five or more parcels along an existing or proposed street, highway, easement or right-of-way for sale or for rent as residential lots or residential building plots. . . ." Anderson, *supra* note 31, § 15.02 at 667.

Subdivision controls are meant to direct development under the comprehensive

IV. Defining a Transferable Development Right: A Guide for Legislative Reform

One remarkable aspect of the zoning lot merger is that it appears to delegate to private parties the power to negotiate the zoning capacity of a development project, a power previously reserved only to the government.¹³⁵ The courts and some legal authorities have assigned the terms air rights, transferred air rights, transferable development rights and others to describe the legal interest negotiated in a zoning lot merger. The statute itself does not use any of these terms, rather it uses such terms as zoning lots, tract of land, parties in interest and FAR levels.¹³⁶ The misuse of these terms may contribute to the confusion.

The present case law, however, adheres to at least two distinct views of transferred air rights without ever defining the term. The first view as enunciated by the court in *MacMillan v. C.F. Lex Assoc.* and *MacMillan v. Cadillac Fairview*, defines air rights to the extent that what is transferred is an interest in real property.¹³⁷ For example, one court states that the zoning resolution is merely "sophisticated procedures to facilitate the functional transfer of air rights. In so doing it treats of [sic] property rights long antedating the enactment of the [zoning] resolution."¹³⁸ The second viewpoint is described by the court in *Newport Assoc. v.*

plan at the lot level. They are designed to promote economic development and require the developer to install and pay for basic improvements. *Id.* Although New York's highrise developments are similar to a vertical form of the subdivision, they are not classified as a subdivision. One New York case holds that condominium is not a subdivision of land under the General Municipal Law. *See Gerber v. Clarkstown*, 70 Misc. 2d 220, 356 N.Y.S.2d 926 (N.Y. Sup. Ct. 1979).

Compare supra note 4. These regulations allow city planners to regulate ingress, egress, congestion levels, building materials, common areas and the like in return for additional FAR; *see also* N.Y. Real Prop. Law § 339 (McKinney Supp. 1984). The Common Interest Ownership Act has similar attributes to subdivision regulations.

135. The delegated power to zone is in the state enabling act. *See supra* note 42.

136. New York, N.Y., Zoning Res. § 12-10 at 48 (1981).

137. *See MacMillan v. Cadillac Fairview*, 86 A.D.2d 15, 17, 448 N.Y.S.2d at 668, 670 (1982), *rev'd*, *MacMillan v. C.F. Lex Assoc.*, 56 N.Y.2d 386, 389, 437 N.E.2d 1134, 1136, 452 N.Y.S.2d 377, 379 (1983); *see infra* note 149-51 and accompanying text.

138. *C.F. Lex Assoc.*, 56 N.Y.2d at 393 n.3, 437 N.E.2d at 1138 n.3, 452 N.Y.S.2d at 381 n.3.

Solow. This latter viewpoint states that transferred air rights are merely a creation of an ordinance that permits the owner of the air rights (as opposed to the fee owner) to merge his zoning capacity (FAR) with the zoning capacity of an adjacent lot owner and declare unity of zoning capacity ownership while the underlying fees themselves remain in separate ownership.¹³⁹

A. *The Fallacy of a Transferable Air Right*

The term "air rights" is a recent phenomenon of jurisprudence and at times it has been misused.¹⁴⁰ Air rights may be traced to modern urban congestion which places a financial premium on height and bulk.¹⁴¹ The right to build upwards in various forms of ownership have consequently become of great importance to real property law. A basis for legally defining vertical ownership such as a condominium is the theory of air rights.¹⁴² Air rights are defined as an independent unit of real property created through the horizontal subdivision of real estate and it describes the right to occupy that space above a "specified plane over, on, or beneath a designated tract of land."¹⁴³ Air itself is not real property and is not conveyed; however, air rights are real property when described in the three dimensions with reference to a specific locus.¹⁴⁴

At common law air rights were determined according to the ancient maxim, "cujus est solum," where air rights were thought to be one part of a bundle of rights included in the

139. *Newport Assoc. v. Solow*, 30 N.Y.2d 263, 268, 283 N.E.2d 600, 602, 332 N.Y.S.2d 617, 620, (1972), *cert. denied*, 410 U.S. 931 (1973).

140. *See* Frankel, *supra* note 78, at 340.

141. *See* Comment, *Conveyance and Taxation of Air Rights*, 64 Colum. L. Rev. 338 (1964).

