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Development Rights as Collateral: A Lender's
Perspective on Development Rights Deals:
Due Diligence; Perfection; Surprises!

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DEVELOPMENT RIGHTS AS COLLATERAL: A LENDER'S PERSPECTIVE ON DEVELOPMENT RIGHTS DEALS: DUE DILIGENCE; PERFECTION; SURPRISES!

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This program addresses development rights deals in New York City, with an emphasis on lenders' concerns. Development rights are sometimes called "floor area" or, incorrectly, "air rights." In this program, the term "development rights" is used broadly to refer to the panoply of rights set forth in the Zoning Resolution that permit development and use of a zoning lot, including, most notably, floor area, as well as density, lot coverage, minimum distance, and other bulk restrictions.

The topics covered include the market for development rights, the lenders' roles in development rights deals, the framework for zoning lot mergers, the mechanics of zoning lot mergers, and due diligence.

1. The Market for Development Rights

The market for development rights in the City is exploding. Only 18 development rights deals closed in 2003. More than 70 closed in 2007. Then, after the 2008 crash, fewer than 13 closed each year between 2009 and 2011.² According to my informal search of ACRIS records, there were 81 projects involving zoning lot mergers in 2015, surpassing pre-crash activity.

The most visible and controversial³ results of recent development rights deals are the collection of tall new residential condominium buildings south of Central Park. They range from 1,005 feet to 1,552 feet in height (1,775 feet, if you count the spire), and all of them used as-of-right zoning lot mergers to transfer development rights to the development site. One57, a project located at 157 West 57th Street, required 12 separate mergers to achieve its height.⁴

¹ With the assistance of Ariel S. Holzer, Associate, GoldmanHarris LLC.

² Josiah Madar "Buying Sky: The Market for Transferable Development Rights in New York City," p. 5 - 6 (Furman Center for Real Estate and Urban Policy 2013; "Furman Report").

<http://furmancenter.org/research/publication/buying-sky-the-market-for-transferable-development-rights-in-new-york-city>

³ Municipal Arts Society of New York City, "Accidental Skyline" (2013)

<http://www.mas.org/urbanplanning/accidental-skyline/>; see, also Joe Anuta, "Residents file plans to curb supertall towers in tony Manhattan neighborhood," *Crain's New York Business* (January 22, 2016)

http://www.crainsnewyork.com/article/20160122/REAL_ESTATE/160129956/residents-file-zoning-plans-to-curb-supertall-towers-in-sutton-place; and a critique of the plan by Nikolai Fedak, "Local Politicians Spearhead Request by 26th Floor Resident Of The Sovereign For 250-Foot Height Limit In Vicinity," *New York YIMBY* (January 26, 2016)

[http://newyorkyimby.com/2016/01/local-politicians-spearhead-request-by-26th-floor-resident-of-the-sovereign-for-250-foot-height-limit-in-vicinity.html?utm_source=YIMBY+News&utm_campaign=4616383fca-YIMBY_News_01_26_2016&utm_medium=email&utm_term=0_d76c6a6290-4616383fca-108440861&ct=\(YIMBY_News_01_26_2016\)](http://newyorkyimby.com/2016/01/local-politicians-spearhead-request-by-26th-floor-resident-of-the-sovereign-for-250-foot-height-limit-in-vicinity.html?utm_source=YIMBY+News&utm_campaign=4616383fca-YIMBY_News_01_26_2016&utm_medium=email&utm_term=0_d76c6a6290-4616383fca-108440861&ct=(YIMBY_News_01_26_2016))

⁴ New York City Department of City Planning ("DCP Report"), "A Survey of Transferable Development Rights Mechanisms in New York City," p. 8 (February 26, 2015) <http://www.nyc.gov/html/dcp/pdf/tdr/research.pdf?r=1>

The deals are no longer just a Midtown or Manhattan-wide phenomenon.⁵ They are surging in Brooklyn and Queens, between private parties and between private parties and public agencies. *Curbed* reported that the MTA approved a \$56 million, 478,000 square foot development rights deal enabling the developer to construct a 77-story building in Long Island City.⁶ Without the development rights, the tower would be only about half the size.

2. Overview of the Role of Lenders in Development Rights Deals

Lenders have a unique role in development rights deals. They sit on both sides of the transaction and control the deals in fundamental ways pursuant to their mortgages and the Zoning Resolution.

If a mortgage encumbers the seller's property, the seller's lender will have to approve the sale of the unused development rights, in effect releasing the lien of the mortgage from the unused development rights.⁷ It must be satisfied that the sale doesn't impair the value of the existing building. The seller's lender also has a vital role under the Zoning Resolution as a "party in interest" to a zoning lot merger. As a requirement for the sale, as discussed below, the seller's lender must execute a Declaration of Zoning Lot Restrictions or a Waiver of Declaration (most lenders execute a Waiver), evidencing its consent to the merger. The Declaration or Waiver must be recorded along with the other required zoning documents. Without it, the transaction is not valid.

At the same time, the purchaser's lender controls the deal because it is funding the acquisition. It must be satisfied that the development rights can be incorporated into the project and are worth the purchase price.⁸ Like the seller's lender, the purchaser's lender is a party in interest and also must execute and record a Declaration or a Waiver.

Furthermore, although not required by the mortgage or the Zoning Resolution, in most development rights deals, the seller and the purchaser each wants the other party's lender to subordinate its interest to a zoning lot development agreement (a "ZLDA"), assuring that its terms will be honored in the event of a foreclosure. Therefore, both lenders must be certain that the ZLDA conveys only the desired development rights to the development site and provides the appropriate protections for the assets.

In a competitive market, there is tremendous pressure to tie up the deal and complete a purchase contract, with zoning documents as exhibits, as soon as possible. Due diligence should be performed regarding the fundamental zoning issues, ideally, before pursuing the negotiations but, in any event, before closing.

