

Outside Counsel

Expert Analysis

Floor Area Transfer By Zoning Lot Merger

The ability to transfer floor area by zoning lot merger derives from two basic principles under the Zoning Resolution. First, under the definition of “zoning lot” set forth at ZR §12-10, it is permissible to merge one’s own lot with any other lot that is located on the same block and contiguous for a minimum of 10 linear feet. In particular, subdivision (d) of the definition states that a zoning lot may consist of “a tract of land ... consisting of two or more lots of record contiguous for a minimum of ten linear feet, located within a single block, which ... is declared to be ... treated as one zoning lot for the purpose of this Resolution.” Second, the ZR regulates compliance on the basis of a zoning lot, not a tax lot or other lot of record. Therefore, after two parcels are merged into a single zoning lot, their compliance with all regulations, including floor area, is evaluated based

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on the lot area of the merged parcel. Since DOB will, following the zoning lot merger, analyze the floor area compliance based on the entire zoning lot, a zoning lot merger under subdivision (d) may be used to transfer unutilized development rights from one or more contiguous parcels to another that is under separate ownership.

A zoning lot merger under subdivision (d) is required to be documented and evidenced to the DOB by a series of “zoning exhibits” that are intended to confirm that all parties that have an interest in the affected land, e.g., fee owners, ground lessees, lenders and easement holders, have consented to the formation of the zoning lot. This requirement dates from 1977 amendments to the “zoning lot”

definition that were intended to address issues arising out of the litigation in *Newport Assoc. v. Solow*, 30 N.Y.2d 263 (1972). In *Newport*, a developer ground leasing property had, without the consent of the ground lessor, transferred the excess floor area from that property to an adjacent property it owned and incorporated them into the build-

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ing he was developing thereon. The 1977 amendments were adopted (1) to avoid situations, such as that in the *Solow* case, in which parties with an interest in a property have their rights compromised without their consent, and (2) to ensure that the public land records show when and where such transfers had taken place.

With respect to the specific zoning exhibits, first, a title company must to identify the “parties in interest” on an Exhibit I or III Certification of Parties in Interest. Second, the parties, or, more often, just the fee owners, enter into an Exhibit IV Declaration of Zoning Lot Restrictions declaring that the parcels constitute and are to be treated as a single zoning lot. Third, all parties in interest who do not sign the Declaration are required to execute an Exhibit V Waiver of their right to do so. These documents must be recorded and are submitted to DOB at the time of filing for a building permit, together with an Exhibit II Zoning Lot Description and Ownership, which is executed by the permit applicant and reconfirms the zoning lot status.

A Zoning Lot Development Agreement, or ZLDA, is generally recorded with the zoning exhibits. Although the primary purpose of the ZLDA is usually to allocate floor area among the parcels, it also sets forth various rights and obligations of the parties. For example, it may include light and air and construction easements, prohibit parties from allowing or creating zoning violations on their property, and provide for cooperation among the parties in applications to public agencies. And, significantly, it should address contingencies raised by the application of zoning regulations to the particular parcels in question. The particulars of a development right

transaction can vary based upon based upon the applicable zoning district, existing built conditions on the zoning lot, prior regulatory approvals, and the proposed uses on the respective parcels. All of these issues should be reviewed by an experienced land use practitioner before entering into a development rights transaction.

A few practice pointers to note.

- The only limitation on one’s ability to merge with an adjacent parcel is that a zoning lot subdivision cannot create a zoning non-compliance. Therefore, one cannot merge with another parcel if (1) that other parcel is already part of another zoning lot with, and would have to be subdivided from, other parcels, and (2) that subdivision would create a zoning non-compliance. As an example, if two lots are part of a single zoning lot but all of the available floor area on the zoning lot has been incorporated into a building on one of the lots, it would most likely not be permissible to subdivide that zoning lot without creating a floor area non-compliance, since one of the lots would be overbuilt after the subdivision.

- At times, a parcel without excess floor area may be merged in solely for purposes of creating contiguity and allowing merger with parcels further down the block that do have excess floor area. The owners of such “passthrough parcels” are paid by the developer solely for enter-

ing into the zoning lot merger and not for any actual floor area development rights. The caveat here is that if the passthrough parcel is overbuilt, any such overbuild must be deducted from the floor area that is transferred so that the zoning lot as a whole will not have a floor area non-compliance after the new building is constructed.

- There may be other situations where it is advantageous to merge with parcels that have already been fully built to their basic maximum floor area ratio (FAR)—specifically, for purposes of utilizing their bonus rights. If a parcel is built to its a basic maximum of, e.g., 10 FAR but is allowed a total of 12 FAR through, e.g., plaza or inclusionary housing bonuses, a developer may merge with that parcel for purposes of increasing the lot area of the zoning lot and thereby increasing the bonus floor area available to the new development.

- A development project must comply with all applicable regulations of the Zoning Resolution, of which floor area regulations are but one. Therefore, if a development project is located in a zoning district in which height limits apply—generally, a “contextual zoning district”—the ability to incorporate additional floor area from an adjacent parcel is effectively limited by such height and other bulk envelope limitations. Although contextual districts generally define the allowable bulk envelope in such a

way that an additional increment of floor area beyond that generated on the parcel itself may be incorporated, such additional increment may only be an additional 20 or 30 percent over the floor area generated on the parcel itself. Further, the allowable envelope may be more limited on an irregularly shaped parcel, e.g., one that is unusually shallow, where required rear yards and setbacks consume a disproportionate share of the lot area. Thus, zoning lot mergers are of more limited benefit in contextual districts.

- Similar difficulties can arise with respect to “split lots”, i.e., zoning lots that are divided by a district boundary line. Although there is no restriction on merging with a parcel that is in a different zoning district, there are limitations on the ability to transfer floor area from one district to another where the two districts are subject to different floor area regulations.

- Since the merged parcels are viewed as a single unit for purposes of zoning compliance by the DOB, in theory any owner on the zoning lot may be issued a violation by DOB as a result of a zoning condition created on another parcel. The ZLDA should include provisions to prevent and mitigate such occurrences.

- Our clients are at times surprised to learn that a ZLDA is not submitted to DOB. DOB’s task in reviewing a building permit application is to confirm that

the zoning lot as a whole, after construction of the proposed building, complies with applicable zoning regulations. The zoning information relative to the other parcels on the zoning lot is included in the submission as a way of confirming that the zoning lot as a whole complies. If any information is inconsistent with the floor area allocation or any other provisions of the ZLDA, that is for the parties to resolve by private means (although DOB may at times, in the event of a dispute between owners on a zoning

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lot, decide to delay issuance of or initiate proceedings to revoke a building permit on that basis).

- Practitioners should be aware of one surprisingly common issue—where there is a disjunction between the ZLDA and the DOB filing. For example, we have seen situations where an architect has filed plans at DOB incorporating all excess floor area on the zoning lot into the new building, without recognizing that the ZLDA reserved some of this excess floor area to another owner on the zoning lot. The lesson here is that the architect must be fully aware of the substantive provisions contained in the ZLDA. Better yet,

the land use attorney should be involved in the project through the DOB application to ensure that the project is fully compliant with the ZLDA.

Finally, note that there are also various mechanisms under the Zoning Resolution whereby floor area can be transferred from locations beyond the immediate block of the development site, but most of those are dependent upon either the landmark or special district status of the properties in question, and in most cases those types of transfer cannot be accomplished on an as-of-right basis.