142. *See* Morris, *Air Rights are Fertile Soil*, 1 Urb. Law. 247, 248-49 (1964).

143. Comment, *supra* note 141, at 338.

144. *Id.* For example of specific locus we have such definitive descriptions as tax lots, lot and block descriptions and metes and bounds descriptions. *See* N.Y. Real Prop. Law. § 240 (McKinney 1964). Case law envisions deed description in the two and three dimensional realms. *See generally* *Fletcher v. Flake*, 97 A.D.2d 623, 468 N.Y.S.2d 938 (1983); *Hibiscus Harbor v. Ebersol*, 63 A.D.2d 824, 406 N.Y.S.2d 182 (1978).

ownership of land.¹⁴⁵ This "appurtenant theory" holds that air rights are appurtenant to the ownership of the soil, and the surface owner may exercise these rights in full enjoyment of his land. Presently, a controversial theory has arisen which distinguishes air rights from land rights.¹⁴⁶ The latter controversial theory, the "homogeneous space theory," holds that air space itself is owned just like the soil, and that a title in fee consists of a three dimensional homogeneous space, part of it filled with soil and the remainder air space.¹⁴⁷ Thus, in the homogeneous space theory, land is measured in a two dimensional "metes and bounds description" for convenience and is essential only for locating the horizontal stratification of ownership of real estate.¹⁴⁸

Not coincidentally, the appurtenant theory is the basis for the court of appeals overturning the appellate division in *C.F. Lex Assoc.* The court, in that case, looked at the phrase "tract of land" and noted that air rights

have historically been conceived as one of the bundle of rights associated with the ownership of land rather than with the ownership of the structure erected on the land. Air rights are incidental to the ownership of the surface property - the right of one who owns land to utilize the space above it.¹⁴⁹

Therefore, ownership of air rights according to the theory means title ownership or an interest in the land.¹⁵⁰

145. See *Morris*, *supra* note 142.

146. *Id.* at 250.

147. *Id.*

148. *Id.*

149. *C.F. Lex Assoc.*, 56 N.Y.2d at 392, 437 N.E.2d at 1138, 452 N.Y.S.2d at 381.

150. Although the court of appeals relies heavily on the appurtenant theory, by acknowledging that air rights may be transferred the court has taken the theory beyond its own limitations. The appurtenant theory employs the concept of air rights only so long as they remain attached to a specific fee. Furthermore one authority stated:

Much as one cannot transfer the year warranty that comes with a new car unless one transfer the car as well, the property owner may not transfer his light-air access rights without the land to which the rights are appurtenant. . .the right to occupy air space does not run with air space; it runs with

The appellate division, on the other hand, implied a homogeneous air rights theory into the zoning resolution when it interprets "tract of land" to "mean more than merely the plot of land on which the structure stands . . . 'tract of land' should be deemed to include the space above the land, particularly the buildings on the land."¹⁵¹

There are, however, physical limitations to these theories as well. The air rights, whether thought of as appurtenant or homogeneous, remain affixed to its locus point which is a metes and bounds, longitude-latitude deed description of the property below.¹⁵² These theories which describe a conveyance of real property could hardly be applied to a physical transfer of air rights. Without affixing a two dimensional reference point it would be impossible to locate at a given point in time the boundary of the property, and subsequently the legal relations between subjacent owner, the land owner and the superadjacent owner would be indeterminable, without a four dimensional deed.¹⁵³

In summary, neither the homogeneous theory which uses the fee owner's tract as a locus for the three dimensional sub-

and is inseparable from ownership of the land. . . .

Morris, *supra* note 142, at 252.

Note under this definition condominium owners defined by the "common interest ownership act" would be parties in interest since their ownership is appurtenant to the land. See N.Y. Real Prop. Law § 339(e)(5) (McKinney Supp. 1984).

151. *Cadillac Fairview*, 86 A.D. 2d at 19-20, 448 N.Y.S.2d at 669. Legislative recognition of fee ownership in air rights has resulted in such air right developments as the Washbridge Apartments which rest upon Interstate 95. Additionally, the Pan American building (this building in fact is built over Grand Central Station), Park Avenue and Madison Square Garden are all examples of buildings, under separate air rights ownership, which are separate structures, independent from the land and sub-surface structure upon which they rest; however, in order for these projects to work, the developer must exact a support system from the supporting structure below. Real property law has provided a bundle of devices such as "fee support columns," support easements and lease-sublease back schemes in order to define the support rights of the individual owners. See Comment, *supra* note 141, at 346-50; Morris, *supra* note 142, at 261-64.

