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Use Caution When Buying And Selling 'Up'

by *Jamie Heiberger-Jacobsen*
Heiberger & Associates

As land available for development in Manhattan and other prime areas becomes more and more limited, it seems the only direction to build is up. During the last few years, buying and selling air rights, the unused right to build in the space above buildings, has become important for developers, building owners, and even not-for-profit organizations. While there are mutual financial benefits for both buyers and sellers of air rights, the process can be extremely complex and requires a great deal of knowledge and familiarity with the system and zoning laws.

Air rights, as we understand them today, stem from new city zoning rules that were established in the 1960's. The zoning rules established density limitations that are defined by a ratio of floor area to lot size (F.A.R.). In a district with an F.A.R. of 2.0, for example, the floor area of a building on a 10,000 square foot lot cannot exceed 20,000 square feet. But a developer could potentially buy 5,000 square feet of unused air rights from a neighbor and construct a 25,000 square foot building. Developers can even buy unused air rights from a building down the block, so long as they have purchased rights from the neighbors with whom they share a certain portion of lot line. Occasionally, in certain areas, air rights can even be transferred across streets or anywhere within specified zones. Generally, unused air rights sell for about 50 to 60 percent of what land in the area would sell for, depending on supply and demand in the area.

During the real estate boom of the past few years, the air rights 'industry' has seen its own boom. At one time, the air rights business seemed to be reserved for large-scale developers, but many smaller owners and developers joined the game with the belief that additional space could bring much greater success to a project. However, numerous legal and logistical complications, including zoning restrictions that limit a building's height, can arise and are difficult or nearly impossible to overcome. In fact, many experts believe that it is easier to be in the business of selling and trading air rights than actually using them directly on one's own property. Either way, dealing with air rights is not for beginners.

Many building owners or developers with aspirations of adding floors have run into problems after their air or roof rights purchase is complete. It is common knowledge that the Landmarks Preservation Commission has strict guidelines about any alterations to historic buildings themselves. But frequently the commission restricts roof additions to buildings that neighbor landmark build-

ings or those that are within designated historic districts. While an owner may have purchased enough air rights for the desired expansion, zoning and landmark regulations can drastically reduce the amount of allowable new space. Therefore, it is imperative that before architects and contractors begin planning, an attorney who is familiar with the zoning laws is consulted about the feasibility of building up. While ambitious goals of expansion might quickly be shattered, it is essential to be aware of appropriate zoning laws prior to investing time and money into an impossible project.

The expansion of top-floor apartments has also become popular among individual apartment owners. The enlarged space not only benefits the residents, it can also benefit entire buildings. The building is able to earn additional revenue, not only from the sale of the space but also by implementing additional maintenance fees or common charges for the apartment's additional square footage. Plus, these expansion projects are more likely to be in smaller pre-war buildings where height restrictions haven't already been used up and where extra income can significantly help building repairs, façade restorations, and the like.

While these kinds of expansions sound ideal in theory, there are issues that should be addressed before the sale is completed. First, architects or other building experts must assess the structural integrity of the building and whether the building can handle the expansion. Second, the building's ventilation system and the building's rooftop mechanical equipment will be displaced and will need to be rerouted. Is this even feasible? Finally, condo and co-op boards must sign-off on the desired addition. Rooftop construction is not generally a pleasant experience for residents below and it may be difficult to get the board's approval.

As more people enter the game of buying and selling air rights and expanding upon their buildings' rooftops, it becomes more important that they seek the guidance of experienced attorneys and architects. New York City zoning laws are not straightforward and can complicate any seemingly simple transaction. There have been cases of developers whose new buildings exceeded the zoning height restrictions and were required to dismantle several floors. The business of building 'up' in New York will never be easy, but consulting professionals who are well versed in the system will be advantageous for even the most experienced owners and developers. ■

Jamie Heiberger-Jacobsen
Heiberger & Associates PC
205 Lexington Avenue, 19th Floor
New York, NY 10016
Tel: 212-532-0500 / Fax: 212-532-2040
Jamie@heibergerlaw.com
www.heibergerlaw.com