⁵ Only two-thirds were in the Financial District, Lower East Side/Chinatown, Clinton/Chelsea, and Midtown. See, Furman Report, *supra* n. 1, at p. 8.

⁶ Jessica Daley, "Air Rights Deal Brings Queens' Tallest Tower Closer to Reality," *Curbed* (March 26, 2015).

⁷ The executed Waiver of Declaration of Zoning Lot Restrictions, discussed below, apparently serves as the bank's consent and release. Typically, no release of lien of the mortgage or amended mortgage is executed. Note that some mortgages may explicitly exclude the development rights.

⁸ See, Joshua Stein, "Development Rights: Lender's View," *Commercial Observer* (January 13, 2015) <https://commercialobserver.com/2015/01/development-rights-lenders-view/>

3. Framework for Zoning Lot Mergers under the Zoning Resolution

The original 1916 Zoning Resolution sought to limit the height of buildings and to regulate uses. In a precursor to our current framework for zoning lot mergers, a developer and his neighbor could agree that the neighbor's lot area could be counted as part of the "development site" so the developer could build a taller building.⁹

The original approach to zoning was significantly changed in 1961. To regulate the size of buildings, the 1961 Zoning Resolution created the "zoning lot" as the unit of land to which all zoning regulations would be applied, and "floor area ratio" ("FAR") as the mechanism to control the size of buildings on a zoning lot.¹⁰ The interplay between the two is what allows for development rights deals.

The floor area ratio is the maximum permissible ratio of a building's floor area¹¹ to the area of the zoning lot, as established by the Zoning Resolution for each zoning district based on use. In a zoning district that has a maximum FAR of 5, a 5,000 square foot lot ("Lot A") would have a permitted maximum floor area of 25,000 square feet of floor area.¹²

	Lot A
Lot Area (square feet)	5,000
FAR	x 5
Total Floor Area Permitted	25,000

To the extent that a property does not use all of its permitted floor area, it has excess floor area. For example, if the building constructed on Lot A contained only 10,000 zsf, it would have 15,000 zsf unused.

	Lot A
Lot Area (square feet)	5,000
FAR	x 5
Total Floor Area Permitted	25,000
Total Floor Area Utilized	10,000
Total Floor Area Unused	15,000

⁹ The Department of Buildings approved such arrangements, enabling a tower with a base equal to 25% of the lot area of the development site to exceed the height limit. In 1956, this arrangement was incorporated into the Zoning Resolution. For a description of the evolution of zoning lot mergers; see DCP Report, *supra* n. 2, at pp. 5-8.

¹⁰ The bulk of buildings also is regulated on a zoning lot-wide basis by other provisions of the Zoning Resolution, such as height and setback, yards, and lot coverage. Use, parking, loading and signage also are regulated by the Zoning Resolution.

¹¹ "Floor area," as used in the Zoning Resolution, is the sum of the gross area of each floor of the building, excluding certain spaces, such as mechanical space, cellar space, floor space in open balconies, elevators or stair bulkheads and, in most zoning districts, floor space used for accessory parking that is located less than 23 feet above curb level.

¹² "Square feet of floor area" is abbreviated herein as "zsf."

The 1961 Zoning Resolution allowed tax lots with at least 10 feet of contiguity to be combined – or merged – into a single “zoning lot” for the purpose of applying the zoning regulations. A zoning lot merger is the joining of two or more adjacent lots into a new zoning lot. Unused floor area and other development rights may then be shifted from one property to another, on an as-of-right basis.

Thus, the unused floor area from one portion of the zoning lot may be used on the other portion of the zoning lot, without regard to the boundaries of ownership, because the amount of floor area on the entire merged zoning lot, based on the FAR, would remain constant. There may be more than two lots in a merged zoning lot, provided there is 10 feet of contiguity between each lot and the next, like links in a chain.

In the example given, assume the adjacent developer’s lot (“Lot B”) is 10,000 square feet and is in the same 5 FAR district. Lot B could be developed with a building containing 50,000 zsf, as follows:

	Lot B
Lot Area (square feet)	10,000
FAR	x 5
Total Floor Area Permitted	50,000

From a business perspective, Lot A’s owner could sell 15,000 zsf to Lot B’s owner, who would construct a 65,000 zsf building on Lot B.

In contrast, from a zoning perspective, when Lots A and B are merged, they would be considered zoning Lot AB, with a lot area of 15,000 square feet and the right to build 75,000 zsf, 10,000 zsf of which has already been utilized and 65,000 zsf is available to be utilized anywhere on Lot AB. By private agreement, the parties would allocate the development rights appurtenant to the merged zoning lot between the two constituent lots, with the owner of Lot A retaining its 10,000 zsf building, and conveying its right to 15,000 zsf to the owner of Lot B. The owner of Lot B could then add the 15,000 zsf to its 50,000 zsf and construct a 65,000 zsf building. The merged zoning lot would be limited to a total of 75,000 zsf, which is 5 FAR.

	Lot A	Lot B	Lot AB
Lot Area (square feet)	5,000	10,000	15,000
FAR	x 5	x 5	x 5
Total Permitted Floor Area (FA)	25,000	50,000	75,000
Total FA Utilized	10,000	0	10,000
Total Unused FA Available	15,000	50,000	65,000
Total FA Transferred		15,000	
Total FA After Transfer	10,000	65,000	75,000

While the basic 1961 framework for zoning lot mergers remains intact, as a result of *Newport Assoc. v. Solow*, 30 N.Y.2d 263 (1972),¹³ the mechanism to merge zoning lots changed in a 1977 amendment of the Zoning Resolution which has remained in effect, with virtually no modifications, for 39 years. It is an effective tool for the private market to buy and sell floor area on an as-of-right basis, shifting development potential from one lot to another, while protecting the rights of lenders.

