

Developers Grasping for Air Rights

With land at a premium in New York City, developers are struggling to maximize the developable floor area on their parcels. This has resulted in a marked increase in the acquisition of “air rights” from adjacent properties or neighboring landmark buildings.

Properties in New York City are divided into tax lots for Department of Finance assessment purposes and zoning lots for Department of Buildings zoning purposes. Generally, a particular tax lot and zoning lot encompass the same area. The New York City Zoning Resolution limits the amount of floor area that can be utilized on a particular zoning lot. The floor area of a building is the sum of the gross area of all floors, excluding cellars and space used for mechanical equipment.

Under the Zoning Resolution, a property owner with a building that does not utilize the maximum permitted floor area is permitted to transfer the excess floor area to an adjoining property owner through the merger of zoning lots. This transfer is commonly known as an “air rights” transfer, although this term is now being replaced with the more accurate term “development rights” transfer.

To effect a transfer, the adjoining property owner’s land must be contiguous for at least 10 feet and the zoning district of the lot receiving the floor area must be the same or less restrictive than the zoning lot transferring the floor area. The Zoning Resolution provides a dispensation from the 10-foot rule to landmark buildings by allowing the transfer of development rights to lots directly across the street.

The acquisition of development rights involves the creation of a merged zoning lot from two separate zoning lots. The merger does not affect the status of the tax lots, which continue to be assessed and taxed separately. The maximum floor area available to both zoning lots is then aggregated and split between the different owners pursuant to an agreement known as a zoning lot and development agreement or ZLDA (pronounced “Zelda”). The ZLDA dictates how the development rights are to be allocated and used by the different owners of the tax lots within the zoning lot. Buildings that cannot be enlarged due to zoning or Buildings Code restrictions are ideal candidates for the sale of development rights.

Owners or prospective purchasers of properties adjoining such buildings should consider the added value of acquiring such rights.

This article was written by Robert Jacobs. For more information on the sale or purchase of development rights or other Land Use issues, please contact Mr. Jacobs.



Robert Jacobs

Breaking Up is Hard to Do

Parties to a contract for the conveyance of an apartment or building typically enter into the contract anticipating that the conveyance will close without problems. Title issues will be cleared, payments due under the contract will be made, and title will be transferred. However, defaults frequently occur for a multitude of reasons, some meritorious and others not so. Careful attention to the terms of the contract, to the remedies spelled out in the contract, and to the procedures set forth in the contract for enforcing rights is very important for proper enforcement of contractual rights and remedies.

In the typical contract for the conveyance of an apartment or building, the remedy reserved for the seller in the event of a purchaser's default is for the seller to retain the contract deposit as liquidated damages. The purchaser's remedy, in the event of a seller's default, is typically for the buyer to sue for specific performance, which entails litigation in the Supreme Court seeking an order from the court requiring the seller to comply with its contractual obligations and convey title to the property at issue to the purchaser. Unless the contract provides for an award of attorneys' fees to the non-breaching party in the event of a breach, each party will have to bear its own attorneys' fees, costs and disbursements.

One common situation is where either the seller or the purchaser decides it does not want to execute the transaction. Perhaps after signing the contract, the seller gets a better offer, has a change of heart, or a change of circumstances, and decides he or she does not want to move. Or perhaps a purchaser decides he or she didn't negotiate a good deal, or finds an apartment or home he or she prefers more.

Generally speaking, none of these reasons is a meritorious defense under the law to a claim of breach a contract for failing to close. In fact, in these situations, the applicable case law is well developed and quite uniform: Sellers are found to be entitled to retain the entire contract deposit as liquidated damages. Purchasers are found to be entitled to an order compelling the

seller to convey title.

Often times, if a party to the contract wants out of the deal, the other party will know long before a closing date arrives. A seller or purchaser may inquire whether the other side will release that party from the contract, or a purchaser may inquire whether the seller will permit the purchaser to assign the rights under the contract to a third party.

When presented with a situation where it appears that a party to a contract is going to default, the most important step—and first step to be taken—is to speak with your attorney and review the contract to ascertain what constitutes a default under the contract, whether a default has occurred, whether and how the defaulting party is to be put on notice of the default, and whether the defaulting party is entitled to any opportunity to cure the default. Also to be considered is the question of whether the default is one which, under the specific terms of the contract, entitles either party to cancel the contract.