152. Therefore, the transfer of air space rights from parcel to parcel would be the equivalent of transferring air space on top of already existing air space. See N.Y. Times, Feb. 21, 1986, § D at 1, col. 3.

153. Subjacent owner refers to the three dimensional owner below a specified horizontal plane and superadjacent owner refers to the owner above that plane. See Morris, *supra* note 142, at 260.

division, nor the appurtenant theory, which attaches ownership of air and structures over the land to the fee itself, recognize the ability to transfer three dimensional air space from one fee to another fee.¹⁵⁴ These theories describe a conveyance of air rights and not a transfer of fee air rights.¹⁵⁵ Perhaps these aforementioned cases would have made more sense if the courts employed a two step analysis. The first step of this analysis is that a party in interest is an owner of transferable floor area. The second step calls on the court to determine who is a party in interest by choosing a theory of air rights and then determining if that party is adversely affected or not.¹⁵⁶

This analysis, however, is convoluted. It requires a two step analysis and the result depends on an ambiguous choice between two theoretical views of real property. In order to facilitate this transaction and obtain greater certainty for developers as well as predictability in judicial interpretations it is desirous to describe the transferred interest itself. This interest which has been referred to for the most part as a transfer of air rights will hereinafter be referred to as a transfer of development rights (TDR).¹⁵⁷

B. *Dimensional Zoning and Transferable Development Rights*

Recently, legal authorities have turned to "dimensional

154. See *supra* note 110 and accompanying text.

155. A description transferring the location of an interest in real property would have to describe the property not only in a three dimensional form as in an air rights conveyance, but would also have to add the element of time. N.Y. Real Prop. Law. § 240 (McKinney Supp. 1985) does not cover this type of description nor does N.Y. Real Property Law discuss the rights if a builder defaults or the property is rezoned before rights vest. See Kuntz & Opar, *supra* note 31, at col. 1.

156. According to the court of appeals' appurtenant theory a person with an interest in the land itself is the most crucial factor in owning the transferable floor area (development rights). See *C.F. Lex Assoc.*, 56 N.Y.2d at 392-93, 437 N.E.2d at 1138, 452 N.Y.S.2d at 381. The appellate division, on the other hand, would argue that a party in interest will be determined in accordance with the three dimensional homogeneous view of real property. See *Cadillac Fairview*, 86 A.D.2d at 20, 448 N.Y.S.2d at 669.

157. See *infra* note 161 and accompanying text.

zoning" in order to describe a legal foundation for the actual transfer of development rights. The concept behind dimensional zoning is that there is a new form of urban land use regulation which is described in terms of space and time.¹⁵⁸ Time zoning is defined to mean the establishment of a timetable for the orderly development of a specified area.¹⁵⁹ Space zoning deals with the technique of transferring zoning or in other words development rights from one site to another, usually in densely occupied urban areas. Space zoning occurs when, "the transferor site (having a building underutilizing its maximum zoning potential) conveys to the transferee site (one in the process of development), all or portion of its unused potential zoning capacity, which would otherwise lie fallow."¹⁶⁰

The zoning lot merger is in reality a TDR.¹⁶¹ TDR is a concept of developing space over time. The space or FAR rights are transferred to a contiguous receiving lot and are not fully utilized until the time sequence, the building process, is complete.¹⁶²

1. *Is a Transfer Development Right an Interest in Real Property.*

The concept underlying TDRs assumes that title to real property is not a unitary or monolithic right, but rather part

158. Morris, *Dimensional Zoning*, 46 St. John's L. Rev. 679 (1977).

159. *Id.* at 680

160. *Id.* at 679. Space zoning is defined to mean the transference of air rights from one parcel to another.

161. Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 Harv. L. Rev. 574, 592 n. 58 (1972); Alan, *supra* note 1, at 338 n.4. Where the author states:

However, the technique does not entail transfer of "air rights". . . . The latter are a property interest in a three dimensional location in space. Development rights, on the other hand, are simply a government license to build a defined amount of floor area as measured by the amount of lot area that has been constructively transferred to the project site.

