

# The Shifting Of Development Rights From Underdeveloped Zoning Lots In New York City

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Development rights generally refer to the maximum permitted floor area available for development on a particular zoning lot. New York City (the "City") contains thousands of "underbuilt" or "underdeveloped" zoning lots – those lots where the floor area of the existing structures is less than the maximum floor area permitted under the Zoning Resolution ("ZR").

Since buildable space is so valuable in New York City, developers have perfected the craft of shifting or reallocating development rights<sup>1</sup> from underdeveloped parcels to development sites. This tool enables developers to maximize value on development sites by merging one or more underdeveloped parcels with a contiguous parcel to create a new "merged" zoning lot. The parties then execute agreements governing this reallocation of unused development rights (herein referred to as "Shifting of Development Rights" or "SDR").

The more commonly used term, "transfer of development rights," or "TDR", actually refers to those specific circumstances when lots are *not* merged, and may not even be adjacent to each other, but are still permitted to engage in the transfer of unused development rights. Situations in which TDR is permitted are governed by various mechanisms in the Zoning Resolution and include, for example, the transfer of development rights from a landmarked building to a building located across the street pursuant to ZR § 74-79 and transfers in certain Special Districts pursuant to specially designed transfer mechanisms.<sup>2</sup>

This article provides a broad overview of the procedures necessary to effectuate the merger of contiguous zoning lots and the shifting or reallocation of development rights from underbuilt parcels in the SDR context.

## CAN DEVELOPMENT RIGHTS BE SHIFTED?

The first step is to determine whether a potential selling parcel is "underdeveloped." An architect or zoning consultant should be retained to provide zoning calculations determining the amount of unused development rights available for reallocation. It is extremely important to note that the merged zoning lot must comply with all applicable zoning regulations. Special care should be taken to determine if a merger of the development site with the underdeveloped or transferring parcel will create any non-complying conditions which would need to be addressed.

Once it has been determined that a parcel has unused development rights available for transfer, one must ensure such a shifting is permitted. Some situations where SDR transactions may be prohibited include, without limitation, (i) zoning lots split by district boundaries created after the effective date of the applicable zoning,<sup>3</sup> (ii) zoning lots subject to BSA jurisdiction,<sup>4</sup> (iii) zoning lots governed by private agreements restricting the use of development rights or (iv) zoning lots containing individual landmarks or located in historic districts. It is therefore important to carefully conduct zoning due diligence and consult with a zoning attorney or experienced architect prior to initiating this type of transaction.

## HOW DOES IT WORK?

### EXECUTING THE PURCHASE AND SALE AGREEMENT

The Purchase and Sale Agreement, or "PSA," is executed by the selling and purchasing parties and governs the SDR transaction. The PSA should address, among other items, (i) the purchase price, (ii) the allocation and payment of transfer taxes and closing costs (often paid by the purchaser), (iii) the amount of unused development rights, (iv) a mechanism to resolve disputes arising when trying to merge the zoning lots, (v) closing obligations of the parties and (vi) contingencies addressing intervening zoning changes affecting the amount of unused development rights prior to closing. The Zoning Lot Development and Easement Agreement, as discussed below is typically attached as an exhibit.

### MERGING THE ZONING LOTS

The definition of "zoning lot" as contained in ZR § 12-10 provides that a developer may merge two or more zoning lots into a single zoning lot provided they are contiguous for at least 10 linear feet. A Department of Buildings (the "DOB") Departmental Memorandum dated May 18, 1978 (the "Memorandum") sets forth the necessary procedures for merging zoning lots. The type of documentation required to effectuate such a merger depends on which "zoning lot" definition from

ZR § 12-10 is applicable.

ZR § 12-10(c) allows two or more zoning lots owned by a *single party* to be declared a single zoning lot, while ZR § 12-10(d) permits the merging of two or more lots owned by *multiple parties*. In order for the DOB to recognize the merger, the merger documents discussed below must be recorded in the Office of the City Register for the county in which the property is located.<sup>5</sup> Once the new zoning lot has been created, the DOB will evaluate the entire zoning lot for zoning compliance. With the lots merged into a single zoning lot, the parties are free to execute documents (as discussed in the next section) shifting or reallocating development rights or other zoning interests as deemed necessary. The merging of zoning lots in furtherance of a SDR transaction involves the preparation of various documents that are often referred to as the "Zoning Exhibits," which are described in detail in the above noted 1978 Memorandum.

### SHIFTING THE DEVELOPMENT RIGHTS

The Zoning Lot Development and Easement Agreement ("ZLDA") controls the allocation of development rights and sets forth the rights and responsibilities of the parties once the transaction has closed. The ZLDA must be recorded in the City Register's or County Clerk's office and will control all future development on the merged zoning lot. A comprehensive ZLDA will anticipate a variety of future scenarios.