4. Mechanics of Zoning Lot Mergers Today

a. *Statutory Requirements*

The mechanics of the typical development rights deal – where one owner sells its development rights to the adjacent owner – are simple. The statutory requirements are set forth in subdivision (d) of the definition of “zoning lot” in Section 12-10 of the Zoning Resolution (see Exhibit 1).¹⁴ The basic forms to implement these requirements are exhibits to a Department of Buildings’ Intra-Departmental Memorandum, prepared by Acting Commissioner Irving E. Minkin, P.E., dated May 18, 1978 (attached as Exhibit 2). The following documents must be prepared, executed and recorded:¹⁵

- **Certification of Parties in Interest:** A Certification is prepared by a title company and identifies the parties having an interest in the properties to be merged, including the owners, mortgagees and other parties who could be adversely affected by the sale of the development rights. It must be recorded.
- **Declaration of Zoning Lot Restrictions:** A Declaration declares that the properties listed shall be treated as one zoning lot. It must be executed by the owners of the properties to be merged and the parties in interest identified in the Certification, unless they execute a Waiver (see below). The form of Declaration is often modified to address, *inter alia*, the right of an owner to enlarge the zoning lot without the consent of other owner. Declarations must be recorded.
- **Waiver of Declaration of Restrictions:** A Waiver may be executed by any party in interest, in lieu of executing a Declaration, and must be recorded. The form of Waiver is often modified to address, *inter alia*, the right of an owner to enlarge the zoning lot without the execution of another Waiver by the party in interest and a mortgagee’s

¹³ In *Newport*, the plaintiff sued the defendant to compel a claim for real property pursuant to Art. 15 of the RPAPL. The defendant held a long-term ground lease for plaintiff’s property that met the Zoning Resolution’s definition of “ownership.” The defendant also owned a parcel (9 West 57th Street) that was contiguous to the ground leased property by 10 feet. Pursuant to the Zoning Resolution, the defendant could merge the two parcels into a single zoning lot and shift the unused development rights from the plaintiff’s property to the defendant’s parcel. The Zoning Resolution did not require the ground lessor to consent to the application at DOB. The Court of Appeals found that the defendant had not violated the statute and ruled in favor of the defendant.

¹⁴ There are three other definitions of “zoning lot” that involve a single owner, or a single owner and a party in interest whose interest covers all or substantially all of the land owned by the owner.

¹⁵ A Zoning Lot Description and Ownership Statement, describing the perimeter of the merged zoning lot, must be executed by the applicant to the Department of Buildings. Since it is not executed by the seller, this document is not necessary to close a development rights deal; it is necessary to obtain a building permit.

subordination of its interest to the ZLDA (discussed below). Generally, lenders execute a Waiver, not a Declaration.

The execution and recording of these instruments is all that is needed to create a merged zoning lot and the consequences of failing to meet these statutory requirements are dire. All of the parties in interest must be listed in the Certification; the failure to list all of the parties in interest and to obtain an executed Declaration or Waiver from them nullifies the merger.¹⁶ Development rights cannot be transferred by a deed.¹⁷ Failure to record the required documents defeats the merger, even where there is convincing evidence that the parties intended the merger to be effected.¹⁸ Moreover, the documents must be recorded promptly after the closing, before a new party can gain an interest in one of the merged lots, thereby nullifying the merger.¹⁹ A deed to the development rights is insufficient to transfer development rights to an adjacent lot, unless the documents required by the statute are issued, executed and recorded.²⁰

b. Standard Practice Supplementing the Statutory Requirements

Fulfillment of the statutory requirements is sufficient to form a merged zoning lot. Plans may be approved and permits may be issued by the Department of Buildings based on the merger, allowing the developer to build the proposed building incorporating the development rights acquired from the adjacent lot. However, the required documents do not actually convey the unused development rights to the developer, establish parameters or conditions on their use, or regulate the operation of the merged zoning lot in the future. Based solely on the statutory documents, an unscrupulous seller could obtain a permit to construct a building that incorporates the purchaser's unused development rights.

Consequently, it has become standard practice for a number of other agreements to be entered into by the parties and for the purchaser to seek insurance from the title company. Many of the issues covered in these agreements are of importance to lenders to maintain the value and long-term viability of the seller's property and to make sure the purchaser's project can be developed as planned. These agreements include:

- **Zoning Lot Development Agreement:** A ZLDA is an agreement executed by the owners of the lots that comprise the merged zoning lot.²¹ It is recorded, but DOB does not review or approve it. It is a private agreement that establishes the relationship between the lots comprising a merged zoning lot. Although there are "standard" provisions in a ZLDA, the agreement is not just a form. It is often heavily negotiated and covers numerous topics, including but not limited to the following:

¹⁶ See, *BACM 2006-4 OFF. 41-60, LLC v. Flushing Landmark Realty LLC*, No. 701135/13 (Sup. Ct. Queens County, July 21, 2014).

¹⁷ *Ibid.*

¹⁸ In *B.S.A. Cal. 79-13-A*, regarding 807 Park Avenue, New York, the NYC Board of Standards and Appeals resolved that even though a stipulation in a court approved settlement proved that the parties intended the merger to be effected, the merger was not effective because the requisite zoning documents were not recorded.

¹⁹ See, *Union St Tower LLC v. First Am. Tit. Co.*, No. 502087/13 (Sup. Ct. Kings County Feb. 21, 2014).

²⁰ *BACM 2006-4 OFF. 41-60, LLC, supra*, n. 12.

²¹ More than one Declaration and ZLDA may be entered into as the merged zoning lot is expanded into a multi-lot merger.