162. This process may take years. See Morris, *supra* note 158, at 680-81. See generally *Golden v. Planning Bd. Town of Ramapo*, 30 N.Y.2d 359, 334 N.Y.S.2d 138, appeal dismissed 409 U.S. 1003 (1972). Here a town in upstate New York required developers to complete public infrastructure improvements over a period of years in order to gain permission to develop.

of a bundle of rights, each of which may be separated and transferred to another parcel, leaving the original owner with all other rights of ownership. One of these component rights is the right to develop.¹⁶³ Some authorities believe that there are legal precedents for TDRs.¹⁶⁴ One authority notes that, "we have long been accustomed to the separation and alienability of such components of title as mineral rights and mortgage liens. . . ."¹⁶⁵ Still others cite examples such as the Milldam Acts, which enabled downstream owners to construct dams and harness water power so long as upstream owners were compensated for their lost rights to develop.¹⁶⁶ These authorities also look to the "Town and Country Planning Act" of 1947 which nationalized all land development in Great Britain.¹⁶⁷

It must be noted that in none of these so-called legal precedents were development rights actually transferred from the land. Rather, these examples represent police power regulating the right to develop land on privately owned parcels. The right to develop in these cases did not leave the land, rather they were merely held dormant.¹⁶⁸

Instead, the origin of TDRs is found in the planning and zoning resolutions of New York City.¹⁶⁹ TDR's existence is owed to the zoning regulation for floor area which is a method of regulating population density.¹⁷⁰ Therefore, TDR is a transfer of permissible density levels. As illustrated, the TDR is merely a contrivance, a political compromise, that is in need of a legal classification.

163. Merriam, *Making TDR Work*, 56 N. Car. L. Rev. 77, 85-89 (1977); Rose, *The Transfer of Development Rights: A Preview of an Evolving Concept*, 3 Real Est. L.J. 330, 331-37 (1975).

164. Merriam, *supra* note 163, at 85.

165. Rose, *supra* note 163, at 331.

166. *Id.* at 333-37.

167. Merriam, *supra* note 163, at 88-89.

168. These descriptions note that real property is theoretically a bundle of sticks, but in none of the aforementioned examples does the stick leave the fee. Rose, *supra*, note 163, at 331.

169. New York, N.Y., Zoning Res. § 12-10 at 48-49 (1981); Pedowitz, *infra* note 174, at 198.

170. See *supra* notes 14-25 and accompanying text.

A TDR most likely represents an interest in real property that is less than a fee simple interest.¹⁷¹ Some authorities have termed the TDR as an irrevocable license or a lease in real property.¹⁷² These definitions are extremely unpalatable. Licenses, unlike easements, do not run with the land.¹⁷³ A license in real property is personal to the owner of the land and is assignable only if so intended by the parties.¹⁷⁴ A mortgagee who forecloses on his security lien, for example, would not be bound by the prior owner's license. The most likely explanation of the interest represented by TDRs is that it remains a conveyance of an interest in real property resembling a negative easement.¹⁷⁵ Moreover, a zoning lot merger may be seen as a statutory form of negative easements, and it has a similar effect.¹⁷⁶ Support for this theory may be found in the zoning

171. Costonis, *supra* note 161. See also *supra* note 152-56 and accompanying text.

172. Warren's Weed, *supra* note 50, at 120-21.

173. Warren's Weed, N.Y. Law Real Prop. License, § 1.03 at 2 (4th Ed. 1973).

174. *Id.* Likewise a TDR may also be classified as a lease. A lease on the other hand, confers upon a lessee exclusive possession of some definite space against the owner of property. *Id.* In fact, from 1969 to 1977 it was represented by a lease. If a TDR is a lease the legislator or the courts must discuss what occurs in the event of default or on the expiration of a lease.

Section 12-10 originally described air rights as a lease for 75 years or more. See *supra* note 24 and accompanying text.

As in all property problems which confer less than fee interest, there is a problem of fashioning a remedy upon expiration of an interest. For example, will the reversionary interest become a nonconforming use? Pedowitz, *Air and Development Rights*, 9 Real Prop. & Prob. J. 183, 198 (1974). See Kuntz & Opar, *supra* note 31, at 33. This problem is not addressed by the statute. However New York, N.Y., Zoning Res. § 54-00 (1982) provides a certain number of years amortization for non-conforming uses. Also, there is an issue concerning what happens on default by the lessee. Can the lessee be ordered to tear down floors representing the transferred FAR space? The answer to the latter question is probably no. See generally, *In re Robert Pace*, 93 Misc. 2d 969, 400 N.Y.S.2d 488 (N.Y. Sup. Ct. 1977). The useless destruction of property would be seen as void by public policy. But perhaps the lessor or mortgagor can have a court impose a constructive trust on the transferee accounted for by the proceeds of the additional rentable floor area. Kuntz & Opar, *supra* note 31.

