

Professional Services

Buying air rights in NYC: What you need to know about the NYC dev. rights endorsement



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According to estimates, New York City's five boroughs have approximately 3.7 billion s/f of unused development rights (colloquially, "air rights.") In 2016 alone, more than 1.6 million s/f of development rights traded hands. But buying unused development rights is different than purchasing fee title.

After purchasing fee title, buyers walk away with property that can be seen and touched. Development rights however, are invisible. Until a developer pulls a building permit, there's usually no confirmation that the transaction was correctly completed. Development rights are also a creation of zoning requirements, which are excluded from title insurance coverage. So, after a development rights transaction, buyers are without title insurance coverage for the amount of purchased square footage.

There is, however, a special title insurance product for many development rights transactions. While it does not insure that purchaser is receiving additional development rights, it helps get parties comfortable with crucial aspects of the transaction. Lenders also require it, where collateral includes unused development rights transferred from land not owned by the borrower. Enter the New York City Development Rights Endorsement.

This endorsement is important because of the way purchasers typically acquire unused development rights—through a zoning lot merger, which is like a marriage between properties. In a zoning lot merger, owners combine contiguous tax lots into a shared zoning lot, and then pool together their development rights. For example, owners with lots that each have 100,000 s/f of development rights could agree to a zoning lot merger, and then transfer rights from one site to another, leaving one with 150,000 s/f of development potential, and the other with 50,000 s/f.

When a development rights transfer occurs this way, the endorsement insures that, as required for the formation of a valid zoning lot merger under the city's zoning resolution, all "parties in interest" (including mortgagees of sending and receiving sites) have consented to the underlying zoning lot merger. The endorsement can also provide protection if an objector comes out of the woodwork post-closing. For instance, a cooperative building, governed by a shareholders' agreement that does not require unanimous

consent for transactions, could sell its development rights. If a rogue shareholder challenges the transaction post-closing, the title company would be required to defend and indemnify the air rights purchaser.

The endorsement does not insure that any square-footage is available to be transferred, or has been transferred in the zoning lot development agreement (ZLDA), but it does insure that seller consented to the ZLDA (similar to how, in fee title, title companies insure that seller consented to the deed). ZLDAs dictate how development rights will be split up, and without one, unused s/f would be free for the taking by any owner on the merged zoning lot. The endorsement also insures that seller consented to

negative covenants, such as light and air easements, which restrict the height of future buildings.

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When a purchase agreement requires the endorsement, sellers know what they need to deliver, and buyers know they're getting the documents that the zoning resolution requires to complete a development rights transfer by zoning lot merger. Those same documents are required

to pull a building permit to use development rights. The endorsement is only \$25, but it must be purchased

with a separate title insurance policy in connection with the purchase of the development rights; or if the development rights are purchased contemporaneously with the receiving site, with the relevant owner's policy. The endorsement can't be affixed to a prior owner's policy (where devel-

opment rights are purchased after the receiving site).

The endorsement is primarily for development rights transfers by zoning lot merger, and in certain cases for other kinds of transfers in special districts. It is not available for inclusionary bonus rights.

While valuable, the endorsement is not dispositive. New York City's byzantine zoning resolution determines whether development rights can actually be transferred or not, so if you're involved in a development rights transaction you should always conduct an independent zoning analysis.

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