

CASES

AIR RIGHTS

Wing Ming Properties (U.S.A.) v. Mott Operating Ltd. **148 Misc.2d 680, 561 N.Y.S.2d 337 (N.Y. Sup. 1990)**

SAXE, Justice. Exactly what rights are conveyed when the air rights over a building are transferred to an adjacent parcel of land so that the height of a building constructed on the neighboring property exceeds the limitations set by applicable zoning law height restrictions?

The events leading to the current dispute began in the early 1970s. Plaintiff's [Wing Ming's] predecessor in interest, Hon Yip, planned to construct a building upon the land he owned adjacent to 5 Chatham Square. He envisioned a structure which would exceed the maximum height permitted under the city zoning regulations. The zoning resolution imposes height restrictions based upon a ratio calculated by dividing the total floor area on a lot ("the sum of the gross areas of the several floors of a building") by the area of the lot upon which a building is to be constructed; the builder is limited to a specified floor area ratio (F.A.R.). Recognizing the hardship imposed upon City builders who have access to finite amounts of landspace but must accommodate large numbers of people in proportion, the Resolution provides a loophole. If two adjacent lots are under "single ownership," the unused floor area ratio may be transferred from one lot to another. Thus, if one lot has a two-story building, but based upon the area of the lot upon which it rests maximum height allocable to it would be ten stories, it may transfer the right to build another eight stories to a contiguous lot under the same ownership. The transaction technically involves the conveyance of airspace from one plot to the next and the rights in the airspace exchanged are probably best viewed as "air development rights."

A two-story theatre, owned by [defendant] Mott, leased by [defendant] Kaplan, and subleased at the time by [defendants] Chu and Tam, was situated upon the lot contiguous to Hon Yip's property. The height of

this building was substantially lower than the F.A.R. allocable to it under the zoning resolution. Since the acquisition of a sufficient ownership interest in the adjacent plot of land at 5 Chatham Square could facilitate a transfer of air development rights and enable him to construct the "oversized" building on his Mott Street property, Hon Yip arranged to acquire the status of "single ownership" mandated by the zoning resolution. [Mott and Kaplan conveyed their air rights to Hon Yip in a document entitled "1973 Conveyance of Air Rights" ("Conveyance") and Kaplan temporarily assigned her lease to Hon Yip to meet the "single ownership" requirement.]

* * *

In 1985, defendant Kaplan subleased her retained interest in 5 Chatham Square to defendant Bank of Central Asia (BCA). The agreement between Kaplan and the BCA permitted the installation of new air-conditioning units on BCA's roof and construction of a parapet to conceal these units from view. Both additions were allegedly completed by 1986.

The action in trespass was brought by plaintiff because of its concern that the newly installed air-conditioning units and parapets have increased the utilized floor area space on 5 Chatham Square. If this is so, it fears that the air development rights transferred to Wing Ming's property would be deemed illegal since the rights contained in the airspace are being simultaneously used by both properties. Wing Ming fears that the Building Department will be alerted to the contemporaneous use of air development rights, will confiscate the excess floor area space of the Citibank building, and force it to reduce its multistory office building to legal size.

Wing Ming asserts that even if as a matter of law the floor area space at 5 Chatham Square has not been increased, the construction of air-conditioning units and parapets on the roof still constitutes a trespass by

AIR RIGHTS

Wing Ming Properties (U.S.A.) v. Mott Operating Ltd.
148 Misc.2d 680, 561 N.Y.S.2d 337 (N.Y. Sup 1990)

SAXE, Justice. Exactly what rights are conveyed when the air rights over a building are transferred to an adjacent parcel of land so that the height of a building constructed on the neighboring property exceeds the limitations set by applicable zoning law height restrictions?

The events leading to the current dispute began in the early 1970s. Plaintiff's [Wing Ming's] predecessor in interest, Hon Yip, planned to construct a building upon the land he owned adjacent to 5 Chatham Square. He envisioned a structure which would exceed the maximum height permitted under the city zoning regulations. The zoning resolution imposes height restrictions based upon a ratio calculated by dividing the total floor area on a lot ("the sum of the gross areas of the several floors of a building") by the area of the lot upon which a building is to be constructed; the builder is limited to a specified floor area ratio (F.A.R.). Recognizing the hardship imposed upon City builders who have access to finite amounts of landspace but must accommodate large numbers of people in proportion, the Resolution provides a loophole. If two adjacent lots are under "single ownership," the unused floor area ratio may be transferred from one lot to another. Thus, if one lot has a two-story building, but based upon the area of the lot upon which it rests maximum height allocable to it would be ten stories, it may transfer the right to build another eight stories to a contiguous lot under the same ownership. The transaction technically involves the conveyance of airspace from one plot to the next and the rights in the airspace exchanged are probably best viewed as "air development rights."