175. Some authorities hold TDR's are negative easements. See Pedowitz, *supra* note 174, at 197; Rifkin, *supra* note 29, at 22.

176. Morris, *supra* note 142, at 252. Here the author notes that air rights are part of the same class of real property as light-air access rights and they are part of the package included in the ownership of land surface. Under this theory air rights

resolution itself.¹⁷⁷ For example, the stated legislative purpose of bulk (height and setback) and FAR zoning is to regulate the overall congestion and light and air in New York City.¹⁷⁸ Additionally, the TDR as practiced in New York is founded on the zoning ordinance which determined that a parcel of property is entitled to a certain amount of density designated as floor area.¹⁷⁹ The power to allocate a lattice work of the density levels may be deemed given to the parties in interest upon the formation of the original zoning lot. By transferring or purchasing the available rights to certain FAR levels, the transferor would not be transferring air rights, but would be instead conveying or releasing the "transferee" from a statutorily prescribed negative easement consisting of light-air access rights and density-congestion rights.¹⁸⁰

An easement definition, however, raises certain problems. For example, there remains the issue of whether the easement would in fact survive a lot merger, because easements are said to be extinguished upon unity of ownership and the zoning lot merger does merge ownership of the allowable density levels.¹⁸¹ Another problem with an easement theory is that if the easement so impairs the mortgagee's lien, the transferor's mortgagee may accelerate his mortgage due to the alienation of part of his collateral.¹⁸²

and transferred air rights would be one and the same, however it should be noted that it is possible to convey air rights through a three dimensional deed without conveying floor area, thus conveying an empty shell. It is more practical, therefore, to think of an air right conveyance as a three dimensional deed conveyance, while referring to transferred air rights as a conveyance of a density easement to adjacent lot owners (the latter would of course indirectly affect light-air access rights).

177. *See supra* note 8.

178. New York, N.Y., Zoning Res. § 31-00(G), at 195 (1981).

179. *See supra* note 14 and accompanying text.

180. *Cf.* N.Y. Envtl. Conserv. Law § 49-0305 (McKinney Supp. 1985), includes an example of a statutory easement. One authority believes that the transfer of development rights in New York would have its closest affinity to an, "easement in the nature of a profit a prendre." *See* Pedowitz, *supra* note 174.

181. Warren's Weed, N.Y. Law of Real Property, *Easements* § 12.01 (4th ed. 1980). The zoning lot merger may be considered unity of ownership as to air rights. *See Times Square Properties v. Al Habb Realty Corp.*, 117 N.Y.S.2d 901 (N.Y. Sup. Ct. 1952).

182. For this reason, a mortgagee would be included as a party in interest although it may depend on a due on sale clause in the mortgage. *See* Axelrod, *supra*

The preceding theories regarding whether TDRs are real property has in a sense already been answered. In New York, title insurance companies will not insure title to TDRs.¹⁸³ Title insurance companies in New York are limited to insuring title to real property interests including mortgages and leaseholds.¹⁸⁴ TDRs are not considered by the state legislature as real property interests.¹⁸⁵

Title insurance companies will indirectly insure a zoning lot merger through the vehicle of a negative easement between the transferee and transferor.¹⁸⁶ Perhaps, because a title company will only insure the negative easement, this fact may be further evidence that the transfer really represents an easement.¹⁸⁷ The failure, however, of the legislature to define the development right as an interest in real property has thus made it directly uninsurable.

Moreover, since a transferable air right is established by an ordinance it is not a permanent interest, and it is subject to future change as old planners leave and new ones enter.¹⁸⁸ These transitions create a problem because the right to develop in New York does not vest¹⁸⁹ at the time a Building Permit¹⁹⁰ is issued, but rather at a time when substantial con-

note 107, at 121.

183. Pedowitz, *supra* note 174, at 197; Rifkin, *supra* note 29, at 21.

184. Rifkin, *supra* note 29, at 19.

185. *Id.*

186. Rifkin, *supra* note 29, at 21; *see* 805 Third Ave Co. v. M. W. Realty, 58 N.Y.2d 447, 448 N.E.2d 445, 461 N.Y.S.2d 778 (1983). Where the transferor defaulted on his obligation to transfer air rights leaving title to the transferred FAR in controversy.

