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## Developers, wary of cost and delay, spurn city's landmark transfers program for air rights

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A longtime city program that gives landmarked properties the ability to sell their air rights to developers across the street in a “kitty corner” transaction is woefully underused, and some industry insiders have been discussing plans for air rights reform. Eager to avoid getting tangled in expensive bureaucratic red tape, developers currently prefer to engage in as-of-right zoning lot merger transfers with these landmarked buildings, thereby rendering the city's special provision for landmarks largely useless, insiders say.



From left: Tower Verre, Vicki Been and Setai Fifth Avenue

Of the 353 arm's length transfers of air rights in New York City between 2003 and 2011, 27 were from landmarked buildings, according to new research from the Furman Center for Real Estate and Urban Policy. But only two of these 27 transactions occurred through the landmark transfers program.

For the most part, landmark transfers are considered too complex, time-consuming and stifling to development to be a viable option for air rights transfers, the research, published last month in a New York University School of Law working paper shows. The recent Midtown East rezoning proposal has reignited the air rights debate, as landmarked properties including St. Patrick's Cathedral have expressed the need for greater flexibility in the sale of their air rights, as [The Real Deal](#) [previously reported](#).

The landmarks transfer program was created by the city in 1968 to compensate landmarked buildings for the potential financial losses stemming from the landmark preservation law, which severely restricts alterations to landmarks. It allowed the city to skirt the responsibility of directly compensating these buildings, instead giving them the right to sell their air rights to developers for potential projects.

Elisabeth de Bourbon, a spokeswoman for the city's Landmark Preservation Commission, said that the program was “an important benefit, because it allows owners of landmark buildings to use development rights they may not be otherwise able to use on the landmarked property.” This, she added, “results in the restoration and continued maintenance of the landmark building.”

However, most air rights transfers involving landmarks happen through a zoning lot merger, which can occur without the city's intervention and involves joining together two or more contiguous lots. Once the lots are merged, the development rights from all merging lots are combined and can be used freely within the property.

Indeed, 320 transfers, or 91 percent of the total transfers, were zoning lot merger transfers, representing roughly 5.4 million square feet of development rights. Eighty-five percent occurred in Manhattan's Community Districts One through Six, in the area including and south of Midtown. The average price—excluding special districts such as the Theater District and the South Street Seaport which have special air rights regulations—was \$234 per square foot.

The landmark transfer program allows deals to have “legs”—that is, to transfer development rights from a landmark building across the street, in what is known as a “kitty corner” deal.

Between 2003 and 2011, however, only two developments took advantage of the program.

The two deals that occurred through the landmark transfer process were the 2006 sale of 173,692 square feet of development rights from the former Tiffany building at 393 Fifth Avenue to the [Setai Fifth Avenue](#) condo building at 400 Fifth Avenue, and the 2009 University Club transfer of 136,000 square feet of rights to the Tower Verre—formerly the MoMa Tower—at 53 West 53rd Street. The MoMA tower also purchased 275,000 square feet of rights from St. Thomas Church, located at 1 West 53rd Street.

There have only been 14 such transfers since the program got underway, more than 40 years ago.

The main reason is that developers shy away from bearing the expense and hassle of a lengthy Uniform Land Use Review Procedure (ULURP) that could cost between \$500,000 and \$750,000, according to Robert Shapiro, an [assemblage expert](#) who specializes in air rights. A landmark transfer rule also limits the increase in floor area to 20 percent—except in high-density areas—thus further discouraging developers.

“Most developers, if it requires a ULURP, avoid it like the plague,” Shapiro said. “They want to do as-of-right.”

Vicki Been, the director of the Furman Center and lead author of the research paper, said that the program needed overhauling.

"If that process were eased up or were as-of-right, that would make it more useful," she said.

Developers, academics and representatives from the City Planning Commission have discussed ideas to rethink the process at recent policy breakfasts held by the Furman Center. Panelists at an October breakfast included City Planning's general counsel David Karnovsky and Jon Vogel, vice-president of development at Avalon Bay Communities.

Developer Daniel Brodsky, who attended one of the breakfasts, told *The Real Deal* last week that the Furman discussion had brought up some "great ideas," including one that would allow developers to transfer rights throughout the borough or even the city.

But those involved in day-to-day air rights transactions say that this is simply wishful thinking. "It's a non-event. It's never going to happen," Shapiro said. Paraphrasing from George Orwell's dystopian novella, "Animal Farm," Shapiro said that "all things are equal except some things are more equal than others," referring to air rights values.

Other ideas floated include the possibility of establishing an "air rights bank," which would allow the owners of transferable development rights to sell or deposit them within a bank, Been said. The bank would then take the risk of holding them or selling them.

Been cited the example of the South Street Seaport, where the City Planning Commission created a special district and allowed a consortium of commercial banks that held the mortgages on seaport properties to act as the middlemen for many of these deals. However, Been cautioned, that particular experiment "wasn't considered a real success."

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