A two-story theatre, owned by [defendant] Mott, leased by [defendant] Kaplan, and subleased at the time by [defendants] Chu and Tam, was situated upon the lot contiguous to Hon Yip's property. The height of

this building was substantially lower than the F.A.R. allocable to it under the zoning resolution. Since the acquisition of a sufficient ownership interest in the adjacent plot of land at 5 Chatham Square could facilitate a transfer of air development rights and enable him to construct the "oversized" building on his Mott Street property, Hon Yip arranged to acquire the status of "single ownership" mandated by the zoning resolution. [Mott and Kaplan conveyed their air rights to Hon Yip in a document entitled "1973 Conveyance of Air Rights" ("Conveyance") and Kaplan temporarily assigned her lease to Hon Yip to meet the "single ownership" requirement.]

* * *

In 1985, defendant Kaplan subleased her retained interest in 5 Chatham Square to defendant Bank of Central Asia (BCA). The agreement between Kaplan and the BCA permitted the installation of new air-conditioning units on BCA's roof and construction of a parapet to conceal these units from view. Both additions were allegedly completed by 1986.

This action in trespass was brought by plaintiff because of its concern that the newly installed air-conditioning units and parapets have increased the utilized floor area space on 5 Chatham Square. If this is so, it fears that the air development rights transferred to Wing Ming's property would be deemed illegal since the rights contained in the airspace are being simultaneously used by both properties. Wing Ming fears that the Building Department will be alerted to the contemporaneous use of air development rights, will confiscate the excess floor area space of the ~~other~~ building, and force it to reduce its multistory office building to legal size.

Wing Ming asserts that even if as a matter of law the floor area space at 5 Chatham Square has not been increased, the construction of air-conditioning units and parapets on the roof still constitutes a trespass by

BCA. He claims that a conveyance of air rights encompasses a transfer of both development rights encapsulated in the exchanged volume of airspace and the right to its exclusive physical occupation and control. Defendant BCA contends that these rights are separate and distinct and that the sole right acquired by Wing Ming was the regulatory development right allowed under the zoning resolution. BCA further defends itself against Wing Ming's allegations by asserting as a matter of law that no trespass to plaintiffs development rights exists.

At issue is the scope of the rights encompassed in the term "air rights" used in the 1973 Conveyance of Air Rights.

* * *

Defendants offer sufficient evidence of the history surrounding both the execution and performance of the provisions contained within the 1973 Conveyance of Air Rights to convince this court that summary judgment is warranted as to interpretation of the term "air rights" as contained in the agreement. Hon Yip's actions prior and subsequent to the execution of the agreement, and the prevalent custom and usage of the term "air rights" clearly manifest the acquisition of air development rights, and not rights to exclusively occupy and control the physical airspace over 5 Chatham Square.

A primary factor to be considered in any attempt to interpret a contract is the purpose of the parties in making the contract. Hon Yip's actions substantiate the fact that he entered into the series of agreements with the defendants for the sole purpose of acquiring the development rights unused by the occupiers of 5 Chatham Square. Hon Yip knew that New York City

zoning laws prohibited the building of a 12-story building on his property. He therefore sought to legally "borrow" the unused air development rights of the two-story building situated on the property adjacent to his own.

* * *

BCA's rooftop installations could have potentially constituted a trespass only if it had been proven that construction actually increased the floor area of its building encroaching on the development rights obtained by Wing Ming. The language of Zoning Resolution 12-10 as applied to the present facts, however, clearly indicates the absence of a trespass. Floor area is defined by the Zoning Resolution as:

"[t]he sum of the gross areas of the several floors of a building ... measured from the exterior faces of exterior walls or from the center lines of walls separating two buildings."

Specifically excluded from this definition of floor area is "floor space used for mechanical equipment and open terraces provided no more than 50% of it is enclosed by a parapet not higher than three feet eight inches." The new air-conditioning equipment falls under the statutory exception of "mechanical equipment" placed in "open (roof) space." The parapets are similarly excepted since they are less than 3 feet 8 inches high. BCA's construction technically did not increase the floor area space of its building. Therefore, as a matter of law, there has been no trespass on the air development rights acquired by plaintiff to build the twelve-story structure presently housing a Citibank facility. [The Court entered judgment for the defendants.]

BCA. He claims that a conveyance of air rights encompasses a transfer of both development rights encapsulated in the exchanged volume of airspace and the right to its exclusive physical occupation and control. Defendant BCA contends that these rights are separate and distinct and that the sole right acquired by Wing Ming was the regulatory development right allowed under the zoning resolution. BCA further defends itself against Wing Ming's allegations by asserting as a matter of law that no trespass to plaintiffs development rights exists.

