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# Can a Combined Zoning Lot Include a Partial Tax Lot?

**Recently, the Manhattan Supreme Court issued a decision regarding the definition of zoning lots. The issue before the court was whether the New York City zoning regulations mandate that a zoning lot containing more than one tax lot (a "combined zoning lot") must include the entire tax lot or can it include a portion of a tax lot.**

***By Christopher Wright***

Recently, the Manhattan Supreme Court issued a decision regarding the definition of zoning lots. The issue before the court was whether the New York City zoning regulations mandate that a zoning lot containing more than one tax lot (a "combined zoning lot") must include the entire tax lot or can it include a portion of a tax lot. See *The Committee for Environmental Sound Development v. Amsterdam Avenue Development Associates LLC,* 2019 WL 1206357 (N.Y. Sup.), 2019 N.Y. Slip Op. 30621 (U) (Trial Order) Hon. W. Franc Perry).

The matter involved three proceedings. First, an application was submitted to the New York City Department of Buildings (the DOB) seeking a permit to construct a 55-story residential building based on a combined zoning lot that included partial tax lots. Second, the DOB permit was appealed by a local civic group to the New York City Board of Standards and Appeals (the BSA) alleging that the combined zoning lot's use of partial tax lots did not comply with zoning regulations. Third, after the BSA rejected the appeal and upheld the permit based on a finding that the combined zoning lot was zoning compliant, a lawsuit was filed alleging that the combined zoning lot was faulty and that the BSA was in error. The court reversed the BSA and held that the plain language of the zoning regulations prohibited a combined zoning lot from including portions of tax lots.

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These proceedings involved complex zoning arguments, however the central issue was relatively simple. The question to be decided is: Can a zoning lot that consists of more than one tax lot include a portion of another tax lot or must it include the entire tax lot?

Tax lots are combined into a single zoning lot for the purpose of transferring development rights or other zoning requirements between the tax lots to achieve a more efficient

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development scenario. The combined zoning lot in question was being used to construct a 55-story building located at 200 Amsterdam Avenue that abuts the Lincoln Towers residential complex located between Amsterdam and West End Avenues, between 66th and 70th Street. Lincoln Towers houses several thousand apartments and has large open areas between the buildings that are used as green space and driveways for the residents. These open areas are considered "open space" pursuant to the New York City Zoning Resolution (the ZR). All residential developments are required to provide a certain amount of open space, depending on the size of the building.

The developer of 200 Amsterdam Avenue wanted to create a combined zoning lot to transfer both development rights and open space from Lincoln Towers to the proposed project. The transfer of development rights was significant, totaling over 200,000 sq. ft. of zoning floor area. The open space transfer was carefully calculated to satisfy the open space requirements generated by the transferred development rights.

Certain residential zoning districts do not have building height limits. These are called height factor buildings. Height factor requires a series of setbacks as the building goes higher, causing the building to taper at the higher floors. The tapering factor defines the "zoning envelope." The building must be constructed within the zoning envelope. However, as the building goes higher, more open space is required at the ground level to allow light and air to reach the streets and sidewalks.

The **Zoning Diagram** of the proposed building submitted to DOB demonstrated that a tapering 55-story building could be built on the development site using the applicable height factor zoning envelope. However, due to the size of the building the tax lots comprising the development site were not large enough to provide the required open space. To solve this problem a combined zoning lot was created that included portions of the Lincoln Tower open space, including the green space and driveways. This open space was located on portions of various tax lots throughout the Lincoln Towers complex. The combined zoning lot allowed the development site to claim this open space as satisfying the open space requirement for the 55-story building. Essentially, portions of Lincoln Towers' open space were transferred to the development site, not physically like development rights, but for the purpose of satisfying open space zoning calculations.

The development site is at the corner of West 69th Street and Amsterdam Avenue. As shown on the **Zoning Diagram**, the combined zoning lot basically extends tentacles from the development site to encircle the Lincoln Towers green space and driveways. The combined zoning lot crosses several of the Lincoln Towers tax lot lines to reach this open space.

During these proceedings, the parties on both sides referenced numerous zoning regulations that used the terms

"zoning lot" and "tax lot." The proponents of partial tax lots argued that the zoning regulations were vague and never explicitly stated that a combined zoning lot must include the entire tax lot. The parties in opposition argued that the plain language of the zoning regulations clearly inferred that full tax lots must be included in any combined zoning lot.

The proponents also referenced a 1978 DOB memorandum (the Minkin Memo) that stated that combined zoning lots could include "parts of tax lots" and argued that this had been the standard interpretation for 50 years. The developer identified 34 examples of combined zoning lots containing partial tax lots. However, the court distinguished all of these combined zoning lots as applying to special circumstances not applicable to the developer's combined zoning lot.

Interestingly, during the BSA proceedings the General Counsel Office for DOB requested that the BSA uphold the subject combined zoning lot (DOB had issued the 200 Amsterdam permits and construction had commenced) based on the current interpretation of the Minkin Memo. However, at the same time DOB testified that the Minkin Memo was in error and that, in fact, the ZR required combined zoning lots to include full tax lots. DOB went further and stated that a revised DOB memo would be issued shortly correcting this error and clarifying that combined zoning lots must include full tax lots. In its decision to annul the combined zoning lot, the court gave great weight to DOB's testimony and the pending retraction of the Minkn Memo's language regarding partial tax lots. It was the court's opinion that DOB has the legal authority to retract permits issued in error and that these permits were, in fact, issued based on a flawed zoning lot.

I have never come across a combined zoning lot using partial tax lots. In addition, although the court did not address this issue, for the residential developments that I have analyzed, the required open space is in proximity to the building for the purpose of providing an amenity to the residents. Here, the open space had no physical relationship to the 55-story building. Open space designed for use by Lincoln Towers residents was being used to give the proposed building open space credits. The proposed building itself was not creating any new open space.

Despite this ruling, the importance of the Minkin Memo to zoning should be not be diminished. This decision could be interpreted as holding that the Minkin Memo imposed a flawed zoning doctrine for 50 years. That is not the case. It was the Minkin Memo's interpretation of the ZR that provided the road map to creating combined zoning lots. The Minkin Memo, written in 1978, offered an interpretation of a 1977 amendment to the ZR that permitted the creation of combined zoning lots for development purposes. The Minkin Memo specifically referenced five documents (with templates attached) to be recorded that would effectuate the combined zoning lot and allow DOB to issue building permits. Every combined zoning lot created since 1978 has followed the Minkin Memo's direction. The Minkin Memo did state "parts of tax lots," but these four words have had little to no impact on the combined zoning lot industry that the Minkin Memo spawned and the resulting zoning flexibility it afforded to developments.