- *Transfer and allocation of development rights:* Most importantly, it allocates the development rights on the zoning lot between the purchaser (developer) and the seller, transferring all or some of unused development rights to the developer and reserving the utilized development rights and any balance of the unused development rights to the seller. A development rights survey or architect’s certificate verifying the amount of development rights utilized on the seller’s property is advisable in many cases.
 - *Restrictions on use of development rights and design:* The ZLDA specifies any restrictions on the use of the development rights, as well as any bulk restrictions.
 - *Cooperation:* The ZLDA provides for mutual cooperation in connection with filings at the Department of Buildings for construction and alterations. It also addresses cooperation with respect to discretionary actions, such as variances and special permits. It may address the sequence of construction work on the merged zoning lot so that orderly filings at DOB and construction can occur for both owners.
 - *Violations:* The ZLDA generally requires each owner to avoid creating and, if issued, to cure, any zoning and code violations that impact the ability of the other owner to get a permit or a certificate of occupancy.
 - *Casualty and Downzoning:* The ZLDA outlines the rights of the parties to rebuild in the event of a casualty and a downzoning that reduces the amount of development rights appurtenant to the merged zoning lot.
 - *Upzoning:* The ZLDA provides the extent to which either owner benefits from an upzoning.
 - *Enlargement of the Zoning Lot:* The ZLDA addresses the right of each party to enlarge the zoning lot. In some development rights deals, the developer is purchasing rights from only one other lot for use on the development site. In other deals, the developer intends to purchase rights from multiple lots and must be able to enlarge the zoning lot to include additional lots. On the other hand, if the developer doesn’t purchase all of the seller’s unused development rights, the seller may desire the right to enlarge the zoning lot to sell her rights to another contiguous property on the block.
- **Easement for Light and Air:** If most or all of the seller’s unused development rights are sold, the ability to vertically enlarge the seller’s building would be limited. Therefore, the seller may be willing to grant an Easement for Light and Air restricting the height of its building. The easement benefits the purchaser by preserving views from the new building and may enable windows in the purchaser’s building to meet light and air requirements for habitation under the Multiple Dwelling Law.

The grant of the easement may be included in the ZLDA, in which case it is typically referred to as a “zoning lot development and easement agreement,” or it may be a separate agreement, such as the form of easement required by DOB. In either case, the precise elevation of the easement must be stated in the agreement and a roof survey is often warranted.

- **Subordination to the ZLDA:** It is now common to obtain the subordination of the parties' mortgagees to the ZLDA to preserve the owners' rights in the event of a foreclosure and sale to a third party. The subordination may be a separate agreement, although it is usually incorporated into the Waiver, in which case the Waiver is referred to as a "Waiver and Subordination." Many lenders do not scrutinize the ZLDA's provisions. When representing a lender, however, provisions in the ZLDA that protect the lender's interest should be considered, such as notice in the event of a default and exemption from paying damages for defaults that occur prior to foreclosure.
- **Construction License Agreement:** The parties may want to address their respective rights in preparation for and during construction, expanding upon the rights and obligations granted by law. A construction license agreement covers such matters as preconstruction surveys, access for inspections or construction, construction protections, the term of construction, and insurance. Instead of preparing a separate agreement, comparable provisions are sometimes included in the ZLDA.
- **Development Rights Endorsement:** In the context of a sale, development rights are not considered real property. Rather, they are considered statutory rights and are not an insurable interest for title purposes in New York State. Accordingly, no title insurance can be issued for development rights in New York State. However, a "development rights endorsement" can be obtained from a title company, insuring that all the proper steps were taken to form the merged zoning lot, and that the ZLDA and easement for light and are enforceable. The endorsement is associated with a title policy relating to a real property interest, such as a fee policy. Neither the existence of nor any specific amount of development rights may be insured. It is strongly recommended that a development rights endorsement be obtained by the purchaser.²²
- **ACRIS and Transfer Taxes:** Although, as mentioned above, development rights are not considered real property for which title insurance can be obtained in New York State, the City and State of New York do consider them real property for transfer tax purposes, and courts consider them real property for purposes of the statute of limitations.²³

5. Due Diligence

Before embarking on a transaction – and certainly before signing a contract – each party should conduct zoning due diligence. The research should verify that there are in fact unused development rights that can be utilized on the developer's property for the use and design contemplated, and that the merger can be effectuated. Building code issues that may impinge on the ability to construct the proposed building or to use it in the manner contemplated should also be considered. The amount of floor area utilized in seller's building (and the amount left over for transfer) should be ascertained and agreed upon by the parties. The seller should confirm that the use of its building and any retained development rights are not compromised by the sale. The

²² In *Union St Tower LLC*, *supra* n. 19, a title insurance company was not responsible for insuring development rights where it was not requested to record the zoning documents and issue a development rights endorsement and the policy insured only the fee property.

²³ See, *Harmit Realities LLC v. 835 Avenue of the Americas, L.P.*, 15065-651931/13 (App. Div. 1st Dept. 2015).

same issues are of concern to lenders. Due diligence should be performed by zoning attorneys, architects, surveyors, title companies, code consultants and any other appropriate professionals, and reviewed by the client. The matters explored in due diligence depend upon the particular facts and circumstances and may include the following:

- Title matters
 - Covenants and deed restrictions that may restrict the transaction or use of the development rights
 - Previous incorporation of seller's lot in a merged zoning lot
 - Previous sale of seller's development rights

- Zoning Regulations and Pending Legislation
 - Verification of how much floor area has been utilized on the seller's lot
 - Zoning district boundary lines that cannot be crossed by development rights
 - Limitations on the amount of additional floor area allowed on the purchaser's lot
 - Height or lot coverage restrictions
 - Use restrictions
 - Parking or loading requirements
 - Zoning proposals and legislation that may impact the amount of development rights available, the ability to incorporate them into a building in a suitable configuration, their permitted use, affordability, or otherwise affect the project. Of immediate interest is the proposed legislation for Mandatory Inclusionary Housing and Zoning for Quality and Affordability

- Other Administrative Restrictions
 - Designation of one of the buildings as an individual landmark or inclusion of any of the lots in a landmark district
 - Location of the development site in an Industrial Business Zone
 - Prior grant of a variance or special permit by the Board of Standards and Appeals or City Planning Commission

The importance of performing zoning due diligence to verify that the deal is feasible and worth pursuing for each party cannot be underestimated.²⁴ Once the transaction is closed, it may be extremely difficult or impossible to rescind the deal and restore the zoning status quo.