At issue is the scope of the rights encompassed in the term "air rights" used in the 1973 Conveyance of Air Rights.

* * *

Defendants offer sufficient evidence of the history surrounding both the execution and performance of the provisions contained within the 1973 Conveyance of Air Rights to convince this court that summary judgment is warranted as to interpretation of the term "air rights" as contained in the agreement. Hon Yip's actions prior and subsequent to the execution of the agreement, and the prevalent custom and usage of the term "air rights" clearly manifest the acquisition of air development rights, and not rights to exclusively occupy and control the physical airspace over 5 Chatham Square.

A primary factor to be considered in any attempt to interpret a contract is the purpose of the parties in making the contract. Hon Yip's actions substantiate the fact that he entered into the series of agreements with the defendants for the sole purpose of acquiring the development rights unused by the occupiers of 5 Chatham Square. Hon Yip knew that New York City

zoning laws prohibited the building of a 12-story building on his property. He therefore sought to legally "borrow" the unused air development rights of the two-story building situated on the property adjacent to his own.

* * *

BCA's rooftop installations could have potentially constituted a trespass ~~only~~ if it had been proven that construction actually ~~increased~~ the floor area of its building encroaching on the development rights obtained by Wing Ming. The language of Zoning Resolution 12-10 as applied to the present facts, however, clearly indicates the absence of a trespass. Floor area is defined by the Zoning Resolution as:

"[t]he sum of the gross areas of the several floors of a building ... measured from the exterior faces of exterior walls or from the center lines of walls separating two buildings."

Specifically excluded from this definition of floor area is "floor space used for mechanical equipment and open terraces provided no more than 50% of it is enclosed by a parapet not higher than three feet eight inches." The new air-conditioning equipment falls under the statutory exception of "mechanical equipment" placed in "open (roof) space." The parapets are similarly excepted since they are less than 3 feet 8 inches high. BCA's construction technically did not increase the floor area space of its building. Therefore, as a matter of law, there has been no trespass on the air development rights acquired by plaintiff to build the twelve-story structure presently housing a Citibank facility. [The Court entered judgment for the defendants.]

claims that a conveyance of air rights encompassed both development rights encapsulated in a large volume of airspace and the right to its physical occupation and control. Defendant contends that these rights are separate and distinct from the sole right acquired by Wing Ming was the development right allowed under the zoning laws. BCA further defends itself against Wing Ming's allegations by asserting as a matter of law that no development rights exist to plaintiffs development rights. The scope of the rights encompassed in the "air rights" used in the 1973 Conveyance of

* * *

plaintiffs offer sufficient evidence of the history of both the execution and performance of the provisions contained within the 1973 Conveyance of rights to convince this court that summary judgment is warranted as to interpretation of the "air rights" as contained in the agreement. Honorable Yip's actions prior and subsequent to the execution of the agreement, and the prevalent custom and usage of "air rights" clearly manifest the acquisition of development rights, and not rights to exclusively occupy and control the physical airspace over 5 Chatham Square.

The primary factor to be considered in any attempt to interpret a contract is the purpose of the parties in entering into the contract. Honorable Yip's actions substantiate that he entered into the series of agreements with the defendants for the sole purpose of acquiring development rights unused by the occupiers of 5 Chatham Square. Honorable Yip knew that New York City

zoning laws prohibited the building of a 12-story building on his property. He therefore sought to legally "borrow" the unused air development rights of the two-story building situated on the property adjacent to his own.

* * *

BCA's rooftop installations could have potentially constituted a trespass only if it had been proven that the construction actually increased the floor area of its building encroaching on the development rights obtained by Wing Ming. The language of Zoning Resolution 12-10 as applied to the present facts, however, clearly indicates the absence of a trespass. Floor area is defined by the Zoning Resolution as:

"[t]he sum of the gross areas of the several floors of a building ... measured from the exterior faces of exterior walls or from the center lines of walls separating two buildings."

Specifically excluded from this definition of floor area is "floor space used for mechanical equipment and open terraces provided no more than 50% of it is enclosed by a parapet not higher than three feet eight inches." The new air-conditioning equipment falls under the statutory exception of "mechanical equipment" placed in "open (roof) space." The parapets are similarly excepted since they are less than 3 feet 8 inches high. BCA's construction technically did not increase the floor area space of its building. Therefore, as a matter of law, there has been no trespass on the air development rights acquired by plaintiff to build the twelve-story structure presently housing a Citibank facility. [The Court entered judgment for the defendants.]