187. Pedowitz, *supra* note 174; *in agreement*, In Re Brause 140 N.Y.L.J. 108 (N.Y. Sup. Ct. 1958). Presently the only title insurance available is negative easement for light and air. *Cf.* Smith, *Title Insurance and Zoning Coverage*, reprinted in Axelrod, *supra* note 107 where the author advocates that city officials define the legal nature of certain zoning concepts in order to provide for affirmative insurance coverage.

188. Pedowitz, *supra* note 174, at 198.

189. Vesting means the right to continue construction following the issuance of a building permit, but while a rezoning is occurring. *See* Ellickson & Turlock, *supra* note 32, at 200-12.

190. A building permit is issued by a department of buildings to proceed with construction according to and under the auspices of the zoning ordinance. *Id.*

struction has occurred.¹⁹¹ Consequently, the City and the purchaser of the development rights may not be bound to a TDR and the transfer would therefore not survive a downzoning in the district where it is located.¹⁹²

2. *A license air rights development permit*

A TDR might best be explained as a licensed air right permit in quasi real property.¹⁹³ A license in things other than the use of real property is a privilege conferred by the state.¹⁹⁴ In this case the license would represent the right or privilege to build. By transferring this right a transferor would not be transferring real property in the form of air rights, but rather he would be negotiating away his right to build and subjecting his property's development capacity to a state of dormancy.¹⁹⁵

The line between personal property and real property is not always discernible. Presently, the law has established certain types of property that at times are real property and at other times personal property. The law regarding security interest in fixtures is just one example of property that can be both personal property and real property.¹⁹⁶ Also, New York cooperative apartment association law deems the shares distributed to an apartment unit holder as personal property, even though the shares represent an interest in real property.¹⁹⁷ An air rights building permit may similarly be thought of as personal property or a share of allowable floor area that may be bought and sold. These shares would remain personal

191. Under New York City's zoning resolution rights under a building permit generally vest upon the completion of a building foundation. See *Temkia v. Karaghenzoff*, 34 N.Y.2d 324, 329, 313 N.E.2d 770, 774, 357 N.Y.S. 2d 470, 474 (1974).

192. Down zoning refers to restricting the potential capacity and intensity of development in a given area. See *Hinds, Upper East Side Fears Downzoning*, N.Y. Times, June 16, 1985, § 8 (real estate), at 1, col. 5.

193. *Costonis, supra* note 161.

194. *Weed, supra* note 173.

195. *Costonis, supra* note 161, at 586-92.

196. See N.Y.U.C.C. § 9-401 (McKinney Supp. 1984); Garfinkel, *How Objects Become Fixtures*, 1 Prac. Real Est. L. 19 (1985).

197. *Superior Financial Corp. v. Haskell*, 556 F. Supp. 199 (S.D.N.Y. 1983); *State Tax Comm. v. Shorr*, 43 N.Y.2d 151, 371 N.E.2d 523, 400 N.Y.S.2d 805 (1977).

property¹⁹⁸ until the transferee's rights vest through the actual development of these air rights. After vesting, the air rights would then represent real property.

V. Conclusion

The controversy surrounding the zoning lot merger invites the conclusion that political expediency is not a panacea for unsound municipal planning. The § 12-10 resolution is fraught with inconsistencies that have greatly troubled the courts. The arguments made in favor of a transfer of air rights rest on tenuous grounds. Instead, as demonstrated, it is more practical to define transfer air rights as either a statutorily prescribed negative easement or as quasi real property in the form of a government granted license to build.

If the transferred FAR is thought of as a personalty then the transferring of the floor area could be governed by the commercial code as are the fixtures. This method would allow state law to define what a transferred air rights is and who the parties in interest are. On the other hand, the transferred floor area may be considered real property and thus subject to the Real Property Law of New York. Under this interpretation the parties in interest would be all those parties that would traditionally have an interest in an easement and it may be supplemented by including parties such as large space tenants who have a long term adversely affected interest in the premises. Finally, if a transferred air right is in actuality an easement or a negotiable license, it must be so stated and the rights and interests of the parties must be explicitly defined by the regulatory authorities for such a program to function in terms of the law and in terms of equity.

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198. Article 9 also follows a policy of terming certain interests in real property that have been sold to third parties or traded such as a mortgage backed security as personal property. See N.Y.U.C.C. § 9-102 comment 4 (McKinney Supp. 1984).