²⁴ In *New York City Educ. Constr. Fund v. Verizon NY Inc.*, 650193/09 (Sup. Ct. NY County June 12, 2012), the court ruled that the defendant's incorrect characterization of space as "mechanical" and, therefore, a deduction from floor area was not fraudulent because the plaintiff was deemed to be a sophisticated party and had no reason to rely on the defendant's assertions regarding the amount of available floor area without performing its own due diligence.

12-10 (continued)

Yard line, rear (12/15/61)

A "rear yard line" is a line drawn parallel to a *rear lot line* at a distance therefrom equal to the depth of a required *rear yard*.

Yard, rear (12/15/61)

A "rear yard" is a *yard* extending for the full length of a *rear lot line*.

Yard, side (12/15/61)

A "side yard" is a *yard* extending along a *side lot line* from the required *front yard* (or from the *front lot line* if no *front yard* is required) to the required *rear yard* (or to the *rear lot line*, if no *rear yard* is required). In the case of a *corner lot*, any *yard* which is not a *front yard* shall be considered a *side yard*.

Zero lot line building (2/2/11)

†A "zero lot line building" is a *building* that *abuts* only one *side lot line* and does not *abut* another *building* on the same or an adjoining *zoning lot* and which is surrounded on all sides but one by *yards*, other open area or *street lines* on the *zoning lot*. However, *accessory buildings* permitted pursuant to Section 23-44 (Permitted Obstructions in Required Yards or Rear Yard Equivalents) may be permitted to *abut* a *zero lot line building* on an adjoining *zoning lot*.

Zoning lot (2/2/11)

A "zoning lot" is either:

- (a) a lot of record existing on December 15, 1961 or any applicable subsequent amendment thereto;
- (b) a tract of land, either unsubdivided or consisting of two or more contiguous lots of record, located within a single *block*, which, on December 15, 1961 or any applicable subsequent amendment thereto, was in single ownership;
- (c) a tract of land, either unsubdivided or consisting of two or more lots of record contiguous for a minimum of ten linear feet, located within a single *block*, which at the time of filing for a building permit (or, if no building permit is required, at the time of the filing for a certificate of occupancy) is under single fee ownership and with respect to which each party having any interest therein is a party in interest (as defined herein); or
- (d) a tract of land, either unsubdivided or consisting of two or more lots of record contiguous for a minimum of ten linear feet, located within a single *block*, which at the time of filing for a building permit (or, if no building permit is required, at the time of filing for a certificate of occupancy) is declared to be a tract of land to be treated as one *zoning lot* for the purpose of this Resolution. Such declaration shall be made in one written Declaration of Restrictions covering all of such tract of land or in separate written Declarations of Restrictions covering parts of such tract of land and which in the aggregate cover the entire tract of land comprising the *zoning lot*. Any Declaration of Restrictions or Declarations of Restrictions which individually or collectively cover a tract of land are referred to herein as "Declarations". Each Declaration shall be executed by each party in interest (as defined herein) in the portion of such tract of land covered by such Declaration (excepting any such party as shall have waived its right to execute such Declaration in a written instrument executed by such party in recordable form and recorded at or prior to the recording of the Declaration). Each Declaration and waiver of right to execute a Declaration shall be recorded in the Conveyances Section of the Office of the City Register or, if applicable, the County Clerk's Office of the county in which such tract of land is located, against each lot of record constituting a portion of the land covered by such Declaration.

(Continued next page)

Exhibit 1

ARTICLE I: GENERAL PROVISIONS
CHAPTER 2: CONSTRUCTION OF LANGUAGE AND DEFINITIONS

12-10 (continued)

A *zoning lot*, therefore, may or may not coincide with a lot as shown on the official tax map of the City of New York, or on any recorded subdivision plat or deed.

Parcels within City-owned tracts of land located in Broad Channel within the boundaries of Community Board 14 in the Borough of Queens that were numerically identified for leasing purposes on maps filed in the Office of Borough President prior to December 15, 1961, may be considered as individual lots of record as of September 10, 1981.

(e) For purposes of the provisions of paragraph (c) hereof:

(1) Prior to issuing a building permit or a certificate of occupancy, as the case may be, the Department of Buildings shall be furnished with a certificate issued to the applicant therefor by a title insurance company licensed to do business in the State of New York showing that each party having any interest in the subject tract of land is a party in interest (as defined herein) except that where the City of New York is a fee owner, such certificate may be issued by the New York City Law Department; and

(2) A "party in interest" in the tract of land shall include only (W) the fee owner thereof, (X) the holder of any enforceable recorded interest superior to that of the fee owner and which could result in such holder obtaining possession of all or substantially all of such tract of land, (Y) the holder of any enforceable recorded interest in all or substantially all of such tract of land which would be adversely affected by the development thereof and (Z) the holder of any unrecorded interest in all or substantially all of such tract of land which would be superior to and adversely affected by the development thereof and which would be disclosed by a physical inspection of the tract of land.

(f) For purposes of the provisions of paragraph (d) hereof:

(1) Prior to issuing a building permit or a certificate of occupancy, as the case may be, the Department of Buildings shall be furnished with a certificate issued to the applicant therefor by a title insurance company licensed to do business in the State of New York showing that each party in interest (excepting those parties waiving their respective rights to join therein, as set forth in this definition) has executed the Declaration and that the same, as well as each such waiver, have been duly recorded; except that where the City of New York is a fee owner, such certificate may be issued by the New York City Law Department; and

(2) The Buildings Department, in issuing a building permit for construction of a *building or other structure* on the *zoning lot* declared pursuant to paragraph (d) above or, if no building permit is required, in issuing a certificate of occupancy for such *building or other structure*, shall accept an application for same from and, if all conditions for issuance of same are fulfilled, shall issue same to any party to the Declaration;

(3) By their execution and recording of a Declaration, the parties to the Declaration, and all parties who have waived their respective rights to execute such Declaration, shall be deemed to have agreed that no breach by any party to the Declaration, or any agreement ancillary thereto, shall have any effect on the treatment of the tract of land covered by the Declaration as one *zoning lot* for purposes of this Resolution and such tract of land shall be treated as one *zoning lot* unless such *zoning lot* is subdivided in accordance with the provisions of this Resolution; and

(4) 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 be superior to and adversely affected by the Declaration and which would be disclosed by a physical inspection of the portion of the tract of land covered by the Declaration.

