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Transferring Development Rights Across Zoning District Boundaries in New York City – When is it Allowed?

As the real estate development market continues to improve to near pre-recession levels, property assemblages, which typically include development rights (a/k/a air rights) transfers, are becoming more common in the outer-boroughs of New York City. Very often property assemblages include a mix of fee owned parcels ("Fee Parcels") and development rights parcels ("Development Rights Parcels"). One issue that is regularly encountered with assemblages that include Development Rights Parcels is the transfer of floor area across zoning district boundaries. For example, a developer acquires three (3) Fee Parcels all of which are zoned R7B. The developer then seeks to purchase and incorporate development rights (a/k/a floor area) from under-developed adjoining parcels (i.e. Development Rights Parcels) by merging them with the Fee Parcels into a common zoning lot (a separate article will discuss the mechanism for merging lots and transferring developing rights). However, the Development Rights Parcels are zoned R6A. The developer is intending to construct a residential building on the Fee Parcels. The R7B zoning district has a maximum residential floor area ratio ("FAR") of 3.0 and the R6A zoning district has a maximum residential FAR of 3.0.

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Under Article 7, Chapter 7 of the New York City Zoning Resolution, the general rule is that you cannot transfer floor area across zoning district boundaries. Some exceptions to this rule apply to zoning lots that existed before the date the zoning district boundary was created (i.e. "pre-existing lots"). This would typically be the case if one or more of the Fee Parcels in my example had a district boundary running through the center of it. In that case, the split lot provisions of Article 7, Chapter 7 apply, and, subject to certain requirements and limitations, the floor area can be averaged over the entire zoning lot, and utilize an "adjusted floor area" on the portion of the zoning lot to be developed. There is also an exception for pre-existing lots that allows the zoning district boundary to be shifted if more than 50% of the lot is in one zoning district and the district boundary is less than 25 feet from the lot line. In this exception, the zoning district that applies to more than 50% of the lot can apply to the entire lot.

The foregoing exceptions would not apply in the example above because the zoning lot is not pre-existing, but instead would be created when the the Fee Parcels

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are merged with the Development Rights Parcels as part of the assemblage to create a new zoning lot. Accordingly, the prohibition under Article 7, Chapter 7 applies, and the floor area available from the Development Rights Parcels zoned R6A cannot be transferred and utilized on the Fee Parcels zoned R7B.

There is, however, an additional exception to the prohibition on transferring floor area across zoning district boundaries that is not expressly stated in the text of the Zoning Resolution but rather is the result of a court-affirmed interpretation. On a newly created zoning lot, where the floor area regulations in the two separate zoning districts are identical with respect to the use being developed, the floor area generated in one zoning district may be transferred to and developed on the portion of the zoning lot within the other district. This interpretation was confirmed in Matter of Beekman Hill Association v. Chin, 274 A.D.2d 161 (1st Dep't 2000), in which the court held that the split lot provisions of the Zoning Resolution do not apply to residential floor area where the maximum residential floor area is the same for each portion of the zoning lot within different zoning districts; thereby allowing a transfer of floor area across the zoning district boundary as if the districts were the same.

In the example above, the exception under Matter of Beekman would apply because the R7B and R6A zoning districts have identical maximum residential FAR's notwithstanding that they are different zoning districts. What if the Fee Parcels were zoned R8A and the Development Rights Parcels were zoned R8B? In this alternative scenario, the exception under Matter of Beekman would not apply because the R8A zoning district has a maximum residential FAR of 6.02 and the R8B zoning district has a maximum residential FAR of 4.0.

Due to the complex rules governing the transfer of floor area across zoning district boundaries, it is critical that a full zoning analysis be performed when considering the acquisition of development rights as part of an assemblage to ascertain, among other things, the applicable zoning districts and when they were established, the history of the lots involved, and the maximum floor area for the use to be developed. Depending upon the outcome of such an analysis, it is possible that the transfer of development rights will be prohibited, permitted, or somewhere in between. Given that the viability of most development projects depend upon the maximum floor area yield, this analysis should be completed as part of any initial due diligence.

For more information, please contact Daniel Braff at 516.228.1300 or dbraff@swc-law.com

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