There are several important issues that should be addressed in the

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ZLDA including, among others, (i) what development rights are being purchased (e.g., only the unused development rights currently available or those currently available and all future development rights in the event of an upzoning), (ii) cooperation between the parties including, but not limited to, filings at the DOB and other City agencies, (iii) mechanisms allocating development rights in the event a downzoning occurs prior to the construction or reconstruction of the parties' building(s) and (iv) any necessary light and air easements to facilitate construction of lot line windows in any new building.<sup>6</sup>

**CONCLUSION**

This article provides a simple overview of the necessary steps to merge zoning lots and reallocate unused development rights. These transactions vary in complexity and can involve such issues as cantilevering new development over existing buildings or the selling of real property and any necessary tax lot reapportionment as part of a SDR transaction.

The attorneys for the parties involved play an integral role in shaping any SDR transaction. It is helpful to consult with land use and zoning attorneys early in the process, as such attorneys typically have an un-

derstanding of the Zoning Resolution which allows them to thoroughly understand its implications for individual properties in these transactions.

<sup>1</sup>The buildable space attributed to a zoning lot is often referred to as "air rights." The more accurate term, however, is development rights as the amount of floor area is derived directly from the lot area of the zoning lot and not any fixed volume of air. Development rights are governed by the applicable bulk regulations for the particular zoning district in which the zoning lot is situated.

<sup>2</sup>See, e.g., ZR § 91-60 (TDR in the South Street Seaport Subdistrict of the Special Lower Manhattan District); ZR § 81-741 (TDR from listed theaters in the Theater Subdistrict of the Special Midtown District); ZR § 81-63 (TDR from landmark sites in Grand Central Subdistrict of Special Midtown District); ZR § 98-33 (TDR from High Line Transfer Corridor in Special West Chelsea District). Some forms of TDR require the separate approval of the City Planning Commission.

<sup>3</sup>The court in *Matter of Beekman Hill Association v. Chin*, 274 A.D.2d 161 (1<sup>st</sup> Dep't 2000) held that the split lot provisions do not apply where the floor area regulations of the two zoning districts are identical with respect to the use being developed, split lot regulations will not prohibit the transfer of floor area from one lot to another under those special circumstances.

<sup>4</sup>See *Bella Vista v. Bennett*, 89 N.Y.2d 465 (1997) (finding that once a particular zoning lot has been granted a variance by the BSA, any transfer of development rights is subject to BSA approval).

<sup>5</sup>Please note: if the zoning lots being merged are located in Staten Island, these documents must be filed with the Richmond County Clerk's Office.

<sup>6</sup>It is important to order an elevation survey of the existing building depicting the height of all objects on the roof of said building. It is in the purchaser's interest to obtain a light and air easement to allow legal windows at the lowest possible horizontal plane.



# The Treatment of Non-Profits Under New York City Zoning Law

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**Introduction**

Common sense dictates that a significant percentage of non-profit corporations engage in some activity which benefits society-at-large. Religious corporations such as churches, synagogues, mosques and other institutions offer religious and other services to their members and often to the larger communities in which they are situated. Non-profit schools and universities give students the tools necessary for social interaction and advancement. Non-profit hospitals and clinics offer care for those in need, helping to prolong life and in many instances to save it.

In recognition of their societal benefits, non-profits are granted certain tax benefits by both the state and Federal governments. What is not as widely known, however, is that such entities are given special consideration under the zoning law as well. Non-profits benefit from a relaxed standard of review for variance applications, derived from relevant statutes, case law, and longstanding agency precedent. This relaxed standard removes non-profits from that realm of zoning law which looks to financial hardship as a necessary precondition to relief.

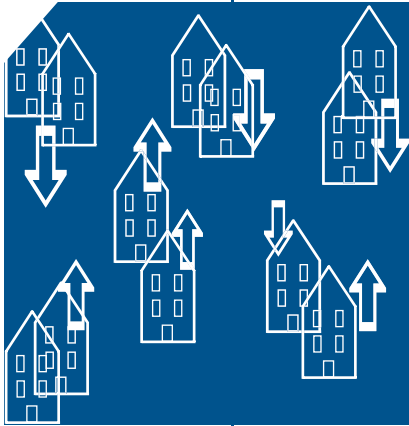
**Statutory Basis**

Practitioners of zoning law are well-familiar with Section 72-21 of the Zoning Resolution of the City of New York, as amended (the "Zoning Resolution"). Section 72-21 provides the legal authority for the granting of variances by the Board of Standards and Appeals (the "BSA"), the administrative agency responsible for interpreting and varying, as necessary, the provisions of the Zoning Resolution. The BSA, a five-member board consisting of experts in land use, architecture and engineering, hears and decides on zoning matters pertaining to all five boroughs of the City of New York.<sup>1</sup>