A *zoning lot* may be subdivided into two or more *zoning lots*, provided that all resulting *zoning lots* and all *buildings* thereon shall comply with all of the applicable provisions of this Resolution. If such *zoning lot*, however, is occupied by a *non-complying building*, such *zoning lot* may be subdivided provided such subdivision does not create a new *non-compliance* or increase the degree of *non-compliance* of such *building*.

Where ownership of a *zoning lot* or portion thereof was effected prior to the effective date of this amendment, as evidenced by an attorney's affidavit, any *development*, *enlargement* or alteration on such *zoning lot* may be based upon such prior effected ownership as then defined in the *zoning lot* definition of Section 12-10. Such prior leasehold agreements shall be duly recorded prior to August 1, 1978.

Prior to the issuance of any permit for a *development* or *enlargement* pursuant to this Resolution a complete metes and bounds of the *zoning lot*, the tax lot number, the block number and the ownership of the *zoning lot* as set forth in paragraphs (a), (b), (c) and (d) herein shall be recorded by the applicant in the Conveyances Section of the Office of the City Register (or, if applicable, the County Clerk's Office) of the county in which the said *zoning lot* is located. The *zoning lot* definition in effect prior to the effective date of this amendment shall continue to apply to Board of Standards and Appeals approvals in effect at the effective date hereof.

Zoning maps (1215/61)

"Zoning maps" are the maps incorporated into the provisions of this Resolution in accordance with the provisions of Section 11-14 (Incorporation of Maps).

THE CITY OF NEW YORK
DEPARTMENT OF BUILDINGS

DEPARTMENTAL MEMORANDUM

DATE: May 18, 1978

TO: Borough Superintendents

FROM: Acting Commissioner Irving E. Minkin, P.E.

SUBJECT: Zoning Lot Certification Pursuant to Section 12-10
of the Zoning Resolution.

On August 18, 1977, the Board of Estimate, per Cal. No. 52, amended the Zoning Resolution as to what constitutes a "Zoning Lot."

Under this amendment an applicant for new developments or enlargements who desires to permit the use of a tract of land within a single block as a single zoning lot, which may consist of one or more tax lots or parts of tax lots, as shown on the official tax map whether in common ownership or not, and without the future ability of utilizing the previous "75 year lease" provision, is required to furnish certain information which is to be certified by a title company licensed to do business in the State of New York before he can obtain a building permit or certificate of occupancy.

Enclosed herewith for the guidance of your personnel are acceptable copies of documentation which may be provided for these certification purposes, then executed and recorded.

The acceptable forms are:

1. Exhibit "I": Certification Pursuant to Zoning Lot Subdivision C for a tract of land in single ownership and which lists all the parties in interest. This is to be provided by the title insurance company.
2. Exhibit "II": Certification Pursuant to Zoning Lot Subdivision D for a tract of land with more than one owner to be treated as one zoning lot with a Declaration of Restrictions which may be individually or collectively written with regard to each party in interest. The boundaries of such zoning lot may or may not coincide with its comprising tax lots. This form is to be used in conjunction with Exhibit "IV" and/or Exhibit "V" and is to be provided by the title insurance company.

1466
Exhibit 2

3. Exhibit "III": Zoning Lot Description and Ownership Statement by Building Department permit applicant in which he states and describes the tax lots applicable to the zoning lot. This is to be recorded in The City Register's office (or, if applicable, in the County Clerk's office) prior to issuance of any permit for a development or enlargement;

4. Exhibit "IV": Declaration of Zoning Lot Restrictions by the parties in interest declaring that certain tract of land is to be treated as a zoning lot. (See Exhibit II)

5. Exhibit "V": Waiver of Declaration of Zoning Restriction by the parties in interest who waiver their rights to execute a declaration, such as Exhibit "IV". (See Exhibit II)

The following procedures shall be followed:

1a. A New Building application or an Alteration application is to be filed for each of the premises declared to be part of the tract of land declared to be treated as one zoning lot. The ownership, metes and bounds and plot plan on the Statement "A" should reflect this. The specification sheets of the applications are to contain the following statement:

"These premises have been declared to be subject to the provisions of Section 12-10 Zoning Resolution as to zoning lot ownership." / They are also to contain the libre and page of the Declaration as recorded in the County Clerk's or Register's office.

2a. No certificate of occupancy shall be required for existing buildings on a premises in the tract of land now existing without one and for which there is no change of occupancy or use, and for which the sole purpose an application was filed was to make such Declaration a matter of record in Building Department files.

b. Similarly, the inspectional requirements for an amended certificate of occupancy for an existing building with an existing certificate of occupancy are to be waived when the sole purpose of the application is to make such Declaration a matter of record in Building Department files.

c. However, this shall not be construed to preclude ongoing enforcement of any existing violations in existing buildings.

1467

3. Index cards and other appropriate department records shall also be noted as to such Declaration.

4. A building permit may be issued after:

a. The appropriate "Certification" is filed with the department.

EXHIBIT III

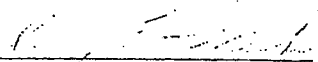
b. The "Zoning Lot Description and Ownership Statement" is recorded in the Conveyances Section of the County Clerk's or Register's office, and evidence of this is received by the department.