Assuming the default is not one which entitles the non-breaching party to cancel the contract, and that the breaching party is not entitled to an opportunity to cure the default, the non-defaulting party wants to place the defaulting party in a position where such party either must comply with, or be deemed in default under the contract by a date certain. This often entails setting a closing date where "time is of the essence" ("TOE"), meaning that on the selected date, the recalcitrant party must attend and close, "or else." Typically, most closing dates recited in a contract for the sale of real property or a cooperative apartment are not TOE, and a TOE closing date cannot be declared until the closing date set forth in the contract has come and gone. When declaring a TOE closing date, the declarant has to provide a reasonable time for the closing, which usually is thirty (30) days. Once the TOE closing date is properly set, the defaulting party's negotiating position diminishes substantially. As the TOE closing date draws near, the would-be- defaulting-party's negotiating

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position diminishes to nothing.

Given that the TOE declaration is one of the most important steps in contract enforcement, it is imperative that it be given properly. Attention must be paid to ensure that the declarant is, or will be, in a position to comply with its obligations under the contract on the TOE date. The notice provisions in the contract must be reviewed to ensure that the TOE declaration is made properly, *i.e.*, by the party to the contract or the party's attorney, if permissible under the contract, and that the TOE declaration is served properly, *i.e.*, by certified or overnight mail, with a copy to the other party's attorney.

Once the TOE closing date is set, and the defaulting party is in the weakest possible negotiating position, that is the time to consider settlement of the dispute, if it can be settled. If the seller wants to break the contract, the negotiations will be based on how much the seller is willing to pay the purchaser for the right to break the contract. Relevant to these negotiations are the value of the property involved, the seller's reason(s) for wanting out of the contract, and the purchaser's willingness to negotiate. Under such circumstances, a knowledgeable purchaser will know that, if the parties are unable to negotiate a settlement, it will be in a position to commence litigation for specific performance, and that it will have a substantial likelihood of prevailing in that litigation. However, the purchaser will have to factor in the time, expense and aggravation of litigation, and whether under the circumstances it may simply be better to get paid a breakup fee and use that money towards a down payment on another purchase.

If the purchaser wants to break the contract, the negotiations will be based on how much of the contract deposit the seller wants to keep in exchange for allowing the purchaser out of the contract. Under these circumstances, a knowledgeable seller will know that, if a settlement is not negotiated, it will have a claim to the entire contract deposit, and that should litigation ensue over the contract deposit, that it has a substantial likelihood of prevailing in that litigation. But again, the seller should factor in the time,

expense and aggravation of litigation, and in doing so, may determine that negotiating a breakup fee is the sensible thing to do.

Finally, when negotiating a breakup fee, one important consideration is the possible exposure that either party, but more likely the seller, has to a claim by any real estate broker(s) who brought the parties together in the first place. Attention must be paid to what the listing agreement provides as to when a commission is deemed earned. If the agreement provides that commission is only due if the transaction closes, then the Seller's exposure is minimal, if anything. However, if the agreement provides that the commission is earned when the broker procures a prospective purchaser that is "ready, willing and able" to purchase on seller's terms, the Seller has exposure for the full commission, if not a portion of the breakup fee.

Regardless of the terms of any listing agreement, it is possible that any broker involved in the transaction may sue, arguing that but for the seller's and purchaser's agreement to break the contract, a full commission was earned. While such a suit may have no legal merit, it will still entail substantial time and expense to litigate. Thus, it is important, when negotiating a breakup fee, to obtain either a release from all brokers, or at a minimum, an indemnity from the breaching party agreeing to reimburse the non-breaching party in the event any broker sues for a commission.

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Brokerage Commissions: When are they Due and Payable?

The New York State Department of State (“Department”) has issued a Memorandum addressing when brokerage commissions become due and payable. The Memo confirms that, in New York State, unless otherwise agreed to in writing, a licensed real estate broker is entitled to a commission when presenting a seller with a prospective purchaser who is ready, willing and financially able to purchase the property offered for sale. The same principle holds true for the sale of cooperatives and condominiums. The Department’s Memo cautions those involved in residential real estate transactions to carefully review the listing agreement to determine when the seller’s obligation for the payment of commission vests.

BBW&G’s general advice to sellers is that any listing agreement or brokerage agreement clearly state that the commission payable to a broker for the sale of a property is payable only if, as, and when a closing occurs.

Although not addressed in the Memo, it is, nonetheless, important to emphasize the importance of having a written brokerage agreement in effect when selling property. Under New York State’s case law, a real estate broker arguably has earned and is entitled to collect a commission when presenting a seller with a purchaser who is ready, willing and financially able to purchase the property offered for sale. Therefore, from a seller’s perspective, it is crucial to tie the liability for the fee to the sale, not just the broker’s presentation of a purchaser of the property.

Although the Memo specifically addresses residential sales, the concepts apply to commercial real estate transactions as well. Accordingly, it is imperative that a written brokerage agreement be executed by the seller of a property



before listing a property with a broker (the most common occurrence in a residential transaction), and certainly before forwarding the contract of sale to a prospective purchaser for review (as often occurs in a commercial transaction).

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