As per Section 72-21, the BSA has the authority to vary the provisions of the Zoning Resolution provided that an applicant has satisfied the five findings set forth therein. Although entire articles have been written on Section 72-21, very briefly the findings required are (a) that the subject property has some physical uniqueness, (b) that this uniqueness gives rise to a financial hardship in using the property in conformance with the Zoning Resolution, (c) that the proposed development is consistent with the character of the surrounding neighborhood, (d) that the hardship complained of was not created by the applicant and (e) that the requested variance is the minimum necessary to afford the applicant relief.<sup>2</sup>

The text of Section 72-21(b) contains an important provision regarding the finding of financial hardship: "this finding shall not be required for the granting of a variance to a non-profit organization." This is no small concession. Proving financial hardship in the context of a variance is often the most technically demanding of the required findings. Although the New York City Charter sets forth that certain land use experts are required to sit on the BSA, there is no requirement that any of these members be a financial expert. Thus the discussion of the hardship finding is often dictated by a financial analysis submitted to the BSA by a qualified expert. This analysis generally assesses a subject property with regard to comparable sales and rental prices, average construction costs and any premium costs, and sets forth projected returns for both as-of-right and proposed development scenarios. Ideally, the financial analysis should portray a less than reasonable financial return for as-of-right scenarios, and a reasonable financial return for the proposed scenario. The hardship finding is considered a "threshold" finding, and, along with the "uniqueness" finding, is typically one of the two most difficult findings to satisfy.<sup>3</sup>

As per the text of Section 72-21, however, non-profits are exempt from the “b” finding. Non-profits therefore also benefit from a relaxing of the requirements of Section 72-21(a), which states that “as a result of such unique physical conditions, practical difficulties or unnecessary hardship arise in complying strictly with the use or bulk provisions of the Resolution.” The text of the “a” finding thus leads to the paradoxical situation where a subject property must have some uniqueness to prove economic difficulty which in the case of a non-profit entity need not itself be proved. The question arises as to whether this text would require the BSA to make any realistic “uniqueness” finding for non-profits.



The BSA has generally interpreted the “uniqueness” finding for non-profit applicants as requiring a showing that the alleged uniqueness imposes a serious limitation on the fulfillment of a non-profit’s institutional goals. Certain non-profits, however, will not be required to allege any real *physical* uniqueness relating to their property, relying instead on the established concept of “programmatic needs.”

#### BSA Precedent – Programmatic Needs

Although it appears nowhere in the Zoning Resolution, the term “programmatic needs” has been repeatedly relied upon in BSA decisions to support the granting of variances to non-profits. The term “programmatic needs” basically means that a non-profit has unique needs as an institution, and that these needs dictate that a variance is required for a non-profit to accomplish its stated goals. While the underlying logic may seem circular, non-profits rely heavily on the concept of programmatic needs to satisfy the “uniqueness” finding when little other uniqueness can be found. The BSA will generally require a non-profit to set forth with specificity what the needs of the subject institution are, including the number of members, hours of operation, types of programs and similar information.

To supplement the “programmatic needs” argument, an applicant may also rely on the limitations of an existing structure.

New York courts have held that the uniqueness required for Section 72-21(a) can be satisfied, at least in part, by setting forth the uniqueness of an existing building for which an applicant seeks a variance.<sup>4</sup> The programmatic needs of a non-profit coupled with the limitations of an existing building will often provide the necessary uniqueness for the BSA to grant a requested variance. This is especially the case for non-profit religious and educational institutions, which receive a presumptive benefit under the law as discussed in the next section. Other non-profits will typically bear a heavier burden in establishing

uniqueness, and in proving that a real physical limitation exists which prevents the non-profit from satisfying its programmatic needs.

#### Case Law Governing Non-Profits under the Zoning Law

New York courts have consistently held that religious and educational institutions are presumed to have a beneficial effect on the communities in which they locate. It is widely acknowledged in New York that “when the church enters the picture, different considerations apply” and that “church and school and accessory uses are, in themselves, clearly in furtherance of the public morals and general welfare.”<sup>5</sup>

In the seminal case of *Cornell University v. Bagnardi*,<sup>6</sup> the Court of Appeals held that the favorable zoning status accorded for religious and educational uses may be limited solely by factors involving the health, safety or welfare of the public. The zoning board involved in *Cornell*<sup>7</sup> demanded that the school make a showing of affirmative need for a proposed expansion, and the zoning board’s denial of a special permit was therefore reversed and remanded by the Court. While the BSA must still engage in a typical inquiry when granting a variance to non-profit schools and religious institutions, it has expressly recognized that variance applications for such non-profits are entitled to significant deference.<sup>8</sup>

The BSA has further indicated that the uses which occupy a proposed development must generally be related to the non-profit purpose of the institution itself. Thus, the BSA has been hesitant to grant non-profits variances allowing, for example, additional bulk for residential housing, even when such housing

would be controlled by and in the same building as a valid religious institution.<sup>9</sup>

#### Federal Law and Religious Organizations

Although zoning law is by nature an exercise of a state’s police power, the Federal government has had a hand in zoning as it relates to religious organizations. In passing the Religious Freedom Restoration Act of 1993 (“RFRA”), Congress attempted to set forth a “compelling state interest” test, requiring local governments to justify a substantial burden on religion with a compelling state interest and by means narrowly tailored to achieve that interest. RFRA was eventually declared unconstitutional by the Supreme Court, which found that in enacting RFRA, Congress had exceeded its powers under the Fourteenth Amendment.<sup>10</sup>

In 2000, Congress again passed a law which governed the treatment of religious organizations under zoning law, with more lasting effect than RFRA. The Religious Land Use and Institutional Persons Act, or RLUIPA, generally provides that state zoning laws cannot be enforced so as to unreasonably limit the development of religious institutions. A powerful tool for religious institutions, RLUIPA gives religious institutions rebuffed by local zoning boards the right to sue the subject municipality in Federal court. While RLUIPA is currently binding on the BSA, RLUIPA has not been consistently relied upon by non-profit applicants, and to date has not been cited in any online published decisions of the BSA.

#### Conclusion

While non-profit applicants seeking zoning variances must follow the same general procedure as typical applicants before the BSA, the removal of the “hardship” finding from the equation makes the receipt of a variance far less difficult. Coupled with the legal presumption in favor of religious and educational institutions, variance relief for certain non-profits, while not guaranteed, is generally far more easily attained than relief for a for-profit applicant. This easier path to zoning relief is especially apparent when the relief requested is directly related to the programmatic needs of the non-profit applicant.

<sup>1</sup>New York City Charter § 659.

<sup>2</sup>Zoning Resolution § 72-21.

<sup>3</sup>An informal survey of the last 20 BSA variance denials reported online shows 19 based at least in part on a failure to satisfy the “a” finding, and 13 based at least in part on a failure to satisfy the “b” finding. These results, however, ignore those variance applications which were withdrawn prior to the anticipated issuance of a denial. The BSA does not maintain publicly available data on withdrawn applications.

<sup>4</sup>*Commco, Inc. v. Amelkin*, 109 A.D.2d 794, 796 (2d Dep’t 1985).

<sup>5</sup>*Diocese of Rochester v. Planning Board of Town of Brighton*, 1 N.Y.2d 508, 523-26 (1956).

<sup>6</sup>68 N.Y.2d 583 (1986).

<sup>7</sup>*Cornell*, 68 N.Y.2d at 597.

<sup>8</sup>See, e.g., BSA Cal. No. 334-05-BZ.

<sup>9</sup>See, e.g., BSA Cal. No. 72-05-BZ.

<sup>10</sup>*City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997).

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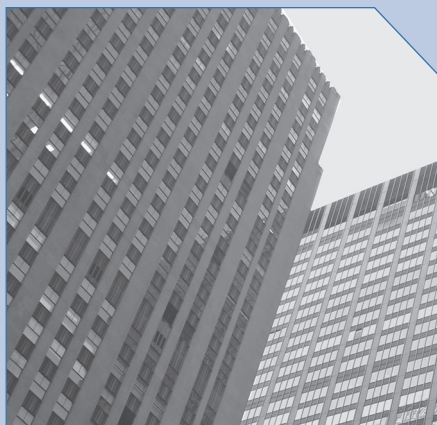
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Many people think of a zoning variance as either the only avenue to relief from exceedingly restrictive regulations, or an avenue so burdensome that it should not be pursued. The articles presented in this issue of our newsletter prove otherwise. Joshua Rinesmith and Jordan Most show creative solutions to floor area restrictions in their article dealing with the shifting of development rights. In his article addressing zoning variances, Richard Lobel shows how the road to zoning relief can be far less burdensome for non-profits. We hope that you will find these articles both interesting and informative, and please feel free to contact our offices with any land use questions you may have.

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