1

5. No "Declaration" or "Certification" is required in connection with any application where the tract of land consisting of two or more contiguous lots of record located within a single block, was in single ownership on August 18, 1977, the effective date of the prior definition of "Zoning Lot" in the resolution and where there is no other Party in Interest, or in the case of applications for other than developments or enlargements, as defined in section 12-10' of the Zoning Resolution.

6. While the enclosed "Exhibit" forms meet the approval of the Counsel of the Department of City Planning and of this department, others may be accepted provided they contain a similar completeness of information.

Referral of the enclosed exhibits to our General Counsel should henceforth not be necessary.


Irving E. Minkin, P.E.
Acting Commissioner

IEM/IP/df
Enclosures

CC: Exec. Staff
Prof. Societies
BCAC; Industry
Norman Marcus, Counsel, Dept City Planning
Bernard M. Rifkin, Vice Pres.
Title Guarantee-N.Y., 120 Broadway, N.Y.C.

- 1) Prove that zoning lot existed prior to 77.
- 2) Prove that there is no other party in interest #5.
- 3)

1468

W.B. # _____
or _____
ALT. # _____

EXHIBIT "I"

CERTIFICATION PURSUANT TO ZONING LOT
SUBDIVISION C OF SECTION 12-10
OF THE ZONING RESOLUTION OF DECEMBER 15, 1961
OF THE CITY OF NEW YORK - AS AMENDED
EFFECTIVE AUGUST 18, 1977

THE TITLE GUARANTEE COMPANY, a title insurance company licensed to do business in the State of New York and having its principal office at 120 Broadway, New York, New York hereby certifies that as to the land hereafter described being a tract of land, either unsubdivided or consisting of two or more lots of record, contiguous for a minimum of ten linear feet, located within a single block in the single ownership of _____ that all the parties in interest consisting of a "party in interest" as defined in Section 12-10, subdivision (c) of the Zoning Resolution of the City of New York, effective December 15, 1961, as amended, are the following

<u>NAME</u>	<u>ADDRESS</u>	<u>NATURE OF INTEREST</u>
-------------	----------------	---------------------------

The subject tract of land with respect to which the foregoing parties are the parties in interest as aforesaid, is known as Tax Lot Number(s) _____ in Block _____ on the Tax Map of the City of New York, _____ County and more particularly described as follows: (Full Metes and Bounds Description)

BEGINNING at a point on the _____ side of
distant _____ feet from the corner
formed by the intersection of
and
running thence _____ feet; thence _____ feet;
(direction) (direction)
thence _____ feet; thence _____ feet;
(direction) (direction)
to the point or place of beginning.

1169

That the said premises are known as and by street address(es)
_____ and _____
_____, as shown on the following

DIAGRAM:

- a) Show Distance from corner. BLOCK NO.
- b) Show Block & Lot numbers and dimensions of each lot.



The north point of the diagram must agree with the arrow.

Delete if not applicable

That the Zoning Lot Description and Ownership Statement containing the above description was recorded on the _____ day of _____ 19 _____ in Record Book at Page _____.

CERTIFIED this _____ day of _____ to _____, the applicant for this certification.

NOTE: A Zoning Lot may or may not coincide with a lot as shown on the Official Tax Map of the City of New York, or on any recorded subdivision plot or deed. A Zoning Lot may be subdivided into two or more zoning lots provided all the resulting zoning lots and all the buildings thereon shall comply with the applicable provisions of the zoning lot resolution.

THIS CERTIFICATE IS MADE FOR AND ACCEPTED BY THE APPLICANT UPON THE EXPRESS UNDERSTANDING THAT LIABILITY HEREUNDER IS LIMITED TO ONE THOUSAND (\$1,000.00) DOLLARS.

THE TITLE GUARANTEE COMPANY

BY: _____

0470

N.E. # _____
 or
 A.L.T. # _____

EXHIBIT II

CERTIFICATION PURSUANT TO ZONING LOT
 SUBDIVISION D OF SECTION 12-10
 OF THE ZONING RESOLUTION OF DECEMBER 15, 1961
 CITY OF NEW YORK - AS AMENDED
 EFFECTIVE AUGUST 18, 1977

THE TITLE GUARANTEE COMPANY, a title insurance company licensed to do business in the State of New York and having its principal office at 120 Broadway, New York, New York, hereby certifies that as to the land hereinafter described, being a tract of land either unsubdivided or consisting of two or more lots or record contiguous for a minimum of ten linear feet, located within a single block, that all the parties in interest constituting a party as defined in Section 12-10, subdivision (d) of the Zoning Resolution of the City of New York, effective December 15, 1961, as amended are the following:

<u>NAME</u>	<u>ADDRESS</u>	<u>INTEREST (IDENTIFY THE LOT OR LOTS AFFECTED)</u>	<u>DECLARATION OR WAIVER INDICATE WHICH</u>	<u>RECORDING DATE</u>	<u>RECORD BOOK</u>	<u>PAGE</u>
-------------	----------------	---	---	---------------------------	------------------------	-------------

The subject tract of land with respect to which the foregoing parties are the parties in interest as aforesaid is known as Tax Lot Number(s) _____ in Block No. _____, as shown on the Tax Map of the City of New York _____ County and more particularly described as follows: (Full Metes and Bounds Description).

BEGINNING at a point on the _____ side of
 distant _____ feet from the corner
 formed by the intersection of _____
 and _____
 running thence _____ feet: thence
 feet: thence _____ feet: thence
 feet; to a point or place of beginning.

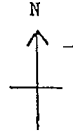
That the said premises are known as and by the street
 address(es) _____

_____ and _____ 1471

That the said premises are known as and by street address(es)
_____ and _____
_____, as shown on the following

DIAGRAM:

- a) Show Distance from corner. BLOCK NO.
- b) Show Block & Lot numbers and dimensions of each lot.



The north point of the diagram must agree with the arrow.

Delete if not applicable

That the Zoning Lot Description and Ownership Statement containing the above description was recorded on the _____ day of _____ 19 _____ in Record Book at Page _____.

CERTIFIED this _____ day of _____ to _____, the applicant for this certification.

NOTE: A Zoning Lot may or may not coincide with a lot as shown on the Official Tax Map of the City of New York, or on any recorded subdivision plot or deed. A Zoning Lot may be subdivided into two or more zoning lots provided all the resulting zoning lots and all the buildings thereon shall comply with the applicable provisions of the zoning lot resolution.

THIS CERTIFICATE IS MADE FOR AND ACCEPTED BY THE APPLICANT UPON THE EXPRESS UNDERSTANDING THAT LIABILITY HEREUNDER IS LIMITED TO ONE THOUSAND (\$1,000.00) DOLLARS.

THE TITLE GUARANTEE COMPANY

BY: _____
1472

N.B.# _____
or
A.E.T.# _____

EXHIBIT III

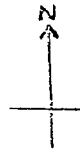
ZONING LOT DESCRIPTION AND OWNERSHIP STATEMENT BY
BUILDING DEPARTMENT PERMIT APPLICANT
AND TO BE RECORDED IN THE
COUNTY CLERK'S OR REGISTER'S OFFICE

_____, a New York Corporation having its principal office at _____, an applicant for present or future permits pursuant to the Zoning Resolution of the City of New York, effective as of December 15, 1961, and as subsequently amended states that the zoning lot to which the aforementioned permit or permits pertain are shown on the Tax Map of the City of New York, County of New York, as Lots _____ in Block _____ as shown on the Tax Map of the City of New York _____ County, and is more particularly described as:

BEGINNING at a point on the _____ side of
distant _____ feet from
the corner formed by the intersection of _____
and _____
running thence _____ feet; thence
feet; thence _____ feet; thence
feet; to the point or place of beginning,
That the said premises are known as and by street
address(es) _____
and _____

as shown on the following DIAGRAM:

- 1) Show distance from corner
- 2) Show Block & Lot Numbers and dimensions of each lot.



The north point of the diagram must agree with the arrow.

The above described zoning lot is presently owned by
BLOCK TAX LOT NAME ADDRESS

1473

IN WITNESS WHEREOF the applicant for permit has executed this instrument this _____ day of _____, 19__.

BY _____

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

On the _____ day of _____, 1978, before me personally came _____ to me known, who, being by me duly sworn, did depose and say that he resides at _____; that he is the _____ of _____; the Corporation described in and which executed the foregoing instrument; that said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

On the _____ day of _____, 1978, before me personally came _____ to be known to be the individual _____ described in and who executed the foregoing instrument, and acknowledged that executed the same.

NOTE: Section C26-110.2 Subdivision (a) Paragraph (1) of the Administrative Code requires submission of an accurate lot diagram in accordance with an attached boundary survey made by a licensed surveyor, which need not be recorded but which must be submitted with the application for the permit.

1476

(E)

EXHIBIT IV

DECLARATION OF ZONING LOT RESTRICTIONS

_____, residing at _____;
_____, residing at _____;
_____ a

_____ corporation having its principal office at _____

line out if not applicable)

constituting the "parties in interest" (excepting those parties waiving their respective rights to join therein) as defined in Section 12-10(d) of the Zoning Resolution of the City of New York effective December 15, 1961, as amended with respect to the land known as Tax Lot(s) _____, in Block _____ on the Tax Map of the City of New York, County of " _____, do hereby declare that the tract of land known as and by street address(es) _____

_____ and _____

_____ is to be treated as one zoning lot for the purposes of and in accordance with the provisions of the aforementioned Zoning Resolution effective December 15, 1961, as amended August 18, 1977.

IN WITNESS WHEREOF, the declarants have executed this instrument this _____ day of _____, 19__.

1475

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

On the _____ day of _____, 19____,
before me personally came _____
to me known, who, being by me duly sworn, did depose and say
that he resides at _____,
that he is the _____ of _____, the
Corporation described in and which executed the foregoing instru-
ment; that he knows the seal of said corporation; that the seal
affixed to said instrument is such corporate seal; that it was so
affixed by order of the board of directors of said corporation;
and that he signed his name thereto by like order.

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

On the _____ day of _____, 19____,
before me personally came _____
to me known to be the individual described in and who executed
the foregoing instrument, and acknowledged that
executed the same.

1476

F

N.B.# _____
OF
ALT.# _____

EXHIBIT V

WAIVER OF DECLARATION OF ZONING RESTRICTIONS

_____, residing at _____;
_____, residing at _____;
_____ a _____ corporation having its principal office at _____

_____, being a "party in interest" as defined in Section 12-10(d) of the Zoning Resolution of the City of New York effective December 15, 1961, as amended with respect to the land known as Tax Lot(s) _____, _____, _____ in Block _____ on the Tax Map of the City of New York, County of _____, hereby waives (its) (his) (her) (their) respective right(s) to execute a declaration that the above described lands which are known by street address(es) _____

_____ and _____ is to be treated as one zoning lot for the purpose of and in accordance with the provisions of the aforementioned zoning resolution and shall have the effect therein set forth.

IN WITNESS WHEREOF, the undersigned has executed this waiver this _____ day of _____, 19____.

1477

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

On the _____ day of _____, 19____,
before me personally came _____
to me known, who, being by me duly sworn, did depose and say that
he resides at _____;
that he is the _____ of _____
the Corporation described in and which executed the foregoing in-
strument; that he knows the seal of said corporation; that the
seal affixed to said instrument is such corporate seal; that it w
so affixed by order of the board of directors of said corporation
and that he signed his name thereto by like order.

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

On the _____ day of _____, 19____,
before me personally came _____
to me known to be the individual _____ described in and who executed
the foregoing instrument, and acknowledged that
executed the same.

1478

NOTES

NOTES