THE "ZONING LOT DEVELOPMENT AGREEMENT": A NEW YORK CONCEPT LONG OVERDUE IN NEW JERSEY

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New York City zoning allows unrelated owners of contiguous properties to merge them into a single zoning lot while thereafter still allowing each to remain separately owned and taxed. It is an advantageous concept long overdue in New Jersey.

The foregoing is accomplished by way of a Zoning Lot Development Agreement ("ZLDA"), which is specifically countenanced by §12-10 (d) of the New York City Zoning Resolution (essentially the City's governing zoning ordinance, though fearsomely difficult to navigate). Broadly speaking, a properly effectuated ZLDA permits owners of two or more properties within the same tax block and having at least ten linear feet of contiguity to aggregate the development rights allocated to each, then reallocate them between the properties as they may agree. For example, where one property is fully developed with less than the fully permitted floor area, the excess may be transferred to a contiguous property, which can then be developed with more floor area than would otherwise be permitted by the Zoning Resolution. The "merger" of the properties for zoning purposes is then binding on all successors and assigns.

The foregoing is a very much an oversimplification, as a multitude of complexities flow from the arrangement that need to be addressed in the ZLDA (which requires execution by all parties in interest including lienholders). The separate ownership permits separate financing, for example, but lenders need to look carefully at all properties being merged by the ZLDA because they remain forever conjoined, so each can affect the other. However, the purpose of this article is merely to introduce the concept and relate it to New Jersey zoning law.

In New Jersey, no provision in the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. (the "MLUL") sanctions the merger of adjacent lots in separate ownership for zoning purposes. Perhaps the closest we come would be the creation of a condominium regime where internal units are separately owned, financed and taxed but the overall property subject to the master deed remains one zoning lot. Pursuant to the New Jersey Condominium Act, however, the assemblage subject to the master deed must have been in common ownership at the time it is recorded. N.J.S.A. 46:8B-8. It thus has little utility for contiguous properties in separate ownership where the owners are disinclined to take on the complexities and annual administrative burdens of the condominium form of ownership.

The author was recently involved in a situation highlighting the foregoing issues. A national convenience retailer needed to modernize and expand a store it owned of longstanding duration at a valuable signalized intersection. Fortuitously, the owner of the immediately adjacent property was in the process of closing its business, which was also of longstanding duration. It was thus an ideal target for acquisition by the retailer, followed by a lot consolidation for redevelopment of the combined parcel. The problem was that the owner had no interest in selling because of the large capital gains tax he would thereby incur. He was willing to participate by way of a long-term groundlease arrangement, however, as this would avoid the tax bite.

The groundlease alternative would thus solve one problem, but a second problem was that the needs of the retailer were such that the existing buildings on both properties needed to be demolished and a new building constructed in the center, directly on the boundary line between them. This rendered problematic the possibility of a long-term groundlease arrangement for the obvious reason that the fee interests underlying the building would in two separate parties. One alternative would have been for the retailer to sell its property to the adjacent owner, who would then merge the two lots and lease the combined parcel back to the retailer. But that would have then shifted the capital gain problem to the retailer, who similarly had no interest in absorbing a large tax bite.

Fortunately, the municipality strongly favored the proposed redevelopment because it would help alleviate a congestion problem at the intersection. It was thus willing to work cooperatively with the parties. The solution ultimately devised was for the two owners to execute and record an agreement whereby their properties would be considered a single zoning lot (i.e., the functional equivalent of a ZLDA), with all bulk requirements to be measured by reference to the combined parcel rather than the individual tax lots. This essentially allowed for the boundary line between them to be "erased" for zoning purposes during the life of the groundlease so that the new building could be placed in the center, directly over the boundary line.

The result was a win-win-win. The municipality got the intersection improvements it desired while remaining protected because the agreement provided that the properties would be considered one zoning lot for as long as the building remained on the boundary line. The adjacent property owner had an easily financeable triple net lease with a creditworthy tenant; thus, he could take out a mortgage loan, pledge the lease as collateral, and realize the cash value of the property without incurring the capital gains tax. And the retailer was able to hold on to its valuable corner property at a signalized intersection while incorporating the adjacent property for the development of a new facility with modern site upgrades, including much improved traffic flow and aesthetics.

The obvious key to the success of this arrangement was the willingness of the municipality to accept it. Because many New Jersey municipalities might just as easily have rejected it as a viable option, it would certainly be preferable if the MLUL were to incorporate provisions similar to the New York Zoning Resolution that explicitly allow for zoning ordinances authorizing contiguous property owners to enter into "zoning lot merger agreements" similar to New York City's